Internal Revenue bulletin

Bulletin No. 2011-46
November 14, 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

T.D. 9548, page 716.

Final regulations under section 355(a)(3)(B) of the Code harmonize its application with the application of section 355(b), consistent with the 2006 amendments to section 355(b), the 2007 proposed regulations under section 355(b), and the 2007 grant of authority that was provided in the Tax Technical Corrections Act of 2007.

REG–133002–10, page 766.

Proposed regulations under section 1502 of the Code will apply to corporations filing consolidated returns. The regulations will require a consolidated loss group or loss subgroup to redetermine its consolidated net unrealized built-in gain and loss in certain circumstances.

Rev. Proc. 2011–53, page 749.

Insurance companies; loss reserves; discounting unpaid losses. The loss payment patterns and discount factors are set forth for the 2011 accident year. These factors will be used for computing discounted unpaid losses under section 846 of the Code.

Rev. Proc. 2011–54, page 759.

Insurance companies; discounting estimated salvage recoverable. The salvage discount factors are set forth for the 2011 calendar year. These factors will be used for computing discounted estimated salvage recoverable under section 832 of the Code.

Announcement 2011–71, page 770.

This announcement solicits public comments regarding the reallocation of available amounts of volume cap for Tribal Economic Development Bonds and provides requirements for a three-month extension of time to issue bonds to Indian tribal governments that have previously received an allocation of Tribal Economic Development Bond volume cap.

EXEMPT ORGANIZATIONS

T.D. 9549, page 718.

Final regulations under sections 170, 507, 509, 6033, and 6043 of the Code affect tax-exempt organizations required to file an annual return under section 6033. The regulations provide guidance relating to the elimination of the advance ruling process for new organizations and change in public support computation, procedures for organizations seeking classification as public charities, and guidance regarding the reporting of other information required on the annual return.

ADMINISTRATIVE

Notice 2011–88, page 748.

This notice postpones the effective date for potential backup withholding obligations imposed under section 3406 of the Code for payments made in settlement of payment card and third party network transactions (section 6050W payments).

Notice 2011–89, page 748.

This notice provides transitional relief from penalties for a section 6050W filer reporting incorrect information on information returns (Form 1099-K) and payee statements filed under section 6050W of the Code.

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

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 355.—Distribution of Stock and Securities of a Controlled Corporation

26 CFR 1.355–2(g): Guidance regarding the treatment of a controlled corporation under section 355(a)(3)(B).

A final regulation narrows the reach of section 355(a)(3)(B) to harmonize its application with the application of section 355(b), consistent with the 2006 amendments to section 355(b), the 2007 proposed regulations under section 355(b), and the 2007 grant of authority that was provided in the Tax Technical Corrections Act of 2007. See T.D. 9548, page 716.

T.D. 9548

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Guidance Regarding the Treatment of Stock of a Controlled Corporation Under Section 355(a)(3)(B)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations regarding the distribution of stock of a controlled corporation acquired in a transaction described in section 355(a)(3)(B) of the Internal Revenue Code (Code). This action is necessary in light of amendments to section 355(b). These final regulations will affect corporations and their shareholders.

DATES: *Effective Date:* These final regulations are effective on October 20, 2011.

Applicability Date: For dates of applicability, see §1.355–2(i).

FOR FURTHER INFORMATION CONTACT: Russell P. Subin, (202) 622–7790 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 1 regarding section 355(a)(3)(B).

Section 355(a) provides that, under certain circumstances, a corporation may distribute stock and securities in a corporation it controls to its shareholders and security holders without causing either the distributing corporation (distributing) or its shareholders and security holders to recognize income, gain, or loss.

Sections 355(a)(1)(C) and 355(b)(1) generally require that distributing and the controlled corporation (controlled) each be engaged, immediately after the distribution, in the active conduct of a trade or business. Section 355(b)(2)(A) provides that a corporation shall be treated as engaged in the active conduct of a trade or business if and only if it is engaged in the active conduct of a trade or business.

Section 355(b)(2)(B) requires that the trade or business have been actively conducted throughout the five-year period ending on the date of the distribution (pre-distribution period). Section 355(b)(2)(C) provides that the trade or business must not have been acquired in a transaction in which gain or loss was recognized in whole or in part (taxable transaction) within the pre-distribution period. Section 355(b)(2)(D) provides that control of a corporation that (at the time of acquisition of control) was conducting the trade or business must not have been directly or indirectly acquired by any distributee corporation or by distributing during the pre-distribution period in a taxable transaction.

Section 355(b)(3)(A) provides that for purposes of determining whether a corporation meets the requirements of section 355(b)(2)(A), all members of such corporation's separate affiliated group (SAG) shall be treated as one corporation. Section 355(b)(3)(B) provides that for purposes of section 355(b)(3), the term *SAG* means, with respect to any corporation, the affiliated group that would be determined under section 1504(a) if such corporation were the common parent and section 1504(b) did not apply. Section 355(b)(3)(C) provides that if a corporation became a SAG member as a result of one or more taxable transactions, any trade or business conducted by such corporation (at the time that such corporation became such a member) shall be treated for purposes of section 355(b)(2) as acquired in a taxable transaction.

Section 355(a)(3)(B) provides that for purposes of section 355 (other than section 355(a)(1)(D)) and so much of section 356 as relates to section 355, stock of controlled acquired by distributing by reason of any transaction (i) which occurs within five years of the distribution of such stock, and (ii) which is a taxable transaction, shall not be treated as stock of controlled, but as other property.

Section 355(b)(3)(D) provides that the Secretary shall prescribe such regulations as are necessary or appropriate to carry out the purposes of section 355(b)(3), including regulations that provide for the proper application of section 355(b)(2)(B), (C), and (D), and modify the application of section 355(a)(3)(B), in connection with the application of section 355(b)(3).

Pursuant to section 355(b)(3)(D) and section 7805, temporary regulations (T.D. 9435, 2009–4 I.R.B. 333) under section 355(a)(3)(B) were published in the **Federal Register** (73 FR 75946) on December 15, 2008. A notice of proposed rulemaking (REG–150670–07, 2009–4 I.R.B. 378) cross-referencing the temporary regulation was published in the **Federal Register** on the same day (73 FR 75979). The temporary regulations were intended to harmonize the application of section 355(a)(3)(B) with section 355(b). Generally, the temporary regulations: (1) Disregarded transfers of controlled stock between members of the distributing corporation's SAG (DSAG), (2) did not treat controlled stock as other property if controlled became a DSAG member, and (3) retained the exception of prior regulation §1.355–2(g) as contained in 26 CFR part 1, revised as of April 1, 2008, for acquisitions from affiliates described in §1.355–3(b)(4)(iii).

The preamble to the temporary regulations requested comments regarding a variety of issues under section 355(a)(3)(B). One written comment responding to the request was received. No public hearing was requested or held.

Summary of Comment and Guidance

The comment generally agreed with the text of the temporary regulations. In addition, the comment addressed, among other things, the treatment of cash paid to acquire controlled stock in lieu of fractional shares, indirect acquisitions and acquisitions of controlled stock by a predecessor to a member of the DSAG, issuances of controlled stock, and redemptions of controlled stock. After considering the comment, the IRS and Treasury Department have decided not to expand the scope of the final regulation to cover additional situations at this time. These final regulations adopt the substantive rules of the temporary regulations without change.

The IRS and Treasury Department continue to study the interrelationship between section 355(a)(3)(B) and section 355(b). No inference regarding the content of future section 355(b) guidance should be drawn from these final regulations. In addition, further guidance may be issued under section 355(a)(3)(B) in connection with future section 355(b) guidance if it is necessary to harmonize the two provisions.

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 is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that section 355(a)(3)(B) generally applies to parent-subsidiary groups of corporations, which tend to be larger businesses, and that these regulations primarily grant relief from the application of section 355(a)(3)(B) in certain situations. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the proposed regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Russell P. Subin of the Office of Associate Chief Counsel (Corporate). 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 is amended by adding an entry in numerical order to read in part as follows:

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

Section 1.355–2(g) and (i) also issued under 26 U.S.C. 355(b)(3)(D). * * *

Par. 2. Section 1.355–0 is amended by revising the entries under §1.355–2(g) and (i) to read as follows:

§1.355–0 Outline of sections.

* * * * *

§1.355–2 Limitations.

* * * * *

(g) Recently acquired controlled stock under section 355(a)(3)(B).

(1) Other property.

(2) Exceptions.

(3) DSAG.

(4) Taxable transaction.

(5) Examples.

* * * * *

(i) Effective/applicability date.

Par. 3. Section 1.355–1 is amended by revising paragraph (a) to read as follows:

§1.355–1 Distribution of stock and securities of a controlled corporation.

(a) *Effective/applicability date of certain sections.* Except as otherwise provided, this section and §§1.355–2 through 1.355–4 apply to transactions occurring after February 6, 1989. For transactions occurring on or before that date, see 26 CFR 1.355–1 through 1.355–4 (revised as of April 1, 1987). This section and §§1.355–2 through 1.355–4, other than §1.355–2(g) and (i), do not reflect the amendments to section 355 made by the Revenue Act of 1987, the Technical and Miscellaneous Revenue Act of 1988, and the Tax Technical Corrections Act of 2007. For the applicability date of §§1.355–2(g), 1.355–5, 1.355–6, and 1.355–7, see §§1.355–2(i), 1.355–5(e), 1.355–6(g), and 1.355–7(k), respectively.

* * * * *

Par. 4. Section 1.355–2 is amended by revising paragraphs (g) and (i) to read as follows:

§1.355–2 Limitations.

* * * * *

(g) *Recently acquired controlled stock under section 355(a)(3)(B)*—(1) *Other property*. Except as provided in paragraph (g)(2) of this section, for purposes of section 355(a)(1)(A), section 355(c), and so much of section 356 as relates to section 355, stock of a controlled corporation acquired by the DSAG in a taxable transaction (as defined in paragraph (g)(4) of this section) within the five-year period ending on the date of the distribution (pre-distribution period) shall not be treated as stock of the controlled corporation but shall be treated as "other property." Transfers of controlled corporation stock that is owned by the DSAG immediately before and immediately after the transfer are disregarded and are not acquisitions for purposes of this paragraph (g)(1).

(2) *Exceptions*. Paragraph (g)(1) of this section does not apply to an acquisition of stock of the controlled corporation—

(i) If the controlled corporation is a DSAG member at any time after the acquisition (but prior to the distribution); or

(ii) Described in §1.355–3(b)(4)(iii).

(3) *DSAG*. For purposes of this paragraph (g), a *DSAG* is the distributing corporation's separate affiliated group (the affiliated group which would be determined under section 1504(a) if such corporation were the common parent and section 1504(b) did not apply) that consists of the distributing corporation as the common parent and all corporations affiliated with the distributing corporation

through stock ownership described in section 1504(a)(1)(B) (regardless of whether the corporations are includible corporations under section 1504(b)). For purposes of paragraph (g)(1) of this section, any reference to the DSAG is a reference to the distributing corporation if it is not the common parent of a separate affiliated group.

(4) *Taxable transaction*—(i) *Generally*. For purposes of this paragraph (g), a *taxable transaction* is a transaction in which gain or loss was recognized in whole or in part.

(ii) *Dunn Trust and predecessor issues*. [Reserved].

(5) *Examples*. The following examples illustrate this paragraph (g). Assume that C, D, P, and S are corporations, X is an unrelated individual, each of the transactions is unrelated to any other transaction and, but for the issue of whether C stock is treated as "other property" under section 355(a)(3)(B), the distributions satisfy all of the requirements of section 355. No inference should be drawn from any of these examples as to whether any requirements of section 355 other than section 355(a)(3)(B), as specified, are satisfied. Furthermore, the following definitions apply:

(i) *Purchase* is an acquisition that is a taxable transaction.

(ii) *Section 368(c) stock* is stock constituting control within the meaning of section 368(c).

(iii) *Section 1504(a)(2) stock* is stock meeting the requirements of section 1504(a)(2).

Example 1. Hot stock. For more than five years, D has owned section 368(c) stock but not section 1504(a)(2) stock of C. In year 6, D purchases additional C stock from X. However, D does not own section 1504(a)(2) stock of C after the year 6 purchase. If D distributes all of its C stock within five years after the year 6 purchase, for purposes of section 355(a)(1)(A), section 355(c), and so much of section 356 as relates to section 355, the C stock purchased in year 6 would be treated as "other property." See paragraph (g)(1) of this section.

Example 2. C becomes a DSAG member. For more than five years, D has owned section 368(c) stock but not section 1504(a)(2) stock of C. In year 6, D purchases additional C stock from X such that D's total ownership of C is section 1504(a)(2) stock. If D distributes all of its C stock within five years after the year 6 purchase, the distribution of the C stock purchased in year 6 would not be treated as "other property" because C becomes a DSAG member. See paragraph (g)(2)(i) of this section. The result would be the same if D did not own any C stock prior to year 6 and D purchased all of the C stock in year 6. See paragraph (g)(2)(i) of this section. Similarly, if D did not own any C stock prior to year 6, D purchased 20 percent of the C stock in year 6, and then acquired all of the remaining C stock in year 7, the C stock purchased in year 6 and the C stock acquired in year 7 (even if purchased) would not be treated as "other property" because C becomes a DSAG member. See paragraph (g)(2)(i) of this section.

Example 3. Intra-SAG transaction. For more than five years, D has owned all of the stock of S. D and S, in the aggregate, have owned section 368(c) stock but not section 1504(a)(2) stock of C. Therefore, D and S are DSAG members, but C is not. In year 6, D purchases S's C stock. If D distributes all of its C stock within five years after the year 6 purchase, the distribution of the C stock purchased in year 6 would not be treated as "other property." D's purchase of the C stock from S is disregarded for purposes of paragraph (g)(1) of this section because that C stock was owned by the DSAG immediately before and immediately after the purchase. See paragraph (g)(1) of this section.

Example 4. Affiliate exception. For more than five years, P has owned 90 percent of the sole outstanding class of the stock of D and a portion of the stock of C, and X has owned the remaining 10 percent of the D stock. Throughout this period, D has owned section 368(c) stock but not section 1504(a)(2) stock of C. In year 6, D purchases P's C stock. However, D does not own section 1504(a)(2) stock of C after the year 6 purchase. If D distributes all of its C stock to X in exchange for X's D stock within five years after the year 6 purchase, the distribution of the C stock purchased in year 6 would not be treated as "other property" because the C stock was purchased from a member (P) of the affiliated group (as defined in §1.355–3(b)(4)(iv)) of which D is a member, and P did not purchase that C stock within the pre-distribution period. See paragraph (g)(2)(ii) of this section.

* * * * *

(i) *Effective/applicability date*. Paragraphs (g)(1) through (g)(5) of this section apply to distributions occurring after October 20, 2011. For rules regarding distributions occurring on or before October 20, 2011, see §1.355–2T(i), as contained in 26 CFR part 1, revised as of April 1, 2011.

§1.355–0T [Removed]

Par. 5. Section 1.355–0T is removed.

§1.355–2T [Removed]

Par. 6. Section 1.355–2T is removed.

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

Approved October 14, 2011.

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

(Filed by the Office of the Federal Register on October 19, 2011, 8:45 a.m., and published in the issue of the Federal Register for October 20, 2011, 76 F.R. 65110)

Section 832.—Insurance Company Taxable Income

26 CFR 1.832–4: Gross income.

The salvage discount factors are set forth for 2011. These factors must be used to compute discounted estimated salvage recoverable for purposes of section 832 of the Code. See Rev. Proc. 2011-54, page 759.

Section 846.—Discounted Unpaid Losses Defined

26 CFR 1.846–1: Application of discount factors.

The composite loss discount factor for Reinsurance (Nonproportional Assumed Property). See Rev. Proc. 2011-53, page 749.

The salvage discount factors are set forth for 2011. These factors must be used to compute discounted estimated salvage recoverable for purposes of section 832 of the Code. See Rev. Proc. 2011-54, page 759.

Section 6033.—Returns by Exempt Organizations

26 CFR 1.6033–2: Returns by exempt organizations (taxable years beginning after December 31, 1969) and returns by certain nonexempt organizations (taxable years beginning after December 31, 1980.)

T.D. 9549

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Parts 1 and 602

Implementation of Form 990

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations necessary to implement the redesigned Form 990, *"Return of Organization Exempt From Income Tax."* These final regulations make revisions to the regulations to allow for new threshold amounts for reporting compensation, to require that compensation be reported on a calendar year basis, and to modify the scope of organizations subject to information reporting requirements upon a substantial contraction. The final regulations also eliminate the advance ruling process for new organizations, change the public support computation period for publicly supported organizations to five years, consistent with the revised Form 990, and clarify that support must be reported using the organization's overall method of accounting. All tax-exempt organizations required to file annual information returns are affected by these regulations.

DATES: *Effective Date:* These regulations are effective on September 8, 2011.

Applicability Date: For dates of applicability, see §§1.170A–9(k), 1.507–2(f), 1.509(a)–3(o), 1.6033–2(k), and 1.6043–3(e).

FOR FURTHER INFORMATION CONTACT: Terri Harris at (202) 622–6070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–2117. The estimated annual burden per recordkeeper will vary, depending on individual circumstances. The collection of information in this final regulation is in §1.6033–2. The information collected under §1.6033–2 relates to compensation reporting by tax-exempt organizations. The information that is required to be collected for purposes of §1.6033–2 is required to be submitted on Form 990, *"Return of Organization Exempt From Income Tax."* For further information concerning this collection of information and the burden associated with the Form 990, or where to submit comments on this collection of information and the accuracy of the estimated burden, please refer to the instructions of the Form 990. The total annual reporting burden associated with this document is one hour.

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

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

Background

Form 990

Under section 6033 of the Internal Revenue Code (Code), organizations that are exempt from Federal income tax under section 501(a) are generally required to file an annual information return reporting gross income, receipts, disbursements, and such other information as the IRS requires. Certain exceptions to this filing requirement apply. For example, churches are not required to file annual information returns. The Treasury regulations direct that the annual information return shall be filed on Form 990, *"Return of Organization Exempt From Income Tax"* or Form 990-PF, *"Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation."* The regulations further specify certain information to be reported on the return.

The IRS revises forms and instructions on an annual basis to reflect changes in the law and evolving tax administration needs. On December 20, 2007, the IRS released a redesigned Form 990. The Form 990 had not been significantly revised since 1979, and both the IRS and stakeholders regarded the form as needing major revision to keep pace with changes in the law and with the increasing size, diversity, and complexity of the exempt sector. With the exception of certain smaller organizations for which there is a graduated transition period, organizations began using the new form for the 2008 tax year (returns filed in 2009).

On September 9, 2008, the IRS and the Treasury Department issued final and temporary regulations under sections 170(b), 507, 509(a), 6033, and 6043 necessary to implement the redesigned Form 990, *"Return of Organization Exempt From Income Tax,"* (T.D. 9423, 2008–2 C.B. 966) in the **Federal Register** (73 FR 52528). Also on September 9, 2008, the IRS and the Treasury Department issued a notice of proposed rulemaking cross-referencing those Temporary Regulations and inviting public comment and requests for a public hearing (REG–142333–07, 2008–2 C.B. 1008) in the **Federal Register** (73 FR 52218).

The IRS did not receive any requests for a public hearing. The IRS received one written comment responding to this notice. After consideration of the comment, the proposed regulations are revised and published in final form substantially as proposed. The major areas of comment and revision are discussed in the following Explanation of Provisions.

Summary of Comments and Explanation of Provisions

Private Foundation Status and Advance Rulings

In its application for recognition of tax-exempt status (Form 1023, *"Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code"),* a section 501(c)(3) organization also requests a determination of its private foundation status or public charity status, that is, whether it is a private foundation and, if not, the Code provision excepting it from private foundation classification. Under the current statute and prior regulations, an organization could request either an advance ruling or a definitive ruling addressing the organization's exemption under section 501(c)(3) and its private foundation status under section 509(a). The proposed regulations eliminated the advance ruling process and provided instead that an organization would be a publicly supported organization (thus qualifying for public charity status) in its first five years if it could show, in its application for exemption, that it could reasonably be expected to receive the requisite public support during such period.

The comment suggested that the final regulations clarify the process for requesting an updated ruling or determination letter as to public charity status under §§1.170A–9(f)(5) and 1.509(a)–3(e). This process is now explained in Rev. Proc. 2011–10, 2011–2 I.R.B. 294 and its successors. Thus, the final regulations do not incorporate this suggestion.

Computation Period for Public Support

The proposed regulations changed the computation period for public support from a four-year period comprised of the four years prior to the taxable year being tested to a five-year period ending with the taxable year being tested. An organization that meets a public support test for a taxable year is treated as publicly supported for that taxable year and the immediately succeeding taxable year. An organization that does not meet a public support test for a taxable year may be at risk of being classified as a private foundation as of the first day of the succeeding taxable year if the organization also fails to meet a public support test for that succeeding taxable year. Because the IRS and the Treasury Department recognized that an organization will not be able to compute its public support for a taxable year under the changed computation period until the subsequent taxable year, the notice of proposed rulemaking requested comments on specific situations that might warrant relief from the imposition of Chapter 42 excise taxes. In addition, organizations that believed that it would be unfair or inequitable to impose the private foundation excise taxes or penalties against them for all or part of the first year in which they were reclassified as private foundations were invited to contact the IRS, Exempt Organizations, Rulings and Agreements, Washington, DC. No organizations contacted the IRS.

The comment suggested that the final regulations should treat organizations that fail a public support test for two consecutive years as private foundations as of the beginning of the second test year only for purposes of section 507 (termination of private foundation status) and section 4940 (excise tax on investment income), and that such an organization should not be treated as a private foundation for all other purposes until the beginning of the third consecutive taxable year. The commenter suggested that such a rule was necessary because organizations cannot always predict the amount of support they receive from year-to-year. The comment analogized this suggestion to the rule that previously applied when a new organization reached the end of its five-year advance ruling period. Under the prior regulations, an organization generally was treated as publicly supported until 90 days after the end of the advance ruling period, or, if Form 8734, *"Support Schedule for Advance Ruling Period,"* was timely submitted, until the IRS made a final determination of its status. If an organization failed to qualify as a publicly supported organization, only the section 4940 investment income tax and section 507 termination tax applied for the five-year advance ruling period that had already ended. The reclassified organization and its disqualified persons would be subject to all the Chapter 42 excise taxes applicable to private foundations and disqualified persons only after the end of the 90-day period or when the IRS made a final determination.

In response to the comment, the final regulations provide that an organization that fails a public support test for two consecutive taxable years will be treated as a private foundation as of the beginning of the second year of failure only for purposes of sections 507, 4940, and 6033. An organization will be treated as a private foundation for all purposes beginning the first day of the third consecutive taxable year.

The comment also suggested adding examples applying the "facts and circumstances test" under §1.170(A)–9T(f)(3) or issuing other guidance providing examples of the application of this test. The proposed regulations contained numerous examples reflecting the five-year computation period in §§1.170A–9T(f)(9), 1.509(a)–3T(c)(6), and 1.509(a)–3T(e)(3), including several examples illustrating the application of the facts and circumstances test in §1.170A–9T(f)(9). The final regulations retain the examples in the proposed regulations but do not include additional examples, as it was not clear what additional clarification was needed.

Method of Accounting

Previously, when a section 501(c)(3) organization computed its public support, it was required to use the cash method of accounting to report the amount of public support it received on Schedule A, *"Public Charity Status and Public Support,"* even if the organization used the accrual method of accounting to keep its books under section 446, and otherwise report on Form 990. Under the proposed regulations, when a section 501(c)(3) organization computed its public support and reported the information on Schedule A, it was required to use the same accounting method that it uses to keep its books under section 446 and that it otherwise uses to report on its Form 990.

The comment observed that an organization using the accrual method of accounting to keep its books and to calculate its public support will need to include the present value of a multi-year grant as support in the year in which the grant commitment is received. The commenter suggested that this could deter private foundations from making substantial multi-year grants to an organization due to a concern that the grant could cause the organization to fail the public support test and be reclassified as a private foundation. The comment suggested that the unusual grant rules in the final regulations be expanded to add a new factor giving favorable consideration to certain types of multi-year private foundation grants. Alternatively, the comment suggested that the regulations should permit organizations to elect, for purposes of the public support test, to accrue multi-year grants ratably over the period to which they relate.

The final regulations do not incorporate these suggestions. While the requirement to compute public support in accordance with an organization's normal method of accounting generally is advantageous and less cumbersome for most organizations, the IRS and the Treasury Department recognize that some accrual-method organizations receiving substantial multi-year grants from private foundations and individuals may be concerned that the requirement to account for those multi-year grants on an accrual-method may adversely affect their public charity status. However, the longer, five-year testing period in the proposed and final regulations should mitigate the impact of recognizing a larger amount of support from one source in a single year.

In addition, one of the goals of the redesign of the Form 990 was to implement consistent reporting throughout each organization's Form 990 and financial records in order to reduce an organization's recordkeeping burden and to increase transparency of an organization's activities to the general public. In general, use of an organization's normal method of accounting for calculation of its public support reduces the recordkeeping and reporting burden on accrual-method taxpayers, as they no longer must maintain separate cash method records solely for reporting public support on Schedule A. The revised Form 990, Schedule A, sets forth easier-to-follow rules for calculating public support and captures the information necessary for the organization and the general public to monitor an organization's compliance with the public support tests. Consistent financial reporting on the basis of an organization's normal accounting method throughout the organization's Form 990, including the support test in Schedule A, facilitates reconciliation of the Form 990 reporting with an organization's audited financial statements, increasing the ability of the general public to rely on an organization's Form 990 as an accurate reflection of the organization's financial circumstances. Consistent reporting thus assists in the oversight of the charitable community by the general public, as well as by the IRS. Given these considerations, the IRS and the Treasury Department have determined not to adopt the suggested elective change to the accounting method for multi-year grants.

The IRS and the Treasury Department also decline to adopt the suggestion that the unusual grant rules be expanded to include multi-year grants. The public support test is designed to ensure that an organization is not funded by a small number of large donors, and IRS and the Treasury Department do not believe it should exclude a large contribution from a single donor simply because it is paid out over a number of years. The fact that a grant is a multi-year grant has historically been taken into consideration in determining whether a particular grant constitutes an unusual grant, at times to the benefit and at times to the detriment of the recipient organization. The unusual grant exclusion generally applies to substantial contributions or bequests that (1) are attracted by the publicly supported nature of the organization, (2) are unusual or unexpected in their amount, and (3) would adversely affect the organization's public charity status because of their amount. The final regulations in §§1.170A–9(f)(6)(ii)(B) and 1.509(a)–3(c)(3)(iii) provide that all pertinent facts and circumstances continue to be taken into consideration when determining whether a particular contribution will be excluded from the support calculation under the unusual grant exclusion, with no single factor being determinative.

If an accrual basis organization receives a substantial multi-year grant from a private foundation or individual that, taken along with all other facts and circumstances, would satisfy the standards in §§1.170A–9(f)(6) and 1.509(a)–3(c)(3) for treatment as an unusual grant, such a grant generally would be excluded from the computation of public support. An organization may request a private letter ruling pursuant to §§1.170A–9(f)(6)(iv) and 1.509(a)–3(c)(5) that a multi-year grant constitutes an unusual grant under §§1.170A–9(f)(6)(ii) and 1.509(a)–3(c)(3), based on all the facts and circumstances. See also Rev. Proc 2011–4, 2011–1 I.R.B. 123, and its successors. Additionally, Rev. Proc. 81–7, 1981–1 C.B. 621, provides guidelines regarding grants and contributions, including multi-year grants to finance capital items, that will be considered unusual grants under §§1.170A–9(f)(6)(ii) and 1.509(a)–3(c)(3) and related provisions without a private letter ruling from the IRS.

Reliance

The proposed regulations provided that donors may rely on an organization's ruling that the organization is described in sections 170(b)(1)(A)(vi) and 509(a)(1) or in section 509(a)(2) until notice of a change in status is provided to the public (such as by publication in the Internal Revenue Bulletin), unless the donor was responsible for, or aware of, the act or failure to act that results in the organization's loss of public charity status. The proposed regulations further provided that donors may rely on advance rulings that expire on or after June 9, 2008, until notice of a change in status is provided to the public (such as by publication in the Internal Revenue Bulletin).

The comment suggested that the final regulations should incorporate a safe harbor under which a grantor or contributor will not be considered responsible for, or aware of, an act or failure to act that will result in loss of public charity status, such as those set forth in Rev. Proc. 89–23, 1989–1 C.B. 844, and Rev. Proc. 81–6, 1981–1 C.B. 620. The IRS and the Treasury Department agree that grantor reliance safe harbors, such as those noted, are still appropriate, but believe that this guidance is more appropriately provided in non-regulatory form, such as revenue procedures. Therefore, the final regulations do not incorporate this suggestion.

However, the final regulations do restore, in §§1.170A–9(f)(5)(iii) and 1.509–3(e)(2)(ii), language that was inadvertently deleted from the proposed regulations giving limited grantor and donor reliance based on a written statement from the grantee organization.

Section 4966 imposes an excise tax on a sponsoring organization of a donor advised fund (DAF) for each taxable distribution it makes from a DAF. Under section 4966(c), a taxable distribution generally is any distribution from a DAF to any natural person, or to any other person if (i) the distribution is for any purpose other than one specified in section 170(c)(2)(B), or (ii) the sponsoring organization maintaining the DAF does not exercise expenditure responsibility with respect to such distribution in accordance with section 4945(h). Among other things, a taxable distribution does not include a distribution from a DAF to any organization described in section 170(b)(1)(A) (other than a disqualified supporting organization).

Notice 2006–109, 2006–2 C.B. 1121, requested comments on the application of the Pension Protection Act of 2006, Public Law 109–280 (120 Stat. 780 (2006)) (PPA) to DAFs and supporting organizations. Several comments were received requesting that sponsoring organizations of DAFs be allowed to rely on an IRS ruling or determination of an organization's public charity status for various purposes, including for purposes of determining whether a distribution to an organization would be a taxable distribution under section 4966. The IRS and the Treasury Department agree that reliance relief for sponsoring organizations of DAFs is appropriate. Accordingly, the final regulations provide that, for purposes of section 4966, sponsoring organizations of DAFs may rely on an IRS determination letter or ruling that the organization is described in sections 170(b)(1)(A)(vi) and 509(a)(1) or in section 509(a)(2) to the same extent as other grantors and contributors. The final regulations also allow sponsoring organizations of DAFs to rely on a favorable determination issued to a grantee that a grant is an unusual grant.

Private Foundation Termination

Section 1.507–2 addresses private foundation terminations under section 507(b). The proposed regulations revised §1.507–2 to delete references to the four-year computation period and the transition rules related to 12-month terminations that are obsolete. Section 507(b)(1)(B) allows an organization to terminate its private foundation status by meeting the requirements of section 509(a)(1), (a)(2), or (a)(3) (and thus operating as a public charity) for a continuous period of 60 months, provided the organization (1) prior to commencement of the 60-month period, notifies the Secretary in the manner prescribed by regulations that it is terminating private foundation status, and (2) later establishes to the satisfaction of the Secretary in a manner prescribed by regulations that it operated as a public charity during the 60-month period. The proposed regulations continued to provide that a terminating private foundation could request an advance ruling regarding its public charity status under §1.507–2T(d). The proposed regulations also retained the provision requiring terminating private foundations to provide sufficient information to the IRS within 90 days of the end of the 60-month period to allow the IRS to make a determination on public charity status.

The comment suggested that the final regulations should simplify the process of terminating private foundation status under §1.507–2 by eliminating the requirement that an organization file certain information with the IRS within 90 days after completing the 60-month termination period. The comment observed that the IRS eliminated the Form 8734 filing requirement for newly-formed organizations with advance rulings, choosing instead to rely on the information reported on Schedule A to monitor public support.

The final regulations do not incorporate this suggestion. In eliminating the advance ruling period and liberalizing the procedures for new organizations, the IRS took into consideration the experiential data indicating the high incidence of qualification for public charity status at the end of the advance ruling period. As stated in the notice of proposed rulemaking, approximately 95 percent of the organizations that received advance rulings later received definitive rulings that they were public charities. The IRS does not have analogous experiential data relating to organizations attempting to terminate private foundation status under section 507(b)(1)(B) to support a similar change in these procedures.

In addition, if the organization fails to qualify as a public charity for the entire 60-month period, it will continue to be treated as a private foundation for the entire 60-month period. Thus, unlike a new organization that had an advance ruling as a public charity, an organization terminating its private foundation status continues to be classified as a terminating private foundation during the 60-month period and continues as such until the IRS receives and makes a determination on the organization's 90-day submission of information following the end of its advance ruling period.

Substantial Contributor

The term "substantial contributor," for purposes of Chapter 42, is defined under section 507(d)(2) and §1.507–6. The comment suggested that, given that a new organization that fails to qualify as publicly supported after its first five years of existence will not be treated as a private foundation for any purpose during its first five years, the final regulations should clarify whether, for purposes of Chapter 42, the identity of substantial contributors to the organization will be determined by taking into account contributions received while the organization was a public charity, or only contributions received after the date the organization is reclassified as a private foundation.

Because section 1.507–6 is not within the scope of these final regulations, the final regulations do not incorporate this suggestion.

Miscellaneous

In §1.170A–9(f), changes were made in the proposed regulation to clarify that the facts and circumstances test described in paragraph (f)(3) takes into account all pertinent facts and circumstances, and not just those listed in paragraph (f)(3)(iii); additional conforming changes were made in the final regulations. In §1.507–2, language inadvertently added to the proposed regulation when clarifying the factors for determining whether a grantee organization has an independent governing body was deleted. In addition, the final regulations include language conforming §1.6033–2(g) to the changes made to section 6033(a)(3)(B) of the Code under the PPA. Since the date of enactment of the PPA, August 17, 2006, the Commissioner's discretionary authority to relieve organizations from the annual filing requirement under section 6033(a) has not applied to supporting organizations described in section 509(a)(3) of the Code. Section 1.6033–2(g)(6), which provides the general statement of the Commissioner's discretionary authority to relieve organizations from the annual filing requirement under section 6033(a), has been corrected to include the modifying language provided by the PPA in section 6033(a)(3)(B). Sections 1.6033–2(g)(1)(iii) and 1.6033–2(g)(1)(iv) have been amended to include conforming changes. Several other incidental changes were made throughout the final regulations in order to increase clarity and consistency, none of which modify the substance of the proposed regulations.

Additionally, the final regulations include a correction in §1.6033–2(i) to the place to which an organization's change of operation notifications is sent.

Effective/Applicability Date and Transition Rules

These final regulations generally are effective on September 8, 2011 and generally apply to taxable years beginning on or after January 1, 2008. All organizations, including organizations that received a definitive ruling prior to the effective date of these regulations, must use the new five-year computation period to calculate public support for their first taxable year beginning on or after January 1, 2008, and for all subsequent taxable years.

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 13565. 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. It is hereby certified that the collection of information in this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that burden on tax-exempt entities will be reduced by (1) eliminating the separate advance ruling process and the additional process for subsequently seeking a definitive ruling, (2) clarifying rules regarding the method of accounting and period for reporting certain items, and (3) providing discretion for the IRS to narrow or clarify circumstances under which reporting is required. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Statement of Availability for Documents Published in the Internal Revenue Bulletin

For copies of recently issued revenue procedures, revenue rulings, notices and other guidance published in the Internal Revenue Bulletin or Cumulative Bulletin, please visit the IRS website at *http://www.irs.gov*.

Drafting Information

The principal author of this regulation is Terri Harris, Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in their development.

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Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are 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. Section1.170A–9 is amended by revising paragraphs (f) and (k) to read as follows:

§1.170A–9 Definition of section 170(b)(1)(A) organization.

* * * * *

(f) *Definition of section 170(b)(1)(A)(vi) organization*—(1) *In general.* An organization is described in section 170(b)(1)(A)(vi) if it—

(i) Is referred to in section 170(c)(2) (other than an organization specifically described in paragraphs (b) through (e) of this section); and

(ii) Normally receives a substantial part of its support from a governmental unit referred to in section 170(c)(1) or from direct or indirect contributions from the general public ("publicly supported"). For purposes of this paragraph (f), an organization is publicly supported if it meets the requirements of either paragraph (f)(2) of this section ($33\frac{1}{3}$ percent support test) or paragraph (f)(3) of this section (facts and circumstances test). Paragraph (f)(4) of this section defines "normally" for purposes of the $33\frac{1}{3}$ percent support test and the facts and circumstances test, and for new organizations in the first five years of the organization's existence as a section 501(c)(3) organization. Paragraph (f)(5) of this section provides for determinations of foundation classification and rules for reliance by donors and contributors. Paragraphs (f)(6), (f)(7), and (f)(8) of this section list the items that are included and excluded from the term support. Paragraph (f)(9) of this section provides examples of the application of this paragraph. Types of organizations that, subject to the provisions of this paragraph (f), generally qualify under section 170(b)(1)(A)(vi) as "publicly supported" are publicly or governmentally supported museums of history, art, or science, libraries, community centers to promote the arts, organizations providing facilities for the support of an opera, symphony orchestra, ballet, or repertory drama or for some other direct service to the general public.

(2) *Determination whether an organization is "publicly supported"; $33\frac{1}{3}$ percent support test.* An organization is publicly supported if the total amount of support (see paragraphs (f)(6), (f)(7), and (f)(8) of this section) that the organization normally (see paragraph (f)(4)(i) of this section) receives from governmental units referred to in section 170(c)(1), from contributions made directly or indirectly by the general public, or from a combination of these sources, equals at least $33\frac{1}{3}$ percent of the total support normally received by the organization. See paragraph (f)(9), *Example 1* of this section.

(3) *Determination whether an organization is "publicly supported"; facts and circumstances test.* Even if an organization fails to meet the $33\frac{1}{3}$ percent support test described in paragraph (f)(2) of this section, it is publicly supported if it normally (see paragraph (f)(4)(i) of this section) receives a substantial part of its support from governmental units, from contributions made directly or indirectly by the general public, or from a combination of these sources, and meets the other requirements of this paragraph (f)(3). In order to satisfy the facts and circumstances test, an organization must meet the requirements of paragraphs (f)(3)(i) and (f)(3)(ii) of this section. In addition, the organization must be in the nature of an organization that is publicly supported, taking into account all pertinent facts and circumstances, including the factors listed in paragraphs (f)(3)(iii)(A) through (f)(3)(iii)(E) of this section.

(i) *Ten-percent support limitation.* The percentage of support (see paragraphs (f)(6), (f)(7) and (f)(8) of this section) normally received by an organization from governmental units, from contributions made directly or indirectly by the general public, or from a combination of these sources, must be substantial. For purposes of this paragraph (f)(3), an organization will not be treated as normally receiving a substantial amount of governmental or public support unless the total amount of governmental and public support normally received equals at least 10 percent of the total support normally received by such organization.

(ii) *Attraction of public support.* An organization must be so organized and operated as to attract new and additional public or governmental support on a continuous basis. An organization will be considered to meet this requirement if it maintains a continuous and *bona fide* program for solicitation of funds from the general public, community, or membership group involved, or if it carries on activities designed to attract support from governmental units or other organizations described in section 170(b)(1)(A)(i) through (b)(1)(A)(vi). In determining whether an organization maintains a continuous and *bona fide* program for solicitation of funds from the general public or community, consideration will be given to whether the scope of its fundraising activities is reasonable in light of its charitable activities. Consideration will also be given to the fact that an organization, in its early years of existence, may limit the scope of its solicitation to persons deemed most likely to provide seed money in an amount sufficient to enable it to commence its charitable activities and expand its solicitation program.

(iii) In addition to the requirements set forth in paragraphs (f)(3)(i) and (f)(3)(ii) of this section that must be satisfied, all pertinent facts and circumstances, including the following factors, will be taken into consideration in determining whether an organization is "publicly supported" within the meaning of paragraph (f)(1) of this section. However, an organization is not generally required to satisfy all of the factors in paragraphs (f)(3)(iii)(A) through (f)(3)(iii)(E) of this section. The factors relevant to each case and the weight accorded to any one of them may differ depending upon the nature and purpose of the organization and the length of time it has been in existence.

(A) *Percentage of financial support*. The percentage of support received by an organization from public or governmental sources will be taken into consideration in determining whether an organization is "publicly supported." The higher the percentage of support above the 10 percent requirement of paragraph (f)(3)(i) of this section from public or governmental sources, the lesser will be the burden of establishing the publicly supported nature of the organization through other factors, including those described in this paragraph (f)(3), while the lower the percentage, the greater will be the burden. If the percentage of the organization's support from public or governmental sources is low because it receives a high percentage of its total support from investment income on its endowment funds, such fact will be treated as evidence of an organization being "publicly supported" if such endowment funds were originally contributed by a governmental unit or by the general public. However, if such endowment funds were originally contributed by a few individuals or members of their families, such fact will increase the burden on the organization of establishing that it is "publicly supported" taking into account all pertinent facts and circumstances, including the other factors described in paragraph (f)(3)(iii) of this section.

(B) *Sources of support*. The fact that an organization meets the requirement of paragraph (f)(3)(i) of this section through support from governmental units or directly or indirectly from a representative number of persons, rather than receiving almost all of its support from the members of a single family, will be considered evidence of an organization being "publicly supported." In determining what is a "representative number of persons," consideration will be given to the type of organization involved, the length of time it has been in existence, and whether it limits its activities to a particular community or region or to a special field which can be expected to appeal to a limited number of persons.

(C) *Representative governing body*. The fact that an organization has a governing body which represents the broad interests of the public, rather than the personal or private interests of a limited number of donors (or persons standing in a relationship to such donors which is described in section 4946(a)(1)(C) through (a)(1)(G)), will be considered evidence of an organization being "publicly supported." An organization will be treated as having a representative governing body if it has a governing body (whether designated in the organization's governing instrument or bylaws as a Board of Directors, Board of Trustees, or similar governing body) which is comprised of public officials acting in their capacities as such; of individuals selected by public officials acting in their capacities as such; of persons having special knowledge or expertise in the particular field or discipline in which the organization is operating; of community leaders, such as elected or appointed officials, clergymen, educators, civic leaders, or other such persons representing a broad cross-section of the views and interests of the community; or, in the case of a membership organization, of individuals elected pursuant to the organization's governing instrument or bylaws by a broadly based membership.

(D) *Availability of public facilities or services; public participation in programs or policies*. (*1*) The fact that an organization generally provides facilities or services directly for the benefit of the general public on a continuing basis (such as a museum or library which holds open its building or facilities to the public, a symphony orchestra which gives public performances, a conservation organization which provides educational services to the public through the distribution of educational materials, or an old age home which provides domiciliary or nursing services for members of the general public) will be considered evidence that such organization is "publicly supported."

(*2*) The fact that an organization is an educational or research institution which regularly publishes scholarly studies that are widely used by colleges and universities or by members of the general public will also be considered evidence that such organization is "publicly supported."

(*3*) The following factors will also be considered evidence that an organization is "publicly supported":

(*i*) The participation in, or sponsorship of, the programs of the organization by members of the public having special knowledge or expertise, public officials, or civic or community leaders.

(*ii*) The maintenance of a definitive program by an organization to accomplish its charitable work in the community, such as combating community deterioration in an economically depressed area that has suffered a major loss of population and jobs.

(*iii*) The receipt of a significant part of its funds from a public charity or governmental agency to which it is in some way held accountable as a condition of the grant, contract, or contribution.

(E) *Additional factors pertinent to membership organizations*. The following are additional factors to be considered in determining whether a membership organization is "publicly supported":

(*1*) Whether the solicitation for dues-paying members is designed to enroll a substantial number of persons in the community or area, or in a particular profession or field of special interest (taking into account the size of the area and the nature of the organization's activities).

(*2*) Whether membership dues for individual (rather than institutional) members have been fixed at rates designed to make membership available to a broad cross section of the interested public, rather than to restrict membership to a limited number of persons.

(*3*) Whether the activities of the organization will be likely to appeal to persons having some broad common interest or purpose, such as educational activities in the case of alumni associations, musical activities in the case of symphony societies, or civic affairs in the case of parent-teacher associations. See *Example 2* through *Example 5* contained in paragraph (f)(9) of this section for illustrations of this paragraph (f)(3).

(4) *Definition of normally; general rule*—(i) *Normally; 33$^1/_3$ percent support test*. An organization "normally" receives the requisite amount of public support and meets the 33$^1/_3$ percent support test for a taxable year and the taxable year immediately succeeding that year, if, for the taxable year being tested and the four taxable years immediately preceding that taxable year, the organization meets the 33$^1/_3$ percent support test on an aggregate basis.

(ii) *Normally*; *facts and circumstances test*. An organization "normally" receives the requisite amount of public support and meets the facts and circumstances test of paragraph (f)(3) for a taxable year and the taxable year immediately succeeding that year, if, for the taxable year being tested and the four taxable years immediately preceding that taxable year, the organization meets the facts and circumstances test on an aggregate basis. In the case of paragraphs (f)(3)(iii)(A) and (f)(3)(iii)(B) of this section, facts pertinent to years preceding the five-year period may also be taken into consideration. The combination of factors set forth in paragraphs (f)(3)(iii)(A) through (f)(3)(iii)(E) of this section that an organization normally must meet does not have to be the same for each five-year period so long as there exists a sufficient combination of factors to show compliance with the facts and circumstances test.

(iii) *Special rule*. The fact that an organization has normally met the requirements of the 33$^1/_3$ percent support test for a current taxable year, but is unable normally to meet such requirements for a succeeding taxable year, will not in itself prevent such organization from meeting the facts and circumstances test for such succeeding taxable year.

(iv) *Example*. The application of paragraphs (f)(4)(i), (f)(4)(ii), and (f)(4)(iii) of this section may be illustrated by the following example:

Example. (i) X is recognized as an organization described in section 501(c)(3). On the basis of support received during taxable years 2008, 2009, 2010, 2011, and 2012, in the aggregate, X receives at least 33$^1/_3$ percent of its support from governmental units referred to in section 170(c)(1), from contributions made directly or indirectly by the general public, or from a combination of these sources. Consequently, X meets the 33$^1/_3$ percent support test for taxable year 2012 (the current taxable year). X also meets the 33$^1/_3$ support test for 2013, as the immediately succeeding taxable year.

(ii) In taxable years 2009, 2010, 2011, 2012, and 2013, in the aggregate, X does not receive at least 33$^1/_3$ percent of its support from governmental units referred to in section 170(c)(1), from contributions made directly or indirectly by the general public, or from a combination of these sources. However, X still meets the 33$^1/_3$ percent support test for taxable year 2013 based on the aggregate support received for taxable years 2008 through 2012.

(iii) In taxable years 2010, 2011, 2012, 2013, and 2014, in the aggregate, X does not receive at least 33$^1/_3$ percent of its support from governmental units referred to in section 170(c)(1), from contributions made directly or indirectly by the general public, or from a combination of these sources. X does not meet the 33$^1/_3$ percent support test for taxable year 2014.

(iv) X meets the facts and circumstances test for taxable year 2013 and for taxable year 2014 (the immediately succeeding taxable year) based on the aggregate support X receives, X's fundraising program, and consideration of other factors, including those listed in paragraphs (f)(3)(iii)(A) through (f)(3)(iii)(E) of this section, during taxable years 2009, 2010, 2011, 2012, and 2013. Therefore, even though X does not meet the 33$^1/_3$ percent support test for taxable year 2014, X is still an organization described in section 170(b)(1)(A)(vi) for that year.

(v) *Normally; first five years of an organization's existence*. (A) An organization "normally" receives the requisite amount of public support and meets the 33$^1/_3$ percent public support test or the facts and circumstances test during its first five taxable years as a section 501(c)(3) organization if the organization can reasonably be expected to meet the requirements of the 33$^1/_3$ percent support test or the facts and circumstances test during that period. With respect to such organization's sixth taxable year, the general definition of normally set forth in paragraphs (f)(4)(i), (f)(4)(ii), and (f)(4)(iii) of this section apply. Alternatively, the organization shall be treated as "normally" meeting the 33$^1/_3$ percent support test or the facts and circumstances test for its sixth taxable year (but not its seventh taxable year) if it meets the 33$^1/_3$ percent support test or the facts and circumstances test under the definition of normally set forth in paragraphs (f)(4)(i), (f)(4)(ii), and (f)(4)(iii) of this section for its fifth taxable year (based on support received in its first through fifth taxable years).

(B) *Basic consideration*. In determining whether an organization can reasonably be expected (within the meaning of paragraph (f)(4)(v)(A) of this section) to meet the requirements of the 33$^1/_3$ percent support test or the facts and circumstances test during its first five taxable years, the basic consideration is whether its organizational structure, current or proposed programs or activities, and actual or intended method of operation are such as can reasonably be expected to attract the type of broadly based support from the general public, public charities, and governmental units that is necessary to meet such tests. The factors that are relevant to this determination, and the weight accorded to each of them, may differ from case to case, depending on the nature and functions of the organization. The information to be considered for this purpose shall consist of all pertinent facts and circumstances, including the factors set forth in paragraph (f)(3) of this section.

(vi) *Example*. The application of paragraph (f)(4)(v) of this section may be illustrated by the following example:

Example. (i) Organization Y was formed in January 2008, and uses a taxable year ending December 31. After September 9, 2008, and before December 31, 2008, Organization Y filed Form 1023 requesting recognition of exemption as an organization described in section 501(c)(3) and in sections 170(b)(1)(A)(vi) and 509(a)(1). In its application, Organization Y established that it can reasonably be expected to operate as a publicly supported organization under paragraph (f)(2) or (f)(3) and paragraph (f)(4)(v) of this section. Subsequently, Organization Y received a ruling or determination letter that it is an organization described in section 501(c)(3) and sections 170(b)(1)(A)(vi) and 509(a)(1) effective as of the date of its formation.

(ii) Organization Y is described in sections 170(b)(1)(A)(vi) and 509(a)(1) for its first five taxable years (the taxable years ending December 31, 2008, through December 31, 2012).

(iii) Organization Y can qualify as a publicly supported organization for the taxable year ending December 31, 2013, if Organization Y can meet the requirements of either paragraph (f)(2) or paragraph (f)(3) of this section or §1.509(a)–3(a) and §1.509(a)-(3)(b) for the taxable years ending December 31, 2009, through December 31, 2013, or for the taxable years ending December 31, 2008, through December 31, 2012.

(vii) *Organizations reclassified as private foundations*. (A) *New publicly supported organizations*. If a new publicly supported organization described under section 170(b)(1)(A)(vi) cannot meet the requirements of the 33$^1/_3$ percent test of paragraph (f)(2) or the facts and circumstances test of paragraph (f)(3) for its sixth taxable year under the general definition of normally set forth in paragraphs (f)(4)(i), (f)(4)(ii), and (f)(4)(iii) of this section or under the alternate rule set forth in paragraph (f)(4)(v) of this section (effectively failing to meet a public support test for both its fifth and sixth taxable years), it will be treated as a private foundation as of the first day of its sixth taxable year only for purposes of sections 507, 4940, and 6033. Such an organization must file a Form 990-PF, *"Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation,"* and will be liable for the net investment tax imposed by section 4940 and, if applicable, the private foundation termination tax imposed by section 507(c), for its sixth taxable year. For succeeding taxable years, the organization will be treated as a private foundation for all purposes.

(B) *Other publicly supported organizations*. A publicly supported organization described in section 170(b)(1)(A)(vi) (other than a new publicly supported organization described in paragraph (f)(4)(vii)(A) of this section) that has failed to meet both the 33$^1/_3$ percent support test and the facts and circumstances test for any two consecutive taxable years will be treated as a private foundation as of the first day of the second consecutive taxable year only for purposes of sections 507, 4940, and 6033. Such an organization must file a Form 990-PF, *"Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation,"* and will be liable for the net investment tax imposed by section 4940 and, if applicable, the private foundation termination tax imposed by section 507(c), for the second consecutive failed taxable year. For succeeding taxable years, the organization will be treated as a private foundation for all purposes.

(5) *Determinations of foundation classification and reliance*. (i) A ruling or determination letter that an organization is described in section 170(b)(1)(A)(vi) may be issued to an organization. Such determination may be made in conjunction with the recognition of the organization's tax-exempt status or at such other time as the organization believes it is described in section 170(b)(1)(A)(vi). The ruling or determination letter that the organization is described in section 170(b)(1)(A)(vi) may be revoked if, upon examination, the organization has not met the requirements of paragraph (f) of this section. The ruling or determination letter that the organization is described in section 170(b)(1)(A)(vi) also may be revoked if the organization's application for a ruling or determination contained one or more material misstatements or omissions of fact or if such application was part of a scheme or plan to avoid or evade any provision of the Internal Revenue Code. The revocation of the determination that an organization is described in section 170(b)(1)(A)(vi) does not preclude revocation of the determination that the organization is described in section 501(c)(3).

(ii) *Status of grantors or contributors*. For purposes of sections 170, 507, 545(b)(2), 642(c), 4942, 4945, 4966, 2055, 2106(a)(2), and 2522, grantors or contributors may rely upon a determination letter or ruling that an organization is described in section 170(b)(1)(A)(vi) until the IRS publishes notice of a change of status (for example, in the Internal Revenue Bulletin or Publication 78, *"Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1986,"* which can be searched at *www.irs.gov*). For this purpose, grantors or contributors also may rely on an advance ruling that expires on or after June 9, 2008. However, a grantor or contributor may not rely on such an advance ruling or any determination letter or ruling if the grantor or contributor was responsible for, or aware of, the act or failure to act that resulted in the organization's loss of classification under section 170(b)(1)(A)(vi) or acquired knowledge that the IRS had given notice to such organization that it would be deleted from such classification.

(iii) *Reliance by grantors or contributors*. A grantor or contributor, other than one of the organization's founders, creators, or foundation managers (within the meaning of section 4946(b)), will not be considered to be responsible for, or aware of, the act or failure to act that resulted in the loss of the organization's "publicly supported" classification under section 170(b)(1)(A)(vi), if such grantor or contributor has made such grant or contribution in reliance upon a written statement by the grantee organization that such grant or contribution will not result in the loss of such organization's classification as a publicly supported organization as described in section 170(b)(1)(A)(vi). Such statement must be signed by a responsible officer of the grantee organization and must set forth sufficient information, including a summary of the pertinent financial data for the five taxable years immediately preceding the current taxable year, to assure a reasonably prudent person that his grant or contribution will not result in the loss of the grantee organization's classification as a publicly supported organization as described in section 170(b)(1)(A)(vi). If a reasonable doubt exists as to the effect of such grant or contribution, or if the grantor or contributor is one of the organization's founders, creators, or foundation managers, the procedure set forth in paragraph (f)(6)(iv) of this section for requesting a determination from the IRS may be followed by the grantee organization for the protection of the grantor or contributor.

(6) *Definition of support; meaning of general public*—(i) *In general*. In determining whether the 33$^1/_3$ percent support test or the 10 percent support limitation described in paragraph (f)(3)(i) of this section is met, contributions by an individual, trust, or corporation shall be taken into account as support from direct or indirect contributions from the general public only to the extent that the total amount of the contributions by any such individual, trust, or corporation during the period described in paragraph (f)(4)(i) or paragraph (f)(4)(ii) of this section does not exceed two percent of the organization's total support for such period, except as provided in paragraph (f)(6)(ii) of this section. Therefore, for example, any contribution by one individual will be included in full in the denominator of the fraction determining the 33$^1/_3$ percent support or the 10 percent support limitation, but will be includible in the numerator of such fraction only to the extent that such amount does not exceed two percent of the denominator. In applying the two percent limi-

tation, all contributions made by a donor and by any person or persons standing in a relationship to the donor that is described in section 4946(a)(1)(C) through (a)(1)(G) and the related regulations shall be treated as made by one person. The two percent limitation shall not apply to support received from governmental units referred to in section 170(c)(1) or to contributions from organizations described in section 170(b)(1)(A)(vi), except as provided in paragraph (f)(6)(v) of this section. For purposes of paragraphs (f)(2), (f)(3)(i), and (f)(7)(iii)(A)(*2*) of this section, the term *indirect contributions from the general public* includes contributions received by the organization from organizations (such as section 170(b)(1)(A)(vi) organizations) that normally receive a substantial part of their support from direct contributions from the general public, except as provided in paragraph (f)(6)(v) of this section. See the examples in paragraph (f)(9) of this section for the application of this paragraph (f)(6)(i). For purposes of this paragraph (f), the term *contributions* includes qualified sponsorship payments (as defined in §1.513–4) in the form of money or property (but not services).

(ii) *Exclusion of unusual grants*. (A) For purposes of applying the two percent limitation described in paragraph (f)(6)(i) of this section to determine whether the 33$^{1}/_{3}$ percent support test or the 10 percent support limitation in paragraph (f)(3)(i) of this section is satisfied, one or more contributions may be excluded from both the numerator and the denominator of the applicable support fraction if such contributions meet the requirements of paragraph (f)(6)(iii) of this section. The exclusion provided by this paragraph (f)(6)(ii) is generally intended to apply to substantial contributions or bequests from disinterested parties, which contributions or bequests—

(*1*) Are attracted by reason of the publicly supported nature of the organization;

(*2*) Are unusual or unexpected with respect to the amount thereof; and

(*3*) Would, by reason of their size, adversely affect the status of the organization as normally being publicly supported for the applicable period described in paragraph (f)(4) of this section.

(B) In the case of a grant (as defined in §1.509(a)–3(g)) that meets the requirements of this paragraph (f)(6)(ii), if the terms of the granting instrument require that the funds be paid to the recipient organization over a period of years, the grant amounts received by the organization may be excluded for such year or years in which they would otherwise be includible in computing support under the method of accounting on the basis of which the organization regularly computes its income in keeping its books under section 446. However, no item of gross investment income may be excluded under this paragraph (f)(6). The provisions of this paragraph (f)(6) shall apply to exclude unusual grants made during any of the applicable periods described in paragraph (f)(4) or paragraph (f)(6) of this section. See paragraph (f)(6)(iv) of this section as to reliance by a grantee organization upon an unusual grant ruling under this paragraph (f)(6).

(iii) *Determining factors*. In determining whether a particular contribution may be excluded under paragraph (f)(6)(ii) of this section, all pertinent facts and circumstances will be taken into consideration. No single factor will necessarily be determinative. For some of the factors similar to the factors to be considered, see §1.509(a)–3(c)(4).

(iv) *Grantors and contributors*. Prior to the making of any grant or contribution that will allegedly meet the requirements for exclusion under paragraph (f)(6)(ii) of this section, a potential grantee organization may request a determination whether such grant or contribution may be so excluded. Requests for such determination may be filed by the grantee organization in the time and manner specified by revenue procedure or other guidance published in the Internal Revenue Bulletin. The issuance of such determination will be at the sole discretion of the Commissioner. The organization must submit all information necessary to make a determination on the factors referred to in paragraph (f)(6)(iii) of this section. If a favorable determination is issued, such determination may be relied upon by the grantor or contributor of the particular contribution in question for purposes of sections 170, 507, 545(b)(2), 642(c), 4942, 4945, 4966, 2055, 2106(a)(2), and 2522 and by the grantee organization for purposes of paragraph (f)(6)(ii) of this section.

(v) *Grants from public charities*. Pursuant to paragraph (f)(6)(i) of this section, contributions received from a governmental unit or from a section 170(b)(1)(A)(vi) organization are not subject to the two percent limitation described in paragraph (f)(6)(i) of this section unless such contributions represent amounts which have been expressly or impliedly earmarked by a donor to such governmental unit or section 170(b)(1)(A)(vi) organization as being for, or for the benefit of, the particular organization claiming section 170(b)(1)(A)(vi) status. See §1.509(a)–3(j)(3) for examples illustrating the rules of this paragraph (f)(6)(v).

(7) *Definition of support; special rules and meaning of terms*—(i) *Definition of support*. For purposes of this paragraph (f), the term "support" shall be as defined in section 509(d) (without regard to section 509(d)(2)). The term "support" does not include—

(A) Any amounts received from the exercise or performance by an organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a). In general, such amounts include amounts received from any activity the conduct of which is substantially related to the furtherance of such purpose or function (other than through the production of income); or

(B) Contributions of services for which a deduction is not allowable.

(ii) For purposes of the 33$^{1}/_{3}$ percent support test and the 10 percent support limitation in paragraph (f)(3)(i) of this section, all amounts received that are described in paragraph (f)(7)(i)(A) or paragraph (f)(7)(i)(B) of this section are to be excluded from both the numerator and the denominator of the fractions determining compliance with such tests, except as provided in paragraph (f)(7)(iii) of this section.

(iii) *Organizations dependent primarily on gross receipts from related activities*. (A) Notwithstanding the provisions of paragraph (f)(7)(i) of this section, an organization will not be treated as satisfying the 33$^{1}/_{3}$ percent support test or the 10 percent support limitation in paragraph (f)(3)(i) of this section if it receives—

(*1*) Almost all of its support (as defined in section 509(d)) from gross receipts from related activities; and

(*2*) An insignificant amount of its support from governmental units (without regard to amounts referred to in paragraph (f)(7)(i)(A) of this section) and contributions made directly or indirectly by the general public.

(B) *Example*. The application of this paragraph (f)(7)(iii) may be illustrated by the following example:

Example. Z, an organization described in section 501(c)(3), is controlled by A, its president. Z received $500,000 during the period consisting of the current taxable year and the four immediately preceding taxable years under a contract with the Department of Transportation, pursuant to which Z has engaged in research to improve a particular vehicle used primarily by the Federal government. During this same period, the only other support received by Z consisted of $5,000 in small contributions primarily from Z's employees and business associates. The $500,000 amount constitutes support under sections 509(d)(2) and 509(a)(2)(A). Under these circumstances, Z meets the conditions of paragraphs (f)(7)(iii)(A)(*1*) and (f)(7)(iii)(A)(*2*) of this section and will not be treated as meeting the requirements of either the 33$^{1}/_{3}$ percent support test or the facts and circumstances test. As to the rules applicable to organizations that fail to qualify under section 170(b)(1)(A)(vi) because of the provisions of this paragraph (f)(7)(iii), see section 509(a)(2) and the related regulations. For the distinction between gross receipts (as referred to in section 509(d)(2)) and gross investment income (as referred to in section 509(d)(4)), see §1.509(a)–3(m).

(iv) *Membership fees*. For purposes of this paragraph (f)(7), the term *support* shall include "membership fees" within the meaning of §1.509(a)–3(h) (that is, if the basic purpose for making a payment is to provide support for the organization rather than to purchase admissions, merchandise, services, or the use of facilities).

(8) *Support from a governmental unit*. (i) For purposes of the 33$^{1}/_{3}$ percent support test and the 10 percent support limitation described in paragraph (f)(3)(i) of this section, the term *support from a governmental unit* includes any amounts received from a governmental unit, including donations or contributions and amounts received in connection with a contract entered into with a governmental unit for the performance of services or in connection with a government research grant. However, such amounts will not constitute support from a governmental unit for such purposes if they constitute amounts received from the exercise or performance of the organization's exempt functions as provided in paragraph (f)(7)(i)(A) of this section.

(ii) For purposes of paragraph (f)(8)(i) of this section, any amount paid by a governmental unit to an organization is not to be treated as received from the exercise or performance of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a) (within the meaning of paragraph (f)(7)(i)(A) of this section) if the purpose of the payment is primarily to enable the organization to provide a service to, or maintain a facility for, the direct benefit of the public (regardless of whether part of the expense of providing such service or facility is paid for by the public), rather than to serve the direct and immediate needs of the payor. For example—

(A) Amounts paid for the maintenance of library facilities which are open to the public;

(B) Amounts paid under government programs to nursing homes or homes for the aged in order to provide health care or domiciliary services to residents of such facilities; and

(C) Amounts paid to child placement or child guidance organizations under government programs for services rendered to children in the community, are considered payments the purpose of which is primarily to enable the recipient organization to provide a service or maintain a facility for the direct benefit of the public, rather than to serve the direct and immediate needs of the payor. Furthermore, any amount received from a governmental unit under circumstances such that the amount would be treated as a "grant" within the meaning of §1.509(a)–3(g) will generally constitute "support from a governmental unit" described in this paragraph (f)(8), rather than an amount described in paragraph (f)(7)(i)(A) of this section.

(9) *Examples*. The application of paragraphs (f)(1) through (f)(8) of this section may be illustrated by the following examples:

Example 1. (i) M is recognized as an organization described in section 501(c)(3). For the years 2008 through 2012 (the applicable period with respect to the taxable year 2012 under paragraph (f)(4) of this section), M received support (as defined in paragraphs (f)(6) through (8) of this section) of $600,000 from the following sources:

Investment income	$ 300,000
City R (a governmental unit described in section 170(c)(1))	40,000
United Fund (an organization described in section 170(b)(1)(A)(vi))	40,000
Contributions (including six contributions in excess of the two-percent limit, totaling $170,000)	220,000
Total support	$ 600,000

(ii) With respect to the taxable year 2012, M's public support is computed as follows:

Support from a governmental unit described in section 170(c)(1)	40,000
Indirect contributions from the general public (United Fund)	40,000
Contributions by various donors that were not in excess of $12,000, or two percent of total support	50,000
Six contributions that were each in excess of $12,000, or two percent of total support, up to the two-percent limitation, 6 x $12,000	72,000
	202,000

(iii) M's support from governmental units referred to in section 170(c)(1) and from direct and indirect contributions from the general public (as defined in paragraph (f)(6) of this section) with respect to the taxable year 2012 normally exceeds 33$^1/_3$ percent of M's total support ($202,000/$600,000 = 33.67 percent) for the applicable period (2008 through 2012). M meets the 33$^1/_3$ percent support test with respect to 2012 and is therefore publicly supported for the taxable years 2012 and 2013.

Example 2. (i) N is recognized as an organization described in section 501(c)(3). It was created to maintain public gardens containing botanical specimens and displaying statuary and other art objects. The facilities, works of art, and a large endowment were all contributed by a single contributor. The members of the governing body of the organization are unrelated to its creator. The gardens are open to the public without charge and attract a substantial number of visitors each year. For the current taxable year and the four taxable years immediately preceding the current taxable year, 95 percent of the organization's total support was received from investment income from its original endowment. N also maintains a membership society that is supported by members of the general public who wish to contribute to the upkeep of the gardens by paying a small annual membership fee. Over the five-year period in question, these fees from the general public constituted the remaining five percent of the organization's total support for such period.

(ii) Under these circumstances, N does not meet the 33$^1/_3$ percent support test for its current taxable year. Furthermore, because only five percent of its total support is, with respect to the current taxable year, normally received from the general public, N does not satisfy the 10 percent support limitation described in paragraph (f)(3)(i) of this section and therefore does not qualify as publicly supported under the facts and circumstances test. Because N has failed to satisfy the 10 percent support limitation under paragraph (f)(3)(i) of this section, none of the other requirements or factors set forth in paragraphs (f)(3)(iii)(A) through (f)(3)(iii)(E) of this section can be considered in determining whether N qualifies as a publicly supported organization. For its current taxable year, therefore, N is not an organization described in section 170(b)(1)(A)(vi).

Example 3. (i) O, an art museum, is recognized as an organization described in section 501(c)(3). In 1930, O was founded in S City by the members of a single family to collect, preserve, interpret, and display to the public important works of art. O is governed by a Board of Trustees that originally consisted almost entirely of members of the founding family. However, since 1945, members of the founding family or persons standing in a relationship to the members of such family described in section 4946(a)(1)(C) through (G) have annually constituted less than one-fifth of the Board of Trustees. The remaining board members are citizens of S City from a variety of professions and occupations who represent the interests and views of the people of S City in the activities carried on by the organization rather than the personal or private interests of the founding family. O solicits contributions from the general public and, for the current taxable year and each of the four taxable years immediately preceding the current taxable year, O has received total contributions (in small sums of less than $100, none of which exceeds two percent of O's total support for such period) in excess of $10,000. These contributions from the general public (as defined in paragraph (f)(6) of this section) represent 25 percent of the organization's total support for such five-year period. For this same period, investment income from several large endowment funds has constituted 75 percent of O's total support. O expends substantially all of its annual income for its exempt purposes and thus depends upon the funds it annually solicits from the public as well as its investment income in order to carry out its activities on a normal and continuing basis and to acquire new works of art. O has, for the entire period of its existence, been open to the public and more than 300,000 people (from S City and elsewhere) have visited the museum in each of the current taxable year and the four immediately preceding taxable years.

(ii) Under these circumstances, O does not meet the 33$^1/_3$ percent support test for its current year because it has received only 25 percent of its total support for the applicable five-year period from the general public. However, under the facts set forth above, O meets the 10 percent support limitation under paragraph (f)(3)(i) of this section, as well as the requirements of paragraph (f)(3)(ii) of this section. Under all of the facts set forth in this example, O is considered as meeting the requirements of the facts and circumstances test on the basis of satisfying paragraphs (f)(3)(i) and (f)(3)(ii) of this section and the factors set forth in paragraphs (f)(3)(iii)(A) through (f)(3)(iii)(D) of this section. O is therefore publicly supported for its current taxable year and the immediately succeeding taxable year.

Example 4. (i) In 1960, the P Philharmonic Orchestra was organized in T City through the combined efforts of a local music society and a local women's club to present to the public a wide variety of musical programs intended to foster music appreciation in the community. P is recognized as an organization described in section 501(c)(3). The orchestra is composed of professional musicians who are paid by the association. Twelve performances open to the public are scheduled each year. A small admission fee is charged for each of these performances. In addition, several performances are staged annually without charge. During the current taxable year and the four taxable years immediately preceding the current taxable year, P has received separate contributions of $200,000 each from A and B (not members of a single family) and support of $120,000 from the T Community Chest, a public federated fundraising organization operating in T City. P depends on these funds in order to carry out its activities and will continue to depend on contributions of this type to be made in the future. P has also begun a fundraising campaign in an attempt to expand its activities for the coming years. P is governed by a Board of Directors comprised of five individuals. A faculty member of a local college, the president of a local music society, the head of a local banking institution, a prominent doctor, and a member of the governing body of the local chamber of commerce currently serve on P's Board and represent the interests and views of the community in the activities carried on by P.

(ii) With respect to P's current taxable year, P's sources of support are computed on the basis of the current taxable year and the four taxable years immediately preceding the current taxable year, as follows:

Contributions	$520,000
Receipts from performances	100,000
Total support	$ 620,000
Less:	
Receipts from performances (excluded under paragraph (f)(7)(i)(A) of this section)	100,000
Total support for purposes of paragraphs (f)(2) and (f)(3)(i) of this section	$ 520,000

(iii) For purposes of paragraphs (f)(2) and (f)(3)(i) of this section, P's public support is computed as follows:

T Community Chest (indirect support from the general public)	$ 120,000
Two contributions from A & B (each in excess of $10,400— 2 percent of total support) 2 x $10,400	20,800
Total	$ 140,800

(iv) Under these circumstances, P does not meet the 33$^{1}/_{3}$ percent support test for its current year because it has received only 27 percent of its total support ($140,800/$520,000) for the applicable five-year period from the general public. However, under the facts set forth above, P meets the 10 percent support limitation under paragraph (f)(3)(i) of this section, as well as the requirements of paragraph (f)(3)(ii) of this section. Under all of the facts set forth in this example, P is considered as meeting the requirements of the facts and circumstances test on the basis of satisfying paragraphs (f)(3)(i) and (f)(3)(ii) of this section and the factors set forth in paragraphs (f)(3)(iii)(A) through (f)(3)(iii)(D) of this section. P is therefore publicly supported for its current taxable year and the immediately succeeding taxable year.

Example 5. (i) Q is recognized as an organization described in section 501(c)(3). It is a philanthropic organization founded in 1965 by C for the purpose of making annual contributions to worthy charities. C created Q as a charitable trust by the transfer of appreciated securities worth $500,000 to Q. Pursuant to the trust agreement, C and two other members of his family are the sole trustees of Q and are vested with the right to appoint successor trustees. In each of the current taxable year and the four taxable years immediately preceding the current taxable year, Q received $12,000 in investment income from its original endowment. Each year Q makes a solicitation for funds by operating a charity ball at C's residence. Guests are invited and requested to make contributions of $100 per couple. During the five-year period at issue, $15,000 was received from the proceeds of these events. C and his family have also made contributions to Q of $25,000 over the five-year period at issue. Q makes disbursements each year of substantially all of its net income to the public charities chosen by the trustees.

(ii) Q's sources of support for the current taxable year and the four taxable years immediately preceding the current taxable year as follows:

Investment income	$ 60,000
Contributions	40,000
Total support	$ 100,000

(iii) For purposes of paragraphs (f)(2) and (f)(3)(i) of this section, Q's public support is computed as follows:

Contributions from the general public	$ 15,000
C's contribution (in excess of $ 2,000 — 2 percent of total support) 1 X $2,000	2,000
Total	$ 17,000

(iv) Under these circumstances, Q does not meet the 33$^{1}/_{3}$ percent support test for its current year because it has received only 17 percent of its total support ($17,000/$100,000) for the applicable five-year period from the general public. Thus, Q's classification as a "publicly supported" organization depends on whether it meets the requirements of the facts and circumstances test. Even though it satisfies the 10 percent support limitation under paragraph (f)(3)(i) of this section, its method of solicitation makes it questionable whether Q satisfies the requirements of paragraph (f)(3)(ii) of this section. Because of its method of operating, Q also has a greater burden of establishing its publicly supported nature under paragraph (f)(3)(iii)(A) of this section. Based upon the foregoing facts and circumstances, including Q's failure to receive favorable consideration under the factors set forth in paragraphs (f)(3)(iii)(B), (f)(3)(iii)(C), and (f)(3)(iii)(D) of this section, Q does not satisfy the facts and circumstances test.

(10) *Community trust; introduction*. Community trusts have often been established to attract large contributions of a capital or endowment nature for the benefit of a particular community or area, and often such contributions have come initially from a small number of donors. While the community trust generally has a governing body comprised of representatives of the particular community or area, its contributions are often received and maintained in the form of separate trusts or funds, which are subject to varying degrees of control by the governing body. To qualify as a "publicly supported" organization, a community trust must meet the 33 1/3 percent support test, or, if it cannot meet that test, be organized and operated so as to attract new and additional public or governmental support on a continuous basis sufficient to meet the facts and circumstances test. Such facts and circumstances test includes a requirement of attraction of public support in paragraph (f)(3)(ii) of this section which, as applied to community trusts, generally will be satisfied if they seek gifts and bequests from a wide range of potential donors in the community or area served, through banks or trust companies, through attorneys or other professional persons, or in other appropriate ways that call attention to the community trust as a potential recipient of gifts and bequests made for the benefit of the community or area served. A community trust is not required to engage in periodic, community-wide, fundraising campaigns directed toward attracting a large number of small contributions in a manner similar to campaigns conducted by a community chest or united fund. Paragraph (f)(11) of this section provides rules for determining the extent to which separate trusts or funds may be treated as component parts of a community trust, fund, or foundation (herein collectively referred to as a "community trust," and sometimes referred to as an "organization") for purposes of meeting the requirements of this paragraph for classification as a publicly supported organization. Paragraph (f)(12) of this section contains rules for trusts or funds that are prevented from qualifying as component parts of a community trust by paragraph (f)(11) of this section.

(11) *Community trusts; requirements for treatment as a single entity*—(i) *General rule*. For purposes of sections 170, 501, 507, 508, 509, and Chapter 42, any organization that meets the requirements contained in paragraphs (f)(11)(iii) through (f)(11)(vi) of this section will be treated as a single entity, rather than as an aggregation of separate funds, and except as otherwise provided, all funds associated with such organization (whether a trust, not-for-profit corporation, unincorporated association, or a combination thereof) which meet the requirements of paragraph (f)(11)(ii) of this section will be treated as component parts of such organization.

(ii) *Component part of a community trust*. In order to be treated as a component part of a community trust referred to in this paragraph (f)(11) (rather than as a separate trust or not-for-profit corporation or association), a trust or fund:

(A) Must be created by a gift, bequest, legacy, devise, or other transfer to a community trust which is treated as a single entity under this paragraph (f)(11); and

(B) May not be directly or indirectly subjected by the transferor to any material restriction or condition (within the meaning of §1.507–2(a)(7)) with respect to the transferred assets. For purposes of this paragraph (f)(11)(ii)(B), if the transferor is not a private foundation, the provisions of §1.507–2(a)(7) shall be applied to the trust or fund as if the transferor were a private foundation established and funded by the person establishing the trust or fund and such foundation transferred all its assets to the trust or fund. Any transfer made to a fund or trust which is treated as a component part of a community trust under this paragraph (f)(11)(ii) will be treated as a transfer made "to" a "publicly supported" community trust for purposes of sections 170(b)(1)(A) and 507(b)(1)(A) if such community trust meets the requirements of section 170(b)(1)(A)(vi) as a "publicly supported" organization at the time of the transfer, except as provided in paragraph (f)(5)(ii) of this section or §§1.508–1(b)(4) and 1.508–1(b)(6) (relating, generally, to reliance by grantors and contributors). See also paragraphs (f)(12)(ii) and (f)(12)(iii) of this section for special provisions relating to split-interest trusts and certain private foundations described in section 170(b)(1)(F)(iii).

(iii) *Name*. The organization must be commonly known as a community trust, fund, foundation, or other similar name conveying the concept of a capital or endowment fund to support charitable activities (within the meaning of section 170(c)(1) or section 170(c)(2)(B)) in the community or area it serves.

(iv) *Common instrument*. All funds of the organization must be subject to a common governing instrument or a master trust or agency agreement (herein referred to as the "governing instrument"), which may be embodied in a single document or several documents containing common language. Language in an instrument of transfer to the community trust making a fund subject to the community trust's governing instrument or master trust or agency agreement will satisfy the requirements of this paragraph (f)(11)(iv). In addition, if a community trust adopts a new governing instrument (or creates a corporation) to put into effect new provisions (applying to future transfers to the community trust), the adoption of such new governing instrument (or creation of a corporation with a governing instrument) which contains common language with the existing governing instrument shall not preclude the community trust from meeting the requirements of this paragraph (f)(11)(iv).

(v) *Common governing body*. (A) The organization must have a common governing body or distribution committee (herein referred to as the "governing body") which either directs or, in the case of a fund designated for specified beneficiaries, monitors the distribution of all of the funds exclusively for charitable purposes (within the meaning of section 170(c)(1) or section 170(c)(2)(B)). For purposes of this paragraph (f)(11)(v), a fund is designated for specified beneficiaries only if no person is left with the discretion to direct the distribution of the fund.

(B) *Powers of modification and removal*. The fact that the exercise of any power described in this paragraph (f)(11)(v)(B) is reviewable by an appropriate State authority will not preclude the community trust from meeting the requirements of this paragraph (f)(11)(v)(B). Except as provided in paragraph (f)(11)(v)(C) of this section, the governing body must have the power in the governing instrument, the instrument of transfer, the resolutions or by-laws of the governing body, a written agreement, or otherwise—

(*1*) To modify any restriction or condition on the distribution of funds for any specified charitable purposes or to specified organizations if in the sole judgment of the governing body (without the necessity of the approval of any participating trustee, custodian, or agent), such restriction or condition becomes, in effect, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community or area served;

(*2*) To replace any participating trustee, custodian, or agent for breach of fiduciary duty under State law; and

(*3*) To replace any participating trustee, custodian, or agent for failure to produce a reasonable (as determined by the governing body) return of net income (within the meaning of paragraph (f)(11)(v)(F) of this section) over a reasonable period of time (as determined by the governing body).

(C) *Transitional rule*—(*1*) Notwithstanding paragraph (f)(11)(v)(B) of this section, if a community trust meets the requirements of paragraph (f)(11)(v)(C)(*3*) of this section, then in the case of any instrument of transfer which is executed before July 19, 1977, and is not revoked or amended thereafter (with respect to any dispositive provision affecting the transfer to the community trust), and in the case of any instrument of transfer which is irrevocable on January 19, 1982, the governing body must have the power to cause proceedings to be instituted (by request to the appropriate State authority)—

(*i*) To modify any restriction or condition on the distribution of funds for any specified charitable purposes or to specified organizations if in the judgment of the governing body such restriction or condition becomes, in effect, unnecessary, incapable of fulfillment, or inconsistent with the charitable needs of the community or area served; and

(*ii*) To remove any participating trustee, custodian, or agent for breach of fiduciary duty under State law.

(*2*) The necessity for the governing body to obtain the approval of a participating trustee to exercise the powers described in paragraph (f)(11)(v)(C)(*1*) of this section shall be treated as not preventing the governing body from having such power, unless (and until) such approval has been (or is) requested by the governing body and has been (or is) denied.

(*3*) Paragraph (f)(11)(v)(C)(*1*) of this section shall not apply unless the community trust meets the requirements of paragraph (f)(11)(v)(B) of this section, with respect to funds other than those under instruments of transfer described in the first sentence of such paragraph (f)(11)(v)(C)(*1*) of this section, by January 19, 1978, or such later date as the Commissioner may provide for such community trust, and unless the community trust does not, once it so complies, thereafter solicit for funds that will not qualify under the requirements of paragraph (f)(11)(v)(B) of this section.

(D) *Inconsistent State law*—(*1*) For purposes of paragraphs (f)(11)(v)(B)(*1*), (f)(11)(v)(B)(*2*), (f)(11)(v)(B)(*3*), (f)(11)(v)(C)(*1*)(i), (f)(11)(v)(C)(*1*)(ii), and (f)(11)(v)(E) of this section, if a power described in such a provision is inconsistent with State law even if such power were expressly granted to the governing body by the governing instrument and were accepted without limitation under an instrument of transfer, then the community trust will be treated as meeting the requirements of such a provision if it meets such requirements to the fullest extent possible consistent with State law (if such power is or had been so expressly granted).

(*2*) For example, if, under the conditions of paragraph (f)(11)(v)(D)(*1*) of this section, the power to modify is inconsistent with State law, but the power to institute proceedings to modify, if so expressly granted, would be consistent with State law, the community trust will be treated as meeting such requirements to the fullest extent possible if the governing body has the power (in the governing instrument or otherwise) to institute proceedings to modify a condition or restriction. On the other hand, if in such a case the community trust has only the power to cause proceedings to be instituted to modify a condition or restriction, it will not be treated as meeting such requirements to the fullest extent possible.

(*3*) In addition, if, for example, under the conditions of paragraph (f)(11)(v)(D)(*1*) of this section, the power to modify and the power to institute proceedings to modify a condition or restriction is inconsistent with State law, but the power to cause such proceedings to be instituted would be consistent with State law, if it were expressly granted in the governing instrument and if the approval of the State Attorney General were obtained, then the community trust will be treated as meeting such requirements to the fullest extent possible if it has the power (in the governing instrument or otherwise) to cause such proceedings to be instituted, even if such proceedings can be instituted only with the approval of the State Attorney General.

(E) *Exercise of powers*. The governing body shall (by resolution or otherwise) commit itself to exercise the powers described in paragraphs (f)(11)(v)(B), (f)(11)(v)(C), and (f)(11)(v)(D) of this section in the best interests of the community trust. The governing body will be considered not to be so committed where it has grounds to exercise such a power and fails to exercise it by taking appropriate action. Such appropriate action may include, for example, consulting with the appropriate State authority prior to taking action to replace a participating trustee.

(F) *Reasonable return*. In addition to the requirements of paragraphs (f)(11)(v)(B), (f)(11)(v)(C), (f)(11)(v)(D), or (f)(11)(v)(E) of this section, the governing body shall (by resolution or otherwise) commit itself to obtain information and take other appropriate steps with the view to seeing that each participating trustee, custodian, or agent, with respect to each restricted trust or fund that is, and with respect to the aggregate of the unrestricted trusts or funds that are, a component part of the community trust, administers such trust or fund in accordance with the terms of its governing instrument and accepted standards of fiduciary conduct to produce a reasonable return of net income (or appreciation where not inconsistent with the community trust's need for current income), with due regard to safety of principal, in furtherance of the exempt purposes of the community trust (except for assets held for the active conduct of the community trust's exempt activities). In the case of a low return of net income (and, where appropriate, appreciation), the IRS will examine carefully whether the governing body has, in fact, committed itself to take the appropriate steps. For purposes of this paragraph (f)(11)(v)(F), any income that has been designated by the donor of the gift or bequest to which such income is attributable as being available only for the use or benefit of a broad charitable purpose, such as the encouragement of higher education or the promotion of better health care in the community, will be treated as unrestricted. However, any income that has been designated for the use or benefit of a named charitable organization or agency or for the use or benefit of a particular class of charitable organizations or agencies, the members of which are readily ascertainable and are less than five in number, will be treated as restricted.

(vi) *Common reports*. The organization must prepare periodic financial reports treating all of the funds which are held by the community trust, either directly or in component parts, as funds of the organization.

(12) *Community trusts; treatment of trusts and not-for-profit corporations and associations not included as components*. (i) For purposes of sections 170, 501, 507, 508, 509, and Chapter 42, any trust or not-for-profit corporation or association that is alleged to be a component part of a community trust, but that fails to meet the requirements of paragraph (f)(11)(ii) of this section, shall not be treated as a component part of a community trust and, if a trust, shall be treated as a separate trust and be subject to the provisions of section 501, section 4947(a)(1), or section 4947(a)(2), as the case may be. If such organization is a not-for-profit corporation or association, it will be treated as a separate entity, and, if it is described in section 501(c)(3), it will be treated as a private foundation unless it is described in section 509(a)(1), section 509(a)(2), section 509(a)(3), or section 509(a)(4). In the case of a fund that is ultimately treated as not being a component part of a community trust pursuant to this paragraph (f)(12), if the Forms 990 filed annually by the community trust included financial information with respect to such fund and treated such fund in the same manner as other component parts thereof, such returns filed by the community trust prior to the taxable year in which the Commissioner notifies such fund that it will not be treated as a component part will be treated as its separate return for purpose of Subchapter A of Chapter 61 of Subtitle F, and the first such return filed by the community trust will be treated as the notification required of the separate entity for purposes of section 508(a).

(ii) If a transfer is made in trust to a community trust to make income or other payments for a period of a life or lives in being or a term of years to any individual or for any noncharitable purpose, followed by payments to or for the use of the community trust (such as in the case of a charitable remainder annuity trust or a charitable remainder unitrust described in section 664 or a pooled income fund described in section 642(c)(5)), such trust will be treated as a component part of the community trust upon the termination of all intervening noncharitable interests and rights to the actual possession or enjoyment of the property if such trust satisfies the requirements of paragraph (f)(11) of this section at such time. Until such time, the trust will be treated as a separate trust. If a transfer is made in trust to a community trust to make income or other payments to or for the use of the community trust, followed by payments to any individual or for any noncharitable purpose, such trust will be treated as a separate trust rather than as a component part of the community trust. See section 4947(a)(2) and the related regulations for the treatment of such split-interest trusts. The provisions of this paragraph (f)(12)(ii) provide rules only for determining when a charitable remainder trust or pooled income fund may be treated as a component part of a community trust and are not intended to preclude a community trust from maintaining a charitable remainder trust or pooled income fund. For purposes of grantors and contributors, a pooled income fund of a publicly supported community trust shall be treated no differently than a pooled income fund of any other publicly supported organization.

(iii) An organization described in section 170(b)(1)(F)(iii) will not ordinarily satisfy the requirements of paragraph (f)(11)(ii) of this section because of the unqualified right of the donor to designate the recipients of the income and principal of the trust. Such organization will therefore ordinarily be treated as other than a component part of a community trust under paragraph (f)(12)(i) of this section. However, see section 170(b)(1)(F)(iii) and the related regulations with respect to the treatment of contributions to such organizations.

(13) *Method of accounting*. For purposes of section 170(b)(1)(A)(vi), an organization's support will be determined under the method of accounting on the basis of which the organization regularly computes its income in keeping its books under section 446. For example, if a grantor makes a grant to an organization payable over a term of years, such grant will be includible in the support fraction of the grantee organization under the method of accounting on the basis of which the grantee organization regularly computes its income in keeping its books under section 446.

(14) *Transition rules*. (i) An organization that received an advance ruling, that expires on or after June 9, 2008, that it will be treated as an organization described in sections 170(b)(1)(A)(vi) and 509(a)(1) will be treated as meeting the requirements of paragraph (f)(2) or paragraph (f)(3) of this section for the first five taxable years of its existence as a section 501(c)(3) organization unless the IRS issued to the organization a proposed determination prior to September 9, 2008, that the organization is not described in sections 170(b)(1)(A)(vi) and 509(a)(1) or in section 509(a)(2).

(ii) Paragraph (f)(4)(v) of this section shall not apply with respect to an organization that received an advance ruling that expired prior to June 9, 2008, and that did not timely file with the Internal Revenue Service the required information to establish that it is an organization described in sections 170(b)(1)(A)(vi) and 509(a)(1) or in section 509(a)(2).

(iii) An organization that fails to meet a public support test for its first taxable year beginning on or after January 1, 2008, under the regulations in this section may use the prior tests set forth in §1.170A–9(e)(2) or §1.170A–9(e)(3), or in §§1.509(a)–3(a)(2) and 1.509(a)–3(a)(3), as in effect before September 9, 2008 (as contained in 26 CFR part 1 revised April 1, 2008), to determine whether the organization was publicly supported for its 2008 taxable year based on its satisfaction of a public support test for taxable year 2007, computed over the period 2003 through 2006.

(iv) *Examples*. The application of this paragraph (f)(14) may be illustrated by the following examples:

Example 1. (i) Organization X was formed in January 2004 and uses a taxable year ending June 30. Organization X received an advance ruling letter that it is recognized as an organization described in section 501(c)(3) effective as of the date of its formation and that it is treated as a publicly supported organization under sections 170(b)(1)(A)(vi) and 509(a)(1) during the five-year advance ruling period that will end on June 30, 2008. This date is on or after June 9, 2008.

(ii) Under the transition rule, Organization X is a publicly supported organization described in sections 170(b)(1)(A)(vi) and 509(a)(1) for the taxable years ending June 30, 2004, through June 30, 2008. Organization X does not need to establish within 90 days after June 30, 2008, that it met a public support test under §1.170A–9(e) or §1.509(a)–3, as in effect prior to September 9, 2008, (as contained in 26 CFR part 1 revised April 1, 2008), for its advance ruling period.

(iii) Organization X can qualify as a publicly supported organization for the taxable year ending June 30, 2009, if Organization X can meet the requirements of paragraph (f)(2) or (f)(3) of this section or §§1.509(a)–3(a)(2) and 1.509(a)–3(a)(3) for the taxable years ending June 30, 2005, through June 30, 2009, or for the taxable years ending June 30, 2004, through June 30, 2008. In addition, for its taxable year ending June 30, 2009, Organization X may qualify as a publicly supported organization by availing itself of the transition rule contained in paragraph (f)(14)(iii) of this section, which looks to support received by X in the taxable years ending June 30, 2004, through June 30, 2007.

Example 2. (i) Organization Y was formed in January 2000, and uses a taxable year ending December 31. Organization Y received a final determination that it was recognized as tax-exempt under section 501(c)(3) and as a publicly supported organization prior to September 9, 2008.

(ii) For taxable year 2008, Organization Y will qualify as publicly supported if it meets the requirements under either paragraph (f)(2) or (f)(3) of this section or §§1.509(a)–3(a)(2) or 1.509(a)–3(a)(3) for the five-year period January 1, 2004, through December 31, 2008. Organization Y will also qualify as publicly supported for taxable year 2008 if it meets the requirements under §1.170A–9(e)(2) or §1.170A–9(e)(3), or under §§1.509(a)–3(a)(2) and 1.509(a)–3(a)(3), as in effect prior to September 9, 2008, (as contained in 26 CFR part 1 revised April 1, 2008) for taxable year 2007, using the four-year period from January 1, 2003, through December 31, 2006.

* * * * *

(k) *Effective/applicability date*—(1) *In general*. These regulations shall apply to taxable years beginning after December 31, 1969.

(2) *Applicability date*. The regulations in paragraph (f) of this section shall apply to taxable years beginning on or after January 1, 2008. For tax years beginning after December 31, 1969, and beginning before January 1, 2008, see §1.170A–9(e) (as contained in 26 CFR part 1 revised April 1, 2008).

§1.170A–9T [Removed]

Par. 3. Section 1.170A–9T is removed.

Par. 4. Section 1.507–2 is revised to read as follows:

§1.507–2 Special rules; transfer to, or operation as, public charity.

(a) *Transfer to public charities*—(1) *General rule*. Under section 507(b)(1)(A) a private foundation, with respect to which there have not been either willful repeated acts (or failures to act) or a willful and flagrant act (or failure to act) giving rise to liability for tax under Chapter 42, may terminate its private foundation status by distributing all of its net assets to one or more organizations described in section 170(b)(1)(A) (other than in clauses (vii) and (viii)) each of which has been in existence and so described for a continuous period of at least 60 calendar months immediately preceding such distribution. Because section 507(a) does not apply to such a termination, a private foundation which makes such a termination is not required to give the notification described in section 507(a)(1). A private foundation that terminates its private foundation status under section 507(b)(1)(A) does not incur tax under section 507(c) and, therefore, no abatement of such tax under section 507(g) is required.

(2) *Effect of current ruling*. A private foundation seeking to terminate its private foundation status pursuant to section 507(b)(1)(A) may rely on a ruling or determination letter issued to a potential distributee organization that such distributee organization is an organization described in section 170(b)(1)(A)(i), 170(b)(1)(A)(ii), 170(b)(1)(A)(iii), 170(b)(1)(A)(iv), 170(b)(1)(A)(v), or 170(b)(1)(A)(vi) in accordance with the provisions of §1.509(a)–7.

(3) *Organizations described in more than one clause of section 170(b)(1)(A)*. For purposes of this paragraph and section 507(b)(1)(A), the parenthetical term "other than in clauses (vii) and (viii)" shall refer only to an organization that is described only in section 170(b)(1)(A)(vii) or section 170(b)(1)(A)(viii). Thus, an organization described in section 170(b)(1)(A)(i), 170(b)(1)(A)(ii), 170(b)(1)(A)(iii), 170(b)(1)(A)(iv), 170(b)(1)(A)(v), or 170(b)(1)(A)(vi) will not be precluded from being a distributee described in section 507(b)(1)(A) merely because it also appears to meet the description of an organization described in section 170(b)(1)(A)(vii) or section 170(b)(1)(A)(viii).

(4) *Applicability of Chapter 42 to foundations terminating under section 507(b)(1)(A)*. An organization that terminates its private foundation status pursuant to section 507(b)(1)(A) will remain subject to the provisions of Chapter 42 until the distribution of all of its net assets to distributee organizations described in section 507(b)(1)(A) has been completed.

(5) *Return required from organizations terminating private foundation status under section 507(b)(1)(A)*—(i) An organization that terminates its private foundation status under section 507(b)(1)(A) is required to file a return under the provisions of section 6043(b).

(ii) An organization that terminates its private foundation status under section 507(b)(1)(A) is not required to comply with section 6104(d) for the taxable year in which such termination occurs.

(6) *Distribution of net assets*. A private foundation will meet the requirement to "distribute all of its net assets" within the meaning of section 507(b)(1)(A) only if it transfers all of its right, title, and interest in and to all of its net assets to one or more organizations referred to in section 507(b)(1)(A).

(7) *Effect of restrictions and conditions upon distributions of net assets*—(i) *In general*. In order to effectuate a transfer of "all of its right, title, and interest in and to all of its net assets" within the meaning of paragraph (a)(6) of this section, a transferor private foundation may not impose any material restriction or condition that prevents the transferee organization referred to in section 507(b)(1)(A) (herein sometimes referred to as the "public charity") from freely and effectively employing the transferred assets, or the income derived therefrom, in furtherance of its exempt purposes. Whether or not a particular condition or restriction imposed upon a transfer of assets is material (within the meaning of this paragraph (a)(7)) must be determined from all of the facts and circumstances of the transfer. Some of the more significant facts and circumstances to be considered in making such a determination are—

(A) Whether the public charity (including a participating trustee, custodian, or agent in the case of a community trust) is the owner in fee of the assets it receives from the private foundation;

(B) Whether such assets are to be held and administered by the public charity in a manner consistent with one or more of its exempt purposes;

(C) Whether the governing body of the public charity has the ultimate authority and control over such assets, and the income derived therefrom; and

(D) Whether, and to what extent, the governing body of the public charity is organized and operated so as to be independent from the transferor.

(ii) *Independent governing body*. As provided in paragraph (a)(7)(i)(D) of this section, one of the more significant facts and circumstances to be considered in making the determination whether a particular condition or restriction imposed upon a transfer of assets is material within the meaning of this paragraph (a)(7) is whether, and the extent to which, the governing body is organized and operated so as to be independent from the transferor. In turn, the determination as to such factor must be determined from all of the facts and circumstances. Some of the more significant facts and circumstances to be considered in making such a determination are—

(A) Whether, and to what extent, members of the governing body are comprised of persons selected by the transferor private foundation or disqualified persons with respect thereto or are themselves such disqualified persons;

(B) Whether, and to what extent, members of the governing body are selected by public officials acting in their capacities as such; and

(C) How long a period of time each member of the governing body may serve in such capacity. In the case of a transfer that is to a community trust, the community trust shall meet this paragraph (a)(7)(ii)(C) if—

(*1*) Its governing body is comprised of members who may serve a period of not more than ten consecutive years; and

(*2*) Upon completion of a period of service (beginning before or after the date of transfer), no member may serve again within a period consisting of the lesser of five years or the number of consecutive years the member has immediately completed serving.

(iii) *Factors not adversely affecting determination*. The presence of some or all of the following factors will not be considered as preventing the transferee "from freely and effectively employing the transferred assets, or the income derived therefrom, in furtherance of its exempt purposes" (within the meaning of paragraph (a)(7)(i) of this section):

(A) *Name*. The fund is given a name or other designation which is the same as or similar to that of the transferor private foundation or otherwise memorializes the creator of the foundation or his family.

(B) *Purpose*. The income and assets of the fund are to be used for a designated purpose or for one or more particular section 509(a)(1), section 509(a)(2), or section 509(a)(3) organization, and such use is consistent with the charitable, educational, or other basis for the exempt status of the public charity under section 501(c)(3).

(C) *Administration*. The transferred assets are administered in an identifiable or separate fund, some or all of the principal of which is not to be distributed for a specified period, if the public charity (including a participating trustee, custodian, or agent in the case of a community trust) is the legal and equitable owner of the fund and the governing body exercises ultimate and direct authority and control over such fund, as, for example, a fund to endow a chair at a university or a medical research fund at a hospital. In the case of a community trust, the transferred assets must be administered in or as a component part of the community trust within the meaning of §1.170A–9(f)(11).

(D) *Restrictions on disposition*. The transferor private foundation transfers property the continued retention of which by the transferee is required by the transferor if such retention is important to the achievement of charitable or other similar purposes in the community because of the peculiar features of such property, as, for example, where a private foundation transfers a woodland preserve which is to be maintained by the public charity as an arboretum for the benefit of the community. Such a restriction does not include a restriction on the disposition of an investment asset or the distribution of income.

(iv) *Adverse factors*. The presence of any of the following factors will be considered as preventing the transferee "from freely and effectively employing the transferred assets, or the income derived therefrom, in furtherance of its exempt purposes" (within the meaning of paragraph (a)(7)(i) of this section):

(A) *Distributions*. (*1*) With respect to distributions made after April 19, 1977, the transferor private foundation, a disqualified person with respect thereto, or any person or committee designated by, or pursuant to the terms of an agreement with, such a person (hereinafter referred to as donor), reserves the right, directly or indirectly, to name (other than by designation in the instrument of transfer of particular section 509(a)(1), section 509(a)(2), or section 509(a)(3) organizations) the persons to which the transferee public charity must distribute, or to direct the timing of such distributions (other than by direction in the instrument of transfer that some or all of the principal, as opposed to specific assets, not be distributed for a specified period) as, for example, by a power of appointment. The IRS will examine carefully whether the seeking of advice by the transferee from, or the giving of advice by, any donor after the assets have been transferred to the transferee constitutes an indirect reservation of a right to direct such distributions. In any such case, the reservation of such a right will be considered to exist where the only criterion considered by the public charity in making a distribution of income or principal from a donor's fund is advice offered by the donor. Whether there is a reservation of such a right will be determined from all of the facts and circumstances, including, but not limited to, the factors contained in paragraphs (a)(7)(iv)(A)(*2*) and (a)(7)(iv)(A)(*3*) of this section.

(*2*) The presence of some or all of the following factors will indicate that the reservation of a right to direct distributions does not exist:

(*i*) There has been an independent investigation by the staff of the public charity evaluating whether the donor's advice is consistent with specific charitable needs most deserving of support by the public charity (as determined by the public charity).

(*ii*) The public charity has promulgated guidelines enumerating specific charitable needs consistent with the charitable purposes of the public charity and the donor's advice is consistent with such guidelines.

(*iii*) The public charity has instituted an educational program publicizing to donors and other persons the guidelines enumerating specific charitable needs consistent with the charitable purposes of the public charity.

(*iv*) The public charity distributes funds in excess of amounts distributed from the donor's fund to the same or similar types of organizations or charitable needs as those recommended by the donor.

(*v*) The public charity's solicitations (written or oral) for funds specifically state that such public charity will not be bound by advice offered by the donor.

(*3*) The presence of some or all of the following factors will indicate the reservation of a right to direct distributions does exist:

(*i*) The solicitations (written or oral) of funds by the public charity state or imply, or a pattern of conduct on the part of the public charity creates an expectation, that the donor's advice will be followed.

(*ii*) The advice of a donor (whether or not restricted to a distribution of income or principal from the donor's trust or fund) is limited to distributions of amounts from the donor's fund, and the factors described in paragraph (a)(7)(iv)(A)(*2*)(*i*) or paragraph (a)(7)(iv)(A)(*2*)(*ii*) of this section are not present.

(*iii*) Only the advice of the donor as to distributions of such donor's fund is solicited by the public charity and no procedure is provided for considering advice from persons other than the donor with respect to such fund.

(*iv*) For the taxable year and all prior taxable years the public charity follows the advice of all donors with respect to their funds substantially all of the time.

(B) *Other action or withholding of action*. The terms of the transfer agreement, or any expressed or implied understanding, required the public charity to take or withhold action with respect to the transferred assets which is not designed to further one or more of the exempt purposes of the public charity, and such action or withholding of action would, if performed by the transferor private foundation with respect to such assets, have subjected the transferor to tax under Chapter 42 (other than with respect to the minimum investment return requirement of section 4942(e)).

(C) *Assumption of leases, contractual obligations, or liabilities*. The public charity assumes leases, contractual obligations, or liabilities of the transferor private foundation, or takes the assets thereof subject to such liabilities (including obligations under commitments or pledges to donees of the transferor private foundation), for purposes inconsistent with the purposes or best interests of the public charity, other than the payment of the transferor's Chapter 42 taxes incurred prior to the transfer to the public charity to the extent of the value of the assets transferred.

(D) *Retention of investment assets*. The transferee public charity is required by any restriction or agreement (other than a restriction or agreement imposed or required by law or regulatory authority), express or implied, to retain any securities or other investment assets transferred to it by the private foundation. In a case where such transferred assets consistently produce a low annual return of income, the IRS will examine carefully whether the transferee is required by any such restriction or agreement to retain such assets.

(E) *Right of first refusal*. An agreement is entered into in connection with the transfer of securities or other property which grants directly or indirectly to the transferor private foundation or any disqualified person with respect thereto a right of first refusal with respect to the transferred securities or other property when and if disposed of by the public charity, unless such securities or other property was acquired by the transferor private foundation subject to such right of first refusal prior to October 9, 1969.

(F) *Relationships*. An agreement is entered into between the transferor private foundation and the transferee public charity which establishes irrevocable relationships with respect to the maintenance or management of assets transferred to the public charity, such as continuing relationships with banks, brokerage firms, investment counselors, or other advisors with regard to the investments or other property transferred to the public charity (other than a relationship with a trustee, custodian, or agent for a community trust acting as such). The transfer of property to a public charity subject to contractual obligations which were established prior to November 11, 1976, between the transferor private foundation and persons other than disqualified persons with respect to such foundation will not be treated as prohibited under the preceding sentence, but only if such contractual obligations were not entered into pursuant to a plan to terminate the private foundation status of the transferor under section 507(b)(1)(A) and if the continuation of such contractual obligations is in the best interests of the public charity.

(G) *Other conditions*. Any other condition is imposed on action by the public charity which prevents it from exercising ultimate control over the assets received from the transferor private foundation for purposes consistent with its exempt purposes.

(v) *Examples*. The provisions of this paragraph (a)(7) may be illustrated by the following examples:

Example 1. The M Private Foundation transferred all of its net assets to the V Cancer Institute, a public charity described in section 170(b)(1)(A)(iii). Prior to the transfer, M's activities consisted of making grants to hospitals and universities to further research into the causes of cancer. Under the terms of the transfer, V is required to keep M's assets in a separate fund and use the income and principal to further cancer research. Although the assets may be used only for a limited purpose, this purpose is consistent with and in furtherance of V's exempt purposes, and does not prevent the transfer from being a distribution for purposes of section 507(b)(1)(A).

Example 2. The N Private Foundation transferred all of its net assets to W University, a public charity described in section 170(b)(1)(A)(ii). Under the terms of the transfer, W is required to use the income and principal to endow a chair at the university to be known as the "John J. Doe Memorial Professorship," named after N's creator. Although the transferred assets are to be used for a specified purpose by W, this purpose is in furtherance of W's exempt educational purposes, and there are no conditions on investment or reinvestment of the principal or income. The use of the name of the foundation's creator for the chair is not a restriction which would prevent the transfer from being a distribution for purposes of section 507(b)(1)(A).

Example 3. The O Private Foundation transferred all of its net assets to X Bank as trustee for the Q Community Trust, a community trust that is a public charity described in section 170(b)(1)(A)(vi). Under the terms of the transfer, X is to hold the assets in trust for Q and is directed to distribute the income annually to the Y Church, a public charity described in section 170(b)(1)(A)(i). The distribution of income to Y Church is consistent with Q's exempt purposes. If the trust created by this transfer otherwise meets the requirements of §1.170A–9(f)(11) as a component part of the Q Community Trust, the assets transferred by O to X will be treated as distributed to one or more public charities within the meaning of section 507(b)(1)(A). The direction to distribute the income to Y Church meets the conditions of paragraph (a)(7)(iii)(B) of this section and will therefore not disqualify the transfer under section 507(b)(1)(A).

Example 4. (i) The P Private Foundation transferred all of its net assets to Z Bank as trustee for the R Community Trust, a community trust that is a public charity described in section 170(b)(1)(A)(vi). Under the terms of the transfer, Z is to hold the assets in trust for R and distribute the income to those public charities described in section 170(b)(1)(A)(i) through (b)(1)(A)(vi) that are designated by B, the creator of P. R's governing body has no authority during B's lifetime to vary B's direction. Under the terms of the transfer, it is intended that Z retain the transferred assets in their present form for a period of 20 years, or until the date of B's death if it occurs before the expiration of such period. Upon the death of B, R will have the power to distribute the income to such public charities as it selects and may dispose of the corpus as it sees fit.

(ii) Under paragraph (a)(7)(iv)(A) or paragraph (a)(7)(iv)(D) of this section, as a result of the restrictions imposed with respect to the transferred assets, there has been no distribution of all P's net assets within the meaning of section 507(b)(1)(A) at the time of the transfer. In addition, P has not transferred its net assets to a component part of R Community Trust, but rather to a separate trust described in §1.170A–9(f)(12).

(b) *Operation as a public charity*—(1) *In general*. Under section 507(b)(1)(B), an organization can terminate its private foundation status if the organization—

(i) Meets the requirements of section 509(a)(1), section 509(a)(2) or section 509(a)(3) for a continuous period of 60 calendar months beginning with the first day of any taxable year that begins after December 31, 1969;

(ii) In compliance with section 507(b)(1)(B)(ii) and paragraph (b)(3) of this section, properly notifies the IRS, in such manner as may be provided by published guidance, publication, form or instructions, before the commencement of such 60-month period, that it is terminating its private foundation status; and

(iii) Properly establishes immediately after the expiration of such 60-month period that such organization has complied with the requirements of section 509(a)(1), section 509(a)(2) or section 509(a)(3) during the 60-month period, in the manner described in paragraph (b)(4) of this section.

(2) *Relationship of section 507(b)(1)(B) to sections 507(a), 507(c), and 507(g)*. Because section 507(a) does not apply to a termination described in section 507(b)(1)(B), a private foundation's notification that it is commencing a termination pursuant to section 507(b)(1)(B) will not be treated as a notification described in section 507(a) even if the private foundation does not successfully terminate its private foundation status pursuant to section 507(b)(1)(B). A private foundation that terminates its private foundation status under section 507(b)(1)(B) does not incur tax under section 507(c) and, therefore, no abatement of such tax under section 507(g) is required.

(3) *Notification of termination*. In order to comply with the requirements under section 507(b)(1)(B)(ii), an organization shall before the commencement of the 60-month period under section 507(b)(1)(B)(i) notify the IRS, in such manner as may be provided by published guidance, publication, form or instructions, of its intention to terminate its private foundation status. Such notification shall contain the following information—

(i) The name and address of the private foundation;

(ii) Its intention to terminate its private foundation status;

(iii) The Code section under which it seeks classification (section 509(a)(1), section 509(a)(2) or section 509(a)(3));

(iv) If section 509(a)(1) is applicable, the clause of section 170(b)(1)(A) involved;

(v) The date its regular taxable year begins; and

(vi) The date of commencement of the 60-month period.

(4) *Establishment of termination*. In order to comply with the requirements under section 507(b)(1)(B)(iii), an organization shall within 90 days after the expiration of the 60-month period file such information with the IRS, in such manner as may be provided by published guidance, publication, form or instructions, as is necessary to make a determination as to the organization's status as an organization described under section 509(a)(1), section 509(a)(2) or section 509(a)(3) and the related regulations. See paragraph (c) of this section as to the information required to be submitted under this paragraph (b)(4).

(5) *Incomplete information*. The failure to supply, within the required time, all of the information required by paragraph (b)(3) or paragraph (b)(4) of this section is not alone sufficient to constitute a failure to satisfy the requirements of section 507(b)(1)(B). If the information that is submitted within the required time is incomplete and the organization supplies the necessary additional information at the request of the Commissioner within the additional time period allowed by him, the original submission will be considered timely.

(6) *Application of special rules and filing requirements*. An organization that has terminated its private foundation status under section 507(b)(1)(B) is not required to comply with the special rules set forth in sections 508(a) and 508(b). Such organization is also not required to file a return under the provisions of section 6043(b) by reason of termination of its private foundation status under the provisions of section 507(b)(1)(B).

(7) *Extension of time to assess deficiencies*. If a private foundation files a notification (described in paragraph (b)(3) of this section) that it intends to begin a 60-month termination pursuant to section 507(b)(1)(B) and does not file a request for an advance ruling pursuant to paragraph (d) of this section, such private foundation may file with the notification described in paragraph (b)(3) of this section a consent under section 6501(c)(4) to the effect that the period of limitation upon assessment under section 4940 for any taxable year within the 60-month termination period shall not expire prior to one year after the date of expiration of the time prescribed by law for the assessment of a deficiency for the last taxable year within the 60-month period. Such consents, if filed, will ordinarily be accepted by the Commissioner. See paragraph (e)(3) of this section for an illustration of the procedure required to obtain a refund of the tax imposed by section 4940 in a case where such a consent is not in effect.

(c) *Sixty-month terminations*—(1) *Method of determining normal sources of support*. (i) In order to meet the requirements of section 507(b)(1)(B) for the 60-month termination period as a section 509(a)(1) or section 509(a)(2) organization, an organization must meet the requirements of section 509(a)(1) or section 509(a)(2), as the case may be, for a continuous period of at least 60 calendar months. In determining whether an organization seeking status under section 509(a)(1) as an organization described in section 170(b)(1)(A)(iv) or section 170(b)(1)(A)(vi) or under section 509(a)(2) normally meets the requirements set forth under such sections, support received in taxable years prior to the commencement of the 60-month period shall not be taken into consideration, except as otherwise provided in this section.

(ii) For purposes of section 507(b)(1)(B), an organization will be considered to be a section 509(a)(1) organization described in section 170(b)(1)(A)(vi) for a continuous period of 60 calendar months only if the organization satisfies the provisions of §1.170A–9(f), other than §1.170A–9(f)(4)(v), based upon aggregate data for such entire period. The calculation of public support shall be made over the period beginning with the date of the commencement of the 60-month period, and ending with the last day of the 60-month period.

(iii) For purposes of section 507(b)(1)(B), an organization will be considered to be a section 509(a)(2) organization only if such organization meets the support requirements set forth in sections 509(a)(2)(A) and 509(a)(2)(B) and the related regulations, other than §1.509(a)–3(d), for the continuous period of 60 calendar months prescribed under section 507(b)(1)(B). The calculation of public support shall be made over the period beginning with the date of the commencement of the 60-month period, and ending with the last day of the 60-month period.

(2) *Organizational and operational tests*. In order to meet the requirements of section 507(b)(1)(B) for the 60-month termination period as an organization described in section 170(b)(1)(A)(i), 170(b)(1)(A)(ii), 170(b)(1)(A)(iii), 170(b)(1)(A)(iv), or 170(b)(1)(A)(v) or section 509(a)(3), as the case may be, an organization must meet the requirements of the applicable provisions for a continuous period of at least 60 calendar months. For purposes of section 507(b)(1)(B), an organization will be considered to be such an organization only if it satisfies the requirements of the applicable provision (including with respect to section 509(a)(3), the organizational and operational test set forth in section 509(a)(3)(A)) at the commencement of such 60-month period and continuously thereafter during such period.

(d) *Advance rulings for 60-month terminations*—(1) *In general*. An organization that files the notification required by section 507(b)(1)(B)(ii) that it is commencing a 60-month termination may obtain an advance ruling from the Commissioner that it can be expected to satisfy the requirements of section 507(b)(1)(B)(i) during the 60-month period. Such an advance ruling may be issued if the organization can reasonably be expected to meet the requirements of section 507(b)(1)(B)(i) during the 60-month period. The issuance of a ruling will be discretionary with the Commissioner.

(2) *Basic consideration*. In determining whether an organization can reasonably be expected (within the meaning of paragraph (d)(1) of this section) to meet the requirements of section 507(b)(1)(B)(i) for the 60-month period, the basic consideration is whether its organizational structure (taking into account any revisions made prior to the beginning of the 60-month period), current or proposed programs or activities, actual or intended method of operation, and current or projected sources of support are such as to indicate that the organization is likely to satisfy the requirements of section 509(a)(1), section 509(a)(2), or section 509(a)(3) and paragraph (c) of this section during the 60-month period. In making such a determination, all pertinent facts and circumstances shall be considered.

(3) *Reliance by grantors and contributors*. For purposes of sections 170, 545(b)(2), 642(c), 4942, 4945, 4966, 2055, 2106(a)(2), and 2522, grants or contributions to an organization which has obtained a ruling referred to in this paragraph will be treated as made to an organization described in section 509(a)(1), section 509(a)(2), or section 509(a)(3), as the case may be, until the IRS publishes notice that such advance ruling is being revoked (such as by publication in the Internal Revenue Bulletin). However, a grantor or contributor may not rely on such an advance ruling if the grantor or contributor was responsible for, or aware of, the act or failure to act that resulted in the organization's failure to meet the requirements of section 509(a)(1), section 509(a)(2), or section 509(a)(3), or acquired knowledge that the IRS had given notice to such organization that its advance ruling would be revoked. Prior to the making of any grant or contribution which allegedly will not result in the grantee's failure to meet the requirements of section 509(a)(1), section 509(a)(2), or section 509(a)(3), a potential grantee organization may request a ruling whether such grant or contribution may be made without such failure. A request for such ruling may be filed by the grantee organization with the IRS. The issuance of such ruling will be at the sole discretion of the Commissioner. The organization must submit all information necessary to make a determination on the factors referred to in paragraph (d)(2) of this section. If a favorable ruling is issued, such ruling may be relied upon by the grantor or contributor of the particular contribution in question for purposes of sections 170, 507, 545(b)(2), 642(c), 4942, 4945, 4966, 2055, 2106(a)(2), and 2522.

(4) *Reliance by organization*. An organization obtaining an advance ruling pursuant to this paragraph cannot rely on such a ruling. Consequently, if the organization does not pay the tax imposed by section 4940 for any taxable year or years during the 60-month period, and it is subsequently determined that such tax is due for such year or years (because the organization did not in fact complete a successful termination pursuant to section 507(b)(1)(B) and was not treated as an organization described in section 509(a)(1), section 509(a)(2), or section 509(a)(3) for such year or years), the organization is liable for interest in accordance with section 6601 if any amount of tax under section 4940 has not been paid on or before the last date prescribed for payment. However, because any failure to pay such tax during the 60-month period (or prior to the revocation of such ruling) is due to reasonable cause, the penalty under section 6651 with respect to the tax imposed by section 4940 shall not apply.

(5) *Extension of time to assess deficiencies*. The advance ruling described in paragraph (d)(1) of this section shall be issued only if such organization's request for an advance ruling is filed with a consent under section 6501(c)(4) to the effect that the period of limitations upon assessment under section 4940 for any taxable year within the advance ruling period shall not expire prior to one year after the date of the expiration of the time prescribed by law for the assessment of a deficiency for the last taxable year within the 60-month period.

(e) *Effect on grantors or contributors and on the organization itself*—(1) *Effect of satisfaction of requirements for termination; treatment during the termination* *period*. In the event that an organization satisfies the requirements of section 507(b)(1)(B) for termination of its private foundation status during the continuous 60-month period, such organization shall be treated for such entire 60-month period in the same manner as an organization described in section 509(a)(1), section 509(a)(2), or section 509(a)(3), as the case may be.

(2) *Failure to meet termination requirements*—(i) *In general*. Except as otherwise provided in paragraphs (d) and (e)(2)(ii) of this section, any organization that fails to satisfy the requirements of section 507(b)(1)(B) for termination of its private foundation status during the continuous 60-month period shall be treated as a private foundation for the entire 60-month period, for purposes of sections 507 through 509 and Chapter 42, and grants or contributions to such an organization shall be treated as made to a private foundation for purposes of sections 170, 507(b)(1)(A), 4942, and 4945.

(ii) *Certain 60-month terminations*. Notwithstanding paragraph (e)(2)(i) of this section, if an organization fails to satisfy the requirements of section 509(a)(1), section 509(a)(2), or section 509(a)(3) for the continuous 60-month period but does satisfy the requirements of section 509(a)(1), section 509(a)(2), or section 509(a)(3), as the case may be, for any taxable year or years during such 60-month period, the organization shall be treated as a section 509(a)(1), section 509(a)(2), or section 509(a)(3) organization for such taxable year or years, and grants or contributions made during such taxable year or years shall be treated as made to an organization described in section 509(a)(1), section 509(a)(2), or section 509(a)(3). In addition, sections 507 through 509 and Chapter 42 shall not apply to such organization for any taxable year within such 60-month period for which it does meet such requirements. For purposes of determining whether an organization satisfies the requirements of section 509(a)(1), section 509(a)(2), or section 509(a)(3) for any taxable year in the 60-month period, the calculation of public support shall be made over the period beginning with the date of the commencement of the 60-month period, and ending with the last day of the taxable year being tested. The organization shall not be treated as a section 509(a)(1) or section 509(a)(2) organization for any taxable year during the 60-month period solely by reason of having met a public support test for the preceding year. In addition, the transition rules in §§1.170–9(f)(14)(iii) and 1.509(a)–3(n)(iii) shall not apply.

(iii) *Aggregate tax benefit*. For purposes of section 507(d), the organization's aggregate tax benefit resulting from the organization's section 501(c)(3) status shall continue to be computed from the date from which such computation would have been made, but for the notice filed under section 507(b)(1)(B)(ii), except that any taxable year within such 60-month period for which such organization meets the requirements of section 509(a)(1), section 509(a)(2), or section 509(a)(3) shall be excluded from such computations.

(iv) *Excess business holdings*. See section 4943 and the related regulations for rules relating to decreases in a private foundation's holdings in a business enterprise which are caused by the foundation's failure to terminate its private foundation status after giving the notification for termination under section 507(b)(1)(B)(ii).

(3) *Example*. The provisions of this paragraph (e) may be illustrated by the following example:

Example. Y, a calendar year private foundation, notifies the IRS that it intends to terminate its private foundation status by converting into a publicly supported organization described in section 170(b)(1)(A)(vi) and that its 60-month termination period will commence on January 1, 2010. Y does not obtain a ruling described in paragraph (d) of this section. Based upon its support for 2010, Y does not qualify as a publicly supported organization within the meaning of §1.170A–9(f) and this paragraph for 2010. Consequently, in order to avoid the risks of penalties and interest if Y fails to terminate within the 60-month period, Y files its 2010 return as a private foundation and pays the tax imposed by section 4940. Because a consent (described in paragraph (b)(7) of this section), which would prevent the period of limitations for all years in the 60-month period from expiring, is not in effect, in order to be able to file a claim for refund, Y and the IRS must agree to extend the period of limitation for all taxes imposed under Chapter 42 for 2010. Based on the aggregate data for the entire 60-month period (2010 through 2014), Y does qualify as a publicly-supported organization for the entire 60-month period. Consequently, Y is treated as a publicly-supported organization for the entire 60-month period. Y files a claim for refund for the taxes paid under section 4940 for 2010, and such taxes are refunded.

(f) *Effective/applicability date*—(1) *Effective date*. These regulations are effective on September 8, 2011.

(2) *Applicability date*. The regulations in this section shall apply to tax years beginning on or after January 1, 2008. For taxable years beginning after December 31, 1969, and beginning before January 1, 2008, see §1.507–2 (as contained in 26 CFR part 1 revised April 1, 2008).

§1.507–2T [Removed]

Par.5. Section 1.507–2T is removed.

Par. 6. Section 1.509(a)–3 is amended as follows:

1. Revising paragraphs (a)(2), (a)(3)(i), (c), (d), (e), (k) and (n).

2. Adding new paragraph (o).

The revisions and addition read as follows:

§1.509(a)–3 Broadly, publicly supported organizations.

(a) * * *

(2) *One-third support test*. An organization will meet the one-third support test if it normally (within the meaning of paragraph (c) or paragraph (d) of this section) receives from permitted sources more than one-third of its support in each taxable year from any combination of—

(i) Gifts, grants, contributions, or membership fees; and

(ii) Gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in an activity that is not an unrelated trade or business (within the meaning of section 513), subject to certain limitations described in paragraph (b) of this section. For purposes of this section, governmental units, organizations described in section 509(a)(1), and persons other than disqualified persons with respect to the organization shall be referred to as permitted sources. For purposes of this section, the amount of support received from the sources described in paragraph (a)(2)(i) of this section and this paragraph (a)(2)(ii) (subject to the limitations referred to in this paragraph (a)(2)) will be referred to as the numerator of the one-third support fraction, and the total amount of support received (as defined in section 509(d)) will be referred to as the denominator of the one-third support fraction. Section 1.509(a)–3(f) distinguishes gifts and contributions from gross receipts; §1.509(a)–3(g) distinguishes grants from gross receipts; §1.509(a)–3(h) defines membership fees; §1.509(a)–3(i) defines "any bureau or similar agency of a governmental unit"; §1.509(a)–3(j) describes the treatment of certain indirect forms of support; paragraph (k) of this section describes the method of accounting for support; §1.509(a)–3(l) describes the treatment of gross receipts from section 513(a)(1), section 513(a)(2), or section 513(a)(3) activities; §1.509(a)–3(m) distinguishes gross receipts from gross investment income; and §1.509(a)–3(n) describes transition rules for organizations that received advance rulings that expire on or after June 9, 2008.

(3) * * *

(i) *In general*. An organization will meet the not-more-than-one-third support test under section 509(a)(2)(B) if it normally (within the meaning of paragraph (c) or (d) of this section) receives not more than one-third of its support in each taxable year from the sum of its gross investment income (as defined in section 509(e)) and the excess (if any) of the amount of its unrelated business taxable income (as defined in section 512) derived from trades or businesses that were acquired by the organization after June 30, 1975, over the amount of tax imposed on such income by section 511. For purposes of this section the amount of support received from items described in section 509(a)(2)(B) will be referred to as the numerator of the not-more-than-one-third support fraction, and the total amount of support (as defined in section 509(d)) will be referred to as the denominator of the not-more-than-one-third support fraction. For purposes of section 509(a)(2), paragraph (m) of this section distinguishes gross receipts from gross investment income. For purposes of section 509(e), gross investment income includes the items of investment income described in §1.512(b)–1(a).

* * * * *

(c) *Normally*—(1) *In general*—(i) *Definition*. The support tests set forth in section 509(a)(2) are to be computed on the basis of the nature of the organization's normal sources of support. An organization will be considered as "normally" receiving one third of its support from any combination of gifts, grants, contributions, membership fees, and gross receipts from permitted sources (subject to the limitations described in §1.509(a)–3(b)) and not more than one third of its support from items described in section 509(a)(2)(B) for a taxable year and the taxable year immediately succeeding such year, if, for such taxable year and the four taxable years immediately preceding such taxable year, the aggregate amount of the support received during the applicable period from gifts, grants, contributions, membership fees, and gross receipts from permitted sources (subject to the limitations described in §1.509(a)–3(b)) is more than one third, and the aggregate amount of the support received from items described in section 509(a)(2)(B) is not more than one third, of the total support of the organization for such five-year period. A publicly supported organization described under section 509(a)(2) that has failed to meet either the one-third support test of paragraph (a)(2) of this section or the not-more-than-one-third support test of paragraph (a)(3) of this section for two consecutive years will be treated as a private foundation as of the first day of the second consecutive taxable year only for purposes of sections 507, 4940, and 6033. Such an organization must file a Form 990-PF, "*Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation*," and will be liable for the net investment tax imposed by section 4940 and, if applicable, the private foundation termination tax imposed by section 507(c), for that second consecutive failed year. For the succeeding years, the organization will be treated as a private foundation for all purposes.

(ii) *First five years of an organization's existence*. See paragraph (d)(1) of this section for the definition of "normally" for organizations in the first five years of their existence.

(2) *Terminations under section 507(b)(1)(B)*. For the special rules applicable to the term normally as applied to private foundations that elect to terminate their private foundation status pursuant to the 60-month procedure provided in section 507(b)(1)(B), see the regulations under such section.

(3) *Exclusion of unusual grants.* For purposes of applying the tests for support set forth in paragraphs (a)(2) and (a)(3) of this section, one or more contributions may be excluded from the numerator of the one-third support fraction and from the denominator of both the one-third support and not-more-than-one-third support fractions only if such a contribution meets the requirements of this paragraph (c)(3). The exclusion provided by this paragraph (c)(3) is generally intended to apply to substantial contributions and bequests from disinterested parties, which contributions or bequests—

(i) Are attracted by reason of the publicly supported nature of the organization;

(ii) Are unusual or unexpected with respect to the amount thereof; and

(iii) Would by reason of their size, adversely affect the status of the organization as normally meeting the one-third support test for any of the applicable periods described in this paragraph (c) or paragraph (d) of this section. In the case of a grant (as defined in §1.509(a)–3(g)) that meets the requirements of this paragraph (c)(3), if the terms of the granting instrument require that the funds be paid to the recipient organization over a period of years, the grant amounts may be excluded for such year or years in which they would otherwise be includible in computing support under the method of accounting on the basis of which the organization regularly computes its income in keeping its books under section 446. However, no item described in section 509(a)(2)(B) may be excluded under this paragraph (c)(3). The provisions of this paragraph (c)(3) shall apply to exclude unusual grants made during any of the applicable periods described in this paragraph (c) or paragraph (d) of this section. See paragraph (c)(5) of this section as to reliance by a grantee organization upon an unusual grant ruling under this paragraph (c)(3).

(4) *Determining factors*. In determining whether a particular contribution may be excluded under paragraph (c)(3) of this section, all pertinent facts and circumstances will be taken into consideration. No single factor will necessarily be determinative. Among the factors to be considered are—

(i) Whether the contribution was made by any person (or persons standing in a relationship to such person which is described in section 4946(a)(1)(C) through 4946(a)(1)(G)) who created the organization, previously contributed a substantial part of its support or endowment, or stood in a position of authority, such as a foundation manager (within the meaning of section 4946(b)), with respect to the organization. A contribution made by a person other than those persons described in this paragraph (c)(4)(i) will ordinarily be given more favorable consideration than a contribution made by a person described in this paragraph (c)(4)(i);

(ii) Whether the contribution was a bequest or an *inter vivos* transfer. A bequest will ordinarily be given more favorable consideration than an *inter vivos* transfer;

(iii) Whether the contribution was in the form of cash, readily marketable securities, or assets which further the exempt purposes of the organization, such as a gift of a painting to a museum;

(iv) Except in the case of a new organization, whether, prior to the receipt of the particular contribution, the organization has carried on an actual program of public solicitation and exempt activities and has been able to attract a significant amount of public support;

(v) Whether the organization may reasonably be expected to attract a significant amount of public support subsequent to the particular contribution. In this connection, continued reliance on unusual grants to fund an organization's current operating expenses (as opposed to providing new endowment funds) may be evidence that the organization cannot reasonably be expected to attract future support from the general public;

(vi) Whether, prior to the year in which the particular contribution was received, the organization met the one-third support test described in paragraph (a)(2) of this section without the benefit of any exclusions of unusual grants pursuant to paragraph (c)(3) of this section;

(vii) Whether neither the contributor nor any person standing in a relationship to such contributor which is described in section 4946(a)(1)(C) through 4946(a)(1)(G) continues directly or indirectly to exercise control over the organization;

(viii) Whether the organization has a representative governing body as described in §1.509(a)–3(d)(3)(i); and

(ix) Whether material restrictions or conditions (within the meaning of §1.507–2(a)(7)) have been imposed by the transferor upon the transferee in connection with such transfer.

(5) *Grantors and contributors*. Prior to the making of any grant or contribution expected to meet the requirements for exclusion under paragraph (c)(3) of this section, a potential grantee organization may request a determination whether such grant or contribution may be so excluded. Requests for such determination may be filed by the grantee organization in the time and manner specified by revenue procedure or other guidance published in the Internal Revenue Bulletin. The issuance of such determination will be at the sole discretion of the Commissioner. The organization must submit all information necessary to make a determination of the applicability of paragraph (c)(3) of this section, including all information relating to the factors described in paragraph (c)(4) of this section. If a favorable determination is issued, such determination may be relied upon by the grantor or contributor of the particular contribution in question for purposes of sections 170, 507, 545(b)(2), 642(c), 4942, 4945, 4966, 2055, 2106(a)(2), and 2522 and by the grantee organization for purposes of paragraph (c)(3) of this section.

(6) *Examples*. The application of the principles set forth in this paragraph is illustrated by the examples as follows. For purposes of these examples, the term *general public* is defined as persons other than disqualified persons and other than persons from whom the foundation received gross receipts in excess of the greater of $5,000 or 1 percent of its support in any taxable year, the term *gross investment income* is as defined in section 509(e), and the term *gross receipts* is limited to receipts from activities which are not unrelated trades or businesses (within the meaning of section 513).

Example 1. (i) For the years 2008 through 2012, X, an organization exempt under section 501(c)(3) that makes scholarship grants to needy students of a particular city, received support from the following sources:

2008	
Gross receipts (general public)	$ 35,000
Contributions (substantial contributors)	36,000
Gross investment income	29,000
Total support	100,000
2009	
Gross receipts (general public)	34,000
Contributions (substantial contributors)	35,000
Gross investment income	31,000
Total support	100,000
2010	
Gross receipts (general public)	35,000
Contributions (substantial contributors)	30,000
Gross investment income	35,000
Total support	100,000

2011	
Gross receipts (general public)	33,000
Contributions (substantial contributors)	32,000
Gross investment income	35,000
Total support	100,000
2012	
Gross receipts (general public)	31,000
Contributions (substantial contributors)	39,000
Gross investment income	30,000
Total support	100,000

(ii) In applying section 509(a)(2) to the taxable year 2012, on the basis of paragraph (c)(1)(i) of this section, the total amount of support from gross receipts from the general public ($168,000) for the period 2008 through 2012, was more than one third, and the total amount of support from gross investment income ($160,000) was less than one third, of X's total support for the same period ($500,000). For the taxable years 2012 and 2013, X is therefore considered normally to receive more than one third of its support from the public sources described in section 509(a)(2)(A) and less than one third of its support from items described in section 509(a)(2)(B). The fact that X received less than one third of its support from section 509(a)(2)(A) sources in 2012 and more than one third of its support from items described in section 509(a)(2)(B) in 2011 does not affect its status because it normally met the applicable tests over a five-year period.

Example 2. Assume the same facts as in *Example 1* except that in 2012, X also received an unexpected bequest of $50,000 from A, an elderly widow who was interested in encouraging the work of X, but had no other relationship to it. Solely by reason of the bequest, A became a disqualified person. X used the bequest to create five new scholarships. Its operations otherwise remained the same. Under these circumstances, if A's bequest is included in X's support calculation, X could not meet the five-year support test because the total amount received from gross receipts from the general public ($168,000) would not be more than one-third of its total support for the five-year period ($550,000). Because A is a disqualified person, her bequest cannot be included in the numerator of the one-third support test under section 509(a)(2)(A). However, based on the factors set forth in paragraph (c)(4) of this section, A's bequest may be excluded as an unusual grant under paragraph (c)(3) of this section. Therefore, X will be considered to have met the support test for the taxable years 2012 and 2013.

Example 3. Y, an organization described in section 501(c)(3), was created by A, the holder of all the common stock in M corporation; B, A's wife; and C, A's business associate. The purpose of Y was to sponsor and equip athletic teams for underprivileged children in the community. Each of the three creators makes small cash contributions to Y. A, B, and C have been active participants in the affairs of Y since its creation. Y regularly raises small amounts of contributions through fundraising drives and selling admission to some of the sponsored sporting events. The operations of Y are carried out on a small scale, usually being restricted to the sponsorship of two to four baseball teams of underprivileged children. In 2009, M recapitalizes and creates a first and second class of 6 percent nonvoting preferred stock, most of which is held by A and B. In 2010, A contributes 49 percent of his common stock in M to Y. A's contribution of M's common stock was substantial and constitutes 90 percent of Y's total support for 2010. A combination of the facts and circumstances described in paragraph (c)(4) of this section preclude A's contribution of M's common stock in 2010 from being excluded as an unusual grant under paragraph (c)(3) of this section for purposes of determining whether Y meets the one-third support test under section 509(a)(2).

Example 4. (i) M is organized in 2009 to promote the appreciation of ballet in a particular region of the United States. Its principal activities consist of erecting a theater for the performance of ballet and the organization and operation of a ballet company. M receives a determination letter that it is an organization described in section 501(c)(3) and that it is a public charity described in section 509(a)(2). The governing body of M consists of nine prominent unrelated citizens residing in the region who have either an expertise in ballet or a strong interest in encouraging appreciation of the art form.

(ii) In 2010, Z, a private foundation, proposes to makes a grant of $500,000 in cash to M to provide sufficient capital for M to commence its activities. Although A, the creator of Z, is one of the nine members of M's governing body, was one of M's original founders, and continues to lend his prestige to M's activities and fund raising efforts, A does not, directly or indirectly, exercise any control over M. M also receives a significant amount of support from a number of smaller contributions and pledges from other members of the general public. M charges admission to the ballet performances to the general public.

(iii) Although the support received in 2010 will not impact M's status as a public charity for its first five taxable years, it will be relevant to the determination of whether M meets the one-third support test under section 509(a)(2) for the 2014 taxable year, using the computation period 2010 through 2014. Within the appropriate timeframe, M may submit a request for a private letter ruling that the $500,000 contribution from Z qualifies as an unusual grant.

(iv) Under the above circumstances, even though A was a founder and member of the governing body of M, M may exclude Z's contribution of $500,000 in 2010 as an unusual grant under paragraph (c)(3) of this section for purposes of determining whether M meets the one-third support test under section 509(a)(2) for 2014.

Example 5. (i) Assume the same facts as *Example 4(i)* except that, in addition, in 2013, B, a widow, passes away and bequeaths $4 million to M. During 2009 through 2013, B made small contributions to M, none exceeding $10,000 in any year. During 2009 through 2013, M received approximately $450,000 from receipts for admissions and contributions from the general public. At the time of B's death, no person standing in a relationship to B described in section 4946(a)(1)(C) through 4946(a)(1)(G) was a member of M's governing body. B's bequest was in the form of cash and readily marketable securities. The only condition placed upon the bequest was that it be used by M to advance the art of ballet.

(ii) Although the support received in 2013 will not impact M's status as a public charity for its first five taxable years, it will be relevant to the determination of whether M meets the one-third support test under section 509(a)(2) for future years. Within the appropriate timeframe, M may submit a request for a private letter ruling that the $4 million bequest from B qualifies as an unusual grant.

(iii) Under the above circumstances, M may exclude B's bequest of $4 million in 2013 as an unusual grant under paragraph (c)(3) of this section for purposes of determining whether M meets the one-third support test under section 509(a)(2) for 2014 and subsequent years.

Example 6. (i) N is a research organization that was created by A in 2009 for the purpose of carrying on economic studies primarily through persons receiving grants from N and engaging in the sale of economic publications. N received a determination letter that it is described in section 501(c)(3) and that it is a public charity described in 509(a)(2). N's five-member governing body consists of A; A's sons, B and C; and two unrelated economists. In 2009, A made a contribution to N of $100,000 to help establish the organization. During 2009 through 2013, A made annual contributions to N averaging $20,000 a year. During the same period, N received annual contributions from members of the general public averaging $15,000 per year and receipts from the sale of its publications averaging $50,000 per year. In 2013, B made an inter vivos contribution to N of $600,000 in cash and readily marketable securities.

(ii) Although the support received in 2013 will not impact N's status as a public charity for its first five taxable years, it will be relevant to the determination of whether N meets the one-third support test under section 509(a)(2) for future years. In determining whether B's contribution of $600,000 in 2013 may be excluded as an unusual grant, the support N received in 2009 through 2013 is relevant in considering the factor described in paragraph (c)(4)(vi) of this section, notwithstanding that N received a determination letter that it is described in section 509(a)(2).

(iii) Under the above circumstances, in particular the facts that B is a disqualified person described in section 4946(a)(1)(D) and N does not have a representative governing body as described in paragraphs (c)(4)(viii) and (d)(3)(i) of this section, N cannot exclude B's contribution of $600,000 in 2013 as an unusual grant under paragraph (c)(3) of this section for purposes of determining whether N meets the one-third support test under section 509(a)(2) for 2014 and future years.

Example 7. (i) O is an educational organization created in 2009. O received a determination letter that it is described in section 501(c)(3) and that it is a public charity described in section 509(a)(2). The governing body of O has 9 members, consisting of A, a prominent civic leader, and 8 other unrelated civic leaders and educators in the community, all of whom participated in the creation of O. During 2009 through 2013, the principal source of income for O has been receipts from the sale of its educational periodicals. These sales have amounted to $200,000 for this period. Small contributions amounting to $50,000 have also been received during the same period from members of the governing body, including A, as well as other members of the general public.

(ii) In 2013, A contributed $750,000 of the nonvoting stock of S, a closely held corporation, to O. A retained a substantial portion of the voting stock of S. By a majority vote, the governing body of O decided to retain the S stock for a period of at least five years.

(iii) Although the support received in 2013 will not impact O's status as a public charity for its first five taxable years, it will be relevant to the determination of whether O meets the one-third support test under section 509(a)(2) for future years. In determining whether A's contribution of the S stock in 2013 may be excluded as an unusual grant, the support O received in 2009 through 2013 is relevant in considering the factor described in paragraph (c)(4)(vi) of this section, notwithstanding that O received a determination letter that it is described in section 509(a)(2).

(iv) Under the above circumstances, in particular the facts that A is a foundation manager within the meaning of section 4946(b) and A's contribution is in the form of closely held stock, O cannot exclude A's contribution of the S stock in 2013 as an unusual grant under paragraph (c)(3) of this section for purposes of determining whether O meets the one-third support test under section 509(a)(2) for 2014 and future years.

(d) *Definition of normally; first five years of an organization's existence*—(1) *In general*. An organization will "normally" meet the one-third support test and the not-more-than-one-third support test during its first five taxable years as a section 501(c)(3) organization if the organization can reasonably be expected to meet the requirements of the one-third support test and the not-more-than-one-third support test during that period. With respect to an organization's sixth taxable year, the general definition of normally in paragraph (c)(1) of this section applies. Alternatively, the organization shall be treated as normally meeting the one-third support test and the not-more-than-one-third support test for its sixth taxable year (but not its seventh taxable year) if it meets the one-third support test and the not-more-than-one-third support test under the definition of normally set forth in paragraph (c)(1)(i) of this section for its fifth taxable year (based on support received in its first through fifth taxable years). If a new publicly supported organization described under section 509(a)(2) cannot meet the requirements of the one-third support test or the not-more-than-one-third support test for its sixth taxable year using either the general definition of normally in paragraph (c)(1) of this section or the alternate rule above (effectively failing to meet a public support test for both its fifth and sixth years), it will be reclassified as a private foundation as of the first day of its sixth taxable year only for purposes of sections 507, 4940, and 6033. Such an organization must file a Form 990-PF, "*Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation*," and is liable for the net investment tax imposed by section 4940 and, if applicable, the private foundation termination tax imposed by section 507(c), for its sixth taxable year. Beginning the first day of its seventh taxable year, the organization will be treated as a private foundation for all purposes.

(2) *Basic consideration*. In determining whether an organization can reasonably be expected (within the meaning of paragraph (c)(1)(i) of this section) to meet the one-third support test under section 509(a)(2)(A) and the not-more-than-one-third support test under section 509(a)(2)(B) described in paragraph (a) of this section during its first five taxable years, the basic consideration is whether its organizational structure, current or proposed programs or activities, and actual or intended method of operation are such as to attract the type of broadly based support from the general public, public charities, and governmental units that is necessary to meet such tests. The factors that are relevant to this determination, and the weight accorded to each of them, may differ from case to case, depending on the nature and functions of the organization. An organization cannot reasonably be expected to meet the one-third support test and the not-more-than-one-third support test where the facts indicate that an organization is likely during its first five taxable years to receive less than one-third of its support from permitted sources (subject to the limitations of paragraph (b) of this section) or to receive more than one-third of its support from items described in section 509(a)(2)(B).

(3) *Factors taken into account*. All pertinent facts and circumstances shall be taken into account under paragraph (d)(2) of this section in determining whether the organizational structure, programs or activities, and method of operation of an organization are such as to enable it to meet the tests under section 509(a)(2) during its first five taxable years. Some of the pertinent factors are:

(i) Whether the organization has or will have a representative governing body which is comprised of public officials, or individuals chosen by public officials acting in their capacity as such; of persons having special knowledge in the particular field or discipline in which the organization is operating; of community leaders, such as elected officials, clergymen, and educators; or, in the case of a membership organization, of individuals elected pursuant to the organization's governing instrument or bylaws by a broadly based membership. This characteristic does not exist if the membership of the organization's governing body is such as to indicate that it represents the personal or private interests of disqualified persons, rather than the interests of the community or the general public.

(ii) Whether a substantial portion of the organization's initial funding is to be provided by the general public, by public charities, or by government grants, rather than by a limited number of grantors or contributors who are disqualified persons with respect to the organization. The fact that the organization plans to limit its activities to a particular community or region or to a special field which can be expected to appeal to a limited number of persons will be taken into consideration in determining whether those persons providing the initial support for the organization are representative of the general public. On the other hand, the subsequent sources of funding which the organization can reasonably expect to receive after it has become established and fully operational will also be taken into account.

(iii) Whether a substantial proportion of the organization's initial funds are placed, or will remain, in an endowment, and whether the investment of such funds is unlikely to result in more than one third of its total support being received from items described in section 509(a)(2)(B).

(iv) In the case of an organization that carries on fundraising activities, whether the organization has developed a concrete plan for solicitation of funds from the general public on a community or area-wide basis; whether any steps have been taken to implement such plan; whether any firm commitments of financial or other support have been made to the organization by civic, religious, charitable, or similar groups within the community; and whether the organization has made any commitments to, or established any working relationships with, those organizations or classes of persons intended as the future recipients of its funds.

(v) In the case of an organization that carries on community services, such as combating community deterioration in an economically depressed area that has suffered a major loss of population and jobs, whether the organization has a concrete program to carry out its work in the community; whether any steps have been taken to implement that program; whether it will receive any part of its funds from a public charity or governmental agency to which it is in some way held accountable as a condition of the grant or contribution; and whether it has enlisted the sponsorship or support of other civic or community leaders involved in community service programs similar to those of the organization.

(vi) In the case of an organization that carries on educational or other exempt activities for, or on behalf of, members, whether the solicitation for dues-paying members is designed to enroll a substantial number of persons in the community, area, profession, or field of special interest (depending on the size of the area and the nature of the organization's activities); whether membership dues for individual (rather than institutional) members have been fixed at rates designed to make membership available to a broad cross-section of the public rather than to restrict membership to a limited number of persons; and whether the activities of the organization will be likely to appeal to persons having some broad common interest or purpose, such as educational activities in the case of alumni associations, musical activities in the case of symphony societies, or civic affairs in the case of parent-teacher associations.

(vii) In the case of an organization that provides goods, services, or facilities, whether the organization is or will be required to make its services, facilities, performances, or products available (regardless of whether a fee is charged) to the general public, public charities, or governmental units, rather than to a limited number of persons or organizations; whether the organization will avoid executing contracts to perform services for a limited number of firms or governmental agencies or bureaus; and whether the service to be provided is one which can be expected to meet a special or general need among a substantial portion of the general public.

(4) *Example*. The application of this paragraph (d) may be illustrated by the following example:

Example. (i) Organization X was formed in January 2008 and uses a taxable year ending December 31. After September 9, 2008, and before December 31, 2008, Organization X filed Form 1023 requesting recognition of exemption as an organization described in section 501(c)(3) and in section 509(a)(2). In its application, Organization X established that it can reasonably be expected to operate as a publicly supported organization under paragraph (d) of this section. Subsequently, Organization X received a ruling or determination letter that it is an organization described in sections 501(c)(3) and 509(a)(2) effective as of the date of its formation.

(ii) Organization X is described in section 509(a)(2) for its first five taxable years (for the taxable years ending December 31, 2008, through December 31, 2012).

(iii) Organization X can qualify as a publicly supported organization beginning with the taxable year ending December 31, 2013, if Organization X can meet the requirements of either §1.170A–9(f)(2) or §1.170A–9(f)(3) or paragraphs (a) and (b) of this section for the taxable years ending December 31, 2009, through December 31, 2013, or for the taxable years ending December 31, 2008, through December 31, 2012.

(e) *Determinations on foundation classification and reliance*—(1) A ruling or determination letter that an organization is described in section 509(a)(2) may be issued to an organization. Such determination may be made in conjunction with the recognition of the organization's tax-exempt status or at such other time as the organization believes it is described in section 509(a)(2). The ruling or determination letter that the organization is described in section 509(a)(2) may be revoked if, upon examination, the organization has not met the requirements of this section. The ruling or determination letter that the organization is described in section 509(a)(2) also may be revoked if the organization's application for a ruling or determination contained one or more material misstatements or omissions of fact or such application was part of a scheme or plan to avoid or evade any provision of the Code. The revocation of the determination that an organization is described in section 509(a)(2) does not preclude revocation of the determination that the organization is described in section 501(c)(3).

(2) *Status of grantors or contributors.* (i) For purposes of sections 170, 507, 545(b)(2), 642(c), 4942, 4945, 4966, 2055, 2106(a)(2), and 2522, grantors and contributors may rely upon a determination letter or ruling that an organization is described in section 509(a)(2) until the IRS publishes notice of a change of status (for example, in the Internal Revenue Bulletin or Publication 78, "*Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1986*," which can be searched at *www.irs.gov*). For this purpose, grantors or contributors may also rely on an advance ruling that expires on or after June 9, 2008. However, a grantor or contributor may not rely on such an advance ruling or any determination letter or ruling if the grantor or contributor was responsible for, or aware of, the act or failure to act that resulted in the organization's loss of classification under section 509(a)(2) or acquired knowledge that the IRS had given notice to such organization that it would be deleted from such classification.

(ii) A grantor or contributor (other than one of the organization's founders, creators, or foundation managers (within the meaning of section 4946(b)) will not be considered to be responsible for, or aware of, the act or failure to act that resulted in the loss of the organization's publicly supported classification under section 509(a)(2) if such grantor or contributor has made such grant or contribution in reliance upon a written statement by the grantee organization that such grant or contribution will not result in the loss of such organization's classification as not a private foundation under section 509(a). Such statement must be signed by a responsible officer of the grantee organization and must set forth sufficient information, including a summary of the pertinent financial data for the five taxable years immediately preceding the current taxable year, to assure a reasonably prudent person that his grant or contribution will not result in the loss of the grantee organization's classification as a publicly supported organization under section 509(a). If a reasonable doubt exists as to the effect of such grant or contribution, or if the grantor or contributor is one of the organization's founders, creators, or foundation managers, the procedure for requesting a determination letter set forth in paragraph (c)(5) of this section may be followed by the grantee organization for the protection of the grantor or contributor.

(3) *Examples*. The provisions of this paragraph (e) may be illustrated by the following examples:

Example 1. Y, a calendar year organization described in section 501(c)(3), is created in February 2008 for the purpose of displaying African art. On its exemption application Y shows, under penalties of perjury, that it can reasonably, in accordance with the requirements of paragraph (d) of this section, expect to receive support from the public in 2008 through 2012 that will satisfy the one-third support and not-more-than-one-third support tests described in section 509(a)(2) for its first five taxable years, 2008 through 2012. Y may therefore receive a determination that it meets the requirements of paragraph (a) of this section for its first five taxable years (2008, 2009, 2010, 2011, and 2012), regardless of the public support Y in fact receives during this period.

Example 2. Z, a calendar year organization described in section 501(c)(3), is created in July 2008. On its exemption application Z shows, under penalties of perjury, that it can reasonably, in accordance with the requirements of paragraph (d) of this section, expect to receive support from the public in 2008 through 2012 that will satisfy the one-third support and not-more-than-one-third support tests described in section 509(a)(2) for its first five taxable years, 2008 through 2012. Z receives a determination that it is described in section 509(a)(2). However, the support actually received from the public over Z's first five taxable years (2008 through 2012) does not satisfy the one-third support and not-more-than-one-third support tests described in section 509(a)(2). Moreover, the support Z receives from 2009 through 2013, also does not meet the one-third support and not-more-than-one-third support tests described in section 509(a)(2). Z is described in section 509(a)(2) during its first five years for all purposes. However, because Z has not met the requirements of paragraph (a) of this section for either 2008 through 2012 or 2009 through 2013, Z is not described in section 509(a)(2) for its taxable year 2013. If Z is not described in section 509(a)(1), section 509(a)(3), or section 509(a)(4), then Z will be reclassified as a private foundation as of the first day of 2013. However, for 2013, Z will be treated as a private foundation only for purposes of sections 507, 4940 and 6033. Z must file Form 990-PF and will be liable for the net investment tax imposed by section 4940 and, if applicable, the private foundation termination tax imposed by section 507(c) for 2013. For 2014 and succeeding years, Z will be treated as a private foundation for all purposes (except as provided in paragraph (e)(2) of this section with respect to grantors and contributors).

* * * * *

(k) *Method of accounting*. For purposes of section 509(a)(2), an organization's support will be determined under the method of accounting on the basis of which the organization regularly computes its income in keeping its books under section 446. For example, if a grantor makes a grant to an organization payable over a term of years, such grant will be includible in the support fraction of the grantee organization under the method of accounting on the basis of which it regularly computes its income in keeping its books under section 446.

* * * * *

(n) *Transition rules*. (1) An organization that received an advance ruling, that expires on or after June 9, 2008, that it will be treated as an organization described in section 509(a)(2) will be treated as meeting the requirements of paragraph (d)(1) of this section for the first five taxable years of its existence as a section 501(c)(3) organization unless the IRS issued to the organization a proposed determination prior to September 9, 2008, that the organization is not described in sections 170(b)(1)(A)(vi) and 509(a)(1) or in section 509(a)(2).

(2) Paragraph (d)(1) of this section shall not apply to an organization that received an advance ruling that expired prior to June 9, 2008, and that did not timely file with the IRS the required information to establish that it is an organization described in sections 170(b)(1)(A)(vi) and 509(a)(1) or in section 509(a)(2).

(3) An organization that fails to meet a public support test for its first taxable year beginning on or after January 1, 2008, under the regulations in this section may use the prior test set forth in §§1.509(a)–3(a)(2) and 1.509(a)–3(a)(3) or §1.170A–9(e)(2) or §1.170A–9(e)(3) as in effect before September 9, 2008, (as contained in 26 CFR part 1 revised April 1, 2008) to determine whether the organization may be publicly supported for its 2008 taxable year based on its satisfaction of a public support test for taxable year 2007, computed over the period 2003 through 2006.

(4) *Examples*. The application of this paragraph (n) may be illustrated by the following examples:

Example 1. (i) Organization M was formed in January 2004, and uses a taxable year ending June 30. Organization M received an advance ruling letter that it is recognized as an organization described in section 501(c)(3) effective as of the date of its formation and that it is treated as a publicly supported organization under section 509(a)(2) during the five-year advance ruling period that will end on June 30, 2008. This date is on or after June 9, 2008.

(ii) Under the transition rule, Organization M is a publicly supported organization described in section 509(a)(2) for the taxable years ending June 30, 2004, through June 30, 2008. Organization M does not need to establish within 90 days after June 30, 2008, that it met a public support test under §1.170A–9(e) or §1.509(a)–3, as in effect prior to September 9, 2008, (as contained in 26 CFR part 1 revised April 1, 2008) for its advance ruling period.

(iii) Organization M can qualify as a public charity beginning with the taxable year ending June 30, 2009, if Organization M can meet the requirements of §1.170A–9(f)(2) or §1.170A–9(f)(3) or paragraphs (a)(2) and (a)(3) of this section for the taxable years ending June 30, 2005, through June 30, 2009, or for the taxable years ending June 30, 2004, through June 30, 2008. In addition, for its taxable year ending June 30, 2009, Organization M may qualify as a publicly supported organization by availing itself of the transition rule contained in paragraph (n)(iii) of this section, which looks to support received by M in the taxable years ending June 30, 2004, through June 30, 2007.

Example 2. (i) Organization N was formed in January 2000 and uses a December 31 taxable year. Organization N received a final determination that it was recognized as tax-exempt under section 501(c)(3) and as a public charity prior to September 9, 2008.

(ii) For taxable year 2008, Organization N will qualify as publicly supported if it meets the requirements under either §1.170A–9(f)(2) or §1.170A–9(f)(3) or paragraphs (a)(2) and (a)(3) of this section for the five-year period January 1, 2004, through December 31, 2008. Organization N will also qualify as publicly supported for taxable year 2008 if it meets the requirements under either §1.170A–9(e)(2) or §1.170A–9(e)(3) or §§1.509(a)–3(a)(2) and 1.509(a)–3(a)(3) as in effect prior to September 9, 2008, (as contained in 26 CFR part 1 revised April 1, 2008) for taxable year 2007, using the four-year period from January 1, 2003, through December 31, 2006.

(o) *Effective/applicability date*. This section shall generally apply to taxable years beginning after December 31, 1969 except paragraphs (a)(2), (a)(3)(i), (c), (d), (e), (k) and (n) of this section shall apply to tax years beginning on or after January 1, 2008. For tax years beginning after December 31, 1969 and beginning before January 1, 2008, §§1.509(a)–3(a)(2), 1.509(a)–3(a)(3)(i), 1.509(a)–3(c), 1.509(a)–3(d), 1.509(a)–3(e), and 1.509(a)–3(k) as in effect on December 31, 2007 (as contained in 26 CFR part 1 revised April 1, 2008) shall apply.

§1.509(a)–3T [Removed]

Par. 7. Section 1.509(a)–3T is removed.

Par. 8. Section 1.6033–2 is amended by revising paragraphs (a)(1), (a)(2)(ii)(*g*), (a)(2)(ii)(*h*), (g)(1)(iii), (g)(1)(iv), (g)(6), (i)(1) and (k) to read as follows:

§1.6033–2 Returns by exempt organizations (taxable years beginning after December 31, 1969) and returns by certain nonexempt organizations (taxable years beginning after December 31, 1980).

(a) * * *

(1) Except as provided in section 6033(a)(3) and paragraph (g) of this section, every organization exempt from taxation under section 501(a) shall file an annual information return specifically setting forth its items of gross income, gross receipts and disbursements, and such other information as may be prescribed in the instructions, issued with respect to the return. Except as provided in paragraph (d) of this section, such return shall be filed annually regardless of whether such organization is chartered by, or affiliated or associated with, any central, parent, or other organization.

(2) * * *

(ii) * * *

(*g*) The names and addresses of all officers, directors, or trustees (or any person having responsibilities or powers similar to those of officers, directors or trustees) of the organization, and, in the case of a private foundation, all persons who are foundation managers, within the meaning of section 4946(b)(1). Organizations must also attach a schedule showing the names and addresses and/or total numbers of key employees, highly compensated employees, and independent contractors as prescribed by publication, form, or instructions.

(*h*) A schedule showing the compensation and other payments made to each person whose name is required to be listed pursuant to paragraph (a)(2)(ii)(*g*) of this section during the calendar year ending within the organization's annual accounting period, or during such other period as prescribed by publication, form, or instructions.

* * * * *

(g) * * *

(1) * * *

(iii) An organization (other than a private foundation) described in section 6033(a)(3)(C), the gross receipts of which in each taxable year are normally not more than $5,000 (as described in paragraph (g)(3) of this section);

(iv) A mission society (other than an organization described in section 509(a)(3)) sponsored by or affiliated with one or more churches or church denominations, more than one-half of the activities of which society are conducted in, or directed at persons in foreign countries;

* * * * *

(6) The Commissioner may relieve any organization or class of organizations (other than an organization described in section 509(a)(3)) from filing, in whole or in part the annual return required by this section where he determines that such returns are not necessary for the efficient administration of the internal revenue laws.

* * * * *

(i) * * *

(1) An organization that is exempt from taxation under section 501(a) and is not required to file annually an information return required by this section shall immediately notify in writing Exempt Organizations Determinations, at an address prescribed by publication (including publication on the Internal Revenue Service website), of any changes in its character, operations, or purpose for which it was originally created.

* * * * *

(k) *Effective/applicability date*—(1) *Generally*. The provisions of this section shall apply with respect to returns filed for taxable years beginning after December 31, 1969.

(2) The applicability of paragraphs (g)(1)(iii), (g)(1)(iv), and (g)(6) of this section shall be limited to returns filed for taxable years ending after August 17, 2006. For returns filed for taxable years ending on or before August 17, 2006, §§1.6033–(2)(g)(1)(iii), 1.6033–(2)(g)(1)(iv), and 1.6033–(2)(g)(6) (as contained in 26 CFR part 1 revised April 1, 2006) shall apply.

(3) The applicability of paragraphs (a)(2)(ii)(*g*) and (a)(2)(ii)(*h*) of this section shall be limited to returns filed on or after January 1, 2008. For returns filed before January 1, 2008, §§1.6033–(a)(2)(ii)(*g*) and 1.6033–(2)(a)(2)(ii)(*h*) (as contained in 26 CFR part 1 revised April 1, 2008) shall apply.

§1.6033–2T [Removed]

Par. 9. Section 1.6033–2T is removed

Par. 10. Section 1.6043–3 is amended by revising paragraphs (b)(8), (d) and (e) to read as follows:

§1.6043–3 Returns regarding liquidation, dissolution, termination, or substantial contraction of organizations exempt from taxation under section 501(a).

* * * * *

(b) * * *

(8) Any organization no longer exempt from taxation under section 501(a) and that during the period of its exemption under such section was not an organization described in section 501(c)(3), a corporation described in section 501(c)(2) that held title to property for an organization described in section 501(c)(3), or an organization described in such other section as prescribed by publication, form, or instructions.

* * * * *

(d) *Definitions*. (1) For the definition of the term "normally" as used in paragraph (b)(2) of this section, see §1.6033–2(g)(3).

(2) For the definition of the term "integrated auxiliaries" as used in paragraph (b)(1) of this section, see §1.6033–2(h).

(3) For returns filed for taxable years beginning before January 1, 2008, for purposes of this section the definition of the term "substantial contraction" set forth in §1.6043–3(d)(1) (as contained in 26 CFR part 1 revised April 1, 2008) may be used.

(e) *Effective/applicability date*—(1) *Generally*. The provisions of this section shall apply with respect to returns filed for taxable years beginning after December 31, 1969.

(2) Paragraphs (b)(8) and (d) of this section shall apply for taxable years beginning on or after January 1, 2008. For taxable years beginning before January 1, 2008, §§1.6043–3(b)(8) and 1.6043–3(d) (as contained in 26 CFR part 1 revised April 1, 2008) shall apply.

§1.6043–3T [Removed]

Par. 11. Section 1.6043–3T is removed.

PART 602—OMB CONTROL NUMBER UNDER THE PAPERWORK REDUCTION ACT

Par. 12. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 13. In §602.101, paragraph (b) is amended as follows:

1. The following entry to the table is removed:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB Control No.
* * * * *	
1.6033–2T	1545–2117
* * * * *	

2. The following entry is added in numerical order to the table:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB Control No.
* * * * *	
1.6033–2	1545–2117
* * * * *	

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

Approved August 19, 2011.

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

(Filed by the Office of the Federal Register on September 7, 2011, 8:45 a.m., and published in the issue of the Federal Register for September 8, 2011, 76 F.R. 55745)

Part III. Administrative, Procedural, and Miscellaneous

Postponement of Backup Withholding Requirement for Payment Card and Third Party Network Payments Made Under Section 6050W

Notice 2011–88

PURPOSE

This notice postpones the effective date for potential backup withholding obligations imposed under section 3406 for payments made in settlement of payment card and third party network transactions (section 6050W payments). The regulations under section 3406 require that backup withholding apply to section 6050W payments made after December 31, 2011, if a payee has not furnished a correct taxpayer identification number (TIN) to a section 6050W payor. This notice will postpone for one year the requirement to apply backup withholding on section 6050W payments. Specifically, the backup withholding requirements of section 3406 will apply only to section 6050W payments made after December 31, 2012.

BACKGROUND

Section 6050W, added by section 3091 of the Housing Assistance Tax Act of 2008, Div. C of Pub. L. No. 110–289, 122 Stat. 2653 (the Act), requires information returns to be made by certain payors with respect to payments made in settlement of payment card transactions and third party payment network transactions. All payments made in settlement of payment card transactions are required to be reported under section 6050W. Payments made in settlement of third party network transactions, however, are required to be reported only if the amount paid exceeds $20,000 and the aggregate number of transactions exceeds 200 with respect to any payee within a calendar year.

Section 3406(a)(1) requires certain payors to perform backup withholding by deducting and withholding income tax from a reportable payment if a payee fails to furnish the payee's correct taxpayer identification number to the payor. The Act amended section 3406(b)(3) by including payments required to be reported under section 6050W as reportable payments potentially subject to backup withholding.

The regulations under section 3406 require that backup withholding apply to section 6050W payments made after December 31, 2011, if a payee has not furnished a correct TIN to a section 6050W payor. Treas. Reg. § 31.3406(b)(3)–5(e). In addition, the regulations subject all payments, regardless of any monetary or transactional thresholds, to potential backup withholding. Earlier this year, the Treasury Department and the IRS announced that not all payments made in settlement of third party network transactions are subject to backup withholding. Notice 2011–42, 2011–23 I.R.B. 866. Instead, a payment made by a third party settlement organization ("TPSO") is a reportable payment potentially subject to section 3406 backup withholding only if the payee has received payment from that TPSO in more than 200 transactions within a calendar year.

DISCUSSION

Requests to postpone the effective date for backup withholding on section 6050W payments have been made by a number of payors. Among the reasons cited in support of this postponement include the payors' unfamiliarity with procedures for backup withholding because of no prior withholding obligations, the need for additional time to develop systems to enable withholding, unfamiliarity with the IRS' TIN matching program and general difficulties in matching TINs already obtained with the correct taxpayers.

After careful consideration of these comments, Treasury and the IRS are postponing the effective date for the application of backup withholding on section 6050W payments for an additional year from the current effective date. Thus, backup withholding will be required on section 6050W payments made after December 31, 2012.

DRAFTING INFORMATION

The principal author of this notice is Girish Prasad of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this notice, please contact Girish Prasad at (202) 622–4910 (not a toll-free call).

Transitional Penalty Relief for Information Reporting Relating to Payment Card and Third Party Network Transactions

Notice 2011–89

PURPOSE

This notice provides transitional relief from penalties for a section 6050W filer reporting incorrect information on information returns (Form 1099-K) and payee statements filed under section 6050W of the Internal Revenue Code. The relief provided by this notice is available for information returns and payee statements to be filed only in 2012, based on payments made in calendar year 2011, provided that the section 6050W filer makes a good faith effort to accurately file the appropriate information return and the accompanying payee statement.

BACKGROUND

Under section 6050W, added by section 3091 of the Housing Assistance Tax Act of 2008, Div. C of Pub. L. No. 110–289, 122 Stat. 2653 (the Act), a payment settlement entity ("payor") making payment to a participating payee ("payee") in settlement of reportable payment transactions must make an information return for each calendar year to be filed with the Internal Revenue Service setting forth the gross amount of such reportable payment transactions, as well as the name, address, and taxpayer identification number (TIN) of the payee. A similar statement must be furnished to the payee setting forth the gross amount of such reportable payment transactions, as well as the name, address and phone number of the information contact of the person required to make such return.

Section 6050W applies to two types of transactions: (1) payment card transactions and (2) third party network transactions. All payments made in settlement of payment card transactions must be reported in the manner described above. Payments made in settlement of third party network transactions need be reported only if gross payments to a payee exceed $20,000 and the number of such transactions exceeds 200 with respect to the participating payee. The information is to be reported to the IRS on Form 1099-K, *Merchant Card and Third Party Network Payments*.

Section 6721 imposes penalties on a person for, among other things, failing to include all required information or including incorrect information on an information return. Section 6722 imposes penalties on a person for, among other things, failing to include all required information or including incorrect information on a payee statement.

DISCUSSION

Sections 6721 and 6722 are applicable to section 6050W payors that must file information returns for payments made in settlement of reportable payment transactions. Prior to the enactment of section 6050W, payors were not required to file the specific type of information return or to furnish the specific type of payee statement now required by section 6050W. In order to provide additional time to develop appropriate procedures for compliance with these new reporting requirements, the IRS will not impose penalties under sections 6721 and 6722 on payors that must file information returns and payee statements provided that they make good-faith efforts in filing accurate Forms 1099-K and furnishing the accompanying payee statements.

This notice does not apply to a payor who erroneously fails to file an information return or payee statement. Additionally, the relief provided by this notice only applies to information returns and payee statements pertaining to reportable payments made in calendar year 2011.

DRAFTING INFORMATION

The principal author of this notice is Girish Prasad of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this notice, please contact Girish Prasad at (202) 622–4910 (not a toll-free call).

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26 CFR 601.201: Rulings and determination letters. (Also Part I, Sections 846; 1.846–1.)

Rev. Proc. 2011–53

SECTION 1. PURPOSE

This revenue procedure prescribes the loss payment patterns and discount factors for the 2011 accident year. These factors will be used for computing discounted unpaid losses under § 846 of the Internal Revenue Code. *See* Rev. Proc. 2008–10, 2008–1 C.B. 290, for background concerning the loss payment patterns and application of the discount factors.

SECTION 2. SCOPE

This revenue procedure applies to any taxpayer that is required to discount its unpaid losses under § 846 for a line of business using discount factors published by the Secretary.

SECTION 3. TABLES OF DISCOUNT FACTORS

.01 The following tables present separately for each line of business the discount factors under § 846 for accident year 2011. All the discount factors presented in this section were determined using the applicable interest rate under § 846(c) for 2011, which is 3.46 percent, and by assuming all loss payments occur in the middle of the calendar year.

.02 If the groupings of individual lines of business on the annual statement change, taxpayers must discount the unpaid losses on the affected lines of business in accordance with the discounting patterns that would have applied to those unpaid losses based on their classification on the 2005 annual statement. *See* Rev. Proc. 2008–10, section 2, for additional background on discounting under § 846 and the use of the Secretary's tables.

.03 Section V of Notice 88–100, 1988–2 C.B. 439, sets forth a composite method for computing discounted unpaid losses for accident years that are not separately reported on the annual statement. The tables separately provide discount factors for taxpayers who elect to use the composite method of section V of Notice 88–100. *See* Rev. Proc. 2002–74, 2002–2 C.B. 980.

.04 Tables.

Tables of Factors to be Used to Discount Unpaid Losses Incurred in Accident Year 2011

(Interest rate: 3.46 percent)

Lines of Business

Accident and Health
(Other Than Disability Income or Credit Disability Insurance)

Taxpayers that do not use the composite method of Notice 88–100 should use 98.3136 percent to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the 2011 and later taxable years.

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount all unpaid losses in this line of business that are outstanding at the end of the 2011 taxable year.

Auto Physical Damage

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	89.4096	89.4096	10.5904	10.3964	98.1685
2012	99.6848	10.2752	0.3152	0.3047	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2013 and later years		0.1576	0.1576	0.1549	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2013 taxable year.

Commercial Auto/Truck Liability/Medical

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	23.6718	23.6718	76.3282	71.0319	93.0611
2012	47.5425	23.8708	52.4575	49.2094	93.8082
2013	66.6847	19.1421	33.3153	31.4416	94.3756
2014	81.5105	14.8258	18.4895	17.4493	94.3741
2015	90.0548	8.5443	9.9452	9.3622	94.1377
2016	94.7311	4.6763	5.2689	4.9297	93.5605
2017	97.0602	2.3292	2.9398	2.7311	92.9015
2018	98.1174	1.0572	1.8826	1.7502	92.9713
2019	98.8692	0.7518	1.1308	1.0461	92.5132
2020	99.1160	0.2467	0.8840	0.8313	94.0394

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		0.2467	0.6373	0.6092	95.5812
2022		0.2467	0.3906	0.3793	97.1026
2023 and later years		0.2467	0.1439	0.1414	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 96.2951 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Composite

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	34.7004	34.7004	65.2996	60.0800	92.0067
2012	58.6076	23.9072	41.3924	37.8415	91.4214
2013	71.7608	13.1532	28.2392	25.7720	91.2632
2014	81.4987	9.7379	18.5013	16.7588	90.5816

Composite

2015	87.8488	6.3501	12.1512	10.8797	89.5353
2016	91.4226	3.5739	8.5774	7.6209	88.8491
2017	93.4057	1.9831	6.5943	5.8675	88.9785
2018	94.2280	0.8222	5.7720	5.2341	90.6813
2019	95.4875	1.2595	4.5125	4.1341	91.6149
2020	96.3560	0.8685	3.6440	3.3937	93.1328

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		0.8685	2.7754	2.6277	94.6779
2022		0.8685	1.9069	1.8352	96.2404
2023		0.8685	1.0383	1.0152	97.7760
2024 and later years		0.8685	0.1698	0.1669	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 95.6434 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Fidelity/Surety

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	25.2328	25.2328	74.7672	71.6094	95.7765
2012	61.1025	35.8698	38.8975	37.6020	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2013 and later years		19.4487	19.4487	19.1207	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2013 taxable year.

Financial Guaranty/Mortgage Guaranty

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	7.7824	7.7824	92.2176	88.8160	96.3114
2012	62.1390	54.3565	37.8610	36.6001	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2013 and later years		18.9305	18.9305	18.6113	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2013 taxable year.

International (Composite)

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	34.7004	34.7004	65.2996	60.0800	92.0067
2012	58.6076	23.9072	41.3924	37.8415	91.4214
2013	71.7608	13.1532	28.2392	25.7720	91.2632
2014	81.4987	9.7379	18.5013	16.7588	90.5816
2015	87.8488	6.3501	12.1512	10.8797	89.5353
2016	91.4226	3.5739	8.5774	7.6209	88.8491
2017	93.4057	1.9831	6.5943	5.8675	88.9785
2018	94.2280	0.8222	5.7720	5.2341	90.6813
2019	95.4875	1.2595	4.5125	4.1341	91.6149
2020	96.3560	0.8685	3.6440	3.3937	93.1328

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		0.8685	2.7754	2.6277	94.6779
2022		0.8685	1.9069	1.8352	96.2404
2023		0.8685	1.0383	1.0152	97.7760
2024 and later years		0.8685	0.1698	0.1669	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 95.6434 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Medical Malpractice — Claims-Made

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	4.9425	4.9425	95.0575	86.3797	90.8709
2012	19.9369	14.9944	80.0631	74.1168	92.5729
2013	44.3489	24.4120	55.6511	51.8504	93.1706
2014	64.8374	20.4885	35.1626	32.8046	93.2939
2015	80.2530	15.4156	19.7470	18.2596	92.4675
2016	85.7907	5.5377	14.2093	13.2586	93.3097
2017	91.2722	5.4815	8.7278	8.1419	93.2867
2018	93.3314	2.0593	6.6686	6.3290	94.9084
2019	96.1257	2.7942	3.8743	3.7058	95.6514
2020	97.6538	1.5281	2.3462	2.2798	97.1671

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021 and later years		1.5281	0.8182	0.8044	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Medical Malpractice — Occurrence

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	1.5878	1.5878	98.4122	84.2728	85.6325
2012	4.4720	2.8842	95.5280	84.2550	88.1992
2013	17.7738	13.3018	82.2262	73.6402	89.5581
2014	35.8814	18.1076	64.1186	57.7700	90.0986
2015	52.9447	17.0633	47.0553	42.4128	90.1340
2016	68.4348	15.4901	31.5652	28.1245	89.0998
2017	79.5616	11.1268	20.4384	17.7799	86.9929
2018	85.8198	6.2582	14.1802	12.0296	84.8338
2019	90.1267	4.3069	9.8733	8.0650	81.6854
2020	90.3701	0.2434	9.6299	8.0965	84.0769

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		0.2434	9.3865	8.1291	86.6041
2022		0.2434	9.1431	8.1628	89.2781
2023		0.2434	8.8998	8.1977	92.1115
2024		0.2434	8.6564	8.2338	95.1182
2025 and later years		0.2434	8.4130	8.2711	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 91.4625 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Miscellaneous Casualty

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	72.9064	72.9064	27.0936	26.3237	97.1587
2012	93.5836	20.6771	6.4164	6.2028	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2013 and later years		3.2082	3.2082	3.1541	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2013 taxable year.

Multiple Peril Lines
(Homeowners/Farmowners, Commercial Multiple Peril, and Special Liability (Ocean Marine, Aircraft (All Perils), Boiler and Machinery))

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	52.5880	52.5880	47.4120	44.6798	94.2372
2012	80.0449	27.4570	19.9551	18.2978	91.6948
2013	86.1625	6.1175	13.8375	12.7084	91.8401
2014	90.7452	4.5827	9.2548	8.4868	91.7013
2015	93.9006	3.1555	6.0994	5.5709	91.3350
2016	95.7613	1.8607	4.2387	3.8710	91.3257
2017	96.8755	1.1141	3.1245	2.8717	91.9076
2018	97.6715	0.7960	2.3285	2.1614	92.8219
2019	98.0329	0.3615	1.9671	1.8685	94.9895
2020	98.6810	0.6481	1.3190	1.2740	96.5862

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		0.6481	0.6709	0.6588	98.2018
2022 and later years		0.6481	0.0228	0.0224	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.2000 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Other (Including Credit)

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	67.9528	67.9528	32.0472	30.9928	96.7098
2012	89.4609	21.5081	10.5391	10.1881	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2013 and later years		5.2695	5.2695	5.1807	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2013 taxable year.

Other Liability — Claims-Made

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	5.8796	5.8796	94.1204	84.6911	89.9817
2012	18.8735	12.9938	81.1265	74.4047	91.7144
2013	41.6840	22.8105	58.3160	53.7774	92.2171

Other Liability — Claims-Made

2014	62.5322	20.8483	37.4678	34.4322	91.8982
2015	73.5207	10.9885	26.4793	24.4466	92.3234
2016	82.0036	8.4829	17.9964	16.6641	92.5965
2017	88.6279	6.6244	11.3721	10.5026	92.3548
2018	90.7107	2.0828	9.2893	8.7475	94.1680
2019	94.8439	4.1332	5.1561	4.8461	93.9880
2020	96.2689	1.4249	3.7311	3.5644	95.5308

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		1.4249	2.3062	2.2383	97.0573
2022 and later years		1.4249	0.8812	0.8664	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 97.3588 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Other Liability — Occurrence

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	13.6594	13.6594	86.3406	76.0999	88.1392
2012	24.8389	11.1795	75.1611	67.3616	89.6231
2013	41.7792	16.9403	58.2208	52.4615	90.1079
2014	58.4995	16.7203	41.5005	37.2696	89.8052
2015	69.5197	11.0203	30.4803	27.3499	89.7297
2016	77.7513	8.2316	22.2487	19.9234	89.5486
2017	84.2243	6.4730	15.7757	14.0287	88.9261
2018	83.2275	-0.9968	16.7725	15.5280	92.5801
2019	88.8524	5.6249	11.1476	10.3439	92.7903
2020	91.3852	2.5328	8.6148	8.1256	94.3207

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		2.5328	6.0820	5.8304	95.8639
2022		2.5328	3.5492	3.4559	97.3721
2023 and later years		2.5328	1.0164	0.9992	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 96.4881 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Private Passenger Auto Liability/Medical

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	42.6108	42.6108	57.3892	54.5122	94.9868
2012	71.5827	28.9719	28.4173	26.9295	94.7643
2013	84.6947	13.1120	15.3053	14.5243	94.8972
2014	92.3556	7.6610	7.6444	7.2345	94.6384

Private Passenger Auto Liability/Medical

2015	96.2369	3.8812	3.7631	3.5370	93.9912
2016	97.9275	1.6907	2.0725	1.9397	93.5951
2017	98.7719	0.8444	1.2281	1.1480	93.4770
2018	99.2692	0.4973	0.7308	0.6818	93.3059
2019	99.5053	0.2361	0.4947	0.4653	94.0619
2020	99.6440	0.1387	0.3560	0.3404	95.6034

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		0.1387	0.2174	0.2111	97.1228
2022 and later years		0.1387	0.0787	0.0774	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 97.3953 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Products Liability — Claims-Made

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	1.0259	1.0259	98.9741	85.6995	86.5878
2012	11.7927	10.7667	88.2073	77.7132	88.1029
2013	29.3642	17.5716	70.6358	62.5291	88.5234
2014	55.1655	25.8012	44.8345	38.4488	85.7572
2015	83.4171	28.2516	16.5829	11.0430	66.5925
2016	64.8933	-18.5238	35.1067	30.2666	86.2132
2017	82.3346	17.4414	17.6654	13.5733	76.8357
2018	86.3986	4.0640	13.6014	9.9092	72.8547
2019	76.3310	-10.0676	23.6690	20.4924	86.5791
2020	78.7910	2.4600	21.2090	18.6993	88.1666

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		2.4600	18.7490	16.8441	89.8398
2022		2.4600	16.2890	14.9247	91.6242
2023		2.4600	13.8290	12.9389	93.5633
2024		2.4600	11.3691	10.8844	95.7372
2025 and later years		2.4600	8.9091	8.7588	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 92.5254 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Products Liability — Occurrence

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	5.0466	5.0466	94.9534	82.0839	86.4466
2012	13.6935	8.6469	86.3065	76.1288	88.2075
2013	28.2541	14.5606	71.7459	63.9525	89.1376

Products Liability — Occurrence

2014	41.3083	13.0542	58.6917	52.8872	90.1102
2015	59.3693	18.0610	40.6307	36.3463	89.4552
2016	73.0717	13.7024	26.9283	23.6664	87.8868
2017	74.6612	1.5895	25.3388	22.8685	90.2510
2018	78.9833	4.3221	21.0167	19.2636	91.6582
2019	86.1231	7.1398	13.8769	12.6678	91.2869
2020	88.6931	2.5700	11.3069	10.4920	92.7930

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		2.5700	8.7369	8.2410	94.3235
2022		2.5700	6.1669	5.9120	95.8667
2023		2.5700	3.5969	3.5025	97.3749
2024 and later years		2.5700	1.0269	1.0096	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 95.3617 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Reinsurance — Nonproportional Assumed Liability

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	12.9458	12.9458	87.0542	81.6728	93.8183
2012	60.1796	47.2338	39.8204	36.4547	91.5477
2013	80.8225	20.6429	19.1775	16.7190	87.1802
2014	84.9430	4.1205	15.0570	13.1063	87.0445
2015	85.6680	0.7250	14.3320	12.8223	89.4664
2016	80.0452	-5.6229	19.9548	18.9853	95.1412
2017	86.7013	6.6561	13.2987	12.8718	96.7903
2018	97.2533	10.5520	2.7467	2.5843	94.0847
2019	97.6721	0.4188	2.3279	2.2476	96.5528
2020	98.8078	1.1357	1.1922	1.1702	98.1580

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021 and later years		1.1357	0.0564	0.0555	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Reinsurance — Nonproportional Assumed Liability

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	32.5917	32.5917	67.4083	56.1766	83.3379
2012	33.3995	0.8078	66.6005	57.2987	86.0335
2013	35.4948	2.0953	64.5052	57.1500	88.5975
2014	44.0321	8.5373	55.9679	50.4437	90.1297

Reinsurance — Nonproportional Assumed Liability

2015	64.8299	20.7979	35.1701	31.0344	88.2411
2016	66.4358	1.6059	33.5642	30.4748	90.7956
2017	77.8097	11.3738	22.1903	19.9603	89.9504
2018	82.4438	4.6341	17.5562	15.9373	90.7787
2019	84.1944	1.7507	15.8056	14.7081	93.0562
2020	87.9223	3.7279	12.0777	11.4251	94.5971

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		3.7279	8.3498	8.0286	96.1534
2022		3.7279	4.6219	4.5146	97.6776
2023 and later years		3.7279	0.8940	0.8790	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 96.7069 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Reinsurance — Nonproportional Assumed Financial Lines

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	8.4783	8.4783	91.5217	83.8160	91.5804
2012	28.0475	19.5693	71.9525	66.8111	92.8545
2013	60.4351	32.3875	39.5649	36.1797	91.4438
2014	82.4448	22.0097	17.5552	15.0442	85.6967
2015	90.2720	7.8271	9.7280	7.6033	78.1590
2016	85.3168	-4.9551	14.6831	12.9065	87.9002
2017	88.3777	3.0608	11.6223	10.2397	88.1042
2018	89.9934	1.6157	10.0066	8.9507	89.4471
2019	81.6664	-8.3269	18.3336	17.7301	96.7084
2020	91.0491	9.3827	8.9509	8.7999	98.3136

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021 and later years		-	-	-	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

Special Property
(Fire, Allied Lines, Inland Marine, Earthquake, Glass, Burglary and Theft)

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	44.5756	44.5756	55.4244	53.8278	97.1193
2012	88.4263	41.8507	13.5737	13.1217	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

Special Property
(Fire, Allied Lines, Inland Marine, Earthquake, Glass, Burglary and Theft)

2013 and later years		6.7869	6.7869	6.6724	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2013 taxable year.

Workers' Compensation

Tax Year	Estimated Cumulative Losses Paid (%)	Estimated Losses Paid Each Year (%)	Unpaid Losses at Year End (%)	Discounted Unpaid Losses at Year End (%)	Discount Factors (%)
2011	19.0410	19.0410	80.9590	71.0539	87.7653
2012	40.2442	21.2032	59.7558	51.9454	86.9295
2013	57.1497	16.9055	42.8503	36.5472	85.2906
2014	67.8601	10.7104	32.1399	26.9177	83.7516
2015	75.5399	7.6797	24.4601	20.0375	81.9192
2016	80.1157	4.5758	19.8843	16.0766	80.8504
2017	82.1828	2.0672	17.8172	14.5302	81.5516
2018	84.4045	2.2217	15.5955	12.7731	81.9028
2019	85.5195	1.1150	14.4805	12.0810	83.4293
2020	86.2855	0.7661	13.7145	11.7198	85.4558

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount unpaid losses incurred in this line of business in the 2011 accident year and that are outstanding at the end of the tax year shown.

2021		0.7661	12.9484	11.3461	87.6256
2022		0.7661	12.1823	10.9595	89.9620
2023		0.7661	11.4163	10.5595	92.4949
2024		0.7661	10.6502	10.1456	95.2622
2025 and later years		0.7661	9.8842	9.7175	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 91.7432 percent to discount unpaid losses incurred in this line of business in 2011 and prior years and that are outstanding at the end of the 2021 taxable year.

DRAFTING INFORMATION

The principal author of this revenue procedure is Sarah E. Swan of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Ms. Swan at (202) 622–8443 (not a toll-free call).

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26 CFR 601.201: Rulings and determination letters.
(Also Part I, Sections 832, 846; 1.832–4, 1.846–1.)

Rev. Proc. 2011–54

SECTION 1. PURPOSE

This revenue procedure prescribes the salvage discount factors for the 2011 accident year. These factors must be used to compute discounted estimated salvage recoverable under § 832 of the Internal Revenue Code.

SECTION 2. BACKGROUND

Section 832(b)(5)(A) requires that all estimated salvage recoverable (including that which cannot be treated as an asset for state accounting purposes) be taken into account in computing the deduction for losses incurred. Under § 832(b)(5)(A), paid losses are to be reduced by salvage and reinsurance recovered during the taxable year. This amount is adjusted to reflect changes in discounted unpaid losses on nonlife insurance contracts and in unpaid losses on life insurance contracts. An adjustment is then made to reflect any changes in discounted estimated salvage recoverable and in reinsurance recoverable.

Pursuant to § 832(b), the amount of estimated salvage is determined on a discounted basis in accordance with procedures established by the Secretary.

SECTION 3. SCOPE

This revenue procedure applies to any taxpayer that is required to discount estimated salvage recoverable under § 832.

SECTION 4. APPLICATION

.01 The following tables present separately for each line of business the discount factors under § 832 for the 2011 accident year. All the discount factors presented in this section were determined using the applicable interest rate under § 846(c) for

2011, which is 3.46 percent, and by assuming all estimated salvage is recovered in the middle of each calendar year. *See* Rev. Proc. 2008–11, 2008–1 C.B. 301, for background regarding the tables.

.02 These tables must be used by taxpayers irrespective of whether they elected to discount unpaid losses using their own historical experience under § 846.

.03 Section V of Notice 88–100, 1988–2 C.B. 439, provides a composite discount factor to be used in determining the discounted unpaid losses for accident years that are not separately reported on the annual statement approved by the National Association of Insurance Commissioners. The tables separately provide discount factors for taxpayers who elect to use the composite method. Rev. Proc. 2002–74, 2002–2 C.B. 980, clarifies that for certain insurance companies subject to tax under § 831 the composite method for discounting unpaid losses set forth in Notice 88–100, section V, is permitted but not required. This revenue procedure further provides alternative methods for computing discounted unpaid losses that are permitted for insurance companies not using the composite method, and sets forth a procedure for insurance companies to obtain automatic consent of the Commissioner to change to one of the methods described in Rev. Proc. 2002–74.

.04 Tables.

Tables of Factors to be Used to Discount Salvage Recoverable With Respect to Losses Incurred in Accident Year 2011

(Interest rate: 3.46 percent)

Lines of Business

Accident and Health (Other Than Disability Income or Credit Disability Insurance)

Taxpayers that do not use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable with respect to losses incurred in this line of business in the 2011 accident year as of the end of the 2011 and later taxable years.

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount all salvage recoverable in this line of business as of the end of the 2011 taxable year.

Auto Physical Damage

Tax Year	Discount Factors (%)
2011	97.6275
2012	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2013 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2013 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Commercial Auto/Truck Liability/Medical

Tax Year	Discount Factors (%)
2011	93.3955
2012	93.3497
2013	93.6495
2014	93.9535
2015	94.5922
2016	94.4105
2017	93.0655
2018	93.8651
2019	96.7732
2020	98.3136

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Composite

Tax Year	Discount Factors (%)
2011	93.4039
2012	93.1846
2013	93.0306
2014	92.8794
2015	92.3429
2016	91.5493
2017	92.2931
2018	93.4656
2019	95.2188
2020	96.7927

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Fidelity/Surety

Tax Year	Discount Factors (%)
2011	94.5806
2012	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

Fidelity/Surety

2013 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2013 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Financial Guaranty/Mortgage Guaranty

Tax Year	Discount Factors (%)
2011	95.4821
2012	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2013 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2013 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

International (Composite)

Tax Year	Discount Factors (%)
2011	93.4039
2012	93.1846
2013	93.0306
2014	92.8794
2015	92.3429
2016	91.5493

International (Composite)

2017	92.2931
2018	93.4656
2019	95.2188
2020	96.7927

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Medical Malpractice — Claims-Made

Tax Year	Discount Factors (%)
2011	93.6663
2012	94.5958
2013	93.2150
2014	93.7553
2015	93.1492
2016	89.3501
2017	86.4691
2018	91.6464
2019	96.9508
2020	98.3136

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Medical Malpractice — Claims-Made

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Medical Malpractice — Occurrence

Tax Year	Discount Factors (%)
2011	87.4530
2012	91.2904
2013	93.3358
2014	86.4191
2015	95.5109
2016	92.6085
2017	93.9918
2018	96.4593
2019	97.5134
2020	98.3136

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Miscellaneous Casualty

Tax Year	Discount Factors (%)
2011	97.0682
2012	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2013 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2013 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Multiple Peril Lines (Homeowners/Farmowners, Commercial Multiple Peril, and Special Liability (Ocean Marine, Aircraft (All Perils), Boiler and Machinery))

Tax Year	Discount Factors (%)
2011	93.9591
2012	93.4315
2013	93.3624
2014	93.3066
2015	92.6060
2016	91.2535
2017	92.2618
2018	94.3624
2019	95.5747
2020	97.0967

Multiple Peril Lines (Homeowners/Farmowners, Commercial Multiple Peril, and Special Liability (Ocean Marine, Aircraft (All Perils), Boiler and Machinery))

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Other (Including Credit)

Tax Year	Discount Factors (%)
2011	96.2595
2012	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2013 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2013 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Other Liability — Claims-Made

Tax Year	Discount Factors (%)
2011	89.9640
2012	90.9400
2013	89.3209
2014	92.1248
2015	93.4120
2016	95.0362
2017	94.1167
2018	92.9293
2019	97.7390
2020	98.3136

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Other Liability — Occurrence

Tax Year	Discount Factors (%)
2011	88.8323
2012	89.7443
2013	91.7691
2014	92.4298
2015	91.9481
2016	92.0560
2017	91.6100
2018	93.9815
2019	96.3629
2020	97.9202

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Private Passenger Auto Liability/Medical

Tax Year	Discount Factors (%)
2011	95.2907
2012	95.3106
2013	95.0938
2014	94.3448
2015	93.8406
2016	93.1778
2017	93.9588
2018	95.3067
2019	95.3731
2020	96.9202

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Private Passenger Auto Liability/Medical

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Products Liability — Claims-Made

Tax Year	Discount Factors (%)
2011	90.3287
2012	57.4781
2013	59.7457
2014	91.9244
2015	82.7270
2016	92.5554
2017	64.8394
2018	91.7750
2019	92.7747
2020	93.7745

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021	95.3256
2022	96.8802
2023 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 96.1358 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Products Liability — Occurrence

Tax Year	Discount Factors (%)
2011	89.2922
2012	91.1086
2013	92.7443
2014	93.4548
2015	93.8417
2016	91.7263
2017	92.2857
2018	94.8423
2019	95.0804
2020	96.6835

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Reinsurance — Nonproportional Assumed Property

Tax Year	Discount Factors (%)
2011	92.3051
2012	93.7306
2013	96.2743
2014	82.6967
2015	91.1729
2016	83.9159
2017	57.7951
2018	93.7915
2019	76.8594
2020	89.7124

Reinsurance — Nonproportional Assumed Property

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021	91.2427
2022	92.8279
2023	94.4867
2024	96.2644
2025 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 93.2014 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Reinsurance — Nonproportional Assumed Liability

Tax Year	Discount Factors (%)
2011	88.5261
2012	91.3783
2013	92.6425
2014	90.1633
2015	91.9672
2016	92.7246
2017	92.6419
2018	94.1716
2019	95.8463
2020	97.3545

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

Reinsurance — Nonproportional Assumed Liability

2021 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Reinsurance — Nonproportional Assumed Financial Lines

Tax Year	Discount Factors (%)
2011	88.8405
2012	87.7511
2013	91.2356
2014	81.3485
2015	91.5590
2016	82.9553
2017	91.7407
2018	92.1114
2019	97.8713
2020	98.3136

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Special Property (Fire, Allied Lines, Inland Marine, Earthquake, Glass, Burglary and Theft)

Tax Year	Discount Factors (%)
2011	95.6046
2012	96.6697

Taxpayers that do not use the composite method of Notice 88–100 should use the following factor to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2013 and later years	98.3136

Taxpayers that use the composite method of Notice 88–100 should use 98.3136 percent to discount salvage recoverable as of the end of the 2013 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

Workers' Compensation

Tax Year	Discount Factors (%)
2011	89.9261
2012	91.7002
2013	92.3933
2014	92.3172
2015	91.0146
2016	89.7934
2017	90.3201
2018	90.0878
2019	91.9867
2020	93.5222

Taxpayers that do not use the composite method of Notice 88–100 should use the following factors to discount salvage recoverable as of the end of the tax year shown with respect to losses incurred in this line of business in the 2011 accident year.

2021	95.0909
2022	96.6917
2023 and later years	98.3136

Workers' Compensation

Taxpayers that use the composite method of Notice 88–100 should use 96.0008 percent to discount salvage recoverable as of the end of the 2021 taxable year with respect to losses incurred in this line of business in 2011 and prior years.

DRAFTING INFORMATION

The principal author of this revenue procedure is Sarah E. Swan of the Office of the Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Ms. Swan at (202) 622–8443 (not a toll free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Redetermination of the Consolidated Net Unrealized Built-In Gain and Loss

REG–133002–10

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 1502 of the Internal Revenue Code. The regulations will apply to corporations filing consolidated returns. The regulations will require a loss group or loss subgroup to redetermine its consolidated net unrealized built-in gain and loss in certain circumstances. This document also invites comments from the public regarding these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by January 23, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–133002–10), 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–133002–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–133002–10).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Grid Glyer (202) 622–7930; concerning submissions of comments and requests for a public hearing, Oluwafunmilayo Taylor (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

To prevent loss trafficking, section 382 imposes a limitation (the section 382 limitation) on a loss corporation's ability to use net operating losses that arose prior to an ownership change. Section 382(b)(1). In addition, if a loss corporation has a net unrealized built-in loss (NUBIL) at the time of an ownership change, built-in losses will be subject to the section 382 limitation as if they were pre-change losses of the loss corporation if they are recognized during the five-year period following the ownership change (the recognition period). Section 382(h)(1)(B). If a corporation has a net unrealized built-in gain (NUBIG) at the time of its ownership change, recognized built-in gains will increase the section 382 limitation if they are recognized during the recognition period. Section 382(h)(1)(A). Rules for determining whether a loss corporation has a NUBIG or NUBIL are found in section 382(h)(3).

Sections 1.1502–90 through 1.1502–99 provide guidance for applying section 382 with respect to a consolidated loss group or loss subgroup. In this preamble, the term loss group refers to both loss groups and loss subgroups. See §§1.1502–91(c)(1) and 1.1502–91(d).

Section 1.1502–91(g) provides rules for determining whether a loss group has a NUBIG or NUBIL. Section 1.1502–91(g)(1) provides that the determination of whether a loss group has a consolidated NUBIG or NUBIL is based on the aggregate amount of the separately determined NUBIGs and NUBILs of each member included in the loss group. Under this rule, unrealized gain or loss with respect to the stock of a member of the loss group (an included subsidiary) is disregarded in determining the separately determined NUBIG or NUBIL.

Explanation of Provisions

The current regulations under §1.1502–91(g) are premised upon the observation that unrecognized gain or loss on included subsidiary stock generally reflects the same economic gain or loss reflected in the subsidiary's assets and that the consolidated return regulations generally prevent the group from taking that duplicative gain or loss into account more than once. This is the case because, if the subsidiary first recognizes the duplicated gain or loss on its assets, §1.1502–32 eliminates the duplicative gain or loss reflected in stock basis. Conversely, if a member first recognizes duplicated loss on the subsidiary stock, §1.1502–36 eliminates the duplicative asset loss. Although the regulations do not specifically address the recognition of duplicated gain on subsidiary stock, taxpayers generally avoid duplicative gain recognition, for example, through actual and section 338 deemed asset sales and through stock elimination transactions, such as section 332 liquidations. Because duplicative gain and loss is expected to be taken into account only once, the determination of NUBIG and NUBIL would be distorted if it included such amounts more than once.

To illustrate, assume P, the common parent of a consolidated group, contributes $100 to S in exchange for S's sole share of stock. S uses the $100 to purchase a truck. The value of the truck then declines to $70. At this point, the stock has a basis of $100 and a value of $70, reflecting a $30 loss. In addition, the truck has a basis of $100 and value of $70, also reflecting a $30 loss. Thus, it would appear the group has $60 of loss available. However, if S sells the truck and the group absorbs the $30 loss, P will reduce its basis in the S stock by $30 under §1.1502–32, and the duplicative stock loss will be eliminated. On the other hand, if P sells its S share before the loss on the truck is recognized and absorbed, the duplicated loss (on either the truck or the stock, as P chooses) will be eliminated by §1.1502–36. As a result, the group takes into account a single $30 economic loss, and the inclusion of both the unrecognized stock loss and the unrecognized asset loss in the NUBIL determination would overstate the amount of loss actually available to the group.

However, if an unrecognized gain or loss on subsidiary stock exceeds the included subsidiary's gain or loss on its assets, disregarding this unduplicated gain or loss on the stock understates the amount that the group may take into account.

To illustrate, assume the same facts as in the previous example except that P originally purchased the S stock for $150 (S's basis in the truck is still $100). In this case, there is $80 of loss available to the group, the $30 loss that is duplicated (reflected in the bases of both the stock and the truck), as well as the $50 unduplicated stock loss. Disregarding P's loss in its S stock causes the group's NUBIL to be understated by $50. These proposed regulations are intended to prevent such understatement.

The current rule is administratively less burdensome to taxpayers and the government than a rule that would require taxpayers to identify and take into account all unduplicated gain and loss on stock of included subsidiaries when determining NUBIG and NUBIL. Nevertheless, the IRS and the Treasury Department believe that the purpose of section 382(h) would be better served by a rule that does not wholly disregard such gain and loss. A rule that takes into account unduplicated gain or loss on stock would avoid both the understating of loss available to the group (when there is unduplicated stock loss) and the overstating of loss trafficking potential (when there is unduplicated stock gain).

The IRS and the Treasury Department are concerned, however, that requiring all consolidated NUBIG and NUBIL determinations to include all unduplicated stock gains and losses would significantly increase the administrative burden on both taxpayers and the government.

Accordingly, the IRS and the Treasury Department propose to modify the current regulations to take into account the unduplicated gain or loss on stock of included subsidiaries, but only to the extent that such gain or loss is taken into account by the group during the recognition period. This will generally be the case only if, within the recognition period, such stock is sold to a nonmember or becomes worthless, or a member takes an intercompany item into account with respect to such stock.

More specifically, the proposed regulations would revise §1.1502–91(g) by adding a rule that would apply when any member of the consolidated group directly or indirectly (for example, through a partnership) takes any amount of gain or loss into account with respect to a share of stock of an included subsidiary (S), whether or not such amount is absorbed. When the rule applies, the loss group would be required to redetermine NUBIG or NUBIL to include any unduplicated built-in gain or loss with respect to the share. As used in these proposed regulations, the term unduplicated built-in stock gain or loss refers to the portion of the built-in stock gain or loss that was not originally reflected in the loss group's NUBIG or NUBIL as unrealized gain or loss on the assets of a lower-tier included subsidiary. The proposed regulations identify unduplicated built-in stock gain or loss by treating the separate NUBIG or NUBIL of each included subsidiary that is lower-tier to S as having been taken into account and absorbed immediately before the change date. These amounts are then deemed to tier-up to tentatively adjust the basis in the S shares under the principles of §1.1502–32. The difference between the tentatively adjusted change-date basis in a share of S stock and the fair market value of the share (as of the change date) is the unduplicated gain or loss in the S share. However, if, immediately before the change date, a member of the loss group has a deferred gain or loss on S stock and that gain or loss is taken into account during the recognition period, the unduplicated portion of such gain or loss is determined as of the date of the transaction in which the deferred gain or loss was recognized, notwithstanding that such date would be prior to the change date.

The loss group then redetermines its NUBIG or NUBIL by including its unduplicated gain or loss on the S share (or shares) with respect to which an amount is taken into account. Under the proposed regulations, the redetermined NUBIG or NUBIL is given effect only immediately before the gain or loss on the stock is taken into account. It has no effect on the treatment of built-in gain or loss that is recognized and taken into account prior to the time that built-in stock gain or loss is taken into account. Thus, for example, the fact that a NUBIL group was redetermined to be a NUBIG group, or that a NUBIL that exceeded the 15 percent threshold amount in section 382(h)(3)(B) no longer exceeds such amount, has no effect on the tax treatment of amounts taken into account prior to the redetermination of NUBIG or NUBIL.

The proposed regulations also reorganize §1.1502–91(g) and revise §1.1502–91(h)(2) and (h)(4) without substantive change.

Effective/Applicability Date

These proposed regulations will apply to amounts taken into account with respect to a share of stock of an included subsidiary on or after the date that final regulations are published in the **Federal Register**, but only with respect to ownership changes occurring on or after October 24, 2011.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13565. Therefore, a regulatory assessment is not required. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations would not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these proposed regulations would primarily affect members of consolidated groups which tend to be large corporations. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for a Public Hearing

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

Drafting Information

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

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Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Section 1.1502–91 also issued under 26 U.S.C. 1502.

Par. 2. Section 1.1502–91 is amended by:

1. Revising paragraph (g)(1).

2. Adding paragraphs (g)(7) and (g)(8).

3. Revising paragraph (h)(2) and the heading of paragraph (h)(4).

4. Adding paragraph (k).

The revisions and additions read as follows:

§1.1502–91 Application of section 382 with respect to a consolidated group.

* * * * *

(g) *Net unrealized built-in gain and loss*—(1) *In general*. The determination of whether a loss group or loss subgroup has a net unrealized built-in gain (NUBIG) or loss (NUBIL) under section 382(h)(3) is based on the aggregate amount of the separately determined NUBIGs or NUBILs (including items of built-in income and deduction described in section 382(h)(6)) of each member that is included in the loss group or loss subgroup, as the case may be, under paragraph (g)(2) of this section. The threshold requirement under section 382(h)(3)(B) applies on an aggregate basis.

(i) *Members included in group*. If a member is not included in the determination of whether a loss group or loss subgroup has a NUBIL under paragraph (g)(2)(ii) or (g)(2)(iv) of this section, that member is not included in the loss group or loss subgroup. See §1.1502–94(c) (relating to built-in gain or loss of a new loss member) and §1.1502–96(a) (relating to the end of separate tracking of certain losses).

(ii) *Determination of separate NUBIG or NUBIL*. For purposes of determining a member's separate NUBIG or NUBIL—

(A) Stock of a subsidiary that is a member of the loss group or loss subgroup (an included subsidiary) is disregarded, except as provided for in paragraph (g)(7) of this section. For this purpose, the term stock includes stock described in section 1504(a)(4) and §1.382–2T(f)(18)(ii) and (f)(18)(iii);

(B) Intercompany obligations are disregarded; and

(C) Deferred amounts, such as amounts deferred under section 267 or §1.1502–13, are built-in items unless they are deferred with respect to—

(*1*) An intercompany obligation; or

(*2*) A share of stock of an included subsidiary; however, if an amount deferred with respect to a share of such stock is taken into account at any time during the recognition period (whether or not any such loss amount is absorbed), NUBIG or NUBIL must be redetermined in accordance with paragraph (g)(7) of this section.

* * * * *

(7) *Redetermination of NUBIG or NUBIL of a loss group or loss subgroup to reflect unduplicated built-in gain or loss with respect to stock of an included subsidiary*—

(i) *In general*. This paragraph (g)(7) applies if, during the recognition period, any member of the consolidated group directly or indirectly takes into account any gain or loss with respect to a share of stock of an included subsidiary (S) that was held by another member of the loss group or loss subgroup immediately before the change date, regardless of whether any such loss is absorbed. If this paragraph (g)(7) applies, the loss group or loss subgroup must redetermine its NUBIG or NUBIL to include any unduplicated built-in gain or loss with respect to the S share in accordance with the provisions of paragraphs (g)(7)(ii) and (g)(7)(iii) of this section. The redetermination is given effect immediately before the time the gain or loss on stock of an included subsidiary is taken into account. The redetermined NUBIG or NUBIL does not affect the tax treatment of transactions taken into account prior to the event that causes a redetermination of NUBIG or NUBIL under this paragraph (g)(7). However, the redetermined NUBIG or NUBIL is effective for all purposes immediately before the gain or loss on stock of an included subsidiary is taken into account. Thus, for example, the redetermined NUBIG or NUBIL is used to determine whether the loss group or subgroup is a NUBIG or NUBIL group, as well as whether the group meets the threshold requirement of section 382(h)(3)(B), at the time of the redetermination.

(ii) *Computation of unduplicated built-in gain or loss with respect to shares of S stock that are subject to this paragraph (g)(7)*. The loss group or loss subgroup computes its unduplicated built-in gain or loss with respect to each share of S stock that is subject to this paragraph (g)(7) by first treating the basis in the share as tentatively adjusted immediately before the change date or, in the case of an amount with respect to S stock that was deferred on the change date, as of the date of the transaction that gave rise to the amount, as though the following occurred immediately before the ownership change or the transaction that gave rise to the deferred amount—

(A) *Deemed recognition of built-in gain or loss of lower-tier included subsidiaries*. The separate NUBIG and NUBIL of S and all included subsidiaries that are lower-tier to S are treated as recognized, taken into account, and absorbed.

(B) *Tiering up of recognized amounts*. All amounts deemed recognized, taken into account, and absorbed under paragraph (g)(7)(ii)(A) of this section are then deemed to tier up under the principles of §1.1502–32 to tentatively adjust the basis in all of the S shares that are subject to this paragraph (g)(7).

(C) *Unduplicated gain or loss with respect to S stock*. If the aggregate tentatively adjusted basis in the S shares subject to this paragraph (g)(7) exceeds the aggregate fair market value of those shares immediately before the change date or, in the case of a deferred amount, on the date of the transaction that gave rise to the item, the excess is the unduplicated loss with respect to those shares. Alternatively, if the aggregate fair market value of the S shares subject to this paragraph (g)(7) exceeds the aggregate tentatively adjusted basis in those shares on such date, the excess is the unduplicated gain with respect to those shares.

(iii) *Redetermination of the group's NUBIG or NUBIL*. The loss group or loss subgroup's redetermined NUBIG or NUBIL is the sum of—

(A) The loss group or loss subgroup's NUBIG or NUBIL as originally determined without regard to the stock of any included subsidiary;

(B) Any unduplicated gain or loss with respect to a share of stock of an included subsidiary that was previously included in the loss group or loss subgroup's NUBIG or NUBIL under this paragraph (g)(7); and

(C) The unduplicated gain or loss on shares of S stock computed under paragraph (g)(7)(ii) of this section.

(iv) *Anti-avoidance rule*. If any person acts with a principal purpose contrary to the purposes of this paragraph (g), to avoid the effect of the rules of this paragraph (g), or to apply the rules of this paragraph (g) to avoid the effect of any other provision of the consolidated return regulations, adjustments must be made as necessary to carry out the purposes of this paragraph (g).

(8) *Examples*. The following examples illustrate the application of the provisions of paragraph (g) of this section. Unless otherwise stated, P is the common parent of a consolidated group that is a loss group and all members of the P group are included subsidiaries with respect to the loss group. P can establish that its gains are recognized built-in gains; P cannot establish that its losses are not recognized built-in losses. In addition, the threshold requirement of section 382(h)(3)(B) is satisfied. All other relevant facts are set forth in the examples.

Example 1. *Basic application of provision*. (i) *Facts*. On January 1, Year 1, P owns the sole outstanding share of S stock (basis $210, value $160) and the sole outstanding share of M stock. S owns the sole outstanding share of S1 stock (basis $100, value $80) and Truck (basis $70, value $80). S1 owns three of the five outstanding shares of S2 common stock (basis $40, value $20 for each share; thus, basis $120, value $60 in the aggregate). S2 owns Truck 2 (basis $70, value $40) and Truck 3 (basis $30, value $40). M owns the fourth of the five outstanding shares of S2 stock. X, a nonmember of the P group, owns the fifth outstanding share of S2 stock. January 1, Year 1, is a change date for the P group.

(ii) *Determination of the separate NUBIG or NUBIL of each member of the P loss group*. (A) *S2's separate NUBIG or NUBIL*. S2's assets are Truck 2 (with a built-in loss of $30) and Truck 3 (with a built-in gain of $10); therefore, S2 has a NUBIL of $20.

(B) *S1's separate NUBIG or NUBIL*. S1's only assets are the shares of S2 stock, which are disregarded under paragraph (g)(1)(ii)(A) of this section; therefore, S1 has a NUBIG or NUBIL of zero.

(C) *S's separate NUBIG or NUBIL*. S's assets are Truck (with a built-in gain of $10) and the share of S1 stock (which is disregarded); therefore, S has a NUBIG of $10.

(D) *M's separate NUBIG or NUBIL*. M's only asset is the share of S2 stock, which is disregarded under paragraph (g)(1)(ii)(A) of this section; therefore, M has a NUBIG or NUBIL of zero.

(E) *P's separate NUBIG or NUBIL*. P's only assets are the shares of M and S stock, which are disregarded; therefore, P has a NUBIG or NUBIL of zero.

(iii) *Determination of the P group's NUBIG or NUBIL*. The P group has a NUBIL of $10, reflecting the sum of S2's $20 NUBIL and S's $10 NUBIG.

Example 2. *Transfer of shares of stock of an included subsidiary during recognition period*. (i) *Sale to nonmember*. (A) *Facts*. The facts are the same as in *Example 1*. In addition, in Year 4, S sells its share of S1 stock for $65 to an unrelated party. At the time of the sale, S's basis in the share had been reduced to $90 due to adjustments for depreciation on S2's assets that tiered up under §1.1502–32. (No adjustments are made to S's basis in the S1 share under §1.1502–36, including by reason of an election to waive stock loss or reattribute losses.) As a result of the sale of the S1 share during the recognition period, the P group must redetermine its NUBIL under paragraph (g)(7) of this section.

(B) *Redetermination of the P group's NUBIG or NUBIL*. (*1*) *Unduplicated built-in gain or loss with respect to S1 share*. Under paragraph (g)(7)(ii)(A) of this section, the unduplicated built-in gain or loss with respect to the S1 share sold in Year 4 is computed by first treating the separate NUBIG or NUBIL of S1 and S2 (the only included subsidiary that is lower-tier to S1) as having been recognized, taken into account, and absorbed immediately before the change date. Under paragraph (g)(7)(ii)(B) of this section, those amounts are then treated as tiering up under the principles of §1.1502–32 and tentatively adjusting S's basis in its S1 share, in order to identify the unduplicated gain or loss in the basis of the share under paragraph (g)(7)(ii)(C) of this section. S1 has no separate NUBIG or NUBIL to be treated as recognized, taken into account, and absorbed. S2 has a $20 separate NUBIL that is treated as recognized, taken into account, and absorbed and that is then treated as tiering up to adjust S's basis in the S1 share under the principles of §1.1502–32. As a result, $12 of S2's $20 NUBIL would be treated as tiering up to S1 through the three S2 shares (of the total five outstanding) held by S1, and that $12 would then be treated as tiering up through S1 to tentatively adjust S's basis in the S1 share. S's tentatively reduced basis in the S1 share is therefore $100 - $12, or $88. Because the tentatively reduced basis of the share exceeds the value of the share by $8 ($88 - $80), S has an $8 unduplicated loss in its basis in its S1 stock.

(*2*) *Redetermined NUBIG or NUBIL of the P group*. Immediately before S takes into account the $25 loss on the sale of its share of S1 stock, the P group's NUBIL is redetermined to be $18, the sum of S2's NUBIL of $20, S1's NUBIL of $0, S's NUBIG of $10, P's NUBIG or NUBIL of $0, M's NUBIG or NUBIL of $0, and the $8 unduplicated loss in the S1 stock.

(C) *Effect of redetermination*. Of the $25 loss on the sale of the S1 share, $20 is recognized built-in loss, but the group only has an $18 NUBIL and so only $18 of the recognized built-in loss is subject to limitation under section 382.

(ii) *Nonrecognition transfer to member followed by sale to nonmember*. The facts are the same as in paragraph (i)(A) of this *Example 2*, except that, in Year 3, M1 joined the P group and S transferred its share of S1 stock to M1 in a transaction qualifying under section 351; as a result, it is M1, not S, that sells the S1 share to X in Year 4. The analysis and results are the same as in paragraphs (i)(B) and (i)(C) of this *Example 2* because this section applies when any member of the group recognizes gain or loss with respect to stock of an included subsidiary that was held by a member of the loss group immediately before the change date.

Example 3. *Recognition of built-in loss prior to stock sale*. (i) *Facts*. The facts are the same as in paragraph (i)(A) of *Example 2* except that, in addition, in Year 2, S2 sold Truck 2 and recognized the $30 built-in loss on Truck 2, and the P group absorbed the $30 loss. The loss is a recognized built-in loss under section 382(h)(2)(B) and thus subject to limitation to the extent of the originally determined $10 NUBIL.

(ii) *Redetermination of the P group's NUBIG or NUBIL*. (A) *Unduplicated built-in gain or loss with respect to the S1 share*. Because unduplicated stock gain or loss is computed immediately before the change date, the unduplicated stock loss is $8 for the reasons set forth in paragraph (i)(B)(*1*) of *Example 2*.

(B) *Redetermined NUBIG or NUBIL of the P group*. The computation of the P group's redetermined NUBIG or NUBIL is the same as in paragraph (i)(B)(*2*) of *Example 2*, except that the $30 of recognized built-in loss in Year 2 reduces the P group's $10 NUBIL (before NUBIL is redetermined under paragraph (g)(7) of this section) to zero. As a result, immediately before the sale of the S1 share, the P group's NUBIL is redetermined to be $8, which is the sum of zero and the $8 unduplicated loss in the S1 stock.

(iii) *Effect of redetermination*. Of the $25 loss on the sale of the S1 share, $20 is recognized built-in loss, but the group only has an $8 NUBIL and so only $8 of the recognized built-in loss is subject to limitation under section 382. The treatment of the loss recognized on the Year 2 sale of Truck 2 is not affected by the Year 4 redetermination.

Example 4. *Sale of less than all shares of stock of an included subsidiary*. (i) *Facts*. The facts are the same as in paragraph (i)(A) of *Example 2*, except that S1 has ten shares of stock outstanding, designated Share 1 through Share 10, all of which are owned by S. S's basis in Share 1 is $15.50, and S's basis in Share 2 is $4.50. In addition, instead of selling its one share of S1 stock, on January 1, Year 4, S sells Share 1 and Share 2 to an unrelated party for $16 (their aggregate fair market value).

(ii) *Redetermination of the P group's NUBIG or NUBIL.* (A) *Unduplicated built-in gain or loss with respect to S1 Share 1 and S1 Share 2.* The analysis is the same as in paragraph (i)(B)(*1*) of *Example 2* except that the unduplicated loss is $1.60, computed as the excess of $17.60 ($20 aggregate basis in the shares that are sold, tentatively reduced by $2.40, the shares' portion (2/10) of the $12 tentative adjustment that tiered-up from S2) over $16 (the shares' aggregate value).

(B) *Redetermined NUBIG or NUBIL of the P group.* The P group's redetermined NUBIL is $11.60, which is the sum of S2's NUBIL of $20, S1's NUBIL of $0, S's NUBIG of $10, P's NUBIG or NUBIL of $0, M's NUBIG or NUBIL of $0, and the unduplicated stock loss of $1.60.

(C) *Effect of redetermination.* Of the $4 loss recognized on the Year 4 sale of Share 1 and Share 2, all $4 is recognized built-in loss. The group's redetermined NUBIL is $11.60, and thus all $4 of the $4 recognized built-in loss is subject to limitation under section 382.

Example 5. NUBIL redetermined to be NUBIG. (i) *Disposition of stock of included member.* (A) *Facts.* On January 1, Year 1, P owns the sole outstanding share of S stock (basis $10, value $100). S owns Truck 1 (basis $65, value $50) and Truck 2 (basis $45, value $50). January 1, Year 1, is a change date for the P group. In Year 3, P sells its S share for $100.

(B) *Determination of the P group's NUBIG or NUBIL on change date.* S's assets are Truck 1 (with a built-in loss of $15) and Truck 2 (with a built-in gain of $5); therefore S has a separate NUBIL of $10. P's sole asset is the share of S stock, which is disregarded; therefore, P has a separate NUBIG or NUBIL of zero. Accordingly, on the change date, the P group has a NUBIL of $10, reflecting the sum of S's $10 NUBIL and P's $0 NUBIG/NUBIL.

(C) *Redetermination of the P group's NUBIG or NUBIL on disposition of stock of included subsidiary.* (*1*) *Unduplicated built-in gain or loss with respect to the S share.* Under paragraph (g)(7)(ii)(A) of this section, the unduplicated built-in gain or loss with respect to the S share sold in Year 3 is computed by first treating S's $10 NUBIL as having been recognized, taken into account, and absorbed immediately before the ownership change. Then, under paragraph (g)(7)(ii)(B) of this section, S's $10 NUBIL is treated as tentatively adjusting P's basis in the S share under the principles of §1.1502–32. Accordingly, P's tentatively reduced basis in the S share is $10 - $10, or $0. Further, the value of the S share was $100 immediately before the change date. The share's $100 value exceeds the $0 tentatively reduced basis in the share by $100, and thus P has a $100 unduplicated gain in its S stock.

(*2*) *Redetermined NUBIG or NUBIL of the P group.* Immediately before P takes into account the $90 gain on the sale of its share of S stock, the P group's $10 NUBIL is redetermined to be a $90 NUBIG, the sum of S's NUBIL of $10 and the unduplicated gain in the S stock of $100.

(D) *Effect of redetermination.* Of the $90 gain P recognized on the sale of the S share, all $90 is recognized built-in gain and therefore, under section 382(h)(2)(A), the group's section 382 limitation is increased by $90.

(ii) *Disposition of loss asset prior to disposition of stock of included subsidiary.* (A) *Facts.* The facts are the same as in paragraph (i)(A) of this *Example 5*, except that, in addition, in Year 2, S sells Truck 1 for $50, recognizing a $15 loss that is taken into account and absorbed. As a result of the $15 loss absorption, P's basis in the S share is reduced to an excess loss account of $5 in Year 2 and, thus, when P sells the S share in Year 3, P recognizes $105 gain on the sale ($100 sale proceeds + $5 excess loss account recapture).

(B) *Determination of the P group's NUBIG or NUBIL on change date.* For the reasons set forth in paragraph (i)(B) of this *Example 5*, the P group has a NUBIL of $10 on the change date. Accordingly, S's $15 loss on Truck 1 is a recognized built-in loss under section 382(h)(2)(B), and therefore subject to limitation to the extent of the $10 NUBIL.

(C) *Redetermination of the P group's NUBIG or NUBIL on disposition of stock of included subsidiary.* (*1*) *Unduplicated built-in gain or loss with respect to the S share.* For the reasons set forth in paragraph (i)(C)(*1*) of this *Example 5*, the unduplicated built-in gain with respect to the S share is $100.

(*2*) *Redetermined NUBIG or NUBIL of the P group.* For the reasons set forth in paragraph (i)(C)(*2*) of this *Example 5*, the P group's NUBIG is redetermined to be $90. Immediately before P takes into account the $100 gain on the sale of its share of S stock, the P group's $10 NUBIL is redetermined to be a $90 NUBIG, the sum of S's NUBIL of $10 and P's NUBIG of $100.

(D) *Effect of redetermination.* Of the $105 gain P recognized on the sale of the S share, $90 is recognized built-in gain and therefore, under section 382(h)(2)(A), the group's section 382 limitation is increased by $90. The redetermination of P's original $10 NUBIL to a $100 NUBIG in Year 4 has no effect on the treatment of the Year 2 recognized built-in loss from the sale of Truck 1.

(h) * * *

(2) *Disposition of stock or an intercompany obligation of a member.* Built-in gain or loss recognized by a member on the disposition of stock (including stock described in section 1504(a)(4) and §1.382–2T(f)(18)(ii) and (f)(18)(iii)) of another member is treated as a recognized gain or loss for purposes of section 382(h)(2) (unless disallowed) without regard to the extent to which such gain or loss was included in the determination of a net unrealized built-in gain or loss under paragraph (g) of this section. Built-in gain or loss recognized by a member with respect to an intercompany obligation is treated as recognized gain or loss only to the extent (if any) that the transaction gives rise to aggregate income or loss within the consolidated group.

* * * * *

(4) *Successor assets.* * * *

* * * * *

(k) *Effective/Applicability date.* Paragraphs (g)(1), (g)(7), (g)(8), (h)(2) and (h)(4) of this section apply to amounts taken into account with respect to a share of stock of an included subsidiary on or after the date that final regulations are published in the **Federal Register**, but only with respect to ownership changes occurring on or after October 24, 2011. For amounts taken into account with respect to a share of stock of an included subsidiary not described in the preceding sentence, see §§1.1502–91(g) and 1.1502–91(h) as contained in 26 CFR part 1 in effect on April 1, 2011.

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

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Tribal Economic Development Bonds — Request for Public Comment on Volume Cap Allocation Process and Optional Extension of Deadline to Issue Bonds

Announcement 2011–71

SECTION 1. BACKGROUND

Section 1402 of Title I of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009), added § 7871(f) to the Internal Revenue Code (the "Code"). In general, the purpose of § 7871(f) is to give Indian tribal governments greater flexibility to use tax-exempt bonds to finance economic development projects, through the issuance of tribal economic development bonds ("Tribal Economic Development Bonds"), than is allowable under the existing standard of § 7871(c). Section 7871(f)(1) provides that the Treasury Department shall allocate the $2 billion national bond volume limitation authority ("Volume Cap") for Tribal Economic Development Bonds among the Indian tribal governments in such manner as the Treasury Department, in consultation with the Secretary of the Interior, determines appropriate.

In Notice 2009–51, 2009–28 I.R.B. 128 (July 13, 2009), the Treasury Department and the IRS addressed administrative procedures for initial allocations of the $2 billion Volume Cap.

On September 15, 2009, the IRS announced allocations in an aggregate amount of approximately $1 billion of Volume Cap in the first tranche of allocation (the "First Allocation") of authority to issue Tribal Economic Development Bonds. Section 7(f) of Notice 2009–51 provided that if bonds were not issued by December 31, 2010, for any or all of the allocation received by an Indian tribal government from the First Allocation, then such allocation would be treated as forfeited. In Announcement 2010–88, 2010–47 I.R.B. 753 (November 22, 2010), the IRS announced an automatic six-month extension of the administrative deadline to issue bonds under bonding authority from the First Allocation from December 31, 2010, to June 30, 2011, and a process by which Indian tribal governments could receive an additional six-month extension of the administrative deadline to issue bonds under bonding authority from the First Allocation from June 30, 2011, to December 31, 2011. Section 3 of Announcement 2010–88 provides that an allocation received pursuant to the First Allocation shall be treated as forfeited if bonds are not issued by June 30, 2011, for an allocation with respect to which the Indian tribal government does not receive an additional extension as described in the announcement, or by December 31, 2011, for an allocation with respect to which the Indian tribal government receives an additional extension.

On February 9, 2010, the IRS announced allocations in an aggregate amount of approximately $1 billion of Volume Cap in the second tranche of allocation (the "Second Allocation") of authority to issue Tribal Economic Development Bonds. Section 7(f) of Notice 2009–51 provides that if bonds are not issued by December 31, 2011, for any or all of the allocation received by an Indian tribal government from the Second Allocation, then such allocation will be treated as forfeited.

Both Notice 2009–51 and Announcement 2010–88 provide that any allocation amounts treated as forfeited may be available for allocation by the IRS as part of an allocation process to be announced by the IRS at some future date. The IRS estimates that, as of the date of this announcement, up to 95% or more of the $2 billion in Volume Cap authorized for Tribal Economic Development Bonds may become available for reallocation as of January 1, 2012.

SECTION 2. REQUEST FOR PUBLIC COMMENT ON VOLUME CAP ALLOCATION PROCESS

The IRS seeks public comment regarding the reallocation of available amounts of Volume Cap for Tribal Economic Development Bonds in order to facilitate issuance of such bonds by Indian tribal governments. These available amounts include amounts that were previously allocated and have been, or subsequently are, forfeited under Notice 2009–51 and Announcement 2010–88. The IRS seeks public comment from Indian tribal governments and other interested members of the public regarding appropriate methods to employ and criteria to consider in reallocating this Volume Cap, based on facts and circumstances affecting Indian tribal governments and any other relevant factors. The public comment deadline is December 12, 2011.

On July 12, 2010, the Treasury Department published a notice in the Federal Register (75 Fed. Reg. 39730 (July 12, 2010)) soliciting comments regarding the Tribal Economic Development Bonds provision in § 7871(f) of the Code. The Treasury Department received 27 responses to the notice from various Indian tribal governments, tribal organizations, and individual taxpayers. One question in the notice asked about Volume Cap and specifically referenced the $2 billion Tribal Economic Development Bonds authorization as an example. The responses presented a wide variety of thoughtful comments and suggestions regarding Volume Cap.

The IRS is considering potential methods of reallocating Volume Cap that would use an application process and criteria similar to those used to allocate Volume Cap under Notice 2009–51. However, in response to tribal and public input and to facilitate availability of Volume Cap for projects, the IRS is considering improvements to the process and reallocation criteria. The IRS is seeking additional input on the processes and criteria to be included in a method for reallocation. In addition to other processes and criteria, the IRS is considering improvements relating to the following categories of information to increase the likelihood that an allocation will result in issuance of Tribal Economic Development Bonds. The IRS seeks general comments on each of these proposed improvements. Certain additional comments about a proposed improvement are also specifically requested below.

- *Project cost.* The application process may require information regarding the estimated cost of the project, including the portion to be financed by Tribal Economic Development Bonds and any portion to be financed by other sources, if any, and how the estimated cost was determined.
- *Plan for financing.* The application process may require information on the plan for financing for the project, including the following: (1) all reasonably expected sources and uses of financing and the expected security and sources of payment for the bonds, (2) the anticipated date of issuance of the Tribal Economic Development Bonds and any other source of financing, (3) the issuer's reasonably expected schedule for spending proceeds of the Tribal Economic Development Bonds and any other financing taking into account such things as required permits, engineering studies, architectural plans, and other commitments or studies that are required in order for the project to proceed with due diligence, (4) whether amounts to be made available by the Tribal Economic Development Bonds plus other available funds (whether obtained through financing or otherwise) are sufficient to pay for the cost of the project, (5) whether the Tribal Economic Development Bonds are marketable taking into account the type and location of project, the creditworthiness of the applicant, and other considerations, and (6) whether the applicant will be able to obtain financing from other sources if required for project costs. *The IRS seeks specific comments on appropriate evidence to show the applicant's*

ability to obtain the expected security and sources of payment for the bonds.

- *Evidence of readiness to issue.* The application process may require information regarding an allocation recipients' ability to use the allocation to issue Tribal Economic Development Bonds prior to the forfeiture deadline. A recipient's ability to use the allocation to issue Tribal Economic Development Bonds prior to the forfeiture deadline may be indicated by information relating to project cost and readiness, marketability of Tribal Economic Development Bonds, and availability of other required financing. Additionally, the application process may require a demonstration that, assuming receipt of the requested Volume Cap and based on the project and financing structure described in the application (including the proposed security and source of payment for the bonds), the proposed bonds are expected to satisfy, upon issuance, all applicable requirements for Tribal Economic Development Bonds under federal tax law (for example, this could be demonstrated through discussion with or preliminary tax analysis from a recognized public finance attorney or law firm). *The IRS seeks comments on the appropriate evidence that will ensure that recipients are ready to issue bonds and to use the proceeds of such bonds if an allocation is received. Should the IRS require documentation supporting the readiness of an applicant to issue the bonds and to construct the project? If so, what documents should be required?*
- *Allocation process.* The IRS is considering a two-step allocation process. The first step would be to provide applicants with written commitments for an allocation award in the order of priority based on the application submission date and amount requested. The second step – the actual allocation – would be made a certain number of days before closing, for instance, 60 days before closing on the loan or issuance of the bonds. *The IRS seeks specific comments on the number of days an allocation would be "locked in" before closing, as well as the maximum number of days from the date of the allocation award commitment letter to the date of the actual allocation.*
- *Reduced allocations.* The IRS is considering a process to award allocations less than the amount requested if the total amount of Volume Cap requested exceeds the remaining amount of unused and unallocated Volume Cap. Generally, a reduced allocation would not be awarded unless the applicant demonstrates that it has the additional financial resources to complete the project.

Consistent with Executive Order 13175, the IRS expects to hold multiple telephone consultations during the period commencing on the publication of this Announcement and ending December 12, 2011. After the consultations are completed and the comments are received and considered, the IRS expects to provide information about the determined process through published guidance.

SECTION 3. SUBMISSION OF COMMENTS.

Interested persons should send comments by mail to Internal Revenue Service, CC:PA:LPD:PR (Announcement 2011–71), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, D.C. 20224, Attn: CC:PA:LPD:PR (Announcement 2011–71). Comments may also be transmitted electronically via the following e-mail address: *Notice.Comments@irscounsel.treas.gov*. Please include "Announcement 2011–71" in the subject line of any electronic communication. Written comments should be received by December 12, 2011. All submissions will be available for public inspection and copying.

SECTION 4. OPTIONAL EXTENSION OF ADMINISTRATIVE DEADLINE TO ISSUE BONDS

Except as otherwise provided in this announcement, an Indian tribal government that received an allocation of volume cap from the First Allocation (if such Indian tribal government received an extension of the administrative deadline to issue bonds pursuant to such allocation to December 31, 2011, pursuant to the process described in Announcement 2010–88) or the Second Allocation may submit a written request for an extension of time of three months from December 31, 2011, to March 31, 2012, to issue Tribal Economic Development Bonds pursuant to those allocations. Indian tribal governments must submit requests for such extensions to the IRS by November 30, 2011. A request for an extension must include: (1) a copy of the allocation letter from the IRS for the allocation to which the request relates; and (2) statements from an official of the Indian tribal government duly authorized to execute legal documents on behalf of the Indian tribal government in making the request, made under penalty of perjury, including (a) a statement explaining the reason for the extension of time, (b) a statement that the Indian tribal government reasonably expects to issue Tribal Economic Development Bonds pursuant to such allocation on or before March 31, 2012, to finance the project described in the Indian tribal government's original application ("Application"), (c) a statement that upon issuance of the bonds, the Indian tribal government will proceed with due diligence to spend the proceeds of the bonds for the qualified project described in the Application, and (d) a statement that such official has knowledge of the relevant facts and circumstances relating to the request and the Application, has examined the request and the Application, and that the information contained in the request and the Application is true, correct, and complete. The request for an extension must also include documentation that demonstrates the reasonableness of the statements that the bonds are expected to be issued on or before March 31, 2012 and that, subsequent to the bond issuance, the Indian tribal government will proceed with due diligence to expend bond proceeds for the qualified project described in the Application. Extensions are not expected to be granted unless the request demonstrates that there is both a substantial and reasonable basis for the expectation of bond issuance on or before March 31, 2012 and an expectation of proceeding with due diligence to expend the bond proceeds for the project.

A request for an extension must be submitted by mail to the Internal Revenue Service (IRS), SE:T:GE:TEB:CPM, Attention: Mark Helfer, 1122 Town & Country Commons, Chesterfield, Missouri 63017.

A request for an extension should not include an inquiry relating to deviations from information submitted in the Application under Section 8 of Notice 2009–51. Section 8 of Notice 2009–51 provides that an allocation of Volume Cap is valid notwithstanding insubstantial deviations from the information submitted in the Application. Section 8 of Notice 2009–51 also describes criteria applicable to determinations of whether a deviation with respect to the information submitted in the Application is insubstantial, as well as procedures to apply for approval of specific insubstantial deviations.

For requests submitted in compliance with the requirements described in this Announcement for extensions from December 31, 2011, to March 31, 2012, the IRS expects to confirm the extensions by December 31, 2011.

If bonds are not issued by March 31, 2012, for any or all of an allocation of Volume Cap received by an Indian tribal government with respect to which the Indian tribal government receives an extension as described in this section, then any part of such allocation that is not used is treated as forfeited. Any allocation amounts treated as forfeited may be available for reallocation by the IRS as part of an allocation process already announced or to be announced by the IRS at some future date.

SECTION 5. EFFECT ON OTHER TIMING REQUIREMENTS

Except as otherwise provided in this announcement, this announcement does not modify any provisions relating to the forfeiture of allocations of Volume Cap received by Indian tribal governments pursuant to the First Allocation or the Second Allocation.

SECTION 6. DRAFTING INFORMATION

The principal authors of this announcement are Todd Mitchell of the IRS office of Tax Exempt Bonds and Telly Meier of the IRS office of Indian Tribal Governments. However, other personnel from the IRS and Treasury Department participated in its development. For further information regarding this announcement, contact Debbie Cho of the IRS office of Tax Exempt Bonds at (714) 347–9431 (not a toll-free call).

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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