Internal Revenue
bulletin

Bulletin No. 2013-38
September 16, 2013

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. 9630, page 199.

These final regulations address concerns that taxpayers are taking unreasonable positions with respect to the determination of discount rates in applying the income method to determine taxable income in connection with cost sharing arrangements. The final regulations provide guidance on a discount rate-related specified application of the income method and a discount rate-related best method consideration for evaluating an application of the income method.

REG–113792–13, page 211.

These proposed regulations provide guidance on the tax credit available to certain small employers that offer health insurance coverage to their employees under section 45R of the Code, enacted by the Patient Protection and Affordable Care Act. Comments requested by November 25, 2013.

Rev. Proc. 2013–33, page 209.

This revenue procedure provides domestic asset/liability percentages and domestic investment yields needed by foreign life insurance companies and foreign property and liability insurance companies to compute their minimum effectively connected net investment income under section 842(b) of the Code for taxable years beginning after December 31, 2011.

EMPLOYEE PLANS

REG–113792–13, page 211.

These proposed regulations provide guidance on the tax credit available to certain small employers that offer health insurance coverage to their employees under section 45R of the Code, enacted by the Patient Protection and Affordable Care Act. Comments requested by November 25, 2013.

ADMINISTRATIVE

Rev. Rul. 2013–17, page 201.

This revenue ruling amplifies and clarifies Revenue Ruling 58–66. In Revenue Ruling 58–66, 1958–1 C.B. 60, the Internal Revenue Service determined the status of individuals living in a common-law marriage for Federal income tax purposes. This revenue ruling determines the status of individuals of the same-sex who are lawfully married under the laws of a state that recognizes such marriages for Federal tax purposes.

T.D. 9631, page 205.

These final regulations authorize the Secretary of the Treasury to furnish, upon written request by the Secretary of Commerce, additional return information as the Secretary of Treasury may prescribe by regulation to officers and employees of the Bureau of the Census for the purposes of, but only to the extent necessary in, the structuring of censuses and conducting related statistical activities authorized by law.

Notice 2013–55, page 207.

This notice updates the appendix to Notice 2013–1, which lists the Indian tribes who have settled tribal trust cases against the United States. Notice 2012–60 originally was published in I.R.B. 2012–41 (October 9, 2012). Notice 2012–60 was superseded by Notice 2013–1 I.R.B. 2013–3, and the appendix to Notice 2013–1 was superseded by Notice 2013–16 (I.R.B. 2013–14), which was superseded by Notice 2013–36. Four additional tribes have settled cases against the United States since the publication of Notice 2013–36 so the appendix to Notice 2013–1 is updated and Notice 2013–36 is superseded.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

Rev. Proc. 2013–31, page 208.
This procedure publishes the amounts of unused housing credit carryovers allocated to qualified states under section 42(h)(3)(D) of the Code for calendar year 2013.

Announcement 2013–40, page 226.
This announcement contains information about how to obtain Publications 1220, 1187, 1239, 4810 and 1516, updates the electronic filing (FIRE) testing date, and advises customers of the redesigned website.

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.

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.

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

Section 42.—Low-Income Housing Credit

Allocation rules for post-1989 state housing credit ceiling amounts. Guidance is provided to state housing credit agencies of qualified states that request an allocation of unused housing credit carryover under section 42(h)(3)(D) of the Code. See Rev. Proc. 2013-31, page 208.

Section 482.—Allocation of Income and Deductions Among Taxpayers

T.D. 9630

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Use of Differential Income Stream as an Application of the Income Method and as a Consideration in Assessing the Best Method

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that implement the use of the differential income stream as a consideration in assessing the best method in connection with a cost sharing arrangement and as a specified application of the income method.

DATES: *Effective Date:* These regulations are effective on August 27, 2013.

Applicability Dates: For dates of applicability, see §1.482–7(l).

FOR FURTHER INFORMATION CONTACT: Mumal R. Hemrajani, (202) 622–3800 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

Final cost sharing regulations were published in the **Federal Register** (76 FR 80082) (REG–144615–02) (TD 9568) on December 22, 2011 ("final cost sharing regulations"). Corrections to the final cost sharing regulations were published in the **Federal Register** (77 FR 3606, 77 FR 8143, and 77 FR 8144) on January 25, 2012, and February 14, 2012. Certain guidance regarding application of the differential income stream approach was reserved in the final cost sharing regulations because the Treasury Department and the IRS believed it was appropriate to solicit public comments on that subject matter.

Temporary cost sharing regulations and a notice of proposed rule making on application of the differential income stream approach were published in the **Federal Register** (76 FR 80249 and 76 FR 80309) (REG–145474–11) (TD 9569) on December 23, 2011 ("temporary and proposed regulations"). Comments were submitted, which we address in this Preamble. No request for a public hearing was received. The Treasury Department and the IRS are finalizing the proposed regulations without change.

Explanation of Provisions

The Treasury Department and the IRS were aware that some taxpayers were taking unreasonable positions in applying the income method by using relatively low licensing discount rates, and relatively high cost sharing discount rates, without sufficiently considering the appropriate interrelationship of the discount rates and financial projections. This practice gave rise to material distortions and the potential for PCT Payments not in accordance with the arm's length standard. To address these problems, the temporary and proposed regulations provided additional guidance on evaluating the results of an application of the income method (§1.482–7T(g)(2)(v)(B)(*2*) (Implied discount rates) and (g)(4)(vi)(F)(*2*) (Use of differential income stream as a consideration in assessing the best method)), and provided a new specified application of the income method for directly determining the arm's length charge for PCT Payments (§1.482–7(g)(4)(v) (Application of income method using differential income stream)).

Comments noted that §1.482–7T(g)(4)(vi)(F)(*2*) explicitly provides that the implied discount rate may be used to evaluate the reliability of the corresponding actual discount rates associated with the licensing and cost sharing alternatives, but no similar explicit provision is contained in §1.482–7(g)(4)(v) regarding the use of actual discount rates to evaluate the reliability of the corresponding implied discount rate. Thus, the comments suggested that such an explicit provision be adopted. The Treasury Department and the IRS agree that, depending on facts and circumstances, separately derived discount rates pursuant to a general application of the income method may yield a more reliable measure of an arm's length result than a proffered discount rate pursuant to a differential income stream application of the income method in a particular case. In such a case, however, the best method rule already would require a determination of PCT Payments under the method, and the application of such method, that, under the facts and circumstances, provides the most reliable measure of an arm's length result. See, for example, §§1.482–1(c)(1) and 1.482–7(g)(4)(vi)(A). Accordingly, the suggested change was not adopted.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration (CCASBA) for comment on their impact on small business. CCASBA had no comments.

Drafting Information

The principal author of these regulations is Mumal R. Hemrajani, Office of the Associate Chief Counsel (International). However, other personnel from the Internal Revenue Service and the Treasury Department participated in the development of the regulations.

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Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.482–7 is amended by revising paragraph (g)(2)(v)(B)(*2*), adding paragraph (g)(4)(v), revising paragraphs (g)(4)(vi)(F)(*2*), (g)(4)(viii) *Example 8*, adding *Example 9*, and revising paragraph (l).

§1.482–7 Methods to determine taxable income in connection with a cost sharing arrangement.

* * * * *

(g)* * *

(2)* * *

(v)* * *

(B)* * *

(*2*) *Implied discount rates*. In some circumstances, the particular discount rate or rates used for certain activities or transactions logically imply that certain other activities will have a particular discount rate or set of rates (implied discount rates). To the extent that an implied discount rate is inappropriate in light of the facts and circumstances, which may include reliable direct evidence of the appropriate discount rate applicable for such other activities, the reliability of any method is reduced where such method is based on the discount rates from which such an inappropriate implied discount rate is derived. See paragraphs (g)(4)(vi)(F)(*2*) and (g)(4)(viii), *Example 8* of this section.

* * * * *

(4) * * *

(v) *Application of income method using differential income stream*. In some cases, the present value of an arm's length PCT Payment may be determined as the present value, discounted at the appropriate rate, of the PCT Payor's reasonably anticipated stream of additional positive or negative income over the duration of the CSA Activity that would result (before PCT Payments) from undertaking the cost sharing alternative rather than the licensing alternative (differential income stream). See *Example 9* of paragraph (g)(4)(viii) of this section.

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(vi) * * *

(F) * * *

(*2*) *Use of differential income stream as a consideration in assessing the best method*. An analysis under the income method that uses a different discount rate for the cost sharing alternative than for the licensing alternative will be more reliable the greater the extent to which the implied discount rate for the projected present value of the differential income stream is consistent with reliable direct evidence of the appropriate discount rate applicable for activities reasonably anticipated to generate an income stream with a similar risk profile to the differential income stream. Such differential income stream is defined as the stream of the reasonably anticipated residuals of the PCT Payor's licensing payments to be made under the licensing alternative, minus the PCT Payor's cost contributions to be made under the cost sharing alternative. See *Example 8* of paragraph (g)(4)(viii) of this section.

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(viii) * * *

Example 8. (i) The facts are the same as in *Example 1*, except that the taxpayer determines that the appropriate discount rate for the cost sharing alternative is 20%. In addition, the taxpayer determines that the appropriate discount rate for the licensing alternative is 10%. Accordingly, the taxpayer determines that the appropriate present value of the PCT Payment is $146 million.

(ii) Based on the best method analysis described in *Example 2*, the Commissioner determines that the taxpayer's calculation of the present value of the PCT Payments is outside of the interquartile range (as shown in the sixth column of *Example 2*), and thus warrants an adjustment. Furthermore, in evaluating the taxpayer's analysis, the Commissioner undertakes an analysis based on the difference in the financial projections between the cost sharing and licensing alternatives (as shown in column 11 of *Example 1*). This column shows the anticipated differential income stream of additional positive or negative income for FS over the duration of the CSA Activity that would result from undertaking the cost sharing alternative (before any PCT Payments) rather than the licensing alternative. This anticipated differential income stream thus reflects the anticipated incremental undiscounted profits to FS from the incremental activity of undertaking the risk of developing the cost shared intangibles and enjoying the value of its divisional interests. Taxpayer's analysis logically implies that the present value of this stream must be $146 million, since only then would FS have the same anticipated value in both the cost sharing and licensing alternatives. A present value of $146 million implies that the discount rate applicable to this stream is 34.4%. Based on a reliable calculation of discount rates applicable to the anticipated income streams of uncontrolled companies whose resources, capabilities, and rights consist primarily of software applications intangibles and research and development teams similar to USP's platform contributions to the CSA, and which income streams, accordingly, may be reasonably anticipated to reflect a similar risk profile to the differential income stream, the Commissioner concludes that an appropriate discount rate for the anticipated income stream associated with USP's platform contributions (that is, the additional positive or negative income over the duration of the CSA Activity that would result, before PCT Payments, from switching from the licensing alternative to the cost sharing alternative) is 16%, which is significantly less than 34.4%. This conclusion further suggests that Taxpayer's analysis is unreliable. See paragraphs (g)(2)(v)(B)(*2*) and (g)(4)(vi)(F)(*1*) and (*2*) of this section.

(iii) The Commissioner makes an adjustment of $296 million, so that the present value of the PCT Payments is $442 million (the median results as shown in column 6 of *Example 2*).

Example 9. The facts are the same as in *Example 1*, except that additional data on discount rates are available that were not available in *Example 1*. The Commissioner determines the arm's length charge for the PCT Payment by discounting at an appropriate rate the differential income stream associated with the rights contributed by USP in the PCT (that is, the stream of income in column (11) of *Example 1*). Based on an analysis of a set of public companies whose resources, capabilities, and rights consist primarily of resources, capabilities, and rights similar to those contributed by USP in the PCT, the Commissioner determines that 15% to 17% is an appropriate range of discount rates to use to assess the value of the differential income stream associated with the rights contributed by USP in the PCT. The Commissioner determines that applying a discount rate of 17% to the differential income stream associated with the rights contributed by USP in the PCT yields a present value of $446 million, while applying a discount rate of 15% to the differential income stream associated with the rights contributed by USP in the PCT yields a present value of $510 million. Because the taxpayer's result, $464 million, is within the interquartile range determined by the Commissioner, no adjustments are warranted. See paragraphs (g)(2)(v)(B)(*2*), (g)(4)(v), and (g)(4)(vi)(F)(*1*) of this section.

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(l) *Effective/applicability dates*. Except as otherwise provided in this paragraph (l), this section applies on December 16, 2011. Paragraphs (g)(2)(v)(B)(*2*), (g)(4)(vi)(F)(*2*), and (g)(4)(viii), *Example 8* of this section apply to taxable years beginning on or after December 19, 2011. Paragraphs (g)(4)(v) and (g)(4)(viii), *Example 9* apply to taxable years beginning on or after August 27, 2013.

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§1.482–7T [Removed].

Par. 3. Section 1.482–7T is removed.

Beth Tucker,
Deputy Commissioner for Operations Support.

Approved August 15, 2013.

Mark J. Mazur,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on August 26, 2013, 8:45 a.m., and published in the issue of the Federal Register for August 27, 2013, 78 F.R. 52854)

Section 6013.—Joint Returns of Income by Husband and Wife

This revenue ruling amplifies and clarifies Revenue Ruling 58–66. In Revenue Ruling 58–66, 1958–1 C.B. 60, the Internal Revenue Service determined the status of individuals living in a common-law marriage for Federal income tax purposes. This revenue ruling determines the status of individuals of the same-sex who are lawfully married under the laws of a state that recognizes such marriages for Federal tax purposes.

Rev. Rul. 2013–17

ISSUES

1. Whether, for Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex, if the individuals are lawfully married under state[1] law, and whether, for those same purposes, the term "marriage" includes such a marriage between individuals of the same sex.

2. Whether, for Federal tax purposes, the Internal Revenue Service (Service) recognizes a marriage of same-sex individuals validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the state in which they are domiciled does not recognize the validity of same-sex marriages.

3. Whether, for Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include individuals (whether of the opposite sex or same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and whether, for those same purposes, the term "marriage" includes such relationships.

LAW AND ANALYSIS

1. *Background*

In Revenue Ruling 58–66, 1958–1 C.B. 60, the Service determined the marital status for Federal income tax purposes of individuals who have entered into a common-law marriage in a state that recognizes common-law marriages.[2] The Service acknowledged that it recognizes the marital status of individuals as determined under state law in the administration of the Federal income tax laws. In Revenue Ruling 58–66, the Service stated that a couple would be treated as married for purposes of Federal income tax filing status and personal exemptions if the couple entered into a common-law marriage in a state that recognizes that relationship as a valid marriage.

The Service further concluded in Revenue Ruling 58–66 that its position with respect to a common-law marriage also applies to a couple who entered into a common-law marriage in a state that recognized such relationships and who later moved to a state in which a ceremony is required to establish the marital relationship. The Service therefore held that a taxpayer who enters into a common-law marriage in a state that recognizes such marriages shall, for purposes of Federal income tax filing status and personal exemptions, be considered married notwithstanding that the taxpayer and the taxpayer's spouse are currently domiciled in a state that requires a ceremony to establish the marital relationship. Accordingly, the Service held in Revenue Ruling 58–66 that such individuals can file joint income tax returns under section 6013 of the Internal Revenue Code (Code).

The Service has applied this rule with respect to common-law marriages for over 50 years, despite the refusal of some states to give full faith and credit to common-law marriages established in other states. Although states have different rules of marriage recognition, uniform nationwide rules are essential for efficient and fair tax administration. A rule under which a couple's marital status could change simply by moving from one state to another state would be prohibitively difficult and costly for the Service to administer, and for many taxpayers to apply.

Many provisions of the Code make reference to the marital status of taxpayers. Until the recent decision of the Supreme Court in *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013), the Service interpreted section 3 of the Defense of Marriage Act (DOMA) as prohibiting it from recognizing same-sex marriages for purposes of these provisions. Section 3 of DOMA provided that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

In *Windsor*, the Supreme Court held that section 3 of DOMA is unconstitutional because it violates the principles of equal

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[1] For purposes of this ruling, the term "state" means any domestic or foreign jurisdiction having the legal authority to sanction marriages.

[2] A common-law marriage is a union of two people created by agreement followed by cohabitation that is legally recognized by a state. Common-law marriages have three basic features: (1) A present agreement to be married, (2) cohabitation, and (3) public representations of marriage.

protection. It concluded that this section "undermines both the public and private significance of state-sanctioned same-sex marriages" and found that "no legitimate purpose" overcomes section 3's "purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect[.]" *Windsor*, 133 S. Ct. at 2694–95. This ruling provides guidance on the effect of the *Windsor* decision on the Service's interpretation of the sections of the Code that refer to taxpayers' marital status.

2. *Recognition of Same-Sex Marriages*

There are more than two hundred Code provisions and Treasury regulations relating to the internal revenue laws that include the terms "spouse," "marriage" (and derivatives thereof, such as "marries" and "married"), "husband and wife," "husband," and "wife." The Service concludes that gender-neutral terms in the Code that refer to marital status, such as "spouse" and "marriage," include, respectively, (1) an individual married to a person of the same sex if the couple is lawfully married under state law, and (2) such a marriage between individuals of the same sex. This is the most natural reading of those terms; it is consistent with *Windsor*, in which the plaintiff was seeking tax benefits under a statute that used the term "spouse," 133 S. Ct. at 2683; and a narrower interpretation would not further the purposes of efficient tax administration.

In light of the *Windsor* decision and for the reasons discussed below, the Service also concludes that the terms "husband and wife," "husband," and "wife" should be interpreted to include same-sex spouses. This interpretation is consistent with the Supreme Court's statements about the Code in *Windsor*, avoids the serious constitutional questions that an alternate reading would create, and is permitted by the text and purposes of the Code.

First, the Supreme Court's opinion in *Windsor* suggests that it understood that its decision striking down section 3 of DOMA would affect tax administration in ways that extended beyond the estate tax refund at issue. See 133 S. Ct. at 2694 ("The particular case at hand concerns the estate tax, but DOMA is more than simply a determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous Federal regulations that DOMA controls are laws pertaining to . . . taxes."). The Court observed in particular that section 3 burdened same-sex couples by forcing "them to follow a complicated procedure to file their Federal and state taxes jointly" and that section 3 "raise[d] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses." *Id.* at 2694–2695.

Second, an interpretation of the gender-specific terms in the Code to exclude same-sex spouses would raise serious constitutional questions. A well-established principle of statutory interpretation holds that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems," a court should "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). "This canon is followed out of respect for Congress, which [presumably] legislates in light of constitutional limitations," *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), and instructs courts, where possible, to avoid interpretations that "would raise serious constitutional doubts," *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

The Fifth Amendment analysis in *Windsor* raises serious doubts about the constitutionality of Federal laws that confer marriage benefits and burdens only on opposite-sex married couples. In *Windsor*, the Court stated that, "[b]y creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of Federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect." 133 S. Ct. at 2694. Interpreting the gender-specific terms in the Code to categorically exclude same-sex couples arguably would have the same effect of diminishing the stability and predictability of legally recognized same-sex marriages. Thus, the canon of constitutional avoidance counsels in favor of interpreting the gender-specific terms in the Code to refer to same-sex spouses and couples.

Third, the text of the Code permits a gender-neutral construction of the gender-specific terms. Section 7701 of the Code provides definitions of certain terms generally applicable for purposes of the Code when the terms are not defined otherwise in a specific Code provision and the definition in section 7701 is not manifestly incompatible with the intent of the specific Code provision. The terms "husband and wife," "husband," and "wife" are not specifically defined other than in section 7701(a)(17), which provides, for purposes of sections 682 and 2516, that the terms "husband" and "wife" shall be read to include a former husband or a former wife, respectively, and that "husband" shall be read as "wife" and "wife" as "husband" in certain circumstances. Although Congress's specific instruction to read "husband" and "wife" interchangeably in those specific provisions could be taken as an indication that Congress did not intend the terms to be read interchangeably in other provisions, the Service believes that the better understanding is that the interpretive rule set forth in section 7701(a)(17) makes it reasonable to adopt, in the circumstances presented here and in light of *Windsor* and the principle of constitutional avoidance, a more general rule that does not foreclose a gender-neutral reading of gender-specific terms elsewhere in the Code.

Section 7701(p) provides a specific cross-reference to the Dictionary Act, 1 U.S.C. § 1, which provides, in part, that when "determining the meaning of any Act of Congress, unless the context indicates otherwise, . . . words importing the masculine gender include the feminine as well." The purpose of this provision was to avoid having to "specify males and females by using a great deal of unnecessary language when one word would express the whole." Cong. Globe, 41st Cong., 3d Sess. 777 (1871) (statement of Sen. Trumbull, sponsor of Dictionary Act). This provision has been read to require construction of the phrase "husband and wife" to include same-sex married couples. *See Pedersen v. Office of Personnel Mgmt.*, 881 F. Supp. 2d 294, 306–07 (D. Conn. 2012) (construing section 6013 of the Code). The Dictionary Act thus supports interpreting the gender-specific terms in the Code in a gender-neutral manner "unless the context indicates otherwise." 1 U.S.C. § 1. "'Context'" for purposes of the

Dictionary Act "means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993). Here, nothing in the surrounding text forecloses a gender-neutral reading of the gender-specific terms. Rather, the provisions of the Code that use the terms "husband and wife," "husband," and "wife" are inextricably interwoven with provisions that use gender-neutral terms like "spouse" and "marriage," indicating that Congress viewed them to be equivalent. For example, section 1(a) sets forth the tax imposed on "every married individual (as defined in section 7703) who makes a single return jointly with his spouse under section 6013," even though section 6013 provides that a "husband and wife" make a single return jointly of income. Similarly, section 2513 of the Code is entitled "Gifts by Husband or Wife to Third Party," but uses no gender-specific terms in its text. *See also*, *e.g.*, §§ 62(b)(3), 1361(c)(1).

This interpretation is also consistent with the legislative history. The legislative history of section 6013, for example, uses the term "married taxpayers" interchangeably with the terms "husband" and "wife" to describe those individuals who may elect to file a joint return, and there is no indication that Congress intended those terms to refer only to a subset of individuals who are legally married. *See*, *e.g*., S. Rep. No. 82–781, Finance, Part 1, p. 48 (Sept. 18, 1951). Accordingly, the most logical reading is that the terms "husband and wife" were used because they were viewed, at the time of enactment, as equivalent to the term "persons married to each other." There is nothing in the Code to suggest that Congress intended to exclude from the meaning of these terms any couple otherwise legally married under state law.

Fourth, other considerations also strongly support this interpretation. A gender-neutral reading of the Code fosters fairness by ensuring that the Service treats same-sex couples in the same manner as similarly situated opposite-sex couples. A gender-neutral reading of the Code also fosters administrative efficiency because the Service does not collect or maintain information on the gender of taxpayers and would have great difficulty administering a scheme that differentiated between same-sex and opposite-sex married couples.

Therefore, consistent with the statutory context, the Supreme Court's decision in *Windsor*, Revenue Ruling 58–66, and effective tax administration generally, the Service concludes that, for Federal tax purposes, the terms "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if they were lawfully married in a state whose laws authorize the marriage of two individuals of the same sex, and the term "marriage" includes such marriages of individuals of the same sex.

3. *Marital Status Based on the Laws of the State Where a Marriage Is Initially Established*

Consistent with the longstanding position expressed in Revenue Ruling 58–66, the Service has determined to interpret the Code as incorporating a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile. The Service may provide additional guidance on this subject and on the application of *Windsor* with respect to Federal tax administration. Other agencies may provide guidance on other Federal programs that they administer that are affected by the Code.

Under this rule, individuals of the same sex will be considered to be lawfully married under the Code as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages. For over half a century, for Federal income tax purposes, the Service has recognized marriages based on the laws of the state in which they were entered into, without regard to subsequent changes in domicile, to achieve uniformity, stability, and efficiency in the application and administration of the Code. Given our increasingly mobile society, it is important to have a uniform rule of recognition that can be applied with certainty by the Service and taxpayers alike for all Federal tax purposes. Those overriding tax administration policy goals generally apply with equal force in the context of same-sex marriages.

In most Federal tax contexts, a state-of-domicile rule would present serious administrative concerns. For example, spouses are generally treated as related parties for Federal tax purposes, and one spouse's ownership interest in property may be attributed to the other spouse for purposes of numerous Code provisions. If the Service did not adopt a uniform rule of recognition, the attribution of property interests could change when a same-sex couple moves from one state to another with different marriage recognition rules. The potential adverse consequences could impact not only the married couple but also others involved in a transaction, entity, or arrangement. This would lead to uncertainty for both taxpayers and the Service.

A rule of recognition based on the state of a taxpayer's current domicile would also raise significant challenges for employers that operate in more than one state, or that have employees (or former employees) who live in more than one state, or move between states with different marriage recognition rules. Substantial financial and administrative burdens would be placed on those employers, as well as the administrators of employee benefit plans. For example, the need for and validity of spousal elections, consents, and notices could change each time an employee, former employee, or spouse moved to a state with different marriage recognition rules. To administer employee benefit plans, employers (or plan administrators) would need to inquire whether each employee receiving plan benefits was married and, if so, whether the employee's spouse was the same sex or opposite sex from the employee. In addition, the employers or plan administrators would need to continually track the state of domicile of all same-sex married employees and former employees and their spouses. Rules would also need to be developed by the Service and administered by employers and plan administrators to address the treatment of same-sex married couples comprised of individuals who reside in different states (a situation that is not relevant with respect to opposite-sex couples). For all of these reasons, plan administration would grow increasingly complex and certain rules, such as those governing required distributions under section 401(a)(9), would become especially challenging. Administrators of employee benefit plans would have to be retrained, and systems reworked, to comply with an unprecedented and complex system that divides married employees according to their sexual orientation. In many cases, the tracking of employee and spouse domiciles would be less than perfectly accurate or timely and would result in errors or delays. These errors and delays would be costly to employers, and could require some plans to enter the Service's voluntary compliance programs or put benefits of all employees at risk. All of these problems are avoided by the adoption of the rule set forth herein, and the Service therefore has chosen to avoid the imposition of the additional burdens on itself, employers, plan administrators, and individual taxpayers. Accordingly, Revenue Ruling 58–66 is amplified to adopt a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile.

4. *Registered Domestic Partnerships, Civil Unions, or Other Similar Formal Relationships Not Denominated as Marriage*

For Federal tax purposes, the term "marriage" does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state's law, and the terms "spouse," "husband and wife," "husband," and "wife" do not include individuals who have entered into such a formal relationship. This conclusion applies regardless of whether individuals who have entered into such relationships are of the opposite sex or the same sex.

HOLDINGS

1. For Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term "marriage" includes such a marriage between individuals of the same sex.

2. For Federal tax purposes, the Service adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages.

3. For Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term "marriage" does not include such formal relationships.

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 58–66 is amplified and clarified.

PROSPECTIVE APPLICATION

The holdings of this ruling will be applied prospectively as of September 16, 2013.

Except as provided below, affected taxpayers also may rely on this revenue ruling for the purpose of filing original returns, amended returns, adjusted returns, or claims for credit or refund for any overpayment of tax resulting from these holdings, provided the applicable limitations period for filing such claim under section 6511 has not expired. If an affected taxpayer files an original return, amended return, adjusted return, or claim for credit or refund in reliance on this revenue ruling, all items required to be reported on the return or claim that are affected by the marital status of the taxpayer must be adjusted to be consistent with the marital status reported on the return or claim.

Taxpayers may rely (subject to the conditions in the preceding paragraph regarding the applicable limitations period and consistency within the return or claim) on this revenue ruling retroactively with respect to any employee benefit plan or arrangement or any benefit provided thereunder only for purposes of filing original returns, amended returns, adjusted returns, or claims for credit or refund of an overpayment of tax concerning employment tax and income tax with respect to employer-provided health coverage benefits or fringe benefits that were provided by the employer and are excludable from income under sections 106, 117(d), 119, 129, or 132 based on an individual's marital status. For purposes of the preceding sentence, if an employee made a pre-tax salary-reduction election for health coverage under a section 125 cafeteria plan sponsored by an employer and also elected to provide health coverage for a same-sex spouse on an after-tax basis under a group health plan sponsored by that employer, an affected taxpayer may treat the amounts that were paid by the employee for the coverage of the same-sex spouse on an after-tax basis as pre-tax salary reduction amounts.

The Service intends to issue further guidance on the retroactive application of the Supreme Court's opinion in *Windsor* to other employee benefits and employee benefit plans and arrangements. Such guidance will take into account the potential consequences of retroactive application to all taxpayers involved, including the plan sponsor, the plan or arrangement, employers, affected employees and beneficiaries. The Service anticipates that the future guidance will provide sufficient time for plan amendments and any necessary corrections so that the plan and benefits will retain favorable tax treatment for which they otherwise qualify.

DRAFTING INFORMATION

The principal authors of this revenue ruling are Richard S. Goldstein and Matthew S. Cooper of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue ruling, contact Mr. Goldstein and Mr. Cooper at 202–622–3400 (not a toll-free call).

Section 6103.—Confidentiality and Disclosure of Returns and Return Information

T.D. 9631

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 301

Disclosures of Return Information Reflected on Returns to Officers and Employees of the Department of Commerce for Certain Statistical Purposes and Related Activities

AGENCY: Internal Revenue Service (IRS), Treasury

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that authorize the disclosure of certain items of return information to the Bureau of the Census (Bureau) in conformance with section 6103(j)(1) of the Internal Revenue Code (Code). The final regulations are made pursuant to a request from the Secretary of Commerce. Because the return information will be disclosed to the Bureau in statistical format, specific taxpayers will not be identified, and, therefore, no taxpayers are affected by the disclosures authorized by this guidance.

DATES: *Effective Date:* These regulations are effective on August 27, 2013.

Applicability Date: For dates of applicability, see §301.6103(j)(1)–1(e).

FOR FURTHER INFORMATION CONTACT: Melissa Avrutine, (202) 622–7950 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 301. Section 6103(j)(1)(A) authorizes the Secretary of Treasury to furnish, upon written request by the Secretary of Commerce, such return or return information as the Secretary of Treasury may prescribe by regulation to officers and employees of the Bureau for the purpose of, but only to the extent necessary in, the structuring of censuses and conducting related statistical activities authorized by law. Section 301.6103(j)(1)–1 of the existing regulations further defines such purposes by reference to 13 U.S.C. chapter 5 and provides an itemized description of the return information authorized to be disclosed for such purposes.

By letter dated July 24, 2009, the Secretary of Commerce requested that additional items of return information be disclosed to the Bureau for purposes of allowing the Bureau to study a developing trend of increased use of contract workers. Specifically, the Secretary of Commerce requested disclosure of the following additional items: (1) total number of documents reported on Form 1096 transmitting Forms 1099–MISC and (2) total amount reported on Form 1096 transmitting Forms 1099–MISC.

Section 301.6103(j)(1)–1 of the regulations formerly permitted disclosure of the total number of documents reported on Form 1096 transmitting Forms 1099–MISC and the total amount reported on Form 1096 transmitting Forms 1099–MISC. At the request of the Secretary of Commerce, the Treasury Department removed these items from the list of items of return information authorized to be disclosed, as disclosure of this return information was no longer necessary (See TD 9372, 72 FR 73262 [Dec. 27, 2007]).

In 2009, the Secretary of Commerce determined that these items of return information were needed again to provide critical data about contract labor necessary to estimate total employment and payroll in the United States. The employment and compensation data compiled by the Bureau are important to analysts and policy makers in both the public and private sectors. Thus, the Secretary of Commerce asserted that good cause existed to amend §301.6103(j)(1)–1 of the regulations to restore these items to the list of items of return information that may be disclosed to the Bureau. The Treasury Department and the IRS agree that amending existing regulations to permit disclosure of these items to the Bureau is appropriate to meet the analytical needs of the Bureau.

Explanation of Provisions

On August 26, 2010, the IRS and the Treasury Department published temporary regulations under §6103(j)(1) and issued a notice of proposed rulemaking cross-referencing those temporary regulations. See TD 9500 (75 FR 52458), REG–137486–09 (75 FR 52486), and 26 CFR §301.6103(j)(1)–1T. No comments were received, and no public hearing was requested or held. These final regulations adopt the proposed rules with no substantive change.

Section 301.6103(j)(1)–1T authorizes disclosure of three items of return information. Upon publication, these final regulations remove §301.6103(j)(1)–1T because all three items of return information listed in §301.6103(j)(1)–1T will now be contained in §301.6103(j)(1)–1. On December 31, 2007, temporary regulations were published authorizing one of the items of return information contained in §301.6103(j)(1)–1T: the disclosure of categorical information on total qualified research expenses in three ranges (greater than zero, but less than $1 million; greater than or equal to $1 million, but less than $3 million; and greater than or equal to $3 million) (§301.6103(j)(1)(xxv)–1T). See TD 9500 (75 FR 52458). On August 26, 2010, those temporary regulations were finalized, but §301.6103(j)(1)(xxv)–1T was inadvertently not removed. Accordingly, these final regulations remove those temporary regulations as well as the remaining two items of return information contained in §301.6103(j)(1)–1T: total number of documents reported on Form 1096 transmitting Forms 1099–MISC and the total amount reported on Form 1096 transmitting Forms 1099–MISC (subsections xxix and xxx of section 6103(j)(1)–1T).

Special Analyses

It has been determined that these final regulations are not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedures Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal author of these regulations is Melissa Avrutine, Office of the Associate Chief Counsel (Procedure & Administration).

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISITRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

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

Par. 2. Section 301.6103(j)(1)–1 is amended by:

1. Adding paragraphs (b)(3)(xxix) and (b)(3)(xxx).

2. Revising paragraph (e),

The additions and revision read as follows:

§301.6103(j)(1)–1 Disclosure of return information reflected on returns to officers and employees of the Department of Commerce for certain statistical purposes and related activities.

* * * * *

(b) * * *

(3) * * *

(xxix) Total number of documents reported on Form 1096 transmitting Forms 1099–MISC.

(xxx) Total amount reported on Form 1096 transmitting Forms 1099–MISC.

* * * * *

(e) *Effective/applicability date*. Paragraphs (b)(3)(xxv), (b)(3)(xxix), and (b)(3)(xxx) of this section apply to disclosures to the Bureau of the Census made on or after August 27, 2013. For rules that apply to disclosures to the Bureau of the Census before that date, see 26 CFR 301.6103(j)(1)–1 (revised as of April 1, 2013).

§301.6103(j)(1)–1T [Removed]

Par. 3. Section 301.6103(j)(1)–1T is removed.

Heather C. Maloy,
Acting Deputy Commissioner for Services and Enforcement.

Approved August 19, 2013.

Mark J. Mazur,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on August 26, 2013, 8:45 a.m., and published in the issue of the Federal Register for August 27, 2013, 78 F.R. 52856)

Part III. Administrative, Procedural, and Miscellaneous

Per Capita Payments from Proceeds of Settlements of Indian Tribal Trust Cases

Notice 2013–55

BACKGROUND

Notice 2013–1, 2013–3 IRB 281, provides guidance on the federal tax treatment of per capita payments that members of Indian tribes receive from proceeds of certain settlements of tribal trust cases between the United States and those Indian tribes. Additional tribes have settled tribal trust cases against the United States since publication of Notice 2013–1. This notice provides an updated Appendix that reflects the additional settlement agreements.

EFFECT ON OTHER DOCUMENTS

Notice 2013–1 Appendix is modified and superseded.

FURTHER INFORMATION

For further information regarding this notice, please contact Telly Meier at phone number (202) 317–8494 (not a toll-free call).

Appendix
Tribes That Have Entered into Settlement Agreements of Tribal Trust Cases

1. Assiniboine and Sioux Tribes of the Fort Peck Reservation
2. Bad River Band of Lake Superior Chippewa Indians
3. Blackfeet Tribe of the Blackfeet Indian Reservation
4. Bois Forte Band of Chippewa
5. Cachil Dehe Band of Wintun Indians of the Colusa Rancheria
6. Chippewa Cree Tribe of the Rocky Boy's Reservation
7. Coeur d'Alene Tribe
8. Confederated Salish and Kootenai Tribes
9. Confederated Tribes of Siletz Indians
10. Confederated Tribes of the Colville Reservation
11. Confederated Tribes of the Goshute Reservation
12. Crow Creek Sioux Tribe
13. Eastern Shawnee Tribe of Oklahoma
14. Hualapai Indian Tribe
15. Iowa Tribe of Kansas and Nebraska
16. Kaibab Band of Paiute Indians of Arizona
17. Kickapoo Tribe of Kansas
18. Lac Courte Oreilles Band of Lake Superior Chippewa Indians
19. Lac du Flambeau Band of Lake Superior Chippewa Indians
20. Leech Lake Band of Ojibwe
21. Lower Brule Sioux Tribe
22. Makah Indian Tribe of the Makah Reservation
23. Mescalero Apache Tribe
24. Minnesota Chippewa Tribe
25. Nez Perce Tribe
26. Nooksack Indian Tribe
27. Northern Cheyenne Tribe of Indians
28. Omaha Tribe of Nebraska
29. Passamaquoddy Tribe of Maine
30. Pawnee Nation
31. Prairie Band of Potawatomi Nation
32. Pueblo of Zia
33. Quechan Tribe of the Fort Yuma Reservation
34. Red Cliff Band of Lake Superior Chippewa Indians
35. Rincon Luiseño Band of Indians
36. Rosebud Sioux Tribe
37. Round Valley Indian Tribes
38. Salt River Pima-Maricopa Indian Community
39. Santee Sioux Tribe of Nebraska
40. Sault Ste. Marie Tribe
41. Shoshone-Bannock Tribes of the Fort Hall Reservation
42. Soboba Band of Luiseño Indians
43. Spirit Lake Dakotah Nation
44. Spokane Tribe of Indians
45. Standing Rock Sioux Tribe

Appendix
Tribes That Have Entered into Settlement Agreements of Tribal Trust Cases

46. Stillaguamish Tribe of Indians
47. Summit Lake Paiute Tribe
48. Swinomish Indian Tribal Community
49. Te-Moak Tribe of Western Shoshone Indians
50. Tohono O'odham Nation
51. Tulalip Tribes
52. Tule River Indian Tribe
53. Ute Indian Tribe of the Uintah and Ouray Reservation
54. Ute Mountain Ute Tribe
55. Winnebago Tribe of Nebraska
56. Qawalangin Tribe of Unalaska
57. Tlingit & Haida Tribes of Alaska
58. Northwestern Band of Shoshone Indians
59. Hoopa Valley Tribe
60. Ak-Chin Indian Community
61. Oglala Sioux Tribe
62. Yoruk Tribe
63. Cheyenne River Sioux Tribe
64. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony
65. Seminole Nation of Oklahoma
66. Otoe-Missouria Tribe of Oklahoma
67. Samish Indian Nation
68. Tonkawa Tribe of Indians of Oklahoma
69. Yakama Nation
70. Miami Tribe of Oklahoma

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26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, § 42; 1.42–14.)

Rev. Proc. 2013–31

SECTION 1. PURPOSE

This revenue procedure publishes the amounts of unused housing credit carryovers allocated to qualified states under § 42(h)(3)(D) of the Internal Revenue Code for calendar year 2013.

SECTION 2. BACKGROUND

Rev. Proc. 92–31, 1992–1 C.B. 775, provides guidance to state housing credit agencies of qualified states on the procedure for requesting an allocation of unused housing credit carryovers under § 42(h)(3)(D). Section 4.06 of Rev. Proc. 92–31 provides that the Internal Revenue Service will publish in the Internal Revenue Bulletin the amount of unused housing credit carryovers allocated to qualified states for a calendar year from a national pool of unused credit authority (the National Pool). This revenue procedure publishes these amounts for calendar year 2013.

SECTION 3. PROCEDURE

The unused housing credit carryover amount allocated from the National Pool by the Secretary to each qualified state for calendar year 2013 is as follows:

Qualified State	*Amount Allocated*
Alabama	46,914
Arizona	63,757
California	370,106
Connecticut	34,930
Delaware	8,922
Florida	187,941
Georgia	96,511
Idaho	15,525
Illinois	125,264
Kansas	28,077
Louisiana	44,772
Maryland	57,251
Massachusetts	64,661
Michigan	96,155
Minnesota	52,334

Qualified State	*Amount Allocated*
Mississippi	29,040
Nebraska	18,052
New Jersey	86,244
New Mexico	20,290
New York	190,400
North Carolina	94,878
North Dakota	6,807
Ohio	112,314
Oregon	37,937
Pennsylvania	124,177
Rhode Island	10,218
South Dakota	8,108
Texas	253,531
Vermont	6,090
Virginia	79,641
Washington	67,101
West Virginia	18,051

EFFECTIVE DATE

This revenue procedure is effective for allocations of housing credit dollar amounts attributable to the National Pool component of a qualified state's housing credit ceiling for calendar year 2013.

DRAFTING INFORMATION

The principal author of this revenue procedure is Jian H. Grant of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure contact Ms. Grant on (202) 622–3040 (not a toll-free call).

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

Rev. Proc. 2013–33

SECTION 1. PURPOSE

This revenue procedure provides the domestic asset/liability percentages and domestic investment yields needed by foreign life insurance companies and foreign property and liability insurance companies to compute their minimum effectively connected net investment income under section 842(b) of the Internal Revenue Code for taxable years beginning after December 31, 2011. Instructions are provided for computing foreign insurance companies' liabilities for the estimated tax and installment payments of estimated tax for taxable years beginning after December 31, 2011. For more specific guidance regarding the computation of the amount of net investment income to be included by a foreign insurance company on its U.S. income tax return, see Notice 89–96, 1989–2 C.B. 417. For the domestic asset/liability percentage and domestic investment yield, as well as instructions for computing foreign insurance companies' liabilities for estimated tax and installment payments of estimated tax for taxable years beginning after December 31, 2010, see Rev. Proc. 2012–40, 2012–40 I.R.B. 424.

SECTION 2. CHANGES

DOMESTIC ASSET/LIABILITY PERCENTAGES FOR 2012. The Secretary determines the domestic asset/liability percentage separately for life insurance companies and property and liability insurance companies. For the first taxable year beginning after December 31, 2011, the relevant domestic asset/liability percentages are:

[163.8] percent for foreign life insurance companies, and

[186.5] percent for foreign property and liability insurance companies.

.02 DOMESTIC INVESTMENT YIELDS FOR 2012. The Secretary is required to prescribe separate domestic investment yields for foreign life insurance companies and for foreign property and liability insurance companies. For the first taxable year beginning after December 31, 2011, the relevant domestic investment yields are:

[3.5] percent for foreign life insurance companies, and

[3.7] percent for foreign property and liability insurance companies.

.03 SOURCE OF DATA FOR 2012. The section 842(b) percentages to be used for the 2012 tax year are based on tax return data following the same methodology used for the 2011 year.

SECTION 3. APPLICATION—ESTIMATED TAXES

To compute estimated tax and the installment payments of estimated tax due for taxable years beginning after December 31, 2011, a foreign insurance company must compute its estimated tax payments by adding to its income other than net investment income the greater of (i) its net investment income as determined under section 842(b)(5), that is actually effectively connected with the conduct of a trade or business within the United States for the relevant period, or (ii) the minimum effectively connected net investment income under section 842(b) that would result from using the most recently available domestic asset/liability percentage and domestic investment yield. Thus, for installment payments due after the publication of this revenue procedure, the domestic asset/liability percentages and the domestic investment yields provided in this revenue procedure must be used to compute the minimum effectively connected net investment income. However, if the due date of an installment is less than 20 days after the date this revenue procedure is published in the Internal Revenue Bulletin, the asset/liability percentages and domestic investment yields provided in Rev. Proc. 2012–40 may be used to compute the minimum effectively connected net investment income for such installment. For further guidance in computing estimated tax, see Notice 89–96.

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective for taxable years beginning after December 31, 2011.

SECTION 5. DRAFTING INFORMATION

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

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Tax Credit for Employee Health Insurance Expenses of Small Employers

REG–113792–13

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance on the tax credit available to certain small employers that offer health insurance coverage to their employees under section 45R of the Internal Revenue Code (Code), enacted by the Patient Protection and Affordable Care Act. These proposed regulations affect certain taxable employers and certain tax-exempt employers.

DATES: Comments and request for a public hearing must be received by November 25, 2013.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–113792–13), Internal Revenue Service, room 5205, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to CC:PA:LPD:PR (REG–113792–13), 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 113792–13).

FOR FURTHER INFORMATION CONTACT: Concerning these proposed regulations, call Stephanie Caden at (202) 927–9639; concerning submission of comments, and/or to request a hearing, Oluwafunmilayo Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 45R of the Internal Revenue Code (Code) offers a tax credit to certain small employers that provide insured health coverage to their employees. Section 45R was added to the Code by section 1421 of the Patient Protection and Affordable Care Act, enacted March 23, 2010, Public Law No. 111–148 (as amended by section 10105(e) of the Patient Protection and Affordable Care Act, which was amended by the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029)) (collectively, the "Affordable Care Act").

I. *Section 45R*

Section 45R(a) provides for a health insurance tax credit in the case of an eligible small employer for any taxable year in the credit period. Section 45R(d) provides that in order to be an eligible small employer with respect to any taxable year, an employer must have in effect a contribution arrangement that qualifies under section 45R(d)(4) and must have no more than 25 full-time equivalent employees (FTEs), and the average annual wages of its FTEs must not exceed an amount equal to twice the dollar amount determined under section 45R(d)(3)(B). The amount determined under section 45R(d)(3)(B) is $25,000 (as adjusted for inflation for taxable years beginning after December 31, 2013).

Section 45R(d)(4) states that a contribution arrangement qualifies if it requires an eligible small employer to make a nonelective contribution on behalf of each employee who enrolls in a qualified health plan (QHP) offered to employees by the employer through an Exchange in an amount equal to a uniform percentage (not less than 50 percent) of the premium cost of the QHP (referred to in this preamble as the uniform percentage requirement). For purposes of section 45R, an Exchange refers to a Small Business Health Options Program (SHOP) Exchange, established pursuant to section 1311 of the Affordable Care Act and defined in 45 CFR 155.20. For purposes of this preamble and the proposed regulations, a contribution arrangement that meets these requirements is referred to as a "qualifying arrangement." See also the section of this preamble entitled "Explanation of Provisions."

Section 45R(b) provides that, subject to the reductions described in section 45R(c), the amount of the credit is equal to 50 percent (35 percent in the case of a tax-exempt eligible small employer) of the lesser of: (1) the aggregate amount of nonelective contributions the employer made on behalf of its employees during the taxable year under the qualifying arrangement for premiums for QHPs offered by the employer to its employees through a SHOP Exchange, or (2) the aggregate amount of nonelective contributions the employer would have made during the taxable year under the arrangement if each employee taken into account under: (1) of this sentence had enrolled in a QHP which had a premium equal to the average premium (as determined by the Secretary of Health and Human Services) for the small group market in the rating area in which the employee enrolls for coverage. Section 45R(c) phases out the credit based upon the number of the employer's FTEs in excess of 10 and the amount by which the average annual wages exceeds $25,000 (as adjusted for inflation for taxable years beginning after December 31, 2013 pursuant to section 45R(d)(3)(B)). Specifically, section 45R(c) provides that the credit amount determined under section 45R(b) is reduced (but not below zero) by the sum of: (1) the credit amount determined under section 45R(b) multiplied by a fraction, the numerator of which is the total number of FTEs of the employer in excess of 10 and the denominator of which is 15, and (2) the credit amount determined under section 45R(b) multiplied by a fraction, the numerator of which is the average annual wages of the employer in excess of the dollar amount in effect under section 45R(d)(3)(B) and the denominator of which is such dollar amount. Section 45R(d)(3) provides that the average annual wages of an eligible small employer for any taxable year is the amount determined by dividing the aggregate amount of wages that were paid by the employer to employees during the taxable year by the number of FTEs of the employer and rounding such amount to the next lowest multiple of $1,000.

Section 45R(e)(2) provides that for taxable years beginning in or after 2014, the credit period means the two-consecutive-taxable year period beginning with the first taxable year in which the employer (or any predecessor) offers one or more QHPs to its employees through a SHOP Exchange.

For taxable years beginning in 2010, 2011, 2012, and 2013, section 45R(g) provides that the credit is determined without regard to whether the taxable year is in a credit period, and no credit period is treated as beginning with a taxable year beginning before 2014. The amount of the credit is 35 percent (25 percent in the case of a tax-exempt eligible small employer) of an eligible small employer's nonelective contributions for premiums paid for health insurance coverage (within the meaning of section 9832(b)(1)) of an employee. Section 45R(g)(3) provides that an employer does not become ineligible for the tax credit solely because it arranges for the offering of insurance outside of a SHOP Exchange.

The Treasury Department and the IRS have published two notices addressing the application of section 45R. Each notice provides guidance that taxpayers may rely upon for taxable years beginning before January 1, 2014. See Notice 2010–44 (2010–22 I.R.B. 717 (June 1, 2010)) and Notice 2010–82 (2010–51 I.R.B. 857 (December 20, 2010)). Notice 2010–44 also provided transition relief for taxable years beginning in 2010 with respect to the requirements for a qualifying arrangement under section 45R.

II. *Notice 2010–44*

Notice 2010–44 addresses the eligibility requirements for employers to claim the credit, provides guidance on how to calculate and claim the credit, and explains the effect on estimated tax, alternative minimum tax, and deductions. The notice specifically describes the rules for how employees are taken into account in determining an employer's FTEs, average wages, and premiums paid, with certain individuals excluded and with employees of certain related employers included.

III. *Notice 2010–82*

Notice 2010–82 expands on the guidance provided in Notice 2010–44 and provides additional guidance on determining whether to take into account spouses and leased employees (as defined in section 414(n)) in computing an employer's FTEs, average annual wages, and premiums paid. The notice provides that employer contributions to health reimbursement arrangements (HRAs), health flexible spending arrangements (FSAs), and health savings accounts (HSAs) are not taken into account for purposes of the section 45R credit. The notice further explains the requirement that an eligible small employer must pay a uniform percentage (not less than 50 percent) of the premium for each employee enrolled in health insurance coverage offered by the employer. The notice provides rules for applying the uniform percentage requirement in taxable years beginning after December 31, 2009 and prior to 2014, and further provides that for taxable years beginning in 2010, an employer may satisfy the uniform percentage requirement either by meeting the requirements provided in Notice 2010–82 or by meeting the transition relief rules provided in Notice 2010–44. With respect to calculating the credit, the notice provides guidance on small group markets, taxpayers with employees in multiple States, the application of the average premium cap, and taxpayers with fiscal taxable years.

Explanation of Provisions

These proposed regulations generally incorporate the provisions of Notice 2010–44 and Notice 2010–82 as modified to reflect the differences between the statutory provisions applicable to years before 2014 and those applicable to years after 2013. As in Notices 2010–44 and 2010–82, these proposed regulations use the term "qualifying arrangement" to describe an arrangement under which an eligible small employer pays premiums for each employee enrolled in health insurance coverage offered by the employer in an amount equal to a uniform percentage (not less than 50 percent) of the premium cost of the coverage. Section 45R(d)(4) and these proposed regulations require that, for tax years beginning during or after 2014, the health insurance coverage described in a qualifying arrangement be a QHP offered by an employer to its employees through a SHOP Exchange (but see section II.I of this preamble for a description of certain transition guidance for 2014).

I. *Eligibility for the Credit*

A. *Eligible small employer defined*

Section 45R and these proposed regulations provide that an eligible small employer is defined as an employer that has no more than 25 FTEs for the taxable year, whose employees have average annual wages of less than $50,000 per FTE (as adjusted for inflation for years after December 31, 2013), and that has a qualifying arrangement in effect that requires the employer to pay a uniform percentage (not less than 50 percent) of the premium cost of a QHP offered by the employer to its employees through a SHOP Exchange. A tax-exempt eligible small employer is an eligible small employer that is described in section 501(c) and that is exempt from tax under section 501(a). An employer that is an agency or instrumentality of the Federal government, or of a State, local or Indian tribal government, is not an eligible small employer for purposes of section 45R unless it is an organization described in section 501(a) (and otherwise meets the requirements for an eligible small employer). However, a farmers' cooperative described in section 521 that is subject to tax pursuant to section 1381 and otherwise meets the requirements of this section is an eligible small employer.

Section 45R does not require that, in order for an employer to be an eligible small employer, the employees perform services in a trade or business. Thus, an employer that otherwise meets the requirements for the section 45R credit does not fail to be an eligible small employer merely because the employees of the employer are not performing services in a trade or business. For example, a household employer that otherwise satisfies the requirements of section 45R is an eligible small employer for purposes of the credit.

An employer located outside the United States (including a U.S. Territory) may be an eligible small employer if the employer has income effectively connected with the conduct of a trade or business in the United States, otherwise meets the requirements of this section and is able to offer a QHP to its employees through a SHOP Exchange.

B. *Application of section 414 aggregation rules*

In accordance with section 45R(e)(5), these proposed regulations provide that all employers treated as a single employer under section 414(b), (c), (m), or (o) are treated as a single employer for purposes of section 45R. Thus, for example, all employees of the employers treated as a single employer are counted in computing the single employer's FTEs and average annual wages. This applies to employers that are corporations in a controlled group of corporations, employers that are members of an affiliated service group, and employers that are partnerships, sole proprietorships, etc. under common control under section 414(c). Section 414 also applies to tax-exempt eligible small employers under common control. See §1.414(c)–5.

C. *Determining employees taken into account*

The proposed rules for determining employees taken into account are the same as those in the previous notices. In general, all employees (determined under the common law standard) who perform services for the employer during the taxable year are taken into account in determining FTEs and average annual wages, including those who are not performing services in the employer's trade or business. (But see special rules for seasonal employees described in this section of the preamble.) However, section 45R and these proposed regulations provide that certain individuals are not considered employees when calculating the credit, and hours and wages of these individuals are not counted when determining an employer's eligibility for the credit. The following individuals are not employees or are otherwise excluded for this purpose: independent contractors (including sole proprietors); partners in a partnership; shareholders owning more than two percent of an S corporation; owners of more than five percent of other businesses; family members of these owners and partners, including a child (or descendant of a child), a sibling or step-sibling, a parent (or ancestor of a parent), a step-parent, a niece or nephew, an aunt or uncle, or a son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or a sister-in-law. A spouse is also considered a family member for this purpose, as is a member of the household who is not a family member but qualifies as a dependent on the individual income tax return of an excluded individual.

Section 45R(d)(5) and these proposed regulations provide that seasonal employees who work for 120 or fewer days during the taxable year are not considered employees when determining FTEs and average annual wages, but premiums paid on behalf of seasonal workers may be counted in determining the amount of the credit. Seasonal workers include retail workers employed exclusively during holiday seasons and workers employed exclusively during the summer.

Compensation paid to a minister performing services in the exercise of his or her ministry generally is subject to tax under the Self-Employment Contributions Act (SECA) and not under the Federal Insurance Contributions Act (FICA), whether the minister is an employee or self-employed under the common law. See sections 1402(c)(2)(d), 1402(c)(4), and 3121(b)(8)(A). For purposes of income taxes generally, including the credit under section 45R, whether a minister is an employee is determined under the common law standard for determining worker status. If under the common law a minister is not an employee, the minister is not taken into account in determining an employer's FTEs. If under the common law a minister is an employee, the minister is taken into account in determining an employer's FTEs. However, because a minister performing services in the exercise of his or her ministry is treated as not engaged in employment for purposes of FICA, compensation paid to a minister is not wages as defined under section 3121(a), and so is not included for purposes of computing an employer's average annual wages.

D. *Determining hours of service*

These proposed regulations provide that an employee's hours of service for a year include hours for which the employee is paid, or entitled to payment, for the performance of duties for the employer during the employer's taxable year. Hours of service also include hours for which the employee is paid for vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty, or leave of absence. Hours of service do not include the hours of seasonal employees who work for 120 or fewer days during the taxable year, nor do they include hours worked for a year in excess of 2,080 for a single employee.

These proposed regulations describe three methods for calculating the total number of hours of service for a single employee for the taxable year: actual hours worked; days-worked equivalency; and weeks-worked equivalency. Employers need not use the same method for all employees and may apply different methods for different classifications of employees if the classifications are reasonable and consistently applied. For example, an employer may use the actual hours worked method for all hourly employees and the weeks-worked equivalency method for all salaried employees. These proposed rules are the same as those in the previous notices.

E. *Determining FTEs*

In accordance with section 45R(d)(2), these proposed regulations provide that FTEs are calculated by computing the total hours of service for the taxable year using a method described in section 1.D of this preamble, and dividing the total hours of service by 2,080. If the result is not a whole number (0, 1, 2, etc.), the result is rounded down to the next lowest whole number. The only exception to this rule is when the result is less than one; in this case, the employer rounds up to one FTE. In some circumstances, an employer with 25 or more employees may qualify for the credit if some of its employees work less than full-time. For example, an employer with 46 employees that each are paid wages for 1,040 hours per year has 23 FTEs and, therefore, may qualify for the credit. These proposed rules are the same as those in the previous notices.

F. *Determining average annual FTE wages*

In accordance with section 45R(e)(4), these proposed regulations define wages, for purposes of the credit, as wages defined under section 3121(a) for purposes of FICA, determined without considering the social security wage base limitation. To calculate average annual FTE wages, an employer must figure the total wages paid during the taxable year to all employees, divide the total wages paid by the number of FTEs, and if the result is not a multiple of $1,000, round the result to the next lowest multiple of $1,000. For example, $30,699 is rounded down to $30,000. But see special rules for seasonal employees described in section I.C of this preamble. These proposed rules are the same as those in the previous notices.

II. *Calculating the Credit*

A. *Maximum credit*

Under section 45R and these proposed regulations, for taxable years beginning during or after 2014, the maximum credit for an eligible small employer other than a tax-exempt eligible small employer is 50 percent of the eligible small employer's premium payments made on behalf of its employees under a qualifying arrangement for QHPs offered through a SHOP Exchange. For a tax-exempt eligible small employer for those years, the maximum credit is 35 percent. The employer's tax credit is subject to several adjustments and limitations as set forth in this preamble.

B. *Average premium limitation*

Under section 45R and these proposed regulations, for purposes of calculating the credit for taxable years beginning after 2013, the employer's premium payments are limited by the average premium in the small group market in the rating area in which the employee enrolls for coverage through a SHOP Exchange. The credit will be reduced by the excess of the credit calculated using the employer's premium payments over the credit calculated using the average premium. For example, if an employer pays 50 percent of the $7,000 premium for family coverage for its employees ($3,500), but the average premium for family coverage in the small group market in the rating area in which the employees enroll is $6,000, for purposes of calculating the credit the employer's premium payments are limited to 50 percent of $6,000 ($3,000).

C. *Credit phaseout*

Under section 45R and these proposed regulations, the credit phases out for eligible small employers if the number of FTEs exceeds 10, or if the average annual wages for FTEs exceed $25,000 (as adjusted for inflation for taxable years beginning after December 31, 2013). For an employer with both more than 10 FTEs and average annual FTE wages exceeding $25,000, the credit will be reduced based on the sum of the two reductions. This may reduce the credit to zero for some employers with fewer than 25 FTEs and average annual FTE wages of less than double the $25,000 dollar amount (as adjusted for inflation).

D. *State subsidy and tax credit limitation*

Some States offer tax credits to a small employer that provides health insurance to its employees. Some of these credits are refundable credits and others are nonrefundable credits. In addition, some States offer premium subsidy programs for certain small employers under which the State makes a payment equal to a portion of the employees' health insurance premiums. Generally, the State pays this premium subsidy either directly to the employer or to the employer's insurance company (or another entity licensed under State law to engage in the business of insurance).

Under these proposed regulations, and consistent with previous notices, if the employer is entitled to a State tax credit or premium subsidy that is paid directly to the employer, the amount of employer premiums paid is not reduced for purposes of calculating the section 45R credit, but the amount of the credit cannot exceed the net premiums paid, which are the employer premiums paid minus the amount of any State tax credits or premium subsidies received. If a State makes premium payments directly to the insurance company, the State is treated as making these payments on behalf of the employer for purposes of determining whether the employer has satisfied the "qualifying arrangement" requirement to pay an amount equal to a uniform percentage (not less than 50 percent) of the premium cost of coverage. Also, these premium payments by the State are treated as an employer contribution under section 45R for purposes of calculating the credit, but the amount of the credit cannot exceed the premiums actually paid by the employer. Finally, if a State-administered program, such as Medicaid, makes payments on behalf of individuals and their families who meet certain eligibility requirements, these payments do not reduce the amount of employer premiums paid for purposes of calculating the credit.

E. *Payroll tax limitation for tax-exempt employers*

Section 45R and these proposed regulations define the term "payroll taxes" as (1) amounts required to be withheld under section 3402[1] and (2) the employee's and employer's shares of Medicare tax required to be withheld and paid under sections 3101(b) and 3111(b) on employees' wages for the year. For a tax-exempt eligible small employer, the amount of the credit cannot exceed the amount of the payroll taxes of the employer during the calendar year in which the taxable year begins.

F. *Two-consecutive-taxable year credit period limitation*

These proposed regulations provide that the first year for which an eligible small employer files Form 8941, *Credit for Small Employer Health Insurance Premiums*, claiming the credit, or files Form 990–T, *Exempt Organization Business Income Tax Return*, with an attached Form 8941, is the first year of the two-consecutive-taxable year credit period. Even if the employer is only eligible to claim the credit for part of the first year, the filing of Form 8941 begins the first year of the two-consecutive-taxable year credit period. For application of the two-consecutive-taxable year credit period under the transition relief related to taxable years beginning in 2014, see §1.45R–3(i) of these proposed regulations and section II.I of the Explanation of Provisions section of this preamble.

Section 45R(i) provides that regulations shall be prescribed as necessary to prevent the avoidance of the two-year limit on the credit period through the use of suc-

[1] Although section 45R(f)(3)(A)(i) cites to section 3401(a)(1) as imposing the obligation on employers to withhold income tax from employees, it is actually section 3402 that imposes the withholding obligation. We have cited to section 3402 throughout this preamble and in the proposed regulation.

cessor entities and the avoidance of the credit phaseout limitations through the use of multiple entities. For purposes of identifying successor entities, these proposed regulations generally apply the rules for identifying successor employers applicable under the employment tax provisions for determining when wages paid by a predecessor may be attributed to a successor employer (see §31.3121(a)(1)–1(b)). Accordingly, under the proposed regulations, an entity that would be treated as a successor employer for employment tax purposes will also be treated as a successor employer for purposes of the two-consecutive-taxable year credit period under section 45R. Therefore, if the predecessor employer had previously claimed the credit under section 45R for a period, that period will count towards the successor employer's two-consecutive-taxable year credit period.

G. *Premium payments by the employer*

In general, only premiums paid by the employer for employees enrolled in a QHP offered through a SHOP Exchange are counted when calculating the credit.[2] If the employer pays a portion of the premiums and the employees pay the rest, only the portion paid by the employer is taken into account. For this purpose, any premium paid through a salary reduction arrangement under a section 125 cafeteria plan is not treated as an employer-paid premium. Premiums paid with employer-provided flex credits that employees may elect to receive as cash or as a taxable benefit are treated as paid pursuant to a salary reduction arrangement under a section 125 cafeteria plan. See Notice 2012–40 (2012–26 I.R.B. 1046 (June 25, 2012)). The proposed regulations further provide that amounts made available by an employer under or contributed by an employer to HRAs, FSAs and HSAs are not taken into account for purposes of determining premium payments by the employer.

The proposed regulations provide that if a minister is a common law employee and is taken into account in an employer's FTEs, the premiums paid by the employer for health insurance may be counted in calculating the credit.

A leased employee is defined in section 414(n)(2) as a person who is not an employee of the service recipient and who provides services to the service recipient pursuant to an agreement with the leasing organization. The person must have performed services for the service recipient on a substantially full-time basis for a period of at least one year under the primary direction and control of the service recipient. Leased employees are counted in computing a service recipient's FTEs and average annual wages. See section 45R(e)(1)(B).

See section II.I of this preamble for special rules related to taxable years beginning in 2014.

H. *Trusts, estates, regulated investment companies, real estate investment trusts and cooperative organizations*

Section 45R(e)(5)(B) provides that rules similar to the rules of section 52(c), (d) and (e) will apply. Because section 45R(f) explicitly provides that a tax-exempt eligible small employer may be eligible for the credit, these proposed regulations do not adopt a rule similar to section 52(c). However, these proposed regulations provide that rules similar to the rules of section 52(d) and (e) and the regulations thereunder apply in calculating and apportioning the credit with respect to trusts, estates, regulated investment companies, real estate investment trusts, and cooperative organizations.

I. *Transition rules*

If an eligible small employer's plan year begins on a date other than the first day of its taxable year, it may not be practical or possible for the employer to offer insurance to its employees through a SHOP Exchange at the beginning of its first taxable year beginning in 2014. These proposed regulations provide that if: (1) as of August 26, 2013, a small employer offers coverage in a plan year that begins on a date other than the first day of its taxable year, (2) the employer offers coverage during the period before the first day of the plan year beginning in 2014 that would have qualified the employer for the credit under the rules otherwise applicable to the period before January 1, 2014, and (3) the employer begins offering coverage through a SHOP Exchange as of the first day of its plan year that begins in 2014, then it will be treated as offering coverage through a SHOP Exchange for its entire 2014 taxable year for purposes of eligibility for, and calculation of, a credit under section 45R. Thus, for an employer that meets these requirements, the credit will be calculated at the 50 percent rate (35 percent rate for tax-exempt eligible small employers) for the entire 2014 taxable year and the 2014 taxable year will be the start of the two-consecutive-taxable year credit period.

III. *Application of Uniform Percentage Requirement*

A. *Uniform premium*

Section 45R and these proposed regulations require that to be eligible for the credit, an eligible small employer must generally pay a uniform percentage (not less than 50 percent) of the premium for each employee enrolled in a QHP offered to its employees through a SHOP Exchange. These proposed regulations set forth rules for applying this requirement in separate situations depending upon (1) whether the premium established for the QHP is based upon list billing or is based upon composite billing, (2) whether the QHP offers only self-only coverage, or other coverage (such as family coverage) for which a higher premium is charged, and (3) whether the employer offers one QHP or more than one QHP. The uniform percentage rule applies only to the employees offered coverage and does not impose a coverage requirement.

B. *Composite billing and list billing*

These proposed regulations define the term "composite billing" to mean a system of billing under which a health insurer charges a uniform premium for each of the employer's employees or charges a single aggregate premium for the group of covered employees that the employer may then divide by the number of covered employees to determine the uniform premium. In contrast, the term "list billing" is defined as a billing system under which a health insurer lists a separate premium for

[2] In general a stand-alone dental health plan will be considered a qualifed health plan. Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers, 77 Fed. Reg. 18310, 18315 (March 27, 2012).

each employee based on the age of the employee or other factors.

C. *Employers offering one QHP*

For an employer offering one QHP under a composite billing system with one level of self-only coverage, these proposed regulations provide that the uniform percentage requirement is met if an eligible small employer pays the same amount for each employee enrolled in coverage and that amount is equal to at least 50 percent of the premium for self-only coverage. For employers offering one QHP under a composite billing system with different tiers of coverage (for example, self-only, self plus one, and family coverage) for which different premiums are charged, the uniform percentage requirement is satisfied if the eligible small employer either: (1) pays the same amount for each employee enrolled in that tier of coverage and that amount is equal to at least 50 percent of the premium for that tier of coverage, or (2) pays an amount for each employee enrolled in the more expensive tiers of coverage that is the same for all employees and is no less than the amount that the employer would have contributed toward self-only coverage for that employee (and is equal to at least 50 percent of the premium for self-only coverage).

For an employer offering one QHP under a list billing system that offers only self-only coverage, the uniform percentage requirement is satisfied if the eligible small employer either: (1) pays an amount equal to a uniform percentage (not less than 50 percent) of the premium charged for each employee, or (2) determines an "employer-computed composite rate" and, if any employee contribution is required, each enrolled employee pays a uniform amount toward the self-only premium that is no more than 50 percent of the employer-computed composite rate for self-only coverage. The proposed regulations define "employer-computed composite rate" as the average rate determined by adding the premiums for that tier of coverage for all employees eligible to participate in the employer's health insurance plan (whether or not the eligible employee enrolls in coverage under the plan or in that tier of coverage under the plan) and dividing by the total number of such eligible employees.

For eligible small employers offering one QHP under list billing with different tiers of coverage for which different premiums are charged, the uniform percentage requirement is satisfied if the eligible small employer pays toward the premium for each employee covered under each tier of coverage an amount equal to or exceeding the amount the employer would have contributed with respect to that employee for self-only coverage, calculated either based on the actual premium that would have been charged by the insurer for that employee for self-only coverage, or based on the employer-computed composite rate for self-only coverage, and the employer premium payments within the same tier are uniform in percentage or amount. Alternatively, the eligible small employer may satisfy the uniform percentage requirement by meeting the uniform percentage requirement separately for each tier of coverage and substituting the employer-computed composite rate for that tier of coverage for the employer-computed composite rate for self-only coverage.

The proposed regulations provide examples of how the uniform percentage requirement is applied in all of these situations.

D. *Employers offering more than one plan*

As set forth in these proposed regulations, if an employer offers more than one QHP through a SHOP Exchange, the uniform percentage requirement may be satisfied in one of two ways. The first is on a plan-by-plan basis, meaning that the employer's premium payments for each plan must individually satisfy the uniform percentage requirement stated above. The amounts or percentages of premiums paid toward each QHP do not have to be the same, but they must each satisfy the uniform percentage requirement if each QHP is tested separately. The other permissible method to satisfy the uniform percentage requirement is through the reference plan method. Under the reference plan method, the employer designates one of its QHPs as a reference plan. Then the employer either determines a level of employer contributions for each employee such that, if all eligible employees enrolled in the reference plan, the contributions would satisfy the uniform percentage requirement as applied to that reference plan, or the employer allows each employee to apply the minimum amount of employer contribution determined necessary to meet the uniform percentage requirement toward the reference plan or toward coverage under any other available QHP.

E. *Employers complying with State law*

The Treasury Department and the IRS understand that at least one State requires employers to contribute a certain percentage (50%) to an employee's premium cost, but also requires that the employee's contribution not exceed a certain percentage of monthly gross earnings so that, in some instances, the employer's required contribution for a particular employee may exceed 50 percent of the premium.[3] To satisfy the uniform percentage requirement under section 45R, that employer generally would be required to increase the employer contribution to all its employees' premiums to match the increase for that one employee, which may be difficult especially if the percentage increase is substantial. Accordingly, for taxable years beginning in 2014, an employer will be treated as meeting the uniform percentage requirement if the failure to satisfy the uniform percentage requirement is attributable to additional employer contributions made to certain employees solely to comply with an applicable State or local law.

IV. *Claiming the Credit*

A. *Form 8941, Credit for Small Employer Health Insurance Premiums*

For an eligible small employer that is not a tax-exempt eligible small employer, the credit is calculated on Form 8941, *Credit for Small Employer Health Insurance Premiums*, and can be applied against both regular and alternative minimum tax. For tax-exempt eligible small employers, the credit is also calculated on Form 8941 and attached to Form 990–T, *Exempt Organization Business Income Tax Return*. Filing Form 990–T with an attached Form 8941 is required for a tax-exempt eligible

[3] See Hawaii Prepaid Health Care Act, Hawaii Revised Statutes Chapter 393 (1974).

small employer to claim the credit, even if it is not otherwise required to file Form 990–T.

B. *Estimated tax payments and alternative minimum tax (AMT) liability*

These proposed regulations provide that the section 45R credit may be reflected in an eligible small employer's estimated tax payments in accordance with the estimated tax rules. The credit can also be used to offset an eligible small employer's AMT liability for the year, subject to certain limitations based on the amount of an employer's regular tax liability, AMT liability and other allowable credits. See section 38(c)(1), as modified by section 38(c)(4)(B)(vi), for these limitations.

C. *Reduced section 162 deduction*

No deduction is allowed under section 162 for that portion of the premiums paid equal to the amount of the credit claimed under section 45R. See section 280C(h).

Proposed Effective/Applicability Dates

These regulations are proposed to be effective the date the final regulations are published in the **Federal Register**, and apply to taxable years beginning after December 31, 2013. To assist with any preparation needed for transition to the requirements applicable to taxable years beginning after December 31, 2014, employers may also rely on these proposed regulations for guidance for taxable years beginning after December 31, 2013, and before December 31, 2014. If and to the extent future guidance is more restrictive than the guidance in these proposed regulations, the future guidance will be applied without retroactive effect and employers will be provided with time to come into compliance with the final regulations (and will in any case not be required to comply for taxable years beginning prior to January 1, 2015).

Availability of IRS Documents

IRS notices cited in this preamble are made available by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

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 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

It is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. While the number of small entities affected is substantial, the economic impact on the affected small entities is not significant. The information required to determine a small employer's eligibility for, and amount of, an applicable credit, generally consisting of the annual hours worked by its employees, the annual wages paid to its employees, the cost of the employees' premiums for qualified health plans and the employer's contribution towards those premiums, is information that the small employer generally will retain for business purposes and be readily available to accumulate for purposes of completing the necessary form for claiming the credit. In addition, this credit is available to any eligible small employer only twice (because the credit can be claimed by a small employer only for two consecutive taxable years beginning after December 31, 2013, beginning with the taxable year for which the small employer first claims the credit). Accordingly, no small employer will calculate the credit amount or complete the process for claiming the credit under this regulation more than two times.

Based on these facts, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are timely submitted to the IRS as prescribed in this preamble under the "Addresses" heading. The IRS and the Treasury Department request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request. A public hearing will 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 hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Stephanie Caden, Office of the Division Counsel/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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Proposed Amendments to the Regulations

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

PART I—INCOME TAXES

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

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

Par. 2. Section 1.45R–0 is added to read as follows:

§1.45R–0 Table of contents

This section lists the table of contents for §§1.45R–1 through 1.45R–5.

§1.45R–1 Definitions

(7) Exchange.

(8) Family member.

(9) Full-time equivalent employee (FTE).

(10) List billing.

(11) Net premium payments.

(12) Nonelective contribution.

(13) Payroll taxes.

(14) Qualified health plan (QHP).

(15) Qualifying arrangement.

(16) Seasonal worker.

(17) Small Business Health Options Program (SHOP).

(18) State.

(19) Tax-exempt eligible small employer.

(20) Tier.

(21) United States.

(22) Wages.

(b) Effective/applicability date.

§1.45R–2 Eligibility for the credit.

(a) Eligible small employer.

(b) Application of section 414 employer aggregation rules.

(c) Employees taken into account.

(d) Determining the hours of service performed by employees.

(1) In general.

(2) Permissible methods.

(3) Examples.

(e) FTE calculation.

(1) In general.

(2) Example.

(f) Determining the employer's average annual wages.

(1) In general.

(2) Example.

(g) Effective/applicability date.

§1.45R–3 Calculating the credit.

(a) In general.

(b) Average premium limitation.

(1) In general.

(2) Examples.

(c) Credit phaseout.

(1) In general.

(2) $25,000 dollar amount adjusted for inflation.

(3) Examples

(d) State credits and subsidies for health insurance.

(1) Payments to employer.

(2) Payments to issuer.

(3) Credits may not exceed net premium payment.

(4) Examples.

(e) Payroll tax limitation for tax-exempt eligible small employers.

(1) In general.

(2) Example.

(f) Two-consecutive-taxable year credit period limitation.

(g) Premium payments by the employer for a taxable year.

(1) In general.

(2) Excluded amounts.

(h) Rules applicable to trusts, estates, regulated investment companies, real estate investment trusts and cooperative organizations.

(i) Transition rule for 2014.

(1) In general.

(2) Example.

(j) Effective/applicability date.

§1.45R–4 Uniform percentage of premium paid.

(a) In general.

(b) Employers offering one QHP.

(1) Employers offering one QHP, self-only coverage, composite billing.

(2) Employers offering one QHP, other tiers of coverage, composite billing.

(3) Employers offering one QHP, self-only coverage, list billing.

(4) Employers offering one QHP, other tiers of coverage, list billing.

(c) Employers offering more than one QHP.

(1) QHP-by-QHP method.

(2) Reference QHP method.

(d) Special rules regarding employer compliance with applicable State and local law.

(e) Examples.

(f) Effective/applicability date.

§1.45R–5 Claiming the credit.

(a) Claiming the credit.

(b) Estimated tax payments and alternative minimum tax (AMT) liability.

(c) Reduction of section 162 deduction.

(d) Effective/applicability date.

Par. 2 Sections 1.45R–1, 1.45R–2, 1.45R–3, 1.45R–4 and 1.45R–5 are added to read as follows:

§1.45R–1 Definitions.

(a) *Definitions*. The definitions in this section apply to this section and §§1.45R–2, 1.45R–3, 1.45R–4, and 1.45R–5.

(1) *Average premium*. The term *average premium* means an average premium for the small group market in the rating area in which the employee enrolls for coverage. The average premium for the small group market in a rating area is determined by the Secretary of Health and Human Services.

(2) *Composite billing*. The term *composite billing* means a system of billing under which a health insurer charges a uniform premium for each of the employer's employees or charges a single aggregate premium for the group of covered employees that the employer then divides by the number of covered employees to determine the uniform premium.

(3) *Credit period*—(i) *In general*. The term *credit period* means, with respect to any eligible small employer (or any predecessor employer), the two-consecutive-taxable year period beginning with the first taxable year beginning after December 31, 2013, for which the eligible small employer files an income tax return with an attached Form 8941, *Credit for Small Employer Health Insurance Premiums* (or files a Form 990–T, *Exempt Organization Business Income Tax Return*, with an attached Form 8941 in the case of a tax-exempt eligible employer). For a transition rule for 2014, see §1.45R–3(i).

(ii) *Examples*. The following examples illustrate the provisions of paragraph (a)(3)(i) of this section:

Example 1. (i) *Facts*. In 2014, an eligible small employer (Employer) that uses a calendar year as its taxable year begins to offer insurance through a SHOP Exchange. Employer has 4 employees and otherwise qualifies for the credit, but none of the employees enroll in the coverage offered by Employer through the SHOP Exchange. In mid–2015, the 4 employees enroll for coverage through the SHOP Exchange but Employer does not file Form 8941 or claim the credit. In 2016, Employer has 20 employees and all are enrolled in coverage offered through the SHOP Exchange. Employer files Form 8941 with Employer's 2016 tax return to claim the credit.

(ii) *Conclusion*. Employer's taxable year 2016 is the first year of the credit period. Accordingly, Employer's two-year credit period is 2016 and 2017.

Example 2. (i) *Facts*. Same facts as *Example 1*, but Employer files Form 8941 with Employer's 2015 tax return.

(ii) *Conclusion*. Employer's taxable year 2015 is the first year of the credit period. Accordingly, Employer's two-year credit period is 2015 and 2016 (and does not include 2017). Employer is entitled to a credit based on a partial year of SHOP Exchange coverage for Employer's taxable year 2015.

(4) *Eligible small employer*. (i) The term *eligible small employer* means an employer that meets the requirements set forth in §1.45R–2.

(ii) For the definition of tax-exempt eligible small employer, see paragraph (a)(19) of this section.

(iii) A farmers' cooperative described under section 521 that is subject to tax pursuant to section 1381, and otherwise meets the requirements of this paragraph (a)(4) and §1.45R–2, is an eligible small employer.

(5) *Employee*—(i) *In general*. Except as otherwise specifically provided in this paragraph (a)(5), the term *employee* means an individual who is an employee of the eligible small employer under the common law standard. See §31.3121(d)–1(c).

(ii) *Leased employees*. For purposes of this paragraph (a)(5), the term *employee* also includes a leased employee (as defined in section 414(n)).

(iii) *Certain individuals excluded*. The term *employee* does not include independent contractors (including sole proprietors), partners in a partnership, shareholders owning more than two percent of an S corporation, and any owners of more than five percent of other businesses. The term *employee* also does not include family members of these owners and partners including the employee-spouse of a shareholder owning more than two percent of the stock of an S corporation, the employee-spouse of an owner of more than five percent of a business, the employee-spouse of a partner owning more than a five percent interest in a partnership, and the employee-spouse of a sole proprietor.

(iv) *Seasonal employees*. The term *employee* does not include seasonal workers unless the seasonal worker provides services to the employer on more than 120 days during the taxable year.

(v) *Dependents*. The term *employee* does not include any other member of the household of owners and partners who qualifies as a dependent under section 152(d)(2)(H).

(vi) *Ministers*. Whether a minister is an employee is determined under the common law standard for determining worker status. If, under the common law standard, a minister is not an employee, the minister is not an employee for purposes of this paragraph (a)(5) and is not taken into account in determining an employer's FTEs, and premiums paid for the minister's health insurance coverage are not taken into account in computing the credit. If, under the common law standard, a minister is an employee, the minister is an employee for purposes of this paragraph (a)(5), and is taken into account in determining an employer's FTEs, and premiums paid by the employer for the minister's health insurance coverage can be taken into account in computing the credit. Because the performance of services by a minister in the exercise of his or her ministry is not treated as employment for purposes of the Federal Insurance Contributions Act (FICA), compensation paid to the minister is not wages as defined under section 3121(a), and is not counted as wages for purposes of computing an employer's average annual wages.

(6) *Employer-computed composite rate*. The term *employer-computed composite rate* refers to a rate for a tier of coverage (such as self-only or family) of a QHP that is the average rate determined by adding the premiums for that tier of coverage for all employees eligible to participate in the QHP (whether or not they actually receive coverage under the plan or under that tier of coverage) and dividing by the total number of such eligible employees. The employer-computed composite rate is used in list billing to convert individual premiums for a tier of coverage into an employer-computed composite rate for that tier of coverage.

(7) *Exchange*. The term *Exchange* means an exchange as defined in 45 CFR 155.20.

(8) *Family member*. The term *family member* is defined with respect to a taxpayer as a child (or descendant of a child); a sibling or step-sibling; a parent (or ancestor of a parent); a step-parent; a niece or nephew; an aunt or uncle; or a son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law or sister-in-law. A spouse of any of these family members is also considered a family member.

(9) *Full-time equivalent employee (FTE)*. The number of *full-time equivalent employees* (*FTEs)* is determined by dividing the total number of hours of service for which wages were paid by the employer to employees during the taxable year by 2,080. See §1.45–2(d) and (e) for permissible methods of calculating hours of service and the method for calculating the number of an employer's FTEs.

(10) *List billing*. The term *list billing* refers to a system of billing under which a health insurer lists a separate premium for each employee based on the age of the employee or other factors.

(11) *Net premium payments*. The term *net premium payments* means, in the case of an employer receiving a State tax credit or State subsidy for providing health insurance to its employees, the excess of the employer's actual premium payments over the State tax credit or State subsidy received by the employer. In the case of a State payment directly to an insurance company (or another entity licensed under State law to engage in the business of insurance), the employer's net premium payments are the employer's actual premium payments. If a State-administered program (such as Medicaid or another program that makes payments directly to a health care provider or insurance company on behalf of individuals and their families who meet certain eligibility guidelines) makes payments that are not contingent on the maintenance of an employer-provided group health plan, those payments are not taken into account in determining the employer's net premium payments.

(12) *Nonelective contribution*. The term *nonelective contribution* means an employer contribution other than a contribution pursuant to a salary reduction arrangement under section 125.

(13) *Payroll taxes*. For purposes of section 45R, the term *payroll taxes* means amounts required to be withheld as tax from the employees of a tax-exempt eligible small employer under section 3402, amounts required to be withheld from such employees under section 3101(b), and amounts of tax imposed on the tax-exempt eligible small employer under section 3111(b).

(14) *Qualified health plan (QHP)*. The term *qualified health plan* (*QHP)* means a qualified health plan as defined in Affordable Care Act section 1301(a) (*see* 42 U.S.C. 18021(a)), but does not include a catastrophic plan described in Affordable Care Act section 1302(e) (*See* 42 U.S.C. 18022(e)).

(15) *Qualifying arrangement*. The term *qualifying arrangement* means an arrangement that requires an eligible small employer to make a nonelective contribution on behalf of each employee who enrolls in a QHP offered to employees by the employer through a SHOP Exchange in an amount equal to a uniform percentage (not less than 50 percent) of the premium cost of the QHP.

(16) *Seasonal worker*. The term *seasonal worker* means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including (but not limited to) workers covered by 29 CFR 500.20(s)(1), and retail workers employed exclusively during holiday seasons.

(17) *Small Business Health Options Program (SHOP)*. The term *Small Business Health Options Program* (*SHOP)* means an Exchange established pursuant to section 1311 of the Affordable Care Act and defined in 45 CFR 155.20.

(18) *State*. The term *State* means a State as defined in section 7701(a)(10), including the District of Columbia.

(19) *Tax-exempt eligible small employer*. The term *tax-exempt eligible small employer* means an eligible small employer that is exempt from federal income tax under section 501(a) as an organization described in section 501(c).

(20) *Tier*. The term *tier* refers to a category of coverage under a benefits package that varies only by the number of individuals covered. For example, self-only coverage, self plus one coverage, and family coverage would constitute three separate tiers of coverage.

(21) *United States*. The term *United States* means United States as defined in section 7701(a)(9).

(22) *Wages*. The term *wages* for purposes of section 45R means wages as defined under section 3121(a) for purposes of the Federal Insurance Contributions Act (FICA), determined without regard to the social security wage base limitation under section 3121(a)(1).

(b) *Effective/applicability date*. This section is applicable for periods after December 31, 2013.

§1.45R–2 Eligibility for the credit.

(a) *Eligible small employer*. To be eligible for the credit, an employer must be an eligible small employer. In order to be an eligible small employer, with respect to any taxable year, an employer must have no more than 25 full-time equivalent employees (FTEs), must have in effect a qualifying arrangement, and the average annual wages of its FTEs must not exceed an amount equal to twice the dollar amount in effect under §1.45R–3(c)(2). To claim the credit for taxable years beginning in or after 2014, the qualifying arrangement is an arrangement that requires an employer to make a nonelective contribution on behalf of each employee who enrolls in a qualified health plan (QHP) offered to employees through a small business health options program (SHOP) Exchange in an amount equal to a uniform percentage (not less than 50 percent) of the premium cost of the QHP. Notwithstanding the foregoing, an employer that is an agency or instrumentality of the federal government, or of a State, local or Indian tribal government, is not an eligible small employer unless it is an organization described in section 501(c) that is exempt from tax under section 501(a). An employer does not fail to be an eligible small employer merely because its employees are not performing services in a trade or business of the employer. An employer located outside the United States (including a U.S. Territory) must have income effectively connected with the conduct of a trade or business in the United States, and otherwise meet the requirements of this section, to be an eligible small employer. For eligibility standards for SHOP related to foreign employers, see 45 CFR 155.710. Paragraphs (b) through (f) of this section provide the rules for determining whether the requirements to be an eligible small employer are met, including rules related to identifying and counting the employer's number of the employer's FTEs, counting the employees' hours of service, and determining the employer's average annual FTE wages for the taxable year. For rules on determining whether the uniform percentage requirement is met, see §1.45R–4.

(b) *Application of section 414 employer aggregation rules*. All employers treated as a single employer under section 414(b), (c), (m) or (o) are treated as a single employer for purposes of this section. Thus, all employees of a controlled group under section 414(b), (c) or (o), or an affiliated service group under section 414(m), are taken into account in determining whether any member of the controlled group or affiliated service group is an eligible small employer. Similarly, all wages paid to, and premiums paid for, employees by the members of the controlled group or affiliated service group are taken into account when determining the amount of the credit for a group treated as a single employer under these rules.

(c) *Employees taken into account*. To be eligible for the credit, an employer must have employees as defined in §1.45R–1(a)(5) during the taxable year. All employees of the eligible small employer are taken into account for purposes of determining the employer's FTEs and average annual FTE wages. Employees include former employees who terminated employment during the year for which the credit is being claimed, employees covered under a collective bargaining agreement, and employees who do not enroll in a QHP offered by the employer through a SHOP Exchange.

(d) *Determining the hours of service performed by employees*—(1) *In general*. An employee's hours of service for a year include each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer during the employer's taxable year. It also includes each hour for which an employee is paid, or entitled to payment, by the employer on account of a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence (except that no more than 160 hours of service are required to be counted for an employee on account of any single continuous period during which the employee performs no duties).

(2) *Permissible methods*. In calculating the total number of hours of service that must be taken into account for an employee during the taxable year, eligible small employers need not use the same method for all employees, and may apply different methods for different classifications of employees if the classifications are reasonable and consistently applied. Eligible small employers may change the method for calculating employees' hours of service for each taxable year. An eligible small employer may use any of the following three methods.

(i) *Actual hours worked*. An employer may use the actual hours of service provided by employees including hours worked and any other hours for which payment is made or due (as described in paragraph (d)(1) of this section).

(ii) *Days-worked equivalency*. An employer may use a days-worked equivalency whereby the employee is credited with 8 hours of service for each day for which the employee would be required to be credited with at least one hour of service under paragraph (d)(1) of this section.

(iii) *Weeks-worked equivalency*. An employer may use a weeks-worked equivalency whereby the employee is credited with 40 hours of service for each week for which the employee would be required to be credited with at least one hour of service under paragraph (d)(1) of this section.

(3) *Examples*. The following examples illustrate the rules of paragraph (d) of this section:

Example 1. Counting hours of service by hours actually worked or for which payment is made or due. (i) *Facts*. An eligible small employer (Employer) has payroll records that indicate that Employee A worked 2,000 hours and that Employer paid Employee A for an additional 80 hours on account of vacation, holiday and illness. Employer uses the actual hours worked method described in paragraph (d)(2)(i) of this section.

(ii) *Conclusion*. Under this method of counting hours, Employee A must be credited with 2,080 hours of service (2,000 hours worked and 80 hours for which payment was made or due).

Example 2. Counting hours of service under days-worked equivalency. (i) *Facts*. Employee B worked from 8 a.m. to 12 p.m. every day for 200 days. Employer uses the days-worked equivalency method described in paragraph (d)(2)(ii) of this section.

(ii) *Conclusion*. Under this method of counting hours, Employee B must be credited with 1,600 hours of service (8 hours for each day Employee B would otherwise be credited with at least 1 hour of service x 200 days).

Example 3. Counting hours of service under weeks-worked equivalency. (i) *Facts*. Employee C worked 49 weeks, took 2 weeks of vacation with pay, and took 1 week of leave without pay. Employer uses the weeks-worked equivalency method described in paragraph (d)(2)(iii) of this section.

(ii) *Conclusion*. Under this method of counting hours, Employee C must be credited with 2,040 hours of service (40 hours for each week during which Employee C would otherwise be credited with at least 1 hour of service x 51 weeks).

Example 4. Excluded employees. (i) *Facts*. Employee D worked 3 consecutive weeks at 32 hours per week during the holiday season. Employee D did not work during the remainder of the year. Employee E worked limited hours after school from time to time through the year for a total of 350 hours. Employee E does not work through the summer. Employer uses the actual hours worked method described in paragraph (d)(2)(i) of this section.

(ii) *Conclusion*. Employee D is a seasonal employee who worked for 120 days or less for Employer during the year. Employee D's hours are not counted when determining the hours of service of Employer's employees. Employee E works throughout most of the year and is not a seasonal employee. Employer counts Employee E's 350 hours of service during the year.

(e) *FTE Calculation*—(1) *In general*. The number of an employer's FTEs is determined by dividing the total hours of service, determined in accordance with paragraph (d) of this section, credited during the year to employees taken into account under paragraph (c) of this section (but not more than 2,080 hours for any employee) by 2,080. The result, if not a whole number, is then rounded to the next lowest whole number. If, however, after dividing the total hours of service by 2,080, the resulting number is less than one, the employer rounds up to one FTE.

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

Example. Determining the number of FTEs. (i) *Facts*. A sole proprietor pays 5 employees wages for 2,080 hours each, pays 3 employees wages for 1,040 hours each, and pays 1 employee wages for 2,300 hours. One of the employees working 2,080 hours is the sole proprietor's nephew. The sole proprietor's FTEs would be calculated as follows: 8,320 hours of service for the 4 employees paid for 2,080 hours each (4 x 2,080); the sole proprietor's nephew is excluded from the FTE calculation; 3,120 hours of service for the 3 employees paid for 1,040 hours each (3 x 1,040); and 2,080 hours of service for the 1 employee paid for 2,300 hours (lesser of 2,300 and 2,080). The sum of the included hours of service equals 13,520 hours of service.

(ii) *Conclusion*. The sole proprietor's FTEs equal 6 (13,520 divided by 2,080 = 6.5, rounded to the next lowest whole number).

(f) *Determining the employer's average annual FTE wages*—(1) *In general*. All wages paid to employees (including overtime pay) are taken into account in computing an eligible small employer's average annual FTE wages. The average annual wages paid by an employer for a taxable year is determined by dividing the total wages paid by the eligible small employer during the employer's taxable year to employees taken into account under paragraph (c) of this section by the number of the employer's FTEs for the year. The result is then rounded down to the nearest $1,000 (if not otherwise a multiple of $1,000). For purposes of determining the employer's average annual wages for the taxable year, only wages that are paid for hours of service determined under paragraph (d) of this section are taken into account.

(2) *Example*. The following example illustrates the provision of paragraphs (e) and (f) of this section:

Example. (i) *Facts*. An employer has 26 FTEs with average annual wages of $23,000. Only 22 of the employer's employees enroll for coverage offered by the employer through a SHOP Exchange.

(ii) *Conclusion*. The hours of service and wages of all employees are taken into consideration in determining whether the employer is an eligible small employer for purposes of the credit. Because the employer does not have fewer than 25 FTEs for the taxable year, the employer is not an eligible small employer for purposes of this section, even if less than 25 employees (or FTEs) enroll for coverage through the SHOP Exchange.

(g) *Effective/applicability date*. This section is applicable for periods after December 31, 2013.

§1.45R–3 Calculating the credit.

(a) *In general*. The tax credit available to an eligible small employer equals 50 percent of the eligible small employer's premium payments made on behalf of its employees under a qualifying arrangement, or in the case of a tax-exempt eligible small employer, equals 35 percent of the employer's premium payments made on behalf of its employees under a qualifying arrangement. The employer's tax credit is subject to the following adjustments and limitations:

(1) The average premium limitation for the small group market in the rating area in which the employee enrolls for coverage, described in paragraph (b) of this section;

(2) The credit phaseout described in paragraph (c) of this section;

(3) The net premium payment limitation in the case of State credits or subsidies described in paragraph (d) of this section;

(4) The payroll tax limitation for a tax-exempt eligible small employer described in paragraph (e) of this section;

(5) The two-consecutive-taxable year credit period limitation, described in paragraph (f) of this section;

(6) The rules with respect to the premium payments taken into account, described in paragraph (g) of this section;

(7) The rules with respect to credits applicable to trusts, estates, regulated investment companies, real estate invest-

ment trusts and cooperatives described in paragraph (h) of this section; and

(8) The transition relief for 2014 described in paragraph (i) of this section.

(b) *Average premium limitation*—(1) *In general*. The amount of an eligible small employer's premium payments that are taken into account in calculating the credit is limited to the premium payments the employer would have made under the same arrangement if the average premium for the small group market in the rating area in which the employee enrolls for coverage were substituted for the actual premium.

(2) *Examples*. The following examples illustrate the provisions of paragraph (b)(1) of this section:

Example 1. Comparing premium payments to average premium for small group market. (i) *Facts*. An eligible small employer (Employer) offers a health insurance plan with self-only and family coverage through a small business options program (SHOP) Exchange. Employer has 9 full-time equivalent employees (FTEs) with average annual wages of $23,000 per FTE. All 9 employees are employees as defined under §1.45R–1(a)(5). Four employees are enrolled in self-only coverage and 5 are enrolled in family coverage. Employer pays 50% of the premiums for all employees enrolled in self-only coverage and 50% of the premiums for all employees enrolled in family coverage (and the employee is responsible for the remainder in each case). The premiums are $4,000 a year for self-only coverage and $10,000 a year for family coverage. The average premium for the small group market in Employer's rating area is $5,000 for self-only coverage and $12,000 for family coverage. Employer's premium payments for each FTE ($2,000 for self-only coverage and $5,000 for family coverage) do not exceed 50 percent of the average premium for the small group market in Employer's rating area ($2,500 for self-only coverage and $6,000 for family coverage).

(ii) *Conclusion*. The amount of premiums paid by Employer for purposes of computing the credit equals $33,000 ((4 x $2,000) plus (5 x $5,000)).

Example 2. Premium payments exceeding average premium for small group market. (i) *Facts*. Same facts as *Example* 1, except that the premiums are $6,000 for self-only coverage and $14,000 for family coverage. Employer's premium payments for each employee ($3,000 for self-only coverage and $7,000 for family coverage) exceed 50% of the average premium for the small group market in Employer's rating area ($2,500 for self-only coverage and $6,000 for family coverage).

(ii) *Conclusion*. The amount of premiums paid by Employer for purposes of computing the credit equals $40,000 ((4 x $2,500) plus (5 x $6,000)).

(c) *Credit phaseout*—(1) *In general*. The tax credit is subject to a reduction (but not reduced below zero) if the employer's FTEs exceed 10 or average annual FTE wages exceed $25,000. If the number of FTEs exceeds 10, the reduction is determined by multiplying the otherwise applicable credit amount by a fraction, the numerator of which is the number of FTEs in excess of 10 and the denominator of which is 15. If average annual FTE wages exceed $25,000, the reduction is determined by multiplying the otherwise applicable credit amount by a fraction, the numerator of which is the amount by which average annual FTE wages exceed $25,000 and the denominator of which is $25,000. In both cases, the result of the calculation is subtracted from the otherwise applicable credit to determine the credit to which the employer is entitled. For an employer with both more than 10 FTEs and average annual FTE wages exceeding $25,000, the total reduction is the sum of the two reductions.

(2) *$25,000 dollar amount adjusted for inflation*. For taxable years beginning in a calendar year after 2013, each reference to "$25,000" in paragraph (c)(1) of this section is replaced with a dollar amount equal to $25,000 multiplied by the cost-of-living adjustment under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2012" for "calendar year 1992" in section 1(f)(3)(B).

(3) *Examples*. The following examples illustrate the provisions of paragraph (c) this section. For purposes of these examples, no employer is a tax-exempt organization and no other adjustments or limitations on the credit apply other than those adjustments and limitations explicitly set forth in the example.

Example 1. Calculating the maximum credit for an eligible small employer without an applicable credit phaseout. (i) *Facts*. An eligible small employer (Employer) has 9 FTEs with average annual wages of $23,000. Employer pays $72,000 in health insurance premiums for those employees (which does not exceed the total average premium for the small group market in the rating area), and otherwise meets the requirements for the credit.

(ii) *Conclusion*. Employer's credit equals $36,000 (50% x $72,000).

Example 2. Calculating the credit phaseout if the number of FTEs exceeds 10 or average annual wages exceed $25,000, as adjusted for inflation. (i) *Facts*. An eligible small employer (Employer) has 12 FTEs and average annual FTE wages of $30,000 in a year when the amount in paragraph (c)(1) of this section, as adjusted for inflation, is $25,000. Employer pays $96,000 in health insurance premiums for its employees (which does not exceed the average premium for the small group market in the rating area) and otherwise meets the requirements for the credit.

(ii) *Conclusion*. The initial amount of the credit is determined before any reduction (50% x $96,000) = $48,000. The credit reduction for FTEs in excess of 10 is $6,400 ($48,000 x 2/15). The credit reduction for average annual FTE wages in excess of $25,000 is $9,600 ($48,000 x $5,000/$25,000), resulting in a total credit reduction of $16,000 ($6,400 + $9,600). Employer's total tax credit equals $32,000 ($48,000 - $16,000).

(d) *State credits and subsidies for health insurance*—(1) *Payments to employer*. If the employer is entitled to a State tax credit or a premium subsidy that is paid directly to the employer, the premium payment made by the employer is not reduced by the credit or subsidy for purposes of determining whether the employer has satisfied the requirement to pay an amount equal to a uniform percentage (not less than 50 percent) of the premium cost. Also, except as described in paragraph (d)(3) of this section, the maximum amount of the credit is not reduced by reason of a State tax credit or subsidy or by reason of payments by a State directly to an employer.

(2) *Payments to issuer*. If a State makes payments directly to an insurance company (or another entity licensed under State law to engage in the business of insurance) to pay a portion of the premium for coverage of an employee enrolled for coverage through a SHOP Exchange, the State is treated as making these payments on behalf of the employer for purposes of determining whether the employer has satisfied the requirement to pay an amount equal to a uniform percentage (not less than 50 percent) of the premium cost of coverage. Also, except as described below in paragraph (d)(3) of this section, these premium payments by the State are treated as an employer contribution under this section for purposes of calculating the credit.

(3) *Credits may not exceed net premium payment*. Regardless of the application of paragraphs (d)(1) and (d)(2) of this section, in no event may the amount of the credit exceed the amount of the employer's net premium payments as defined in §1.45R–1(a)(11).

(4) *Examples*. The following examples illustrate the provisions of paragraphs (d)(1) through (d)(3) of this section. For purposes of these examples, the eligible small employer's taxable year and plan year begin during or after 2014. No other adjustments or limitations on the credit apply other than those adjustments and limitations explicitly set forth in the example.

Example 1. State premium subsidy paid directly to employer. (i) *Facts*. The State in which an eligible small employer (Employer) operates provides a health insurance premium subsidy of up to 40% of the health insurance premiums for each eligible employee. The State pays the subsidy directly to Employer. Employer has one employee, Employee D. Employee D's health insurance premiums are $100 per month and are paid as follows: $80 by Employer and $20 by Employee D through salary reductions to a cafeteria plan. The State pays Employer $40 per month as a subsidy for Employer's payment of insurance premiums on behalf of Employee D. Employer is otherwise an eligible small employer that meets the requirements for the credit.

(ii) *Conclusion*. For purposes of calculating the credit, the amount of premiums paid by the employer is $80 per month (the premium payment by the Employer without regard to the subsidy from the State). The maximum credit is $40 ($80 x 50%).

Example 2. State premium subsidy paid directly to insurance company. (i) *Facts*. The State in which Employer operates provides a health insurance premium subsidy of up to 30% for each eligible employee. Employer has one employee, Employee E. Employee E is enrolled in self-only coverage through a qualified health plan (QHP) offered by Employer through a SHOP Exchange. Employee E's health insurance premiums are $100 per month and are paid as follows: $50 by Employer; $30 by the State and $20 by the employee. The State pays the $30 per month directly to the insurance company and the insurance company bills Employer for the employer and employee's share, which equal $70 per month. Employer is otherwise an eligible small employer that meets the requirements for the credit.

(ii) *Conclusion*. For purposes of calculating the amount of the credit, the amount of premiums paid by Employer is $80 per month (the sum of Employer's payment and the State's payment). The maximum credit is $40 ($80 x 50%).

Example 3. *Credit limited by employer's net premium payment*. (i) *Facts*. Employer is an eligible small employer that is not a tax-exempt organization. The State in which Employer operates provides a health insurance premium subsidy of up to 50% for each eligible employee. Employer has one employee, Employee F. Employee F is enrolled in self-only coverage under the QHP offered to Employee F by Employer through a SHOP Exchange. Employee F's health insurance premiums are $100 per month and are paid as follows: $20 by Employer; $50 by the State and $30 by Employee F. The State pays the $50 per month directly to the insurance company and the insurance company bills Employer for the employer's and employee's shares, which total $50 per month. Employer is otherwise an eligible small employer that meets the requirements for the credit. The amount of premiums paid by Employer (the sum of Employer's payment and the State's payment) is $70 per month, which is more than 50% of the $100 monthly premium payment. The amount of the premium for calculating the credit is also $70 per month.

(ii) *Conclusion*. The maximum credit without adjustments or limitations is $35 ($70 x 50%). Employer's net premium payment is $20 (the amount actually paid by Employer excluding the State subsidy). Because the credit may not exceed Employer's net premium payment, the credit is $20 (the lesser of $35 or $20).

(e) *Payroll tax limitation for tax-exempt eligible small employers*—(1) *In general*. For a tax-exempt eligible employer, the amount of the credit claimed cannot exceed the total amount of payroll taxes (as defined in §1.45R–1(a)(13)) of the employer during the calendar year in which the taxable year begins.

(2) *Example*. The following example illustrates the provisions of paragraph (e)(1) of this section. For purposes of this example, the eligible small employer's taxable year and plan year begin during or after 2014. No other adjustments or limitations on the credit apply other than those adjustments and limitations explicitly set forth in the example.

Example. Calculating the maximum credit for a tax-exempt eligible small employer. (i) *Facts*. Employer is a tax-exempt eligible small employer that has 10 FTEs with average annual wages of $21,000. Employer pays $80,000 in health insurance premiums for its employees (which does not exceed the average premium for the small group market in the rating area) and otherwise meets the requirements for the credit. The total amount of Employer's payroll taxes equals $30,000.

(ii) *Conclusion*. The initial amount of the credit is determined before any reduction: (35% x $80,000) = $28,000, and Employer's payroll taxes are $30,000. The total tax credit equals $28,000 (the lesser of $28,000 and $30,000).

(f) *Two-consecutive-taxable year credit period limitation*. The credit is only available to an eligible small employer, including a tax-exempt eligible small employer, during that employer's credit period. For a transition rule for 2014, see paragraph (i) of this section. To prevent the avoidance of the two-year limit on the credit period through the use of successor entities, a successor entity and a predecessor entity are treated as the same employer. For this purpose, the rules for identifying successor entities under §31.3121(a)(1)–1(b) apply. Accordingly, for example, if an eligible small employer claims the credit for the 2014 and 2015 taxable years, that eligible small employer's credit period will have expired so that any successor employer to that eligible small employer will not be able to claim the credit for any subsequent taxable years.

(g) *Premium payments by the employer for a taxable year*—(1) *In general*. Only premiums paid by an eligible small employer or tax-exempt eligible small employer on behalf of each employee enrolled in a QHP or payments paid to the issuer in accordance with paragraph (d)(2) of this section are counted in calculating the credit. If an eligible small employer pays only a portion of the premiums for the coverage provided to employees (with employees paying the rest), only the portion paid by the employer is taken into account. Premiums paid on behalf of seasonal workers may be counted in determining the amount of the credit (even though seasonal worker wages and hours of service are not included in the FTE and average annual FTE wage calculation unless the seasonal worker works for the employer on more than 120 days during the taxable year).

(2) *Excluded amounts*—(i) *Salary reduction amounts*. Any premium paid pursuant to a salary reduction arrangement under a section 125 cafeteria plan is not treated as paid by the employer for purposes of section 45R and these regulations. For this purpose, premiums paid with employer-provided flex credits that employees may elect to receive as cash or other taxable benefit are treated as paid pursuant to a salary reduction arrangement under a section 125 cafeteria plan.

(ii) *HSAs, HRAs, and FSAs*. Employer contributions to, or amounts made available under, health savings accounts, reimbursement arrangements, and health flexible spending arrangements are not taken into account in determining the premium payments by the employer for a taxable year.

(h) *Rules applicable to trusts, estates, regulated investment companies, real estate investment trusts and cooperative organizations*. Rules similar to the rules of section 52(d) and (e) and the regulations thereunder apply in calculating and apportioning the credit with respect to a trust, estate, a regulated investment company or real estate investment trusts or cooperative organization.

(i) *Transition rule for 2014*— (1) *In general*. This paragraph (i) applies if as of August 26, 2013, an eligible small employer offers coverage on a plan year that begins on a date other than the first day of its taxable year. In such a case, if an eligible small employer has a health plan year beginning after January 1, 2014 but before January 1, 2015 (2014 health plan year) that begins after the start of its first taxable year beginning after January 1, 2014

(2014 taxable year), and the employer offers one or more QHPs to its employees through a SHOP Exchange as of the first day of its 2014 health plan year, then the eligible small employer is treated as offering coverage through a SHOP Exchange for its entire 2014 taxable year for purposes of section 45R if the health care coverage provided from the first day of the 2014 taxable year through the day immediately preceding the first day of the 2014 health plan year would have qualified for a credit under section 45R using the rules applicable to taxable years beginning before January 1, 2014. If the eligible small employer claims the section 45R credit in the 2014 taxable year, the 2014 taxable year begins the first year of the credit period.

(2) *Example*. The following example illustrates the rule of paragraph (i) of this section. For purposes of this example, the eligible small employer is not a tax-exempt organization. No other adjustments or limitations on the credit apply other than those adjustments and limitations explicitly set forth in the example.

Example. (i) *Facts*. An eligible small employer (Employer) has a 2014 taxable year that begins January 1, 2014 and ends on December 31, 2014, and a 2014 health plan year that begins July 1, 2014 and ends June 30, 2015. Employer offers a QHP through a SHOP Exchange the coverage under which begins July 1, 2014. Employer provides coverage from January 1, 2014 through June 30, 2014 that would have qualified for a credit under section 45R using the rules applicable to taxable years beginning before January 1, 2014.

(ii) *Conclusion*. Employer may claim the credit at the 50% rate under section 45R for the entire 2014 taxable year using the rules under paragraph (i) of this section. Accordingly, in calculating the credit, Employer may count premiums paid for coverage from January 1, 2014 through June 30, 2014, as well as premiums paid from July 1, 2014 through December 31, 2014. If Employer claims the credit for the 2014 taxable year, that taxable year is the first year of the credit period.

(j) *Effective/applicability date*. This section is applicable for periods after December 31, 2013.

§1.45R–4 Uniform percentage of premium paid.

(a) *In general*. An eligible small employer must pay a uniform percentage (not less than 50 percent) of the premium for each employee enrolled in a qualified health plan (QHP) offered to employees by the employer through a small business health options program (SHOP) Exchange.

(b) *Employers offering one QHP*. An employer that offers a single QHP through a SHOP Exchange must satisfy the requirements of this paragraph (b).

(1) *Employers offering one QHP, self-only coverage, composite billing*. For an eligible small employer offering self-only coverage and using composite billing, the employer satisfies the requirements of this paragraph if it pays the same amount toward the premium for each employee receiving self-only coverage under the QHP, and that amount is equal to at least 50 percent of the premium for self-only coverage.

(2) *Employers offering one QHP, other tiers of coverage, composite billing*. For an eligible small employer offering one QHP providing at least one tier of coverage with a higher premium than self-only coverage and using composite billing, the employer satisfies the requirements of this paragraph (b)(2) if it either—

(i) Pays an amount for each employee enrolled in that more expensive tier of coverage that is the same for all employees and that is no less than the amount that the employer would have contributed toward self-only coverage for that employee, or

(ii) Meets the requirements of paragraph (b)(1) of this section for each tier of coverage that if offers.

(3) *Employers offering one QHP, self-only coverage, list billing*. For an eligible small employer offering one QHP providing only self-only coverage and using list billing, the employer satisfies the requirements of this paragraph (b)(3) if either—

(i) The employer pays toward the premium an amount equal to a uniform percentage (not less than 50 percent) of the premium charged for each employee, or

(ii) The employer converts the individual premiums for self-only coverage into an employer-computed composite rate for self-only coverage, and, if an employee contribution is required, each employee who receives coverage under the QHP pays a uniform amount toward the self-only premium that is no more than 50 percent of the employer-computed composite rate for self-only coverage.

(4) *Employers offering one QHP, other tiers of coverage, list billing*. For an eligible small employer offering one QHP providing at least one tier of coverage with a higher premium than self-only coverage and using list billing, the employer satisfies the requirements of this paragraph (b)(4) if it either—

(i) Pays toward the premium for each employee covered under each tier of coverage an amount equal to or exceeding the amount that the employer would have contributed with respect to that employee for self-only coverage, calculated either based upon the actual premium that would have been charged by the insurer for that employee for self-only coverage or based upon the employer-computed composite rate for self-only coverage, or

(ii) Meets the requirements of paragraph (b)(3) of this section for each tier of coverage that it offers substituting the employer-computed composite rate for each tier of coverage for the employer-computed composite rate for self-only coverage.

(c) *Employers offering more than one QHP*. If an eligible small employer offers more than one QHP, the employer must satisfy the requirements of this paragraph (c). The employer may satisfy the requirements of this paragraph (c) in either of the following two ways:

(1) *QHP-by-QHP method*. The employer makes payments toward the premium with respect to each QHP for which the employer is claiming the credit that satisfy the uniform percentage requirement under paragraph (b) of this section on a QHP-by-QHP basis (so that the amounts or percentages of premium paid by the employer for each QHP need not be identical, but the payments with respect to each QHP must satisfy paragraph (b) of this section); or

(2) *Reference QHP method*. The employer designates a reference QHP and makes employer contributions in accordance with the following requirements—

(i) The employer determines a level of employer contributions for each employee such that, if all eligible employees enrolled in the reference QHP, the contributions would satisfy the uniform percentage requirement under paragraph (b) of this section, or

(ii) The employer allows each employee to apply the minimum amount of employer contribution determined necessary to meet the uniform percentage requirement under paragraph (b) of this section either toward the reference QHP or toward the cost of coverage under any of the other available QHPs.

(d) *Special rules regarding employer compliance with applicable State or local law*. An employer will be treated as satisfying the uniform percentage requirement if the failure to otherwise satisfy the uniform percentage requirement is attributable solely to additional employer contributions made to certain employees to comply with an applicable State or local law.

(e) *Examples*. The following examples illustrate the provisions of paragraphs (a) through (d) of this section:

Example 1. (i) *Facts*. An eligible small employer (Employer) offers a QHP on a SHOP Exchange, Plan A, which uses composite billing. The premiums for Plan A are $5,000 per year for self-only coverage, and $10,000 for family coverage. Employees can elect self-only or family coverage under Plan A. Employer pays $3,000 (60% of the premium) toward self-only coverage under Plan A and $6,000 (60% of the premium) toward family coverage under Plan A.

(ii) *Conclusion*. Employer's contributions of 60% of the premium for each tier of coverage satisfy the uniform percentage requirement.

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

(ii) *Conclusion*. Employer's contributions of 60% of the premium toward self-only coverage and the same dollar amount toward the premium for family coverage satisfy the uniform percentage requirement, even though the percentage is not the same.

Example 3. (i) *Facts*. Employer offers two QHPs, Plan A and Plan B, both of which use composite billing. The premiums for Plan A are $5,000 per year for self-only coverage and $10,000 for family coverage. The premiums for Plan B are $7,000 per year for self-only coverage and $13,000 for family coverage. Employees can elect self-only or family coverage under either Plan A or Plan B. Employer pays $3,000 (60% of the premium) for each employee electing self-only coverage under Plan A, $3,000 (30% of the premium) for each employee electing family coverage under Plan A, $3,500 (50% of the premium) for each employee electing self-only coverage under Plan B, and $3,500 (27% of the premium) for each employee electing family coverage under Plan B.

(ii) *Conclusion*. Employer's contributions of 60% (or $3,000) of the premiums for self-only coverage and the same dollar amounts toward the premium for family coverage under Plan A, and of 50% (or $3,500) of the premium for self-only of coverage and the same dollar amount toward the premium for family coverage under Plan B, satisfy the uniform percentage requirement on a QHP-by-QHP basis; therefore the employer's contributions to both plans satisfy the uniform percentage requirement.

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

(ii) *Conclusion*. Employer's contribution of 50% (or $2,500) toward the premium of each employee enrolled under Plan A or Plan B satisfies the uniform percentage requirement.

Example 5. (i) *Facts*. Employer receives a list billing premium quote with respect to Plan X, a QHP offered by Employer on a SHOP Exchange for health insurance coverage for each of Employer's four employees. For Employee L, age 20, the self-only premium is $3,000 per year, and the family premium is $8,000. For Employees M, N and O, each age 40, the self-only premium is $5,000 per year and the family premium is $10,000. The total self-only premium for the four employees is $18,000 ($3,000 + (3 x 5,000)). Employer calculates an employer-computed composite self-only rate of $4,500 ($18,000 / 4). Employer offers to make contributions such that each employee would need to pay $2,000 of the premium for self-only coverage. Under this arrangement, Employer would contribute $1,000 toward self-only coverage for L and $3,000 toward self-only coverage for M, N, and O. In the event an employee elects family coverage, Employer would make the same contribution ($1,000 for L or $3,000 for M, N, or O) toward the family premium.

(ii) *Conclusion*. Employer satisfies the uniform percentage requirement because it offers and makes contributions based on an employer-calculated composite self-only rate such that, to receive self-only coverage, each employee must pay a uniform amount which is not more than 50% of the composite rate, and it allows employees to use the same employer contributions toward family coverage.

Example 6. (i) *Facts*. Same facts as *Example 5*, except that Employer calculates an employer-computed composite family rate of $9,500 (($8,000 + 3 x 10,000) / 4) and requires each employee to pay $4,000 of the premium for family coverage.

(ii) *Conclusion*. Employer satisfies the uniform percentage requirement because it offers and makes contributions based on a calculated self-only and family rate such that, to receive either self-only or family coverage, each employee must pay a uniform amount which is not more than 50% of the composite rate for coverage of that tier.

Example 7. (i) *Facts*. Same facts as *Example 5*, except that Employer also receives a list billing premium quote from Plan Y with respect to a second QHP offered by Employer on a SHOP Exchange for each of Employer's 4 employees. Plan Y's quote for Employee L, age 20, is $4,000 per year for self-only coverage or $12,000 per year for family coverage. For Employees M, N and O, each age 40, the premium is $7,000 per year for self-only coverage or $15,000 per year for family coverage. The total self-only premium under Plan Y is $25,000 ($4,000 + (3 x 7,000)). The employer-computed composite self-only rate is $6,250 ($25,000 / 4). Employer designates Plan X as the reference plan. Employer offers to make contributions based on the employer-calculated composite premium for the reference QHP (Plan X) such that each employee has to contribute $2,000 to receive self-only coverage through Plan X. Under this arrangement, Employer would contribute $1,000 toward self-only coverage for L and $3,000 toward self-only coverage for M, N, and O. In the event an employee elects family coverage through Plan X or either self-only or family coverage through Plan Y, Employer would make the same contributions ($1,000 for L or $3,000 for M, N, or O) toward that coverage.

(ii) *Conclusion*. Employer satisfies the uniform percentage requirement because it offers and makes contributions based on the employer-calculated composite self-only premium for the Plan X reference QHP such that, in order to receive self-only coverage, each employee must pay a uniform amount which is not more than 50% of the self-only composite premium of the reference QHP; it allows employees to use the same employer contributions toward family coverage in the reference QHP or coverage through another QHPs.

Example 8. (i) *Facts*. Employer has five employees. Employer is located in a State that requires employers to pay 50% of employees' premium costs, but also requires that an employee's contribution not exceed a certain percentage of the employee's monthly gross earnings from that employer. Employer offers to pay 50% of the premium costs for all its employees, and to comply with the State law, Employer contributes more than 50% of the premium costs for two of its employees.

(ii) *Conclusion*. Employer satisfies the uniform percentage requirement because its failure to otherwise satisfy the uniform percentage requirement is attributable solely to compliance with the applicable State or local law.

(f) *Effective/applicability date*. This section is applicable for periods after December 31, 2013.

§1.45R–5 Claiming the credit.

(a) *Claiming the credit*. The credit is a general business credit and is claimed on an eligible small employer's annual income tax return and offsets an employer's actual tax liability for the year. The credit is claimed by attaching Form 8941, *Credit for Small Employer Health Insurance Premiums*, to the eligible small employer's income tax return or, in the case of a tax-exempt eligible small employer, by attaching Form 8941 to the employer's Form 990–T, *Exempt Organization Business Income Tax Return*. To claim the credit, a tax-exempt eligible small employer must file a form 990–T with an attached Form 8941, even if a Form 990–T would not otherwise be required to be filed.

(b) *Estimated tax payments and alternative minimum tax (AMT) liability*. An eligible small employer may reflect the credit in determining estimated tax payments for the year in which the credit applies in accordance with the estimated tax rules as set forth in section 6654 and 6655 and the applicable regulations. An eligible small employer may also use the credit to offset the employer's alternative minimum tax (AMT) liability for the year, if any, subject to certain limitations based on the amount of an eligible small employer's regular tax liability, AMT liability and other allowable credits. See section 38(c)(1), as modified by section 38(c)(4)(B)(vi). However, an eligible small employer, including a tax-exempt eligible small employer, may not reduce its deposits and payments of employment tax (that is, income tax required to be withheld under section 3402, social security and Medicare tax under sections 3101 and 3111, and federal unemployment tax under section 3301) during the year in anticipation of the credit.

(c) *Reduction of section 162 deduction*. No deduction under section 162 is allowed for the eligible small employer for that portion of the health insurance premiums that is equal to the amount of the credit under §1.45R–2.

(d) *Effective/applicability date*. This section is applicable for periods after December 31, 2013.

Heather C. Maloy,
Acting Deputy Commissioner for Services and Enforcement.

(Filed in the Office of the Federal Register on August 23, 2013, 8:45 a.m., and published in the issue of the Federal Register for August 26, 2013, 78 F.R. 52719)

Changes to Information Return Publications and Electronic Filing (FIRE) Testing Date

Announcement 2013–40

Beginning in 2013, the guidance for electronic filing information returns will cease to be issued as Revenue Procedures and will be available as publications on *www.irs.gov*:

- Publication 1220 for Forms 1097, 1098, 1099, 3921, 3922, 5498, 8935, and W–2G will be available by mid to late September 2013
- Publication 1239 for Form 8027 will be available by September 30, 2013
- Publication 4810 for Form 8955–SSA will be available by September 30, 2013
- Publication 1187 for Form 1042–S will be available by September 30, 2013
- Publication 1516 for Form 8596 will be available by September 30, 2013

The website for information returns on *www.irs.gov* has been redesigned and will be available by September 30, 2013. The website will contain links to the above publications, record specifications and layouts, and other helpful information for filing information returns. To access the website go to *www.irs.gov* and search on '*filing information returns*'.

The test system for Filing Information Returns Electronically (FIRE) will be available beginning on November 12, 2013.

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2013–1 through 2013–26 is in Internal Revenue Bulletin 2013–26, dated June 24, 2013.

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[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2013–1 through 2013–26 is in Internal Revenue Bulletin 2013–26, dated June 24, 2013.

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INTERNAL REVENUE BULLETIN

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at *www.irs.gov/irb/*.

CUMULATIVE BULLETINS

The contents of the weekly Bulletins were consolidated semiannually into permanent, indexed, Cumulative Bulletins through the 2008–2 edition.

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WE WELCOME COMMENTS ABOUT THE INTERNAL REVENUE BULLETIN

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page (*www.irs.gov*) or write to the IRS Bulletin Unit, SE:W:CAR:MP:P:SPA, Washington, DC 20224.