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bulletin

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HIGHLIGHTS OF THIS ISSUE

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

INCOME TAX

Rev. Rul. 2014–31, page 935.

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for December 2014.

Rev. Rul. 2014–32, page 917.

This revenue ruling updates previous guidance on the use of smartcards, debit or credit cards, or other electronic media to provide qualified transportation fringe benefits to employees. This revenue ruling also provides guidance on the use by employees of debit cards for paying mandatory shipping fees on transit passes. Finally, the revenue ruling provides that after December 31, 2015, employers may no longer provide qualified transit fringe benefits under a bona fide cash reimbursement arrangement in cases in which a terminal-restricted debit card is the only readily available transit pass in the employer's geographic area.

Rev. Proc. 2014–62, page 948.

Rev. Proc. 2014–62 provides the applicable percentage table in § 36B(b)(3)(A) of the Internal Revenue Code used to calculate an individual's premium assistance credit amount for taxable years beginning after calendar year 2015. It also provides the required contribution percentage in § 36B(c)(2)(C)(i)(II) used to determine whether an individual is eligible for affordable employer-sponsored minimum essential coverage for purposes of § 36B for plan years beginning after calendar year 2015. Additionally, Revenue Procedure 2014–37 cross-references the required contribution percentage, as determined under guidance issued by the Department of Health and Human Services, used to determine whether an individual is eligible for an exemption from the individual shared responsibility payment because of a lack of affordable minimum essential coverage under § 5000A(e)(1)(A) for plan years beginning after calendar year 2015. This revenue procedure is effective for taxable years and plan years beginning after December 31, 2015.

Notice 2014–76, page 946.

Notice 2014–76 identifies the hardship exemptions from the individual shared responsibility payment under § 5000A of the Internal Revenue Code that a taxpayer may claim on a Federal income tax return without obtaining a hardship exemption certification from the Health Insurance Marketplace. This notice applies to taxable years beginning after December 31, 2013.

T.D. 9704, page 922.

This Treasury decision contains final regulations under sections 367 and 6038B. Upon a U.S. person's transfer of stock to a foreign corporation, section 367(a) generally conditions nonrecognition treatment on the person properly filing a gain recognition agreement ("GRA"). In addition, the regulations under section 6038B generally require the U.S. person to report the transfer on a Form 926, unless a GRA is properly filed. Under current law, the standard for curing unfiled or deficient GRAs and Forms 926 is the same: a person must demonstrate "reasonable cause." A NPRM (REG–140649–11) published on January 31, 2013 (78 FR 6772–01) proposed to change the reasonable cause standard to a "not willful" standard for GRAs. In addition, the NPRM proposed to require a Form 926 to be filed in all cases in which a GRA is filed and to generally treat noncompliance with the GRA rules (determined without regard to not willful relief) as a failure to satisfy a section 6038B reporting obligation. Further, the NPRM proposed to apply similar rules to other types of section 367 filings. This Treasury decision adopts the NPRM with modifications.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

EMPLOYEE PLANS

Notice 2014–74, page 937.

This notice amends the two safe harbor explanations in Notice 2009–68, 2009–2 C.B. 423, that can be used to satisfy the requirement under § 402(f) of the Internal Revenue Code ("Code") that certain information be provided to recipients of eligible rollover distributions. Amendments to the safe harbor explanations reflected in this notice relate to the allocation of pre-tax and after-tax amounts, distributions in the form of in-plan Roth rollovers, and certain other clarifications to the two safe harbor explanations. The amendments to the safe harbor explanations (and attached model notices) may be used for plans that apply the guidance in section III of Notice 2014–54, 2014–41 I.R.B. 670, with respect to the allocation of pretax and after-tax amounts.

EMPLOYMENT TAX

Rev. Rul. 2014–32, page 917.

This revenue ruling updates previous guidance on the use of smartcards, debit or credit cards, or other electronic media to provide qualified transportation fringe benefits to employees. This revenue ruling also provides guidance on the use by employees of debit cards for paying mandatory shipping fees on transit passes. Finally, the revenue ruling provides that after December 31, 2015, employers may no longer provide qualified transit fringe benefits under a bona fide cash reimbursement arrangement in cases in which a terminal-restricted debit card is the only readily available transit pass in the employer's geographic area.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

Section 132(f).—Qualified Transportation Fringe

26 CFR 1.132–9: Qualified transportation fringes. (Also: 3121(a)(20), 3306(b)(16), 3401(a)(19),7805(b)(8))

Rev. Rul. 2014–32

(1) Whether, under the facts described in Situations 1 through 5 and Situation 7 below, employer-provided transportation benefits provided through electronic media are excluded from gross income under §§ 132(a)(5) and 132(f) of the Internal Revenue Code (Code) and from wages for employment tax purposes.

(2) Whether, under the facts described in Situation 6 below, qualified transportation fringe benefits include delivery charges incurred by an employee in acquiring transit passes.

(3) Whether, under the facts described in Situation 8 below, qualified transportation fringe benefits can be provided through a bona fide reimbursement arrangement.

FACTS

Situation 1. Employer A provides to its employees transportation benefits in an amount not exceeding the statutory monthly limit under § 132(f)(2) (the statutory monthly limit). Transit system X provides smartcards that may be used by employers in the metropolitan area served by X to provide fare media for transit system X to employees. Smartcards are cards that contain a memory chip storing certain information that uniquely identifies the card and value stored on the card, and that can be used either as fare media or to purchase fare media. The amount stored on the smartcard provided by transit system X is usable only as fare media; it cannot be used for any other purpose or to purchase anything else. A uses the smartcards to provide transportation benefits to its employees. A makes monthly payments to X on behalf of its employees who participate in the transportation benefit program, which X then electronically allocates to each employee's smartcard as instructed by A. A does not require its employees to substantiate their use of the smartcards.

Situation 2. Employer B provides to its employees transportation benefits in an amount not exceeding the statutory monthly limit. Debit card provider P provides terminal-restricted debit cards that may be used by employers to provide transportation benefits to their employees. Terminal-restricted debit cards are debit cards that are restricted for use only at merchant terminals at points of sale at which only fare media for local transit systems is sold. B uses the terminal-restricted debit cards provided by P to provide transportation benefits to its employees. B makes monthly payments to P on behalf of its employees who participate in the transportation benefit program, which P then electronically allocates to each employee's terminal-restricted debit card as instructed by B. B does not require its employees to substantiate their use of the debit cards.

Situation 3. Employer C provides to its employees transportation benefits in an amount not exceeding the statutory monthly limit. Debit card provider Q provides debit cards that may be used by employers to provide transportation benefits to their employees. Q restricts the use of the debit cards to merchants that have been assigned a merchant category code (MCC) indicating that the merchant sells fare media. The merchant may or may not sell other merchandise. C uses the MCC-restricted debit card provided by Q to provide transportation benefits to its employees. A voucher or similar item exchangeable only for a transit pass is not otherwise readily available for purchase by C for direct distribution to C's employees within the meaning of § 132(f)(3).

For the first month an employee participates in the transportation benefit program, the employee pays for fare media with after-tax amounts. The employee then substantiates to C the amount of fare media expenses incurred during the month following reasonable substantiation procedures implemented by C as described in § 1.132–9(b) Q/A–16(c) of the Income Tax Regulations. C then remits to Q an amount equal to the amount of substantiated fare media expenses for the prior month, which Q then electronically allocates to the debit card assigned to the employee. For subsequent months, C reimburses the employee for fare media expenses incurred by the employee by providing funds to Q to be allocated to the employee's debit card equal to the amount of fare media expenses substantiated under the following procedures (not exceeding the statutory monthly limit). With respect to expenses for which employees seek reimbursement that were paid using the MCC-restricted debit card, C receives periodic statements providing information on the use of each debit card, which include information on the identity of the merchants at which the debit card was used and the date and amount of the debit card transactions. In addition, for the first month the debit card was used, prior to providing reimbursement, C requires that the employee certify that the debit card was used only to purchase fare media. For subsequent months, C does not require employee certifications prior to reimbursement of recurring expenses that match the seller and the time period covered for expenses previously substantiated under the procedures described above (e.g., for an employee who purchases a transit pass every month from the same seller). However, C requires a recertification at least annually from each employee that the debit card was used only to purchase fare media. C reviews the periodic statements in combination with the employee certifications to determine the fare media expenses incurred by each employee through the use of the debit card and reimburses each employee for the expenses that have been substantiated by transmitting funds to Q to be allocated electronically to each employee's debit card. With respect to fare media expenses for which C's employees seek reimbursement that were not paid using the MCC-restricted debit card, the employees substantiate the amount of the fare media expenses incurred following reasonable substantiation procedures implemented by C as described in § 1.132–9(b) Q/A–16(c). For example, an employee receiving reimbursements of less than the maximum monthly excludable amount of transportation expenses may increase his or her reimbursements for future months by paying for increased fare media expenses by some method other than the use of the debit card and substantiating the additional amount using reasonable substantiation procedures as described in § 1.132–(9)(b) Q/A–16(c).

Situation 4. Employer D provides to its employees transportation benefits in an amount not exceeding the statutory monthly limit. Debit card provider Q provides debit cards that may be used by employers to provide transportation benefits to their employees. The debit cards have been restricted for use only at merchants that have been assigned an MCC indicating that the merchant sells fare media. The merchant may or may not sell other merchandise. D uses the MCC-restricted debit card provided by Q to provide transportation benefits to its employees. A voucher or similar item exchangeable only for a transit pass is not otherwise readily available for purchase by D for direct distribution to D's employees within the meaning of § 132(f)(3). D provides employees with the MCC-restricted debit cards as soon as they begin work. Prior to using the MCC-restricted debit cards, D's employees certify that the card will be used only to purchase fare media. In addition, written on each debit card is the statement that the card is to be used only for fare media, and, by using the card, the employee certifies that the card is being used only to purchase fare media. At no time do D's employees substantiate to D the amount of fare media expenses that have been incurred.

Situation 5. Employer E provides to its employees transportation benefits in an amount not exceeding the statutory monthly limit. Debit card provider R provides debit cards that may be used by employers to provide transportation benefits to their employees. The debit card can be used to purchase fare media on several transit systems within the metropolitan area in which E is located. The debit cards are restricted for use only at merchants that have been assigned an MCC indicating that the merchant sells fare media. The merchant may or may not sell other merchandise. R has worked with the bank that issues the debit card to place additional restrictions on the debit card based on a merchant's Merchant Identification Number. These restrictions block all purchases from any merchant in the area with an acceptable MCC that sells any items other than fare media. These restrictions have been tested and effectively prohibit recipients of the debit cards from using them to purchase any items other than fare media. E makes monthly payments to R on behalf of its employees who participate in the transportation benefit program, which R then electronically allocates to each employee's debit card as instructed by E, in an amount not to exceed the statutory monthly limit. E does not require its employees to substantiate their use of the debit cards.

Situation 6. Same facts as in Situation 5, except E also provides the R debit card to employees who commute using commuter highway vehicles (often called "vanpools"). E requires the employees to use the debit card to purchase their vanpool vouchers. The vanpool voucher provider does not sell any other merchandise. Vanpool vouchers may be purchased by the employee in-person at certain locations or online. If purchased online, the vanpool voucher provider imposes a reasonable and customary delivery charge. The employee includes the delivery charge as a cost of transit and pays for the delivery charge with the debit card. The aggregate cost of the vanpool voucher and the related delivery charge does not exceed the statutory monthly limit.

Situation 7. Employer F and Employer G provide to their employees transportation benefits in amounts not exceeding the statutory monthly limit. F's employees and G's employees commute using Transit System Z. Z provides a smartcard that may be used by employers to provide transportation benefits to their employees. Z's smartcard includes separate accounts to separately track funds provided directly by an employer that are available only for transit use, funds provided directly by an employer that are only available for nontransit use (e.g., parking), and funds added by the cardholder/employee that are available for either use. Funds in each of the three accounts cannot be transferred between accounts. Debit card provider S provides debit cards, which may be used by employers to provide transportation benefits to their employees. Similar to Situation 5, the debit cards are restricted for use only at merchants that have been assigned an MCC indicating that the merchant sells fare media and the cards contain restrictions based on a merchant's Merchant Identification Number. Except as provided below, these restrictions block all purchases from any merchant in the area with an acceptable MCC that sells any items other than fare media.

F provides its employees who use Z with the S debit card and employees use the debit card to load funds onto the smartcard. When F's employees use the S debit card to load funds onto their smartcards, the funds are placed into the account holding funds that are available for either transit or nontransit use. Although the S debit card is otherwise equipped with restrictions to prevent use of the card to purchase any items other than fare media, the restrictions do not work to prevent the employee loading funds onto the smartcard account holding funds that are available for either transit or nontransit use. F does not require its employees to substantiate their use of the debit card.

By contrast, G provides transportation benefit amounts directly to Z. Each month, Z places an amount not exceeding the statutory monthly limit into each of G's employees' smartcard accounts that can only be used for transit. G does not require its employees to substantiate their use of the smartcard.

Situation 8. Employer H has been providing transit benefits to its employees via a bona fide cash reimbursement arrangement. Debit card provider T offers a terminal-restricted debit card, which is readily available under § 1.132–9(b) Q/A –16(b)(4), for use in the geographic area of H's business. T's terminal-restricted debit card is the only readily available voucher or similar item in the area.

LAW

Section 61(a)(1) of the Code provides that, except as otherwise provided in subtitle A, gross income includes compensation for services, including fees, commissions, fringe benefits, and similar items.

Section 132(a)(5) provides that any fringe benefit that is a qualified transportation fringe is excluded from gross income. Section 132(f)(1) provides that the term "qualified transportation fringe" means (1) transportation in a commuter highway vehicle between home and work, (2) any transit pass, and (3) qualified parking. Section 132(f)(2) provides a monthly limit on the amount of the fringe benefit provided by the employer which may be excluded from an employee's gross income under § 132(a)(5). Section 132(f)(6) provides for an annual cost-of-living adjustment in the monthly limit. The amount of the fringe benefit which may be excluded from an employee's gross income and wages for 2014 is limited to $130 per month for the aggregate of transportation in a commuter highway vehicle and transit passes, and $250 per month for qualified parking. See § 132(f)(2); Rev. Proc. 2013–35, 2013–47 I.R.B. 537, § 3.16.

Sections 132(f)(5)(A) and 1.132–9(b), Q/A–3 provide that a transit pass is any pass, token, farecard, voucher or similar item entitling a person to transportation (or transportation at a reduced price) if such transportation is on mass transit facilities or is provided by any person in the business of transporting persons for compensation or hire in a commuter highway vehicle. See § 132(f)(5)(B) for the definition of a commuter highway vehicle.

Section 132(f)(3) provides that a qualified transportation fringe includes a cash reimbursement by an employer to an employee for transit benefits. However, a qualified transportation fringe includes a cash reimbursement by an employer to an employee for any transit pass only if a voucher or similar item that may be exchanged only for a transit pass is not readily available for direct distribution by the employer to the employee.

Section 1.132–9(b) Q/A–16(a) provides that the term qualified transportation fringe includes cash reimbursement for transportation in a commuter highway vehicle, transit passes (if permitted), and qualified parking, provided the reimbursement is made under a bona fide reimbursement arrangement. A payment made before the date an expense has been incurred or paid is not a reimbursement. In addition, a bona fide reimbursement arrangement does not include an arrangement that is dependent solely on the employee certifying in advance that the employee will incur expenses at some future date.

Under Q/A–16(b)(2), a transit system voucher is an instrument, which may be purchased by employers from a voucher provider, that is accepted by one or more mass transit operators (e.g., train, subway, and bus) in an area either as fare media or in exchange for fare media.

Under Q/A–16(b)(3) a voucher provider is any person in the trade or business of selling transit system vouchers to employers or any transit system or transit operator that sells vouchers to employers for the purpose of direct distribution to employees. The requirement that a voucher be distributed in-kind by the employer is satisfied if the voucher is distributed by another person on behalf of the employer. See § 1.132–9(b) Q/A–16(b)(1).

Section 1.132–9(b) Q/A–16(b)(4) provides that a voucher or similar item is readily available for direct distribution by an employer to employees if and only if the employer can obtain it from a voucher provider that does not impose fare media charges greater than 1 percent of the average annual value of the voucher for a transit system, and does not impose other restrictions causing the voucher not to be considered readily available.

Section 1.132–9(b) Q/A–16(b)(5) provides that reasonable and customary delivery charges imposed by the voucher provider are disregarded in computing the fare media charges. Examples of restrictions that effectively prevent the employer from obtaining vouchers appropriate for distribution to employees include advance purchase requirements, purchase quantity requirements, and limitations on denominations of vouchers that are available. See § 1.132–9(b) Q/A–16(b)(5) and (b)(6).

Under § 1.132–9(b) Q/A–16(c), whether a reimbursement is made under a bona fide reimbursement arrangement depends upon the facts and circumstances. The employer must implement reasonable procedures to ensure that the amount equal to the reimbursement was incurred for transportation in a commuter highway vehicle, transit passes, or qualified parking.

Section 1.132–9(b) Q/A–16(d) provides that reasonable reimbursement procedures include the collection of receipts from employees or obtaining employee certifications in appropriate circumstances. The regulations provide that obtaining an employee's certification is a reasonable reimbursement procedure if receipts are not provided by the seller in the ordinary course of business, and if the employer has no reason to doubt the employee's certification.

Section 1.132–9(b) Q/A–18 provides that there are no employee substantiation requirements if an employer distributes a transit pass (including a voucher or similar item) in-kind to the employer's employees.

Federal Insurance Contributions Act (FICA) taxes, Federal Unemployment Tax Act (FUTA) taxes, and Federal income tax withholding are imposed on "wages." See §§ 3101, 3111, 3121(a), 3301, 3306(b), 3402, and 3401(a). Section 3121(a) defines "wages" for FICA purposes as all remuneration for employment including the cash value of all remuneration (including benefits) paid in any medium other than cash, with certain specific exceptions. Sections 3306(b) and 3401(a) define "wages" similarly for FUTA and Federal income tax withholding purposes, respectively.

Section 3121(a)(20) excepts from the definition of "wages" for FICA tax purposes any benefit provided to or on behalf of an employee if, at the time such benefit is provided, it is reasonable to believe that the employee will be able to exclude such benefit from gross income under § 132. Sections 3306(b)(16) and 3401(a)(19) provide similar exclusions for FUTA and Federal income tax withholding purposes, respectively.

Rev. Rul. 2006–57, 2006–47 I.R.B. 911, provided guidance on the use of smartcards, debit cards, or other electronic media to provide employees with transportation fringe benefits and included four situations as illustrations. Originally scheduled to become effective January 1, 2008, the effective date was postponed until January 1, 2012. Because terminal-restricted debit cards were not widely used when Rev. Rul. 2006–57 was first issued, the Treasury Department and the Internal Revenue Service (IRS) lacked sufficient factual information to develop guidance regarding when terminal-restricted debit cards were readily available. Accordingly, Rev. Rul. 2006–57 provided that, as use of terminal-restricted debit cards increased, the IRS intended "to issue guidance clarifying under what situations the [terminal-restricted debit] cards are considered to be readily available and thus preclude cash reimbursement for transit benefits." In the interim, Rev. Rul. 2006–57 provided that the IRS would not challenge the ability of employers to provide qualified transportation fringes in the form of cash reimbursement for transit passes when the only available voucher or similar item was a terminal-restricted debit card.

In Notice 2012–38, 2012–24 I.R.B. 1014, the IRS requested comments on issues surrounding an employer's provision of transit benefits in light of changes in technology since the publication of Rev. Rul. 2006–57. Specifically, comments were requested on (1) how electronic media may meet the statutory requirements under § 132(f) for providing transit benefits in a manner other than those described in Rev. Rul. 2006–57; (2) the availability of terminal-restricted debit cards and any other electronic media qualifying as vouchers or transit passes for purposes of determining whether such items are readily available; and (3) challenges employers encounter in transitioning from paper transit passes or vouchers to either cash reimbursement or electronic media that qualify as transit passes, or from cash reimbursement arrangements to electronic media qualifying as transit passes or vouchers.

ANALYSIS

In Situation 1, the fare media value stored on the smartcards is usable only as fare media for transit system X. Thus, the smartcard qualifies as a transit pass under §§ 132(f)(5)(A) and 1.132–9(b) Q/A–3 distributed in-kind by A to its employees. In addition, the amount allocated to each employee's smartcard is within the amount specified by § 132(f)(2)(A). Accordingly, the value of the fare media provided by A to its employees through the smartcards is excluded from the employees' gross income as a qualified transportation fringe benefit within the meaning of § 132(a)(5) without requiring the employees to substantiate their use of the smartcards. The value of the fare media is also excluded from wages for FICA, FUTA, and income tax withholding.

In Situation 2, the terminal-restricted debit card provided by B to its employees qualifies as a transit pass under §§ 132(f)(5)(A) and 1.132–9(b) Q/A–3 because it can be used only at merchant terminals at points of sale at which only fare media for local transit systems can be purchased. In addition, the amount allocated to each employee's debit card each month is within the amount specified by § 132(f)(2)(A). Therefore, the value of the fare media provided by B to its employees through the terminal-restricted debit cards is excluded from its employees' gross income as a qualified transportation fringe benefit within the meaning of § 132(a)(5) without requiring the employees to substantiate their use of the debit cards. The value of the fare media is also excluded from wages for FICA, FUTA, and income tax withholding.

In Situation 3, the debit card provided by C to its employees does not qualify as a transit system voucher under § 1.132–9(b) Q/A–16(b)(2), but C has established a bona fide reimbursement arrangement within the meaning of § 1.132–9(b) Q/A–16(c). The debit card provided by C does not qualify as a transit system voucher because it is possible that a MCC-restricted debit card may be used to purchase items other than fare media. A merchant properly classified to accept the debit card as payment may sell merchandise other than fare media, and there is nothing in the debit card technology which prevents its use to purchase items other than fare media.

Because a voucher or similar item exchangeable only for fare media is not readily available to C for direct distribution to its employees, § 132(f)(3) permits C to provide qualified transportation fringe benefits in the form of cash reimbursements for transit pass expenses, but only if the reimbursements are provided under a bona fide reimbursement arrangement. With respect to expenses incurred during the first month an employee participates in the transportation benefit program, and with respect to expenses not paid using the MCC-restricted debit card, C has implemented reasonable substantiation procedures as described in § 1.132–9 Q/A–16(c). With respect to expenses paid using the MCC-restricted debit card, C receives periodic statements providing information on the purchases made with the debit card, including the identity of the seller, and the date and amount of the debit card transactions. In addition, for the first month an employee uses the MCC-restricted debit card, C requires that the employee certify that the card was used only to purchase fare media. C does not require monthly certifications with respect to recurring items if the item described in the periodic statement matches with respect to the seller and the time period that have previously been substantiated as fare media expenses. However, C requires at least an annual recertification from each employee that the debit card was used only to purchase fare media. Prior to remitting an amount to Q to put on the debit card as a reimbursement to the employee for fare media expenses, C examines the periodic statements describing debit card transactions in combination with employee certifications to determine the fare media expenses incurred by each employee through the use of the debit card. C provides funds to Q to be electronically allocated to the debit cards only as reimbursements for substantiated fare media expenses that have been incurred and substantiated in this fashion. Based on the facts and circumstances, C has established a bona fide reimbursement arrangement for transit passes within the meaning of § 1.132–9 Q/A–16(c). In addition, the amount of the monthly benefit is within the amount specified by § 132(f)(2)(A).

Therefore, the value of the fare media provided by C to its employees through the MCC-restricted debit cards is excluded from its employees' gross income as a qualified transportation fringe benefit within the meaning of § 132(a)(5). The value of the fare media is also excluded from wages for FICA, FUTA, and income tax withholding.

In Situation 4, as in Situation 3 above, the MCC-restricted debit card does not qualify as a transit system voucher under § 1.132–9(b) Q/A–16(b)(2). Because a voucher or similar item is not otherwise readily available to D, D may provide qualified transportation fringe benefits in the form of cash reimbursements for transit passes under a bona fide reimbursement arrangement. D provides the debit cards in advance, requiring its employees to certify that they will use the cards exclusively to purchase fare media. This arrangement does not constitute a bona fide reimbursement arrangement under § 1.132–9(b) Q/A–16(c) because it provides for advances rather than reimbursements and because it relies solely on employee certifications provided before the expense is incurred. Those certifications, standing alone, do not provide the substantiation of expenses incurred necessary for there to be a bona fide reimbursement arrangement. Because D is providing MCC-restricted debit cards that are not transit system vouchers, and because D is not reimbursing its employees for fare media expenses under a bona fide reimbursement arrangement, the amounts D provides to its employees through the MCC-restricted debit cards are included in its employees' gross income and are wages for FICA, FUTA, and income tax withholding.

In Situation 5, the MCC-restricted debit card containing additional restrictions constitutes a transit pass because the technological restrictions and limitations effectively prohibit employees from using the cards to purchase any items other than fare media for use on local transit systems. The determining factor for a debit card to qualify as a transit pass under §§ 132(f)(5)(A) and 1.132–9(b) Q/A–3 is whether the card restricts purchases to fare media. Based on technological advances, this restriction can be implemented with either a terminal-restricted debit card or an MCC-restricted debit card through technologies that limit use of the card to purchase of only fare media. For example, MCC-restricted debit cards that can only be used to purchase fare media from merchants that either sell only fare media or that have a dedicated fare media terminal can qualify as transit passes because the restrictions prevent use of the debit cards to purchase items other than fare media. It is possible that other technological restrictions are or will become available that will allow additional electronic media to qualify as a transit pass. The value of the fare media provided by E to its employees through the MCC-restricted debit cards is excluded from its employees' income as a qualified transportation fringe benefit within the meaning of § 132(f)(5) without requiring the employees to substantiate the use of the debit card. The value of the fare media is also excluded from wages for FICA, FUTA, and income tax withholding.

In Situation 6, the R debit card provided by E to its employees qualifies as a transit pass under §§ 132(f)(5)(A) and 1.132–9(b) Q/A–3. For those employees who obtain the transit pass online, thereby incurring a delivery charge, the delivery charge is included as part of the transit benefit, and may be excluded from income, subject to the monthly statutory limit. Thus, delivery charges incurred by an employee in acquiring transit benefits are included as part of the transit benefit. In contrast, delivery charges incurred by an employer in obtaining transit passes are not taken into account in determining whether vouchers are readily available for direct distribution by an employer, as described in § 1.132–9 Q/A–16(b)(5).

In Situation 7, the smartcard provided by Z qualifies as a transit pass under §§ 132(f)(5)(A) and 1.132–9(b) Q/A–3 with regard to the amounts provided by G directly to Z and placed into the account that can only be used for transit. In that case, the value of the fare media is excluded from the employee's income and is excluded from wages for FICA, FUTA, and income tax withholding. However, the S MCC-restricted debit card provided by F to its employees who use Z does not qualify as a transit pass under §§ 132(f)(5)(A) and 1.132–9(b) Q/A–3 because the debit card may be used to purchase items other than fare media. Specifically, employees that use the S debit cards to load funds onto the smartcard will be able to use those funds for either transit or nontransit use. In addition, because the smartcard qualifies as a transit pass when amounts are provided directly by the employer to Z and placed into the account that can only be used for transit, F and G must use the smartcard in this manner, or another transit system voucher, to provide transit benefits to their employees as long as the smartcard or other transit system voucher is readily available (that is, benefits provided through the S MCC-restricted debit cards could not in such case be excluded from employees' gross income as qualified transportation fringe benefits even if employees were required to, and did, substantiate that the cards were used solely to purchase fare media). Accordingly, the value of the benefits provided by F to its employees through the S debit cards is included in the employees' income and is included in wages for FICA, FUTA, and income tax withholding.

In Situation 8, H has implemented a bona fide cash reimbursement arrangement. However, § 132(f)(3) provides that a qualified transportation fringe includes a cash reimbursement by an employer to an employee for transit benefits only if a voucher or similar item that may be exchanged only for a transit pass is not readily available for direct distribution by the employer to the employee. Rev. Rul. 2006–57 provided that the IRS would not challenge the ability of employers to provide qualified transportation fringes in the form of cash reimbursement for transit passes when the only available voucher or similar item is a terminal-restricted debit card. Based on comments received in response to Notice 2012–38, the IRS concludes that terminal-restricted debit cards are now widely used and generally available for purchase by employers subject to terms and costs that are similar to other forms of electronic media.

Accordingly, the provision included in Rev. Rul. 2006–57 permitting employers to use cash reimbursement if the only available voucher or similar item is a terminal-restricted debit card is no longer warranted. Beginning after December 31, 2015, in order to provide time for employers to comply, employers are no longer permitted to provide qualified transportation fringe benefits in the form of cash reimbursement in geographic areas where a terminal-restricted debit card is readily available. Whether terminal-restricted debit cards are readily available for direct distribution by an employer to employees must be determined under the standards in § 1.132–9(b) Q/A–16(b)(5) and (b)(6).

The terminal-restricted debit cards offered by T qualify as a transit pass and are readily available in H's geographic area. Therefore, beginning after December 31, 2015, H may no longer provide qualified transportation fringe benefits in the form of cash reimbursement for transit passes.

HOLDINGS

Situation 1. The value of the transit pass benefits provided by A to its employees through the smartcards is excluded from gross income under § 132(a)(5) and from wages for employment tax purposes.

Situation 2. The value of the transit pass benefits provided by B to its employees through the terminal-restricted debit cards is excluded from gross income under § 132(a)(5) and from wages for employment tax purposes.

Situation 3. The value of the transit pass benefits provided by C to its employees through the MCC-restricted debit cards is excluded from gross income under § 132(a)(5) and from wages for employment tax purposes.

Situation 4. The value of the transit benefits provided by D to its employees through the MCC-restricted debit cards is not excluded from gross income under § 132(a)(5) and is wages for employment tax purposes.

Situation 5. The value of the transit pass benefits provided by E to its employees through the MCC-restricted debit cards is excluded from gross income under § 132(a)(5) and from wages for employment tax purposes.

Situation 6. The delivery charges incurred by employees in acquiring the van pool vouchers constitute qualified transportation fringe benefits under § 132(f).

Situation 7. The value of the transit benefits provided by F to its employees through the debit cards is not excluded from gross income under § 132(a)(5) and is wages for employment tax purposes. The value of the transit pass benefits provided by G to its employees through funds loaded directly onto the Z smartcard account that can only be used for transit is excluded from gross income under § 132(a)(5) and from wages for employment tax purposes.

Situation 8. Beginning after December 31, 2015, the value of the transit benefits provided by H to its employees through a cash reimbursement arrangement is not excluded from gross income under § 132(a)(5) and is wages for employment tax purposes.

EFFECT ON OTHER REVENUE RULING

Notice 2012–38 requested comments on issues associated with Rev. Rul. 2006–57. The situations illustrated in Rev. Rul. 2006–57 are incorporated into this Revenue Ruling. Accordingly, Rev. Rul. 2006–57 is modified and superseded.

PROSPECTIVE APPLICATION

Under the authority of § 7805(b)(8), the holding with respect to Situation 8 is effective after December 31, 2015. After that date, employers may no longer provide qualified transportation fringe benefits under a bona fide cash reimbursement arrangement in cases in which a terminal-restricted debit card is the only voucher or similar item available for direct distribution by the employer to employees that may be exchanged for a transit pass.

DRAFTING INFORMATION

The principal author of this revenue ruling is Jean M. Casey of the Office of Division Counsel/Office of Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this revenue ruling, contact Ms. Casey at (202) 317-4774 (not a toll-free number).

Section 280G.—Golden Parachute Payments

Federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

Section 367.——Transfers to foreign corporations subject to section 367(a): In general.

Section 6038B.—Reporting of certain transfers to foreign corporations.

26 CFR 1.367(a)–8: Gain recognition agreement requirements.

T.D. 9704

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Failure to File Gain Recognition Agreements or Satisfy Other Reporting Obligations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations, temporary regulations, and removal of temporary regulations.

SUMMARY: This document contains final and temporary regulations relating to the consequences to U.S. and foreign persons for failing to file gain recognition agreements (GRAs) or related documents, or to satisfy other reporting obligations, associated with certain transfers of property to foreign corporations in nonrecognition exchanges. The regulations are necessary to update and clarify the rules that apply when a U.S. or foreign person fails to file a GRA or related documents or to satisfy other reporting obligations. These regulations affect U.S. and foreign persons that transfer property to foreign corporations in nonrecognition exchanges.

DATES: These regulations are effective on November 19, 2014.

Applicability Dates: For dates of applicability, see §§ 1.367(a)–2(f)(4), 1.367(a)–3(g)(1)(x), 1.367(a)–3T(g)(1)(ix), 1.367(a)–7(j), 1.367(a)–8(r)(1)(i) and (r)(3), 1.367(e)–2(g), and 1.6038B–1(g)(6).

FOR FURTHER INFORMATION CONTACT: Shane M. McCarrick, (202) 317-6937 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in the regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1487.

The collections of information are in §§ 1.367(a)–2(f)(2), 1.367(a)–3(f)(2), 1.367(a)–7(e)(2), 1.367(a)–8(p)(2), 1.367(e)–2(f)(2), 1.6038B–1(c)(4)(ii), and 1.6038B–1(e)(4). The collections of information are mandatory. The likely respondents are domestic corporations.

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

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

Background

This document contains amendments to 26 CFR part 1. On January 31, 2013, the IRS and the Department of the Treasury (Treasury Department) published a notice of proposed rulemaking (REG–140649–11) in the **Federal Register** (78 FR 6772–01) under sections 367 and 6038B of the Internal Revenue Code (Code) (proposed regulations) relating to the consequences to U.S. and foreign persons for failing to file GRAs or related documents, or to satisfy other reporting obligations, associated with certain transfers of property to foreign corporations in nonrecognition exchanges. No public hearing was requested or held. The IRS and the Treasury Department received written comments on the proposed regulations, which are available at www.regulations.gov. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. In addition, this Treasury decision amends and removes a portion of the temporary §§ 1.367(a)–3 and 1.367(a)–7 regulations that were published on March 19, 2013 (T.D. 9615, 2013–1 C.B. 1026). The comments and revisions are discussed in this preamble.

Summary of Comments and Explanation of Revisions

1. Satisfaction of Section 6038B Reporting if a GRA is Filed

The proposed regulations under section 6038B require a U.S. person that transfers property (U.S. transferor) to file a Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation, with respect to a transfer of stock or securities in all cases in which a GRA is filed in order to avoid penalties under section 6038B. However, the proposed regulations do not require the U.S. transferor to report on the Form 926 any specific information regarding the transferred stock or securities. The IRS and the Treasury Department have determined that, similar to the information that must be provided for other types of transferred property, the U.S. transferor should report on the Form 926 the fair market value, adjusted tax basis, and gain recognized with respect to the transferred stock or securities, as well as any other information that Form 926, its accompanying instructions, or other applicable guidance require to be submitted with respect to the transfer of the stock or securities. Section 1.6038B–1(b)(2)(iv) of these final regulations is thus modified accordingly.

2. Application to Previously Filed Requests

The proposed regulations under § 1.367(a)–8(p) only apply to requests for relief submitted on or after the date the proposed regulations are adopted as final regulations. One comment requested that these final regulations permit U.S. transferors to request relief under § 1.367(a)–8(p) of the proposed regulations for certain failures to file a GRA document or comply with the GRA provisions that are the subject of requests for relief submitted before the date the proposed regulations are finalized. According to the commentator, not permitting U.S. transferors to do so could result in disparate treatment for similarly situated U.S. transferors.

The IRS and the Treasury Department have determined that it is appropriate to provide relief for certain failures to file or to comply that were not willful and that were the subject of requests for relief submitted under § 1.367(a)–8(p) of the existing final regulations (or submitted under § 1.367(a)–8T(e)(10), as contained in 26 CFR part 1 revised as of April 1, 2008, or § 1.367(a)–8(c)(2), as contained in 26 CFR part 1 revised as of April 1, 2006) before November 19, 2014 (previously filed requests). Accordingly, § 1.367(a)–8(r)(3) of these final regulations provides a procedure under which U.S. transferors may resubmit certain previously filed requests (including requests that were denied). By submitting a previously filed request under this procedure, a U.S. transferor agrees that these final regulations under § 1.6038B–1 will apply to any transfer that is the subject of the request. This is intended to provide parity between similarly situated U.S. transferors and promote the policies underlying the proposed regulations by ensuring that a U.S. transferor that establishes its failure was not willful under § 1.367(a)–8(p) is still subject to penalties under section 6038B if its failure was not due to reasonable cause.

3. Promptly Filing an Amended Return as a Requirement to Seeking Relief

One comment was received regarding the procedures described in § 1.367(a)–8(p)(2) of the proposed regulations for establishing that failures to file GRA documents, or failures to comply, were not willful. The comment requested that these final regulations excuse Coordinated Industry Case (CIC) taxpayers from the requirement under § 1.367(a)–8(p)(2) of filing an amended return promptly after discovering a failure to file or a failure to comply. Instead, the commentator suggested that these final regulations allow CIC taxpayers to submit the materials required under § 1.367(a)–8(p)(2) when the taxpayers effect a "qualified amended return" under Rev. Proc. 94–69, 1994–2 CB 804 (generally providing special procedures for certain taxpayers to show additional tax due or make adequate disclosure with respect to an item or position on a tax return prior to an audit).

According to the commentator, it is possible that an amended return filed to correct the failure to file or failure to comply will differ from the return that is ultimately audited when the taxpayer effects a qualified amended return under Rev. Proc. 94–69. The commentator stated that this could result in an inefficient use of resources in situations in which a CIC taxpayer, when preparing the amended return, includes not only adjustments related to the failure to file or failure to comply, but also all other adjustments as to which the taxpayer is aware.

The IRS and the Treasury Department decline to adopt this comment. The commentator's concerns exist in other international contexts (for example, § 1.1503(d)–1(c)(2)), and it would be inappropriate to create differing procedures for requesting relief under different provisions. However, the IRS and the Treasury Department intend to study the issue.

4. Modifying the Reported Fair Market Value of Transferred Stock

One comment requested that these final regulations provide a mechanism under which taxpayers may modify the fair market value of transferred stock or securities reported on a previously filed GRA. According to the commentator, taxpayers often determine the fair market value of stock or securities before the date that the stock or securities are transferred to a foreign corporation; these determinations are based on projected financial information that may, in some cases, deviate from the actual financial information on the date of the transfer.

The IRS and the Treasury Department decline to adopt the comment. The IRS and the Treasury Department have determined that the proposed regulations adequately address the commentator's concerns. First, because a GRA is filed when a taxpayer files its tax return (rather than at the time of an outbound transfer of stock or securities), a taxpayer has, not including extensions, at least two and a half months following a transfer to reconcile projected financial information with actual financial information. Furthermore, a taxpayer may file an extension if it needs additional time to comply with the requirements of § 1.367(a)–8. Finally, a taxpayer that fails to materially comply with the requirements of § 1.367(a)–8, including the requirement to include the fair market value of the transferred stock or securities in the GRA pursuant to § 1.367(a)–8(c)(3)(i)(B), may be eligible to correct the GRA by seeking relief based on a claim that the failure was not willful.

5. Extension of Relief for Failures that are Not Willful to Other Section 367(a) Reporting Obligations

The IRS and the Treasury Department have determined that it is appropriate to extend the relief for failures that are not willful to certain other reporting obligations under section 367(a) that were not covered by the proposed regulations. This Treasury decision therefore revises § 1.367(a)–2 (providing an exception to gain recognition under section 367(a)(1) for assets transferred outbound for use in the active conduct of a trade or business outside of the United States) and § 1.367(a)–7 (regarding application of section 367(a) to an outbound transfer of assets by a domestic target corporation in an exchange described in section 361) so that a taxpayer may, solely for purposes of section 367(a), be deemed not to have failed to comply with reporting obligations under §§ 1.367(a)–2 and 1.367(a)–7 by demonstrating that the failure was not willful. The temporary § 1.367(a)–7 regulations regarding reasonable cause relief are therefore removed. Because the cases in which relief is sought under § 1.367(a)–2 and many of the cases in which relief is sought under § 1.367(a)–7 are also subject to reporting under section 6038B and the regulations thereunder, the penalty imposed under section 6038B for failure to satisfy a reporting obligation should generally be sufficient to encourage proper reporting and compliance.

6. Withdrawal of GRA Directive

On July 26, 2010, the Deputy Commissioner International (LMSB) issued directive LMSB–4–0510–017 (Directive). The Directive permits taxpayers to remedy, without having to demonstrate reasonable cause, unfiled or deficient GRA documents associated with a timely filed initial GRA or a timely filed document purporting to be an initial GRA. The Directive explained that the means to best ensure compliance with the GRA provisions was under study and that, pending the study, the Directive would be effective "until further notice." Because this Treasury decision provides comprehensive guidance that is designed to ensure compliance with the GRA provisions, the Deputy Commissioner (International), Large Business & International will revoke the Directive effective on November 19, 2014.

7. Including an Original Form 8838 with a Request for Relief

Under § 1.367(a)–8(p)(2)(i) of the proposed regulations, a U.S. transferor who seeks relief for a failure to file or failure to comply with the GRA rules must, among other requirements, file an original Form 8838, Consent to Extend the Time to Assess Tax Under Section 367—Gain Recognition Agreement, with an amended return. The Form 8838 must, with respect to the gain realized but not recognized on the initial transfer, extend the period of limitations on the assessment of tax to the period specified in § 1.367(a)–8(p)(2)(i) of the proposed regulations. The IRS and the Treasury Department recognize that in certain cases (for example, certain cases in which a U.S. transferor seeks relief for an unfiled annual certification), the U.S. transferor will already have filed an original Form 8838 that extends the period of limitations through the required time period. These final regulations therefore provide that, in these cases, a U.S. transferor need not file another Form 8838 with the amended return; rather, the U.S. transferor must attach a copy of the previously filed Form 8838 to the amended return. A similar modification is made to these final regulations under § 1.367(e)–2 concerning outbound liquidations and certain foreign-to-foreign liquidations described in section 332.

8. Failure to Comply and Extension of Period of Limitations

Section 1.367(a)–8(j)(8) of the existing regulations provides that a failure to comply with the GRA provisions will extend the period of limitations on assessment of tax until the close of the third full taxable year ending after the date on which the Director of Field Operations or Area Director receives actual notice of the failure to comply from the U.S. transferor. The same provision is included in the proposed regulations. Section 1.367(e)–2(e)(4)(ii)(B) of the proposed regulations provides a similar rule with respect to a liquidation document.

The IRS and the Treasury Department have determined that the running of the extended period of limitations arising under §§ 1.367(a)–8(j)(8) and 1.367(e)–2(e)(4)(ii)(B) should be based on when the taxpayer furnishes to the Director of Field Operations International, Large Business & International (or any successor to the roles and responsibilities of such person) the information that should have been provided under the §§ 1.367(a)–8 or 1.367(e)–2 regulations, as applicable. Thus, in these final regulations, §§ 1.367(a)–8(j)(8) and 1.367(e)–2(e)(4)(ii)(B) are modified accordingly.

In addition, §§ 1.367(a)–8(c)(2)(iii), 1.367(e)–2(b)(2)(i)(C)(*1*), and 1.367(e)–2(b)(2)(iii)(D) of these final regulations are revised to clarify that when a taxpayer files a GRA under § 1.367(a)–8 or a liquidation document under § 1.367(e)–2, the taxpayer agrees to extend the period of limitations on assessment of tax, in the circumstances provided in §§ 1.367(a)–8(j)(8) and 1.367(e)–2(e)(4)(ii)(B), as applicable. This agreement is deemed consented to and signed by the Secretary for purposes of section 6501(c)(4).

9. Reporting Requirement in § 1.367(a)–3(c)(6)(i)(F)(3)

Section 1.367(a)–3(a) of the existing final regulations provides the general rule that a U.S. person must recognize gain on certain transfers of stock or securities to a foreign corporation. In relevant part, § 1.367(a)–3(c) of the existing final regulations contains an exception for certain transfers of stock or securities of a domestic corporation. Specifically, § 1.367(a)–3(c)(1) provides that, except as provided in § 1.367(a)–3(e) (providing rules for transfers of stock or securities by a domestic corporation to a foreign corporation pursuant to an exchange described in section 361), a transfer of stock or securities of a domestic corporation by a U.S. person to a foreign corporation that would otherwise be subject to gain recognition under section 367(a)(1) pursuant to § 1.367(a)–3(a) will not be subject to section 367(a)(1) if certain requirements are satisfied. In particular, the domestic corporation the stock or securities of which are transferred (referred to as the U.S. target company) must comply with each of the reporting requirements in § 1.367(a)–3(c)(6) and each of the four conditions set forth in § 1.367(a)–3(c)(1)(i) through (iv) must be satisfied. The condition set forth in § 1.367(a)–3(c)(1)(iv) requires that the active trade or business test (as defined in § 1.367(a)–3(c)(3)) be satisfied. To satisfy the active trade or business test, the substantiality test (as defined in § 1.367(a)–3(c)(3)(iii)) must be satisfied (among other requirements). The substantiality test is satisfied if, at the time of the transfer, the fair market value of the transferee foreign corporation is at least *equal* to the fair market value of the U.S. target company.

Pursuant to the reporting requirement contained in § 1.367(a)–3(c)(6)(i)(F)(*3*), the U.S. target company must submit a statement demonstrating that the value of the transferee foreign corporation *exceeds* the value of the U.S. target company on the acquisition date. The standard that applies for purposes of the reporting requirement of § 1.367(a)–3(c)(6)(i)(F)(*3*) is intended to be the same as the standard that applies for purposes of the substantiality test. Accordingly, this Treasury decision revises § 1.367(a)–3(c)(6)(i)(F)(*3*) so that the U.S. target company must submit a statement demonstrating that the value of the transferee foreign corporation equals or exceeds the value of the U.S. target company on the acquisition date.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that these regulations will not have a significant impact on a substantial number of small entities. This certification is based on the fact that these regulations merely provide for a change in the standard, or clarify or provide the standard, that will be used to determine whether a taxpayer that has failed to file a GRA or satisfy other reporting obligations under section 367 will be entitled to avoid full gain recognition under section 367(a)(1) or 367(e)(2), as applicable. Accordingly a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

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

*** * * * ***

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 1.367(a)–2 is amended by adding new paragraph (f) to read as follows:

§ 1.367(a)–2 Exception for transfers of property for use in the active conduct of a trade or business.

* * * * *

(f) *Failure to comply with reporting requirements of section 6038B*—(1) *Failure to comply*. For purposes of the exception to the application of section 367(a)(1) provided in paragraph (a) of § 1.367(a)–2T, a failure to comply with the reporting requirements of section 6038B and the regulations thereunder (failure to comply) has the meaning set forth in § 1.6038B–1(f)(2).

(2) *Relief for certain failures to comply that are not willful*—(i) *In general*. A failure to comply described in paragraph (f)(1) of this section will be deemed not to have occurred for purposes of satisfying the requirements of this section if the taxpayer demonstrates that the failure was not willful using the procedure set forth in this paragraph (f)(2). For this purpose, willful is to be interpreted consistent with the meaning of that term in the context of other civil penalties, which would include a failure due to gross negligence, reckless disregard, or willful neglect. Whether a failure to comply was a willful failure will be determined by the Director of Field Operations International, Large Business & International (or any successor to the roles and responsibilities of such position, as appropriate) (Director) based on all the facts and circumstances. The taxpayer must submit a request for relief and an explanation as provided in paragraph (f)(2)(ii)(A) of this section. Although a taxpayer whose failure to comply is determined not to be willful will not be subject to gain recognition under this section, the taxpayer will be subject to a penalty under section 6038B if the taxpayer fails to demonstrate that the failure was due to reasonable cause and not willful neglect. See § 1.6038B–1(b)(1) and (f). The determination of whether the failure to comply was willful under this section has no effect on any request for relief made under § 1.6038B–1(f).

(ii) *Procedures for establishing that a failure to comply was not willful*—(A) *Time and manner of submission*. A taxpayer's statement that the failure to comply was not willful will be considered only if, promptly after the taxpayer becomes aware of the failure, an amended return is filed for the taxable year to which the failure relates that includes the information that should have been included with the original return for such taxable year or that otherwise complies with the rules of this section, and that includes a written statement explaining the reasons for the failure to comply. The amended return must be filed with the Internal Revenue Service at the location where the taxpayer filed its original return. The taxpayer may submit a request for relief from the penalty under section 6038B as part of the same submission. See § 1.6038B–1(f).

(B) *Notice requirement*. In addition to the requirements of paragraph (f)(2)(ii)(A) of this section, the taxpayer must comply with the notice requirements of this paragraph (f)(2)(ii)(B). If any taxable year of the taxpayer is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Internal Revenue Service personnel conducting the examination. If no taxable year of the taxpayer is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Director.

(3) For illustrations of the application of the willfulness standard of this paragraph (f), see the examples in § 1.367(a)–8(p)(3).

(4) Paragraph (f) applies to requests for relief submitted on or after November 19, 2014.

Par. 3. Section 1.367(a)–3 is amended:

1. In paragraphs (c)(6)(i)(F)(*3*)(*i*) and (c)(6)(i)(F)(*3*)(*ii*), by adding the language "equals or" before the word "exceeds."

2. By revising paragraph (c)(6)(ii).

3. By adding paragraph (f).

4. By adding paragraph (g)(1)(x).

The additions and revisions read as follows:

§ 1.367(a)–3 Treatment of transfers of stock or securities to foreign corporations.

* * * * *

(c) * * *

(6) * * *

(ii) Except as provided in paragraph (f) of this section, for purposes of this paragraph (c)(6), a U.S. income tax return will be considered timely filed if it is filed on or before the last date prescribed for filing (taking into account any extensions of time therefor) for the taxable year in which the transfer occurs.

* * * * *

(f) *Failure to file statements*—(1) *Failure to file*. For purposes of the exceptions to the application of section 367(a)(1) provided in paragraphs (c) and (d)(2)(vi)(B) of this section, there is a failure to file a statement described in paragraph (c)(6), (c)(7), or (d)(2)(vi)(C) of this section (failure to file) if the statement is not filed with a timely filed U.S. income tax return or is not completed in all material respects.

(2) *Relief for certain failures to file that are not willful*—(i) *In general*. A failure to file described in paragraph (f)(1) of this section will be deemed not to have occurred for purposes of satisfying the requirements of the applicable regulation if the taxpayer demonstrates that the failure was not willful using the procedure set forth in this paragraph (f)(2). For this purpose, willful is to be interpreted consistent with the meaning of that term in the context of other civil penalties, which would include a failure due to gross negligence, reckless disregard, or willful neglect. Whether a failure to file was a willful failure will be determined by the Director of Field Operations International, Large Business & International (or any successor to the roles and responsibilities of such position, as appropriate) (Director) based on all the facts and circumstances. The taxpayer must submit a request for relief and an explanation as provided in paragraph (f)(2)(ii)(A) of this section. Although a taxpayer whose failure to file is determined not to be willful will not be subject to gain recognition under this section, the taxpayer will be subject to a penalty under section 6038B if the taxpayer fails to satisfy the reporting requirements, if any, under that section and does not demonstrate that the failure was due to reasonable cause and not willful neglect. See § 1.6038B–1(b) and (f). The determination of whether the failure to file was willful under this section has no effect on any request for relief made under § 1.6038B–1(f).

(ii) *Procedures for establishing that a failure to file was not willful*—(A) *Time and manner of submission*. A taxpayer's statement that the failure to file was not willful will be considered only if, promptly after the taxpayer becomes aware of the failure, an amended return is filed for the taxable year to which the failure relates that includes the information that should have been included with the original return for such taxable year or that otherwise complies with the rules of this section, and that includes a written statement explaining the reasons for the failure to file. The amended return must be filed with the Internal Revenue Service at the location where the taxpayer filed its original return. The taxpayer may submit a request for relief from the penalty under section 6038B as part of the same submission. See § 1.6038B–1(f).

(B) *Notice requirement*. In addition to the requirements of paragraph (f)(2)(ii)(A) of this section, the taxpayer must comply with the notice requirements of this paragraph (f)(2)(ii)(B). If any taxable year of the taxpayer is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Internal Revenue Service personnel conducting the examination. If no taxable year of the taxpayer is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Director.

(3) For illustrations of the application of the willfulness standard of this paragraph (f), see the examples in § 1.367(a)–8(p)(3).

(g) * * *

(1) * * *

(x) Paragraphs (c)(6)(ii) and (f) of this section apply to statements that are required to be filed on or after November 19, 2014, as well as to requests for relief submitted on or after November 19, 2014.

* * * * *

Par. 4. Section 1.367(a)–3T is amended:

1. In paragraph (d)(2)(vi)(B)(*1*)(*ii*), by removing the language “its U.S. income tax return” and adding the language “its timely filed U.S. income tax return” in its place.

2. In the first and second sentences of paragraph (g)(1)(ix), by removing the language “(d)(2)(vi)(B)” and adding the language “(d)(2)(vi)(B)(*1*)(*i*), (d)(2)(vi)(B)(*1*)(*iii*), and (d)(2)(vi)(B)(*2*),” in its place.

3. By adding two new sentences at the end of paragraph (g)(1)(ix).

The additions read as follows:

§ 1.367(a)–3T Treatment of transfers of stock or securities to foreign corporations (temporary).

* * * * *

(g) * * *

(1) * * *

(ix) * * * Paragraph (d)(2)(vi)(B)(*1*)(*ii*) of this section applies to statements that are required to be filed on or after November 19, 2014. See paragraph (d)(2)(vi)(B)(*1*)(*ii*) of this section, as contained in 26 CFR part 1 revised as of April 1, 2014, for statements required to be filed on or after March 18, 2013, and before November 19, 2014.

* * * * *

Par. 5. Section 1.367(a)–7 is amended:

1. In paragraph (a), by removing the language “reasonable cause” and adding the language “not willful” in its place.

2. By revising paragraph (e)(2).

3. By revising paragraph (j).

The revisions read as follows:

§ 1.367(a)–7 Outbound transfers of property described in section 361(a) or (b).

* * * * *

(e) * * *

(2) *Relief for certain failures to comply that are not willful*—(i) *In general*. A control group member or U.S. transferor’s failure to comply with any requirement of this section will be deemed not to have occurred for purposes of satisfying the requirements of this section if the control group member or U.S. transferor (or the foreign acquiring corporation on behalf of the U.S. transferor), as applicable, demonstrates that the failure was not willful using the procedure set forth in paragraph (e)(2)(ii) of this section. For this purpose, willful is to be interpreted consistent with the meaning of that term in the context of other civil penalties, which would include a failure due to gross negligence, reckless disregard, or willful neglect. Whether the failure to comply was a willful failure will be determined by the Director of Field Operations International, Large Business & International (or any successor to the roles and responsibilities of such person) (Director) based on all the facts and circumstances. The control group member or U.S. transferor (or the foreign acquiring corporation on behalf of the U.S. transferor), as applicable, must submit a request for relief and an explanation as provided in paragraph (e)(2)(ii) of this section. Although a U.S transferor whose failure to comply is determined not to be willful will not be subject to gain recognition under this section, the U.S. transferor will be subject to a penalty under section 6038B if the U.S. transferor fails to demonstrate that the failure was due to reasonable cause and not willful neglect. See § 1.6038B–1(b) and (f). The determination of whether the failure to comply was willful under this section has no effect on any request for relief made under § 1.6038B–1(f).

(ii) *Procedures for establishing that a failure to comply was not willful*—(A) *Time and manner of submission*. A control group member or U.S. transferor’s statement that the failure to comply was not willful will be considered only if, promptly after the control group member or U.S. transferor, as applicable, becomes aware of the failure, an amended return is filed for the taxable year to which the failure relates that includes the information that should have been included with the original return for such taxable year or that otherwise complies with the rules of this section, and that includes a written statement explaining the reasons for the failure to comply. The amended return must be filed with the Internal Revenue Service at the location where the taxpayer filed its original return. The U.S. transferor may submit a request for relief from the penalty under section 6038B as part of the same submission. See § 1.6038B–1(f).

(B) *Notice requirement*. In addition to the requirements of paragraph (e)(2)(ii)(A) of this section, a control group member or U.S. transferor, as applicable, must comply with the notice requirements of this paragraph (e)(2)(ii)(B). If any taxable year of the control group member or U.S. transferor, as applicable, is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Internal Revenue Service personnel conducting the examination. If no taxable year of the control group member or U.S transferor, as applicable, is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Director.

(iii) For illustrations of the application of the willfulness standard of this paragraph (e)(2), see the examples in § 1.367(a)–8(p)(3).

* * * * *

(j) *Effective/applicability dates*. Except for paragraph (e)(2) of this section, this section applies to transfers occurring on or after April 18, 2013. Paragraph (e)(2) applies to requests for relief submitted on or after November 19, 2014. Paragraph (e)(2) of this section also applies to requests for relief submitted before November 19, 2014 if the statute of limitations on the assessment of tax has not expired for any year to which the request relates and the control group member or U.S. transferor, as applicable, resubmits the request under paragraph (e)(2) of this section and notes, on the request, that the request is being submitted pursuant to the third sentence of this paragraph (j). See paragraph (e)(2) of this section, as contained in 26 CFR part 1 revised as of April 1, 2014, for requests for relief submitted after April 17, 2013, and before November 19, 2014, that are not resubmitted under paragraph (e)(2) of this section.

§ 1.367(a)–7T [Removed]

Par. 6. Section 1.367(a)–7T is removed.

Par. 7. Section 1.367(a)–8 is amended:

1. By revising the eleventh sentence of paragraph (a).

2. By redesignating paragraphs (b)(1)(v) through (xv) as (b)(1)(vii) through (xvii), respectively.

3. By redesignating paragraph (b)(1)(iv) as paragraph (b)(1)(v).

4. By adding new paragraphs (b)(1)(iv) and (vi).

5. By revising redesignated paragraphs (b)(1)(xiii), (xiv), and (xv).

6. By revising paragraph (c)(2)(iii).

7. By revising paragraph (d)(1).

8. By revising paragraph (j)(8).

9. By revising paragraph (p).

10. By adding a sentence at the end of paragraph (r)(1)(i).

11. By adding paragraph (r)(3).

The revisions and additions read as follows:

§ 1.367(a)–8 Gain recognition agreement requirements.

(a) *Scope*. * * * Paragraph (p) of this section provides relief for certain failures to file an initial gain recognition agreement (as defined in paragraph (b)(1)(vi) of this section) or to comply with the requirements of this section with respect to a gain recognition agreement (as described in paragraph (c) of this section). * * *

(b) * * *

(1) * * *

(iv) A *gain recognition agreement document* means any agreement, statement, schedule, or form required to be filed under this section, including an initial gain recognition agreement (as defined in paragraph (b)(1)(vi) of this section), a new gain recognition agreement described in paragraph (c)(5) of this section, a Form 8838 extending the period of limitations on assessment of tax described in paragraph (f) of this section, and an annual certification described in paragraph (g) of this section.

* * * * *

(vi) An *initial gain recognition agreement* means the gain recognition agreement entered into under paragraph (c) of this section with respect to the initial transfer.

* * * * *

(xiii) A *timely filed return* means a Federal income tax return filed on or before the last date prescribed for filing (taking into account any extensions of time therefor) such return.

(xiv) *Transferee foreign corporation*. Except as provided in this paragraph (b)(1)(xiv), the *transferee foreign corporation* is the foreign corporation to which the transferred stock or securities are transferred in an initial transfer. In the case of an indirect stock transfer, the transferee foreign corporation has the meaning set forth in § 1.367(a)–3(d)(2)(i). The transferee foreign corporation also includes a corporation designated as the transferee foreign corporation in the case of a new gain recognition agreement entered into under this section.

(xv) *Transferred corporation*. Except as provided in this paragraph (b)(1)(xv), the *transferred corporation* is the corporation the stock or securities of which are transferred in the initial transfer. In the case of an indirect stock transfer, the transferred corporation has the meaning set forth in § 1.367(a)–3(d)(2)(ii). The transferred corporation also includes a corporation designated as the transferred corporation in the case of a new gain recognition agreement entered into under this section.

* * * * *

(c) * * *

(2) * * *

(iii) A statement that the U.S. transferor agrees to comply with all the conditions and requirements of this section, including to recognize gain under the gain recognition agreement in accordance with paragraph (c)(1)(i) of this section, to extend the period of limitations on assessment of tax as provided in paragraph (f) of this section, to file the certification described in paragraph (g) of this section, and, as provided in paragraph (j)(8) of this section, to treat a failure to comply (as described in paragraph (j)(8) of this section) as extending the period of limitations on assessment of tax for the taxable year in which gain is required to be reported.

* * * * *

(d) *Filing requirements*—(1) *General rule*. An initial gain recognition agreement must be timely filed in order for the U.S. transferor to avoid recognizing gain under section 367(a)(1) with respect to the transferred stock or securities by reason of the applicable exceptions provided under § 1.367(a)–3. Except as provided in paragraph (p) of this section, an initial gain recognition agreement is timely filed only if—

(i) The initial gain recognition agreement and any other gain recognition agreement document required to be filed with the initial gain recognition agreement are included with a timely filed return of the U.S. transferor for the taxable year during which the initial transfer occurs; and

(ii) Each gain recognition agreement document identified in paragraph (d)(1)(i) of this section is completed in all material respects.

* * * * *

(j) * * *

(8) *Failure to comply*. A U.S. transferor fails to comply in any material respect with any requirement of this section, or the terms of the gain recognition agree-

ment as described in paragraph (c)(1) of this section. A failure to comply under this paragraph (j)(8) will extend the period of limitations on assessment of tax for the taxable year in which gain is required to be reported until the close of the third full taxable year ending after the date on which the U.S. transferor furnishes to the Director of Field Operations International, Large Business & International (or any successor to the roles and responsibilities of such person) (Director) the information that should have been provided under this section. Except as provided in paragraph (p) of this section, for purposes of this paragraph (j)(8), a failure to comply includes—

(i) If there is a gain recognition event in a taxable year, a failure to report gain or pay any additional tax or interest due under the terms of the gain recognition agreement; and

(ii) A failure to file a gain recognition agreement document, other than an initial gain recognition agreement or a document required to be filed with the initial gain recognition agreement. For this purpose, there is a failure to file a gain recognition agreement document if—

(A) The gain recognition agreement document is not timely filed as required under this section, or

(B) The gain recognition agreement document is not completed in all material respects.

* * * * *

(p) *Relief for certain failures to file or failures to comply that are not willful*—(1) *In general*. This paragraph (p) provides relief if there is a failure to file an initial gain recognition agreement as required under paragraph (d)(1) of this section (failure to file), or a failure to comply that is a triggering event under paragraph (j)(8) of this section (failure to comply). A failure to file or failure to comply will be deemed not to have occurred for purposes of paragraph (d)(1) of this section or paragraph (j)(8) of this section if the U.S. transferor demonstrates that the failure was not willful using the procedure set forth in this paragraph (p). For this purpose, willful is to be interpreted consistent with the meaning of that term in the context of other civil penalties, which would include a failure due to gross negligence, reckless disregard, or willful neglect. Whether a failure to file or failure to comply was willful will be determined by the Director (as described in paragraph (j)(8) of this section) based on all the facts and circumstances. The U.S. transferor must submit a request for relief and an explanation as provided in paragraph (p)(2)(i) of this section. Although a U.S. transferor whose failure to file or failure to comply is determined not to be willful will not be subject to gain recognition under paragraph (b), (c), or (e) of § 1.367(a)–3 or paragraph (c)(1) of this section, as applicable, the U.S. transferor will be subject to a penalty under section 6038B if the U.S. transferor fails to satisfy the reporting requirements under that section and does not demonstrate that the failure was due to reasonable cause and not willful neglect. See § 1.6038B–1(b)(2) and (f). The determination of whether the failure to file or failure to comply was willful under this section has no effect on any request for relief made under § 1.6038B–1(f).

(2) *Procedures for establishing that a failure to file or failure to comply was not willful*—(i) *Time and manner of submission*. A U.S. transferor's statement that a failure to file or failure to comply was not willful will be considered only if, promptly after the U.S. transferor becomes aware of the failure, an amended return is filed for the taxable year to which the failure relates that includes the information that should have been included with the original return for such taxable year or that otherwise complies with the rules of this section, and that includes a written statement explaining the reasons for the failure to file or failure to comply. The U.S. transferor must file, with the amended return, a Form 8838 extending the period of limitations on assessment of tax with respect to the gain realized but not recognized on the initial transfer to the later of: the close of the eighth full taxable year following the taxable year during which the initial transfer occurred (date one); or the close of the third full taxable year ending after the date on which the required information is provided to the Director (date two). However, the U.S. transferor is not required to file a Form 8838 with the amended return if both date one is later than date two and a Form 8838 was previously filed extending the period of limitations on assessment of tax with respect to the gain realized but not recognized on the initial transfer to date one. If a Form 8838 is not required to be filed with the amended return pursuant to the previous sentence, a copy of the previously filed Form 8838 must be filed with the amended return. The amended return and either a Form 8838 or a copy of the previously filed Form 8838, as the case may be, must be filed with the Internal Revenue Service at the location where the U.S. transferor filed its original return. The U.S. transferor may submit a request for relief from the penalty under section 6038B as part of the same submission. See § 1.6038B–1(f).

(ii) *Notice requirement*. In addition to the requirements of paragraph (p)(2)(i) of this section, the U.S. transferor must comply with the notice requirements of this paragraph (p)(2)(ii). If any taxable year of the U.S. transferor is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Internal Revenue Service personnel conducting the examination. If no taxable year of the U.S. transferor is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Director.

(3) *Examples*. The following examples illustrate the application of this paragraph (p). All of the examples are based solely on the following facts and any additional facts stated in the particular example. DC, a domestic corporation, wholly owns FS and FA, each a foreign corporation. In Year 1, pursuant to a transaction qualifying both as an exchange under section 351 and a reorganization under section 368(a)(1)(B), DC transferred all the FS stock to FA solely in exchange for voting stock of FA (FS Transfer). The fair market value of the FS stock exceeded DC's tax basis in the stock at the time of the FS transfer. Absent the application of section 367 to the transaction, DC's exchange of the FS stock for the stock of FA qualified as a tax-free exchange under sections 351(a) and section 354. Immediately after the transaction, both FA and FS were controlled foreign corporations (as defined in section 957). Furthermore, DC was a section 1248 shareholder (as defined in

§ 1.367(b)–2(b)) with respect to FA and FS, and a 5-percent shareholder with respect to FA for purposes of § 1.367(a)–3(b)(ii). Thus, DC was required to recognize gain under section 367(a)(1) by reason of the FS Transfer unless DC timely filed an initial gain recognition agreement (GRA) as required by paragraph (d)(1) of this section and complies in all material respects with the requirements of this section throughout the term of the GRA. The application of section 6038B is not addressed in these examples. DC may be subject to a penalty under section 6038B even if DC demonstrates under this section that a failure to file or failure to comply was not willful. See § 1.6038B–1(b) and (f) for the application of section 6038B.

Example 1. Taxpayer failed to file a GRA due to accidental oversight. (i) *Facts*. DC filed its tax return for the year of the FS Transfer, reporting no gain with respect to the exchange of the FS stock. DC, through its tax department, was aware of the requirement to file a GRA in order for DC to avoid recognizing gain with respect to the FS Transfer under section 367(a)(1), and had the experience and competency to properly prepare the GRA. DC had filed many GRAs over the years and had never failed to timely file a GRA. However, although DC prepared the GRA with respect to the FS Transfer, it was not filed with DC's tax return for the year of the FS Transfer due to an accidental oversight. During the preparation of the following year's tax return, DC discovered that the GRA was not filed. DC filed an amended return to file the GRA and complied with the procedures set forth under paragraph (p)(2) of this section promptly after it became aware of the failure.

(ii) *Result*. Because DC failed to file a GRA with its timely filed tax return for the year of the FS Transfer, there is a failure to timely file the GRA as required by paragraph (d)(1) of this section. However, based on the facts of this *Example 1*, including that the failure to timely file the GRA was an isolated and accidental oversight, the failure to timely file is not a willful failure to file. Accordingly, the timely filed requirement of paragraph (d)(1) of this section is considered to be satisfied, and DC is not required to recognize the gain realized on the FS Transfer under section 367(a)(1).

Example 2. Taxpayer's course of conduct is taken into account in determination. (i) *Facts*. DC filed its tax return for the year of the FS Transfer, reporting no gain with respect to the exchange of the FS stock, but failed to file a GRA. DC, through its tax department, was aware of the requirement to file a GRA in order for DC to avoid recognizing gain with respect to the FS Transfer under section 367(a)(1). DC had not consistently and in a timely manner filed GRAs in the past, and also had an established history of failing to timely file other tax and information returns for which it was subject to penalties. In a year subsequent to Year 1, DC transferred stock of another foreign subsidiary with respect to which DC had a built-in gain (FS2) to FA in a transaction that qualified as both a reorganization under section 368(a)(1)(B) and an exchange described under section 351 (FS2 Transfer). DC was required to recognize gain on the FS2 Transfer under section 367(a)(1) unless DC timely filed a GRA as required by paragraph (d)(1) of this section and complied with the requirements of this section during the term of the GRA. DC reported no gain on the FS2 Transfer on its tax return, but failed to file a GRA. At the time of the FS2 Transfer, DC was already aware of its failure to file the GRA required for the prior FS Transfer, but had not implemented any safeguards to ensure that it would timely file GRAs for future transactions. DC filed an amended return to file the GRA for the FS2 Transfer and complied with the procedures set forth under paragraph (p)(2) of this section promptly after it became aware of the failure. DC asserts that its failure to timely file a GRA with respect to the FS2 Transfer was due to an isolated oversight similar to the one that occurred with respect to the FS Transfer. At issue is DC's failure to timely file a GRA for the FS2 Transfer.

(ii) *Result*. Because DC failed to file a GRA with its timely filed tax return for the year of the FS2 Transfer, there is a failure to timely file the GRA as required by paragraph (d)(1) of this section. DC's course of conduct is taken into account in determining whether its failure to timely file a GRA for the FS2 Transfer was willful. Based on the facts of this *Example 2*, including DC's history of failing to file required tax and information returns in general and GRAs in particular, and its failure to implement safeguards to ensure that it would timely file GRAs, the failure to timely file a GRA with respect to the FS2 Transfer rises to the level of a willful failure to timely file. Accordingly, DC is ineligible for relief under paragraph (p) of this section, the GRA is not considered timely filed for purposes of paragraph (d)(1) of this section, and DC must recognize the full amount of the gain realized on the FS2 Transfer.

Example 3. GRA not completed in all material respects. (i) *Facts*. DC timely filed its tax return for the year of the FS Transfer, reporting no gain with respect to the exchange of the FS stock. DC was aware of the requirement to file a GRA to avoid recognizing gain under section 367(a)(1), including the requirement to provide the basis and fair market value of the transferred stock. However, DC filed a purported GRA that did not contain the fair market value of the FS stock. Instead, the GRA was filed with the statement that the fair market value information was "available upon request." Other than the omission of the fair market value of the FS stock, the GRA contained all other information required by this section.

(ii) *Result*. Because DC omitted the fair market value of the FS stock from the GRA, the GRA was not completed in all material respects. Accordingly, there is a failure to timely file the GRA. Furthermore, because DC knowingly omitted such information, DC's omission is a willful failure to timely file a GRA. Accordingly, DC is ineligible for relief under paragraph (p) of this section, the GRA is not considered timely filed for purposes of paragraph (d)(1) of this section, and DC must recognize the full amount of the gain realized on the FS Transfer. The same result would arise if DC had included the fair market value of the FS stock, but knowingly omitted its tax basis from the GRA.

Example 4. Taxpayer knew of GRA filing requirement, but intentionally chose not to file. (i) *Facts*. When DC filed its tax return for the tax year of the FS Transfer, it was aware of the requirement to file a GRA to avoid recognizing gain under section 367(a)(1). However, because DC anticipated selling Business A in the following tax year, which was expected to produce a capital loss that could be carried back to fully offset the gain recognized on the FS Transfer, DC intentionally chose not to file a GRA. DC recognized the gain from the FS Transfer under section 367(a)(1) and reported the gain on its timely filed tax return. At the end of the following year, a large class action lawsuit was filed against Business A and, consequently, DC was unable to sell the business. As a result, DC did not realize the expected capital loss, and it was not able to offset the gain from the FS Transfer. DC now seeks to file a GRA for the FS Transfer.

(ii) *Result*. Because DC failed to file a GRA with its timely filed tax return for the year of the FS Transfer, there is a failure to timely file the GRA as required by paragraph (d)(1) of this section. Furthermore, because DC intentionally chose not to file a GRA for the FS Transfer, its actions constitute a willful failure to timely file a GRA. Accordingly, DC is ineligible for relief under paragraph (p) of this section, the GRA is not considered timely filed for purposes of paragraph (d)(1) of this section, and DC must recognize the full amount of the gain realized on the FS Transfer in Year 1.

* * * * *

(r) *Effective/applicability dates*—(1) *** * *** (i) *** * *** The eleventh sentence of paragraph (a) and paragraphs (b)(1)(iv), (b)(1)(vi), (b)(1)(xiii), (d)(1), (j)(8), and (p) of this section will apply to gain recognition agreement documents that are required to be filed on or after November 19, 2014, as well as to requests for relief submitted on or after November 19, 2014.

* * * * *

(3) *Applicability to requests for relief submitted before* November 19, 2014. The eleventh sentence of paragraph (a) and paragraphs (b)(1)(iv), (b)(1)(vi), (b)(1)(xiii), (d)(1), (j)(8), and (p) of this section will apply to requests for relief submitted before November 19, 2014 if—

(i) The statute of limitations on the assessment of tax has not expired for any year to which the request relates; and

(ii) The U.S. transferor resubmits the request under paragraph (p) of this section, notes on the request that the request is being submitted pursuant to this paragraph (r)(3), and acknowledges on the request that the last sentence of § 1.6038B–1(g)(6) provides a special rule regarding the application of § 1.6038B–1 to any transfer that is the subject of the request.

Par. 8. Section 1.367(e)–2 is amended:

1. By revising the ninth sentence and adding two new sentences before the last sentence of paragraph (a).

2. By revising paragraph (b)(1)(i).

3. In paragraph (b)(2)(i)(A)(*2*), by removing the language "its U.S. income tax returns" and adding the language "its timely filed U.S. income tax returns" in its place.

4. In paragraph (b)(2)(i)(A)(*3*), by removing the language "its U.S. income tax return" and adding the language "its timely filed U.S. income tax return" in its place.

5. By revising paragraph (b)(2)(i)(C)(*1*).

6. In the first sentence of paragraph (b)(2)(i)(E)(*3*), by removing the language "its U.S. income tax return" and adding the language "its timely filed U.S. income tax return" in its place.

7. In paragraph (b)(2)(i)(E)(*4*)(*ii*), by removing the language "its U.S. income tax return" and adding the language "its timely filed U.S. income tax return" in its place.

8. In paragraph (b)(2)(i)(E)(*5*)(*ii*), by removing the language "its U.S. income tax return" and adding the language "its timely filed U.S. income tax return" in its place.

9. In the first sentence of paragraph (b)(2)(iii)(A), by removing the language "its U.S. income tax return" and adding the language "its timely filed U.S. income tax return" in its place.

10. By adding a sentence at the end of paragraph (b)(2)(iii)(D).

11. In paragraph (c)(2)(i)(B)(*3*), by removing the language "their U.S. income tax returns" and adding the language "their timely filed U.S. income tax returns" in its place.

12. By revising paragraph (e).

13. By adding paragraphs (f) and (g).

The revisions and additions read as follows:

§ 1.367(e)–2 Distributions described in section 367(e)(2).

(a) *Purpose and scope*—(1) *In general*. * * * Paragraph (e) of this section provides rules regarding failures to file statements or other documents required under this section or failures to comply with the requirements of this section. Paragraph (f) of this section provides relief for certain failures to file or comply. Finally, paragraph (g) of this section specifies the effective/applicability dates for the rules of this section. * * *

* * * * *

(b) *Distribution by a domestic corporation*—(1) *General rule*—(i) *Recognition of gain and loss*. If a domestic corporation (domestic liquidating corporation) makes a distribution of property in complete liquidation under section 332 to a foreign corporation (foreign distributee corporation) that meets the stock ownership requirements of section 332(b) with respect to stock in the domestic liquidating corporation, then—

(A) Section 337(a) and (b)(1) will not apply; and

(B) The domestic liquidating corporation will recognize gain or loss on the distribution of property to the foreign distributee corporation, except as provided in paragraph (b)(2) of this section.

* * * * *

(2) * * *

(i) * * *

(C) * * *

(*1*) A declaration that the distribution to the foreign distributee corporation is one to which the rules of this paragraph (b)(2)(i) apply and a certification that the domestic liquidating corporation and the foreign distributee corporation agree to comply with all the conditions and requirements of this section, including, as provided in paragraph (e)(4)(ii)(B) of this section, to treat a failure to comply (as described in paragraph (e)(4)(i) of this section) as extending the period of limitations on assessment of tax for the taxable year in which gain is required to be reported.

* * * * *

(iii) * * *

(D) * * * The required statement shall also state that the domestic liquidating corporation agrees, as provided in paragraph (e)(4)(ii)(B) of this section, to treat a failure to comply (as described in paragraph (e)(4)(i) of this section) as extending the period of limitations on assessment of tax for the taxable year in which gain is required to be reported.

* * * * *

(e) *Failures to file or failures to comply*—(1) *Scope*. This paragraph (e) provides rules regarding a failure to file an initial liquidation document with respect to one or more liquidating distributions by a domestic liquidating corporation that, absent such failure, would qualify for nonrecognition treatment under paragraph (b)(2)(i) or (iii) of this section, or with respect to one or more liquidating distributions by a foreign liquidating corporation that, absent such failure, would qualify for nonrecognition treatment under paragraph (c)(2)(i)(B) of this section (failure to file). This paragraph (e) also provides rules regarding failures to comply in all material respects with the terms of this section with respect to one or more liquidating distributions for which nonrecognition treatment was initially claimed under paragraph (b)(2)(i), (b)(2)(iii), or (c)(2)(i)(B) of this section, as applicable (failure to comply).

(2) *Definitions*. The following definitions apply for purposes of this section.

(i) An *initial liquidation document* means any statement, schedule, or form required to be filed under this section in order for the domestic liquidating corporation or foreign liquidating corporation, as applicable, to initially qualify to claim nonrecognition treatment with respect to one or more liquidating distributions described in this section, including—

(A) The statement and attachments described in paragraph (b)(2)(i)(C) of this section;

(B) The statement described in paragraph (b)(2)(iii)(D) of this section; and

(C) The statement and attachments described in paragraph (c)(2)(i)(C) of this section.

(ii) A *subsequent liquidation document* means any statement, schedule, or form (other than an initial liquidation document) required to be filed under this section in order for the domestic liquidating corporation or foreign liquidating corporation, as applicable, to continue to qualify for nonrecognition treatment with respect to one or more liquidating distributions described in this section, including—

(A) The schedule described in paragraph (b)(2)(i)(E)(*3*) of this section;

(B) The schedule described in paragraph (b)(2)(i)(E)(*4*)(*ii*) of this section; and

(C) The statement and attachments described in paragraph (b)(2)(i)(E)(*5*) of this section.

(iii) A *timely filed U.S. income tax return* means a Federal income tax return filed on or before the last date prescribed for filing (taking into account any extensions of time therefor) such return.

(3) *Failure to file*—(i) *General rule*. For purposes of this section and except as provided in paragraph (b)(2)(i)(D) or (f) of this section, there is a failure to file an initial liquidation document if—

(A) An initial liquidation document is not filed with the timely filed U.S. income tax return specified under this section, or

(B) An initial liquidation document is not completed in all material respects.

(ii) *Consequences of a failure to file*. If there is a failure to file an initial liquidation document, then nonrecognition treatment under paragraph (b)(2)(i), (b)(2)(iii), or (c)(2)(i)(B) of this section (as appropriate) will not apply.

(4) *Failure to comply*—(i) *General rule*. For purpose of this section and except as provided in paragraph (b)(2)(i)(D) or (f) of this section, a failure to comply includes—

(A) A failure to report gain, or pay any additional tax or interest due, in accordance with the requirements under this section; and

(B) A failure to file a subsequent liquidation document, as determined by applying paragraph (e)(3)(i) of this section, but replacing the term "initial liquidation document" with the term "subsequent liquidation document."

(ii) *Consequences of a failure to comply*. If there is a failure to comply in any material respect with the terms of paragraph (b)(2)(i), (b)(2)(iii), or (c)(2)(i) of this section, as applicable, then—

(A) Any gain (but not loss) that was not previously recognized by the domestic liquidating corporation or foreign liquidating corporation, as applicable, under paragraph (b)(2)(i), (b)(2)(iii), or (c)(2)(i)(B) of this section must be recognized; and

(B) The period of limitations on assessment of tax for the taxable year in which gain is required to be reported will be extended until the close of the third full taxable year ending after the date on which the domestic liquidating corporation, foreign distributee corporation, or foreign liquidating corporation, as applicable, furnishes to the Director of Field Operations International, Large Business & International (or any successor to the roles and responsibilities of such position, as appropriate) (Director) the information that should have been provided under this section.

(f) *Relief for certain failures to file or failures to comply that are not willful*—(1) *In general*. This paragraph (f) provides relief if there is a failure to file an initial liquidation document as described in paragraph (e)(3)(i) of this section (failure to file), or a failure to comply in any material respect with the terms of this section as described in paragraph (e)(4)(i) of this section (failure to comply). A failure to file or a failure to comply will be deemed not to have occurred for purposes of paragraph (e)(3)(ii) or (e)(4)(ii) of this section if the taxpayer demonstrates that the failure was not willful using the procedure set forth in this paragraph (f). For this purpose, willful is to be interpreted consistent with the meaning of that term in the context of other civil penalties, which would include a failure due to gross negligence, reckless disregard, or willful neglect. Whether a failure to file or failure to comply was willful will be determined by the Director (as described in paragraph (e)(4)(ii)(B) of this section) based on all the facts and circumstances. The taxpayer must submit a request for relief and an explanation as provided in paragraph (f)(2)(i) of this section. Although a taxpayer whose failure to file or failure to comply is determined not to be willful will not be subject to gain or loss recognition under this section, the taxpayer will be subject to a penalty under section 6038B if the taxpayer fails to satisfy the reporting requirements, if any, under that section and does not demonstrate that the failure was due to reasonable cause and not willful neglect. See § 1.6038B–1(e)(4) and (f). The determination of whether the failure to file or failure to comply was willful under this section has no effect on any request for relief made under § 1.6038B–1(f).

(2) *Procedures for establishing that a failure to file or failure to comply was not willful*—(i) *Time and manner of submission*. A taxpayer's statement that a failure to file or failure to comply was not willful will be considered only if, promptly after the taxpayer becomes aware of the failure, an amended return is filed for the taxable year to which the failure relates that includes the information that should have been included with the original return for such taxable year or that otherwise complies with the rules of this section, and that includes a written statement explaining the reasons for the failure. In the case of a liquidating distribution described in paragraph (b)(2)(iii) of this section, the taxpayer must file, with the amended return, a Form 8838 extending the period of limitations on assessment of tax with respect to the gain realized but not recognized with respect to the liquidating distribution to the close of the third full taxable year ending after the date on which the required information is provided to the Director. In the case of a liquidating distribution described in paragraph (b)(2)(i) or (c)(2)(i)(B) of this section, the taxpayer must file, with the amended return, a Form 8838 extending the period of limitations on the assessment of tax with respect to the gain realized but not recognized with respect to the liquidating distribution to the later of: the date provided in paragraph (b)(2)(i)(C)(*5*), taking into account paragraph (c)(2)(i)(C) and (D), as applicable (date one); or, the close of the third full taxable year ending after the date on which the required information is provided to the Director (date two). However, the taxpayer is not required to file a Form 8838 with the amended return if both date one is later than date two and a Form 8838 was previously filed extending the period of limitations on assessment of tax with respect to the gain realized but not recognized with respect to the liquidating distribution to date one. If a Form 8838 is not required to be filed pursuant to the previous sentence, a copy of the previously filed Form 8838 must be filed with the amended return. The amended return and either a Form 8838 or a copy of the previously filed Form 8838, as the case may be, must be filed with the Internal Revenue Service at the location where the taxpayer filed its original return. The taxpayer may submit a request for relief from the penalty under section 6038B as part of the same submission. See § 1.6038B–1(f).

(ii) *Notice requirement*. In addition to the requirements of paragraph (f)(2)(i) of this section, the taxpayer must comply with the notice requirements of this paragraph (f)(2)(ii). If any taxable year of the taxpayer is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Internal Revenue Service personnel conducting the examination. If no taxable year of the taxpayer is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Director.

(3) For illustrations of the application of the willfulness standard of this paragraph (f), see the examples in § 1.367(a)–8(p)(3).

(g) *Effective/applicability dates*. Except as otherwise provided, this section applies to distributions occurring on or after September 7, 1999 or, if the taxpayer so elects, to distributions in taxable years ending after August 8, 1999. The ninth, tenth, and eleventh sentences of paragraph (a) of this section, and paragraphs (b)(1)(i), (b)(2)(i)(A)(*2*), (b)(2)(i)(A)(*3*), (b)(2)(i)(E)(*3*), (b)(2)(i)(E)(*4*)(*ii*), (b)(2)(i)(E)(*5*)(*ii*), (b)(2)(iii)(A), (c)(2)(i)(B)(*3*), (e), and (f) of this section will apply to liquidation documents that are required to be filed on or after November 19, 2014, as well as to requests for relief submitted on or after November 19, 2014.

Par. 9. Section 1.6038B–1 is amended:

1. By adding a sentence after the first sentence in paragraph (b)(1)(i).

2. By revising paragraph (b)(2)(i)(B)(*1*).

3. By adding paragraph (b)(2)(iii).

4. By adding paragraph (b)(2)(iv).

5. By revising paragraphs (c)(1) through (c)(5).

6. By revising paragraph (e)(4).

7. By removing paragraph (f)(1)(i).

8. By redesignating paragraphs (f)(1)(ii) and (f)(1)(iii) as paragraphs (f)(1)(i) and (f)(1)(ii), respectively.

9. By adding paragraph (f)(2)(iii).

10. By adding paragraph (f)(2)(iv).

11. In paragraph (g)(1), by removing the language "(g)(5)" and adding the language "(g)(6)" in its place.

12. By adding paragraph (g)(6).

The revisions and additions read as follows:

§ 1.6038B–1 Reporting of certain transfers to foreign corporations.

*** * * * ***

(b) * * * (1) * * * –(i) * * * In addition, if the U.S. person files a statement under § 1.367(a)–3(d)(2)(vi)(C), a gain recognition agreement under § 1.367(a)–8, or a liquidation document under § 1.367(e)–2(b), such person must comply in all material respects with the requirements of such section pursuant to the terms of the statement, gain recognition agreement, or liquidation document, as applicable, in order to satisfy a reporting obligation under section 6038B. * * *

* * * * *

(2) * * *

(i) * * *

(B) * * *

(*1*) Except as provided in paragraph (b)(2)(iii) of this section, the U.S. transferor (or one or more successors) filed an initial gain recognition agreement under § 1.367(a)–8, and filed Form 926 in accordance with paragraph (b)(2)(iv) of this section; or

* * * * *

(ii) * * *

(iii) *Timely filed initial gain recognition agreement*. Paragraph (b)(2)(i)(B)(*1*) of this section will not apply unless the initial gain recognition agreement is timely filed as determined under § 1.367(a)–8(d)(1), but for purposes of this section, determined without regard to § 1.367(a)–8(p). However, see paragraph (f)(3) of this section for certain relief that may be available.

(iv) *Satisfaction of section 6038B reporting if a gain recognition agreement is timely filed*. If the U.S. transferor is described in paragraph (b)(2)(i)(B)(*1*) of this section and is not otherwise required to file a Form 926 with respect to a transfer of assets other than the stock or securities to the transferee foreign corporation, the requirements of this section are satisfied with respect to the transfer of the stock or securities by completing Part I and Part II of Form 926, noting on the Form 926 that a gain recognition agreement is being filed pursuant to § 1.367(a)–8; reporting on the Form 926 the fair market value, adjusted tax basis, and gain recognized with respect to the transferred stock or securities; submitting on the Form 926 any other information that Form 926, its accompanying instructions, or other applicable guidance require to be submitted with respect to the transfer of the stock or securities; and attaching a signed copy of the Form 926 to its timely filed U.S. income tax return (including extensions) for the year of the transfer. If the U.S. transferor is required to file Form 926 with respect to a transfer of assets in addition to the stock or securities, the requirements of this section are satisfied with respect to the transfer of the stock or securities by noting on the Form 926 that a gain recognition agreement is being filed pursuant to § 1.367(a)–8; reporting on the Form 926 the fair market value, adjusted tax basis, and gain recognized with respect to the transferred stock or securities; and submitting on the Form 926 any other information that Form 926, its accompanying instructions, or other applicable guidance require to be submitted with respect to the transfer of the stock or securities.

* * * * *

(c) * * *

(1) through (4)(i) [Reserved]. For further guidance, see § 1.6038B–1T(c)(1) through (4)(i).

(ii) *Stock or securities*. Describe any stock or securities that are transferred, including the adjusted tax basis and fair market value of the stock or securities, the class or type, amount, and characteristics of the stock or securities, and the name, address, place of incorporation, and general description of the corporation issuing the stock or securities. In addition, if any provision of § 1.367(a)–3 or § 1.367(a)–3T applies to except the transfer of the stock or securities from section 367(a)(1), provide information supporting the claimed application of such provision. However, see paragraph (b)(2) of this section for certain exceptions and special rules for reporting transfers of stock or securities under section 367(a).

(iii) through (5) [Reserved]. For further guidance, see § 1.6038B–1T(c)(4)(iii) through (5).

* * * * *

(e) * * *

(4) *Reporting rules for section 367(e)(2) distributions by domestic liquidating corporations*—(i) *General rule*. Except as provided in paragraph (e)(4)(ii) of this section, if the distributing corporation makes a distribution of property in complete liquidation under section 332 to

a foreign distributee corporation that meets the stock ownership requirements of section 332(b) with respect to the stock of the distributing corporation, then the distributing corporation must complete a Form 926 and attach a signed copy of such form to its timely filed U.S. income tax return (including extensions) for the taxable years that include one or more liquidating distributions. The property description contained in Part III of the Form 926 must contain a description, including the adjusted tax basis and fair market value, of all property distributed by the distributing corporation (regardless of whether the distribution of the property qualifies for nonrecognition treatment). The description must also identify the items of property for which nonrecognition treatment is claimed under § 1.367(e)–2(b)(2)(ii) or (iii), as applicable.

(ii) *Special rule*. Except as provided in paragraph (e)(4)(iii) of this section, if the distributing corporation distributes items of property that will be used by the foreign distributee corporation in the conduct of a trade or business in the United States and the distributing corporation does not recognize gain or loss on such distribution under § 1.367(e)–2(b)(2)(i) with respect to such property, then the distributing corporation may satisfy the requirements of this section by completing Part I and Part II of Form 926, noting in Part III that the information required by Form 926 is contained in a statement required by § 1.367(e)–2(b)(2)(i)(C)(*2*), and attaching a signed copy of Form 926 to its timely filed U.S. income tax return (including extensions) for each taxable year that includes one or more distributions in liquidation. In addition, if the distributing corporation distributes stock of a domestic subsidiary corporation and does not recognize gain or loss on such distribution under § 1.367(e)–2(b)(2)(iii) with respect to such stock, then the distributing corporation may satisfy the requirements of this section by completing Part I and Part II of Form 926, noting in Part III that the information required by Form 926 is contained in a statement required by § 1.367(e)–2(b)(2)(iii)(D), and attaching a signed copy of Form 926 to its timely filed U.S. income tax return (including extensions) for the taxable years that include one or more distributions of domestic subsidiary stock.

(iii) *Properly filed statement*. Paragraph (e)(4)(ii) will not apply if there is a failure to file an initial liquidation document as determined under § 1.367(e)–2(e)(3)(i), but for purposes of this section, determined without regard to § 1.367(e)–2(f). However, see paragraph (f)(3) of this section for certain relief that may be available.

(f) * * *

(2) * * *

(iii) With respect to an initial gain recognition agreement filed under § 1.367(a)–8, a failure to comply as determined under § 1.367(a)–8(j)(8), but for purposes of this section, determined without regard to the application of § 1.367(a)–8(p).

(iv) With respect to an initial liquidation document filed under § 1.367(e)–2(b)(2), a failure to comply as determined under § 1.367(e)–2(e)(4)(i), but for purposes of this section, determined without regard to the application of § 1.367(e)–2(f).

* * * * *

(g) * * *

(6) The second sentence of paragraph (b)(1)(i) and paragraphs (b)(2)(i)(B)(*1*), (b)(2)(iii), (b)(2)(iv), (c), (e)(4), (f)(2)(iii), and (f)(2)(iv) of this section will apply to documents required to be filed on or after November 19, 2014, as well as to requests for relief submitted on or after November 19, 2014. The second sentence of paragraph (b)(1)(i) and paragraphs (b)(2)(i)(B)(*1*), (b)(2)(iii), (b)(2)(iv), (c), and (f)(2)(iii) of this section will also apply to any transfer that is the subject of a request for relief submitted pursuant to § 1.367(a)–8(r)(3).

John Dalrymple,
Deputy Commissioner for Services and Enforcement.

Approved: October 31, 2014

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

(Filed by the Office of the Federal Register on November 18, 2014, 8:45 a.m., and published in the issue of the Federal Register for November 19, 2014, 79 F.R. 68763)

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

The adjusted applicable federal long-term rate is set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

Section 412.—Minimum Funding Standards

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

Section 482.—Allocation of Income and Deductions Among Taxpayers

Federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

Section 483.—Interest on Certain Deferred Payments

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

Section 642.—Special Rules for Credits and Deductions

Federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

Section 807.—Rules for Certain Reserves

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

Section 846.—Discounted Unpaid Losses Defined

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

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

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

Rev. Rul. 2014–31

This revenue ruling provides various prescribed rates for federal income tax purposes for December 2014 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable federal rates (AFR) for the current month for purposes of section 1274(d) of the Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the appropriate percentages for determining the low-income housing credit described in section 42(b)(1) for buildings placed in service during the current month. However, under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, with respect to housing credit dollar amount allocations made before January 1, 2014, shall not be less than 9%. Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520. Finally, Table 6 contains the 2015 interest rate for sections 846 and 807.

REV. RUL. 2014–31 TABLE 1
Applicable Federal Rates (AFR) for December 2014

	Period for Compounding			
	Annual	*Semiannual*	*Quarterly*	*Monthly*
		Short-term		
AFR	.34%	.34%	.34%	.34%
110% AFR	.37%	.37%	.37%	.37%
120% AFR	.41%	.41%	.41%	.41%
130% AFR	.44%	.44%	.44%	.47%
		Mid-term		
AFR	1.72%	1.71%	1.71%	1.70%
110% AFR	1.89%	1.88%	1.88%	1.87%
120% AFR	2.06%	2.05%	2.04%	2.04%
130% AFR	2.23%	2.22%	2.21%	2.21%
150% AFR	2.59%	2.57%	2.56%	2.56%
175% AFR	3.01%	2.99%	2.98%	2.97%
		Long-term		
AFR	2.74%	2.72%	2.71%	2.70%
110% AFR	3.01%	2.99%	2.98%	2.97%
120% AFR	3.29%	3.26%	3.25%	3.24%
130% AFR	3.57%	3.54%	3.52%	3.51%

REV. RUL. 2014–31 TABLE 2
Adjusted AFR for December 2014
Period for Compounding

	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term adjusted AFR	.34%	.34%	.34%	.34%
Mid-term adjusted AFR	1.28%	1.28%	1.28%	1.28%
Long-term adjusted AFR	2.68%	2.66%	2.65%	2.65%

REV. RUL. 2014–31 TABLE 3
Rates Under Section 382 for December 2014

Adjusted federal long-term rate for the current month	2.68%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	2.80%

REV. RUL. 2014–31 TABLE 4
Appropriate Percentages Under Section 42(b)(1) for December 2014

Note: Under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, with respect to housing credit dollar amount allocations made before January 1, 2014, shall not be less than 9%.

Appropriate percentage for the 70% present value low-income housing credit	7.51%
Appropriate percentage for the 30% present value low-income housing credit	3.22%

REV. RUL. 2014–31 TABLE 5
Rate Under Section 7520 for December 2014

Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	2.0%

REV. RUL. 2014–31 TABLE 6
Rates Under Sections 846 and 807

Applicable rate of interest for 2015 for purposes of sections 846 and 807	1.68%

Section 1288.—Treatment of Original Issue Discount on Tax-Exempt Obligations

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

Section 7520.—Valuation Tables

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

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

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2014. See Rev. Rul. 2014–31, page 935.

Part III. Administrative, Procedural, and Miscellaneous

Safe Harbor Explanations – Eligible Rollover Distributions

Notice 2014–74

I. PURPOSE

This notice amends the two safe harbor explanations in Notice 2009–68, 2009–2 C.B. 423, that can be used to satisfy the requirement under § 402(f) of the Internal Revenue Code ("Code") that certain information be provided to recipients of eligible rollover distributions. Amendments to the safe harbor explanations reflected in this notice relate to the allocation of pretax and after-tax amounts, distributions in the form of in-plan Roth rollovers, and certain other clarifications to the two safe harbor explanations. The amendments to the safe harbor explanations (and attached model notices) may be used for plans that apply the guidance in section III of Notice 2014–54, 2014–41 I.R.B. 670, with respect to the allocation of pretax and after-tax amounts.

II. BACKGROUND

Section 402(f) requires the plan administrator of a plan qualified under § 401(a) to provide the written explanation described in § 402(f)(1) to any recipient of an eligible rollover distribution, as defined in § 402(c)(4). In addition, §§ 403(a)(4)(B) and 457(e)(16)(B) require the plan administrator of a § 403(a) plan, or an eligible § 457(b) plan maintained by a governmental employer described in § 457(e)(1)(A), to provide the written explanation to any recipient of an eligible rollover distribution. Further, § 403(b)(8)(B) requires a payor under a § 403(b) plan to provide the written explanation to the recipient of an eligible rollover distribution.

Notice 2009–68 contains two safe harbor explanations that reflect the relevant law as of September 28, 2009: one explanation is for payments not from a designated Roth account and the other explanation is for payments from a designated Roth account. These explanations include rules on the rollover of payments to Roth IRAs, including explanations of transition rules that only applied to distributions made before 2011. Notice 2009–68 provides that the safe harbor explanations can be used by plan administrators and payors to satisfy § 402(f) to the extent the explanations accurately reflect current law.

Section 402A(c)(4), which was added to the Code by the Small Business Jobs Act of 2010, P.L. 111–240, permits plans that include a qualified Roth contribution program to provide for rollovers to designated Roth accounts in the same plan ("in-plan Roth rollovers"). Notice 2010–84, 2010–51 I.R.B. 872, provides guidance on in-plan Roth rollovers under § 402A(c)(4). For a plan offering in-plan Roth rollovers, Q&A–5 of Notice 2010–84 provides an amendment to the safe harbor explanation for payments not from a designated Roth account that can be used to satisfy § 402(f).

Section 402A(c)(4)(E), which was added to the Code by the American Taxpayer Relief Act of 2012, P.L. 112–240, permits the in-plan Roth rollover of amounts not otherwise distributable. Notice 2013–74, 2013–52 I.R.B. 819, provides additional guidance on in-plan Roth rollovers, including on in-plan Roth rollovers of amounts not otherwise distributable. Notice 2013–74 modifies Notice 2010–84, and also provides that a written explanation under § 402(f) is not required for a participant who makes an in-plan Roth rollover of an amount not otherwise distributable.

Proposed regulations that would modify § 1.402A–1, Q&A–5(a), were issued in conjunction with Notice 2014–54. The proposed regulations would limit the applicability of the requirement in § 1.402A–1, Q&A–5(a), applicable to distributions from designated Roth accounts, that "any amount paid in a direct rollover is treated as a separate distribution from any amount paid directly to the employee." Under the proposed regulations, this separate distribution requirement would not apply to distributions made on or after the applicability date of the Treasury decision finalizing the proposed regulations. Before the proposed regulations are finalized, taxpayers are permitted to apply the rules set out in section III of Notice 2014–54.

Section III of Notice 2014–54 provides new rules on the allocation of pretax and after-tax amounts among disbursements made from a plan to multiple destinations. Notice 2014–54 provides that the new allocation rules generally apply to distributions made on or after January 1, 2015 (or the applicability date of the Treasury decision that finalizes the proposed regulations under § 1.402A–1, in the case of distributions from a designated Roth account). However, transition rules permit the earlier application of the new allocation rules. The notice also provides that the IRS intends to revise the safe harbor explanations under § 402(f) to reflect the new allocation rules.

III. AMENDMENTS TO THE SAFE HARBOR EXPLANATIONS

This section III contains amendments to update the safe harbor explanations in Notice 2009–68 for changes in the law occurring after September 28, 2009, and to make certain other clarifying changes. The amendments with respect to in-plan Roth rollovers apply to plans that offer in-plan Roth rollovers, including in-plan Roth rollovers of amounts not otherwise distributable, and the amendments with respect to the allocation of pretax and after-tax amounts apply to plans that apply the guidance in section III of Notice 2014–54. The updated safe harbor explanations provided in this notice can be used by plan administrators and payors to satisfy § 402(f). However, the updated safe harbor explanations will not satisfy § 402(f) to the extent the explanations are no longer accurate because of a change in the relevant law occurring after December 8, 2014. The instructions in Notice 2009–68 on how to use the safe harbor explanations continue to apply.

Part A contains amendments to the safe harbor explanation for payments not from a designated Roth account and Part B contains amendments to the safe harbor explanation for payments from a designated Roth account. References throughout the safe harbor explanations to "IRS Publication 590, *Individual Retirement Arrangements (IRAs)*" should be replaced with "IRS Publication 590–A, *Contributions to Individual Retirement Arrangements (IRAs)*, and Publication 590–B, *Distributions from Individual Retirement Arrangements (IRAs)*," as applicable, after Publications 590–A and 590–B are issued. Restated safe harbor explanations that include these amendments are at the end of this notice.

Part A – Amendments to the Safe Harbor Explanation for Payments not from a Designated Roth Account

1. Under the heading "How much may I roll over?," replace the eighth bullet with the following:

> Payments of certain automatic enrollment contributions requested to be withdrawn within 90 days of the first contribution

2. Under the heading "If I don't do a rollover, will I have to pay the 10% additional income tax on early distributions?," delete the ninth bullet (as it repeats the concept found in the last bullet), which reads:

> Contributions made under special automatic enrollment rules that are withdrawn pursuant to your request within 90 days of enrollment

3. Under the heading "If I do a rollover to an IRA, will the 10% additional income tax apply to early distributions from the IRA?," replace item (3) in the last bullet with the following:

> payments for health insurance premiums after you have received unemployment compensation for 12 consecutive weeks (or would have been eligible to receive unemployment compensation but for self-employed status).

4. Under the heading "If your payment includes after-tax contributions," replace the first and second paragraphs with the following:

> After-tax contributions included in a payment are not taxed. If a payment is only part of your benefit, an allocable portion of your after-tax contributions is included in the payment, so you cannot take a payment of only after-tax contributions. However, if you have pre-1987 after-tax contributions maintained in a separate account, a special rule may apply to determine whether the after-tax contributions are included in a payment. In addition, special rules apply when you do a rollover, as described below.
>
> You may roll over to an IRA a payment that includes after-tax contributions through either a direct rollover or a 60-day rollover. You must keep track of the aggregate amount of the after-tax contributions in all of your IRAs (in order to determine your taxable income for later payments from the IRAs). If you do a direct rollover of only a portion of the amount paid from the Plan and at the same time the rest is paid to you, the portion directly rolled over consists first of the amount that would be taxable if not rolled over. For example, assume you are receiving a distribution of $12,000, of which $2,000 is after-tax contributions. In this case, if you directly roll over $10,000 to an IRA that is not a Roth IRA, no amount is taxable because the $2,000 amount not directly rolled over is treated as being after-tax contributions. If you do a direct rollover of the entire amount paid from the Plan to two or more destinations at the same time, you can choose which destination receives the after-tax contributions.
>
> If you do a 60-day rollover to an IRA of only a portion of a payment made to you, the after-tax contributions are treated as rolled over last. For example, assume you are receiving a distribution of $12,000, of which $2,000 is after-tax contributions, and no part of the distribution is directly rolled over. In this case, if you roll over $10,000 to an IRA that is not a Roth IRA in a 60-day rollover, no amount is taxable because the $2,000 amount not rolled over is treated as being after-tax contributions.

5. Under the heading "If you roll over your payment to a Roth IRA," delete the first paragraph, which reads:

> You can roll over a payment from the Plan made before January 1, 2010 to a Roth IRA only if your modified adjusted gross income is not more than $100,000 for the year the payment is made to you and, if married, you file a joint return. These limitations do not apply to payments made to you from the Plan after 2009. If you wish to roll over the payment to a Roth IRA, but you are not eligible to do a rollover to a Roth IRA until after 2009, you can do a rollover to a traditional IRA and then, after 2009, elect to convert the traditional IRA into a Roth IRA.

6. Under the heading "If you roll over your payment to a Roth IRA," replace the second paragraph with the following:

> If you roll over a payment from the Plan to a Roth IRA, a special rule applies under which the amount of the payment rolled over (reduced by any after-tax amounts) will be taxed. However, the 10% additional income tax on early distributions will not apply (unless you take the amount rolled over out of the Roth IRA within 5 years, counting from January 1 of the year of the rollover).

7. Under the heading "If you roll over your payment to a Roth IRA," delete the fourth paragraph, which reads:

> You cannot roll over a payment from the Plan to a designated Roth account in an employer plan.

8. Following the section that is headed "If you roll over your payment to a Roth IRA," add a new section to read as follows:

If you do a rollover to a designated Roth account in the Plan

You cannot roll over a distribution to a designated Roth account in another employer's plan. However, you can roll the distribution over into a designated Roth account in the distributing Plan. If you roll over a payment from the Plan to a designated Roth account in the Plan, the amount of the payment rolled over (reduced by any after-tax amounts directly rolled over) will be taxed. However, the 10% additional tax on early distributions will not apply (unless you take the amount rolled over out of the designated Roth account within the 5-year period that begins on January 1 of the year of the rollover).

If you roll over the payment to a designated Roth account in the Plan, later payments from the designated Roth account that are qualified distributions will not be taxed (including earnings after the rollover). A qualified distribution from a designated Roth account is a payment made both after you are age 59½ (or after your death or disability) and after you have had a designated Roth account in the Plan for at least 5 years. In applying this 5-year rule, you count from January 1 of the year your first contribution was made to the designated Roth account. However, if you made a direct rollover to a designated Roth account in the Plan from a designated Roth account in a plan of another employer, the 5-year period begins on January 1 of the year you made the first contribution to the designated Roth account in the Plan or, if earlier, to the designated Roth account in the plan of the other employer. Payments from the designated Roth account that are not qualified distributions will be taxed to the extent of earnings after the rollover, including the 10% additional income tax on early distributions (unless an exception applies).

Part B – Amendments to the Safe Harbor Explanation for Payments from a Designated Roth Account

1. Under the heading "How do I do a rollover?," replace the next-to-last paragraph with the following:

> If you do a direct rollover of only a portion of the amount paid from the Plan and a portion is paid to you at the same time, the portion directly rolled over consists first of earnings.

2. Under the heading "How much may I roll over?," replace the eighth bullet with the following:

> Payments of certain automatic enrollment contributions requested to be withdrawn within 90 days of the first contribution

3. Under the heading "If I don't do a rollover, will I have to pay the 10% additional income tax on early distributions?," delete the eighth bullet (as it repeats the concept found in the last bullet), which reads:

> Contributions made under special automatic enrollment rules that are withdrawn pursuant to your request within 90 days of enrollment

4. Under the heading "If I do a rollover to a Roth IRA, will the 10% additional income tax apply to early distributions from the IRA?," replace item (3) in the last bullet with the following:

> payments for health insurance premiums after you have received unemployment compensation for 12 consecutive weeks (or would have been eligible to receive unemployment compensation but for self-employed status).

IV. EFFECT ON OTHER DOCUMENTS

Notice 2009–68 is modified.

DRAFTING INFORMATION

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

* * *

For Payments Not From a Designated Roth Account

YOUR ROLLOVER OPTIONS

You are receiving this notice because all or a portion of a payment you are receiving from the [INSERT NAME OF PLAN] (the "Plan") is eligible to be rolled over to an IRA or an employer plan. This notice is intended to help you decide whether to do such a rollover.

This notice describes the rollover rules that apply to payments from the Plan that are *not* from a designated Roth account (a type of account with special tax rules in some employer plans). If you also receive a payment from a designated Roth account in the Plan, you will be provided a different notice for that payment, and the Plan administrator or the payor will tell you the amount that is being paid from each account.

Rules that apply to most payments from a plan are described in the "General Information About Rollovers" section. Special rules that only apply in certain circumstances are described in the "Special Rules and Options" section.

GENERAL INFORMATION ABOUT ROLLOVERS

How can a rollover affect my taxes?

You will be taxed on a payment from the Plan if you do not roll it over. If you are under age 59½ and do not do a rollover, you will also have to pay a 10% additional income tax on early distributions (unless an exception applies). However, if you do a rollover, you will not have to pay tax until you receive payments later and the 10% additional income tax will not apply if those payments are made after you are age 59½ (or if an exception applies).

Where may I roll over the payment?

You may roll over the payment to either an IRA (an individual retirement account or individual retirement annuity) or an employer plan (a tax-qualified plan, section 403(b) plan, or governmental section 457(b) plan) that will accept the rollover. The rules of the IRA or employer plan that holds the rollover will determine your investment options, fees, and rights to payment from the IRA or employer plan (for example, no spousal consent rules apply to IRAs and IRAs may not provide loans). Further, the amount rolled over will become subject to the tax rules that apply to the IRA or employer plan.

How do I do a rollover?

There are two ways to do a rollover. You can do either a direct rollover or a 60-day rollover.

If you do a direct rollover, the Plan will make the payment directly to your IRA or an employer plan. You should contact the IRA sponsor or the administrator of the employer plan for information on how to do a direct rollover.

If you do not do a direct rollover, you may still do a rollover by making a deposit into an IRA or eligible employer plan that will accept it. You will have 60 days after you receive the payment to make the deposit. If you do not do a direct rollover, the Plan is required to withhold 20% of the payment for federal income taxes (up to the amount of cash and property received other than employer stock). This means that, in order to roll over the entire payment in a 60-day rollover, you must use other funds to make up for the 20% withheld. If you do not roll over the entire amount of the payment, the portion not rolled over will be taxed and will be subject to the 10% additional income tax on early distributions if you are under age 59½ (unless an exception applies).

How much may I roll over?

If you wish to do a rollover, you may roll over all or part of the amount eligible for rollover. Any payment from the Plan is eligible for rollover, except:

- Certain payments spread over a period of at least 10 years or over your life or life expectancy (or the lives or joint life expectancy of you and your beneficiary)
- Required minimum distributions after age 70½ (or after death)
- Hardship distributions
- ESOP dividends
- Corrective distributions of contributions that exceed tax law limitations
- Loans treated as deemed distributions (for example, loans in default due to missed payments before your employment ends)
- Cost of life insurance paid by the Plan
- Payments of certain automatic enrollment contributions requested to be withdrawn within 90 days of the first contribution
- Amounts treated as distributed because of a prohibited allocation of S corporation stock under an ESOP (also, there will generally be adverse tax consequences if you roll over a distribution of S corporation stock to an IRA).

The Plan administrator or the payor can tell you what portion of a payment is eligible for rollover.

If I don't do a rollover, will I have to pay the 10% additional income tax on early distributions?

If you are under age 59½, you will have to pay the 10% additional income tax on early distributions for any payment from the Plan (including amounts withheld for income tax) that you do not roll over, unless one of the exceptions listed below applies. This tax is in addition to the regular income tax on the payment not rolled over.

The 10% additional income tax does not apply to the following payments from the Plan:

- Payments made after you separate from service if you will be at least age 55 in the year of the separation
- Payments that start after you separate from service if paid at least annually in equal or close to equal amounts over your life or life expectancy (or the lives or joint life expectancy of you and your beneficiary)
- Payments from a governmental defined benefit pension plan made after you separate from service if you are a public safety employee and you are at least age 50 in the year of the separation
- Payments made due to disability
- Payments after your death
- Payments of ESOP dividends
- Corrective distributions of contributions that exceed tax law limitations
- Cost of life insurance paid by the Plan
- Payments made directly to the government to satisfy a federal tax levy
- Payments made under a qualified domestic relations order (QDRO)
- Payments up to the amount of your deductible medical expenses
- Certain payments made while you are on active duty if you were a member of a reserve component called to duty after September 11, 2001 for more than 179 days
- Payments of certain automatic enrollment contributions requested to be withdrawn within 90 days of the first contribution.

If I do a rollover to an IRA, will the 10% additional income tax apply to early distributions from the IRA?

If you receive a payment from an IRA when you are under age 59½, you will have to pay the 10% additional income tax on early distributions from the IRA, unless an exception applies. In general, the exceptions to the 10% additional income tax for early distributions from an IRA are the same as the exceptions listed above for early distributions from a plan. However, there are a few differences for payments from an IRA, including:

- There is no exception for payments after separation from service that are made after age 55.
- The exception for qualified domestic relations orders (QDROs) does not apply (although a special rule applies under which, as part of a divorce or separation agreement, a tax-free transfer may be made directly to an IRA of a spouse or former spouse).
- The exception for payments made at least annually in equal or close to equal amounts over a specified period applies without regard to whether you have had a separation from service.
- There are additional exceptions for (1) payments for qualified higher education expenses, (2) payments up to $10,000 used in a qualified first-time home purchase, and (3) payments for health insurance premiums after you have received unemployment compensation for 12 consecutive weeks (or would have been eligible to receive unemployment compensation but for self-employed status).

Will I owe State income taxes?

This notice does not describe any State or local income tax rules (including withholding rules).

SPECIAL RULES AND OPTIONS

If your payment includes after-tax contributions

After-tax contributions included in a payment are not taxed. If a payment is only part of your benefit, an allocable portion of your after-tax contributions is included in the payment, so you cannot take a payment of only after-tax contributions. However, if you have pre-1987 after-tax contributions maintained in a separate account, a special rule may apply to determine whether the after-tax contributions are included in a payment. In addition, special rules apply when you do a rollover, as described below.

You may roll over to an IRA a payment that includes after-tax contributions through either a direct rollover or a 60-day rollover. You must keep track of the aggregate amount of the after-tax contributions in all of your IRAs (in order to determine your taxable income for later payments from the IRAs). If you do a direct rollover of only a portion of the amount paid from the Plan and at the same time the rest is paid to you, the portion directly rolled over consists first of the amount that would be taxable if not rolled over. For example, assume you are receiving a distribution of $12,000, of which $2,000 is after-tax contributions. In this case, if you directly roll over $10,000 to an IRA that is not a Roth IRA, no amount is taxable because the $2,000 amount not directly rolled over is treated as being after-tax contributions. If you do a direct rollover of the entire amount paid from the Plan to two or more destinations at the same time, you can choose which destination receives the after-tax contributions.

If you do a 60-day rollover to an IRA of only a portion of a payment made to you, the after-tax contributions are treated as rolled over last. For example, assume you are receiving a distribution of $12,000, of which $2,000 is after-tax contributions, and no part of the distribution is directly rolled over. In this case, if you roll over $10,000 to an IRA that is not a Roth IRA in a 60-day rollover, no amount is taxable because the $2,000 amount not rolled over is treated as being after-tax contributions.

You may roll over to an employer plan all of a payment that includes after-tax contributions, but only through a direct rollover (and only if the receiving plan separately accounts for after-tax contributions and is not a governmental section 457(b) plan). You can do a 60-day rollover to an employer plan of part of a payment that includes after-tax contributions, but only up to the amount of the payment that would be taxable if not rolled over.

If you miss the 60-day rollover deadline

Generally, the 60-day rollover deadline cannot be extended. However, the IRS has the limited authority to waive the deadline under certain extraordinary circumstances, such as when external events prevented you from completing the rollover by the 60-day rollover deadline. To apply for a waiver, you must file a private letter ruling request with the IRS. Private letter ruling requests require the payment of a nonrefundable user fee. For more information, see IRS Publication 590–A, *Contributions to Individual Retirement Arrangements (IRAs)*.

If your payment includes employer stock that you do not roll over

If you do not do a rollover, you can apply a special rule to payments of employer stock (or other employer securities) that are either attributable to after-tax contributions or paid in a lump sum after separation from service (or after age 59½, disability, or the participant's death). Under the special rule, the net unrealized appreciation on the stock will not be taxed when distributed from the Plan and will be taxed at capital gain rates when you sell the stock. Net unrealized appreciation is generally the increase in the value of employer stock after it was acquired by the Plan. If you do a rollover for a payment that includes employer stock (for example, by selling the stock and rolling over the proceeds within 60 days of the payment), the special rule relating to the distributed employer stock will not apply to any subsequent payments from the IRA or employer plan. The Plan administrator can tell you the amount of any net unrealized appreciation.

If you have an outstanding loan that is being offset

If you have an outstanding loan from the Plan, your Plan benefit may be offset by the amount of the loan, typically when your employment ends. The loan offset amount is treated as a distribution to you at the time of the offset and will be taxed (including the 10% additional income tax on early distributions, unless an exception applies) unless you do a 60-day rollover in the amount of the loan offset to an IRA or employer plan.

If you were born on or before January 1, 1936

If you were born on or before January 1, 1936 and receive a lump sum distribution that you do not roll over, special rules for calculating the amount of the tax on the payment might apply to you. For more information, see IRS Publication 575, *Pension and Annuity Income*.

If your payment is from a governmental section 457(b) plan

If the Plan is a governmental section 457(b) plan, the same rules described elsewhere in this notice generally apply, allowing you to roll over the payment to an IRA or an employer plan that accepts rollovers. One difference is that, if you do not do a rollover, you will not have to pay the 10% additional income tax on early distributions from the Plan even if you are under age 59½ (unless the payment is from a separate account holding rollover contributions that were made to the Plan from a tax-qualified plan, a section 403(b) plan, or an IRA). However, if you do a rollover to an IRA or to an employer plan that is not a governmental section 457(b) plan, a later distribution made before age 59½ will be subject to the 10% additional income tax on early distributions (unless an exception applies). Other differences are that you cannot do a rollover if the payment is due to an "unforeseeable emergency" and the special rules under "If your payment includes employer stock that you do not roll over" and "If you were born on or before January 1, 1936" do not apply.

If you are an eligible retired public safety officer and your pension payment is used to pay for health coverage or qualified long-term care insurance

If the Plan is a governmental plan, you retired as a public safety officer, and your retirement was by reason of disability or was after normal retirement age, you can exclude from your taxable income plan payments paid directly as premiums to an accident or health plan (or a qualified long-term care insurance contract) that your employer maintains for you, your spouse, or your dependents, up to a maximum of $3,000 annually. For this purpose, a public safety officer is a law enforcement officer, firefighter, chaplain, or member of a rescue squad or ambulance crew.

If you roll over your payment to a Roth IRA

If you roll over a payment from the Plan to a Roth IRA, a special rule applies under which the amount of the payment rolled over (reduced by any after-tax amounts) will be taxed. However, the 10% additional income tax on early distributions will not apply (unless you take the amount rolled over out of the Roth IRA within 5 years, counting from January 1 of the year of the rollover).

If you roll over the payment to a Roth IRA, later payments from the Roth IRA that are qualified distributions will not be taxed (including earnings after the rollover). A qualified distribution from a Roth IRA is a payment made after you are age 59½ (or after your death or disability, or as a qualified first-time homebuyer distribution of up to $10,000) and after you have had a Roth IRA for at least 5 years. In applying this 5-year rule, you count from January 1 of the year for which your first contribution was made to a Roth IRA. Payments from the Roth IRA that are not qualified distributions will be taxed to the extent of earnings after the rollover, including the 10% additional income tax on early distributions (unless an exception applies). You do not have to take required minimum distributions from a Roth IRA during your lifetime. For more information, see IRS Publication 590–A, *Contributions to Individual Retirement Arrangements (IRAs)*, and IRS Publication 590–B, *Distributions from Individual Retirement Arrangements (IRAs)*.

If you do a rollover to a designated Roth account in the Plan

You cannot roll over a distribution to a designated Roth account in another employer's plan. However, you can roll the distribution over into a designated Roth account in the distributing Plan. If you roll over a payment from the Plan to a designated Roth account in the Plan, the amount of the payment rolled over (reduced by any after-tax amounts directly rolled over) will be taxed. However, the 10% additional tax on early distributions will not apply (unless you take the amount rolled over out of the designated Roth account within the 5-year period that begins on January 1 of the year of the rollover).

If you roll over the payment to a designated Roth account in the Plan, later payments from the designated Roth account that are qualified distributions will not be taxed (including earnings after the rollover). A qualified distribution from a designated Roth account is a payment made both after you are age 59½ (or after your death or disability) and after you have had a designated Roth account in the Plan for at least 5 years. In applying this 5-year rule, you count from January 1 of the year your first contribution was made to the designated Roth account. However, if you made a direct rollover to a designated Roth account in the Plan from a designated Roth account in a plan of another employer, the 5-year period begins on January 1 of the year you made the first contribution to the designated Roth account in the Plan or, if earlier, to the designated Roth account in the plan of the other employer. Payments from the designated Roth account that are not qualified distributions will be taxed to the extent of earnings after the rollover, including the 10% additional income tax on early distributions (unless an exception applies).

If you are not a plan participant

Payments after death of the participant. If you receive a distribution after the participant's death that you do not roll over, the distribution will generally be taxed in the same manner described elsewhere in this notice. However, the 10% additional income tax on early distributions and the special rules for public safety officers do not apply, and the special rule described under the section "If you were born on or before January 1, 1936" applies only if the participant was born on or before January 1, 1936.

If you are a surviving spouse. If you receive a payment from the Plan as the surviving spouse of a deceased participant, you have the same rollover options that the participant would have had, as described elsewhere in this notice. In addition, if you choose to do a rollover to an IRA, you may treat the IRA as your own or as an inherited IRA.

An IRA you treat as your own is treated like any other IRA of yours, so that payments made to you before you are age 59½ will be subject to the 10% additional income tax on early distributions (unless an exception applies) and required minimum distributions from your IRA do not have to start until after you are age 70½.

If you treat the IRA as an inherited IRA, payments from the IRA will not be subject to the 10% additional income tax on early distributions. However, if the participant had started taking required minimum distributions, you will have to receive required minimum distributions from the inherited IRA. If the participant had not started taking required minimum distributions from the Plan, you will not have to start receiving required minimum distributions from the inherited IRA until the year the participant would have been age 70½.

If you are a surviving beneficiary other than a spouse. If you receive a payment from the Plan because of the participant's death and you are a designated beneficiary other than a surviving spouse, the only rollover option you have is to do a direct rollover to an inherited IRA. Payments from the inherited IRA will not be subject to the 10% additional income tax on early distributions. You will have to receive required minimum distributions from the inherited IRA.

Payments under a qualified domestic relations order. If you are the spouse or former spouse of the participant who receives a payment from the Plan under a qualified domestic relations order (QDRO), you generally have the same options the participant would have (for example, you may roll over the payment to your own IRA or an eligible employer plan that will accept it). Payments under the QDRO will not be subject to the 10% additional income tax on early distributions.

If you are a nonresident alien

If you are a nonresident alien and you do not do a direct rollover to a U.S. IRA or U.S. employer plan, instead of withholding 20%, the Plan is generally required to withhold 30% of the payment for federal income taxes. If the amount withheld exceeds the amount of tax you owe (as may happen if you do a 60-day rollover), you may request an income tax refund by filing Form 1040NR and attaching your Form 1042–S. See Form W–8BEN for claiming that you are entitled to a reduced rate of withholding under an income tax treaty. For more information, see also IRS Publication 519, *U.S. Tax Guide for Aliens*, and IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*.

Other special rules

If a payment is one in a series of payments for less than 10 years, your choice whether to make a direct rollover will apply to all later payments in the series (unless you make a different choice for later payments).

If your payments for the year are less than $200 (not including payments from a designated Roth account in the Plan), the Plan is not required to allow you to do a direct rollover and is not required to withhold for federal income taxes. However, you may do a 60-day rollover.

Unless you elect otherwise, a mandatory cashout of more than $1,000 (not including payments from a designated Roth account in the Plan) will be directly rolled over to an IRA chosen by the Plan administrator or the payor. A mandatory cashout is a payment from a plan to a participant made before age 62 (or normal retirement age, if later) and without consent, where the participant's benefit does not exceed $5,000 (not including any amounts held under the plan as a result of a prior rollover made to the plan).

You may have special rollover rights if you recently served in the U.S. Armed Forces. For more information, see IRS Publication 3, *Armed Forces' Tax Guide*.

FOR MORE INFORMATION

You may wish to consult with the Plan administrator or payor, or a professional tax advisor, before taking a payment from the Plan. Also, you can find more detailed information on the federal tax treatment of payments from employer plans in: IRS Publication 575, *Pension and Annuity Income*; IRS Publication 590–A, *Contributions to Individual Retirement Arrangements (IRAs)*; IRS Publication 590–B, *Distributions from Individual Retirement Arrangements (IRAs)*; and IRS Publication 571, *Tax-Sheltered Annuity Plans (403(b) Plans)*. These publications are available from a local IRS office, on the web at *www.irs.gov*, or by calling 1-800-TAX-FORM.

For Payments From a
Designated Roth Account

YOUR ROLLOVER OPTIONS

You are receiving this notice because all or a portion of a payment you are receiving from the [INSERT NAME OF PLAN] (the "Plan") is eligible to be rolled over to a Roth IRA or designated Roth account in an employer plan. This notice is intended to help you decide whether to do a rollover.

This notice describes the rollover rules that apply to payments from the Plan that are from a designated Roth account. If you also receive a payment from the Plan that is not from a designated Roth account, you will be provided a different notice for that payment, and the Plan administrator or the payor will tell you the amount that is being paid from each account.

Rules that apply to most payments from a designated Roth account are described in the "General Information About Rollovers" section. Special rules that only apply in certain circumstances are described in the "Special Rules and Options" section.

GENERAL INFORMATION ABOUT ROLLOVERS

How can a rollover affect my taxes?

After-tax contributions included in a payment from a designated Roth account are not taxed, but earnings might be taxed. The tax treatment of earnings included in the payment depends on whether the payment is a qualified distribution. If a payment is only part of your designated Roth account, the payment will include an allocable portion of the earnings in your designated Roth account.

If the payment from the Plan is not a qualified distribution and you do not do a rollover to a Roth IRA or a designated Roth account in an employer plan, you will be taxed on the earnings in the payment. If you are under age 59½, a 10% additional income tax on early distributions will also apply to the earnings (unless an exception applies). However, if you do a rollover, you will not have to pay taxes currently on the earnings and you will not have to pay taxes later on payments that are qualified distributions.

If the payment from the Plan is a qualified distribution, you will not be taxed on any part of the payment even if you do not do a rollover. If you do a rollover, you will not be taxed on the amount you roll over and any earnings on the amount you roll over will not be taxed if paid later in a qualified distribution.

A qualified distribution from a designated Roth account in the Plan is a payment made after you are age 59½ (or after your death or disability) and after you have had a designated Roth account in the Plan for at least 5 years. In applying the 5-year rule, you count from January 1 of the year your first contribution was made to the designated Roth account. However, if you did a direct rollover to a designated Roth account in the Plan from a designated Roth account in another employer plan, your participation will count from January 1 of the year your first contribution was made to the designated Roth account in the Plan or, if earlier, to the designated Roth account in the other employer plan.

Where may I roll over the payment?

You may roll over the payment to either a Roth IRA (a Roth individual retirement account or Roth individual retirement annuity) or a designated Roth account in an employer plan (a tax-qualified plan or section 403(b) plan) that will accept the rollover. The rules of the Roth IRA or employer plan that holds the rollover will determine your investment options, fees, and rights to payment from the Roth IRA or employer plan (for example, no spousal consent rules apply to Roth IRAs and Roth IRAs may not provide loans). Further, the amount rolled over will become subject to the tax rules that apply to the Roth IRA or the designated Roth account in the employer plan. In general, these tax rules are similar to those described elsewhere in this notice, but differences include:

- If you do a rollover to a Roth IRA, all of your Roth IRAs will be considered for purposes of determining whether you have satisfied the 5-year rule (counting from January 1 of the year for which your first contribution was made to any of your Roth IRAs).
- If you do a rollover to a Roth IRA, you will not be required to take a distribution from the Roth IRA during your lifetime and you must keep track of the aggregate amount of the after-tax contributions in all of your Roth IRAs (in order to determine your taxable income for later Roth IRA payments that are not qualified distributions).
- Eligible rollover distributions from a Roth IRA can only be rolled over to another Roth IRA.

How do I do a rollover?

There are two ways to do a rollover. You can either do a direct rollover or a 60-day rollover.

If you do a direct rollover, the Plan will make the payment directly to your Roth IRA or designated Roth account in an employer plan. You should contact the Roth IRA sponsor or the administrator of the employer plan for information on how to do a direct rollover.

If you do not do a direct rollover, you may still do a rollover by making a deposit within 60 days into a Roth IRA, whether the payment is a qualified or nonqualified distribution. In addition, you can do a rollover by making a deposit within 60 days into a designated Roth account in an employer plan if the payment is a nonqualified distribution and the rollover does not exceed the amount of the earnings in the payment. You cannot do a 60-day rollover to an employer plan of any part of a qualified distribution. If you receive a distribution that is a nonqualified distribution and you do not roll over an amount at least equal to the earnings allocable to the distribution, you will be taxed on the amount of those earnings not rolled over, including the 10% additional income tax on early distributions if you are under age 59½ (unless an exception applies).

If you do a direct rollover of only a portion of the amount paid from the Plan and a portion is paid to you at the same time, the portion directly rolled over consists first of earnings.

If you do not do a direct rollover and the payment is not a qualified distribution, the Plan is required to withhold 20% of the earnings for federal income taxes (up to the amount of cash and property received other than employer stock). This means that, in order to roll over the entire payment in a 60-day rollover to a Roth IRA, you must use other funds to make up for the 20% withheld.

How much may I roll over?

If you wish to do a rollover, you may roll over all or part of the amount eligible for rollover. Any payment from the Plan is eligible for rollover, except:

- Certain payments spread over a period of at least 10 years or over your life or life expectancy (or the lives or joint life expectancy of you and your beneficiary)
- Required minimum distributions after age 70½ (or after death)
- Hardship distributions
- ESOP dividends
- Corrective distributions of contributions that exceed tax law limitations
- Loans treated as deemed distributions (for example, loans in default due to missed payments before your employment ends)
- Cost of life insurance paid by the Plan
- Payments of certain automatic enrollment contributions requested to be withdrawn within 90 days of the first contribution
- Amounts treated as distributed because of a prohibited allocation of S corporation stock under an ESOP (also, there will generally be adverse tax consequences if S corporation stock is held by an IRA).

The Plan administrator or the payor can tell you what portion of a payment is eligible for rollover.

If I don't do a rollover, will I have to pay the 10% additional income tax on early distributions?

If a payment is not a qualified distribution and you are under age 59½, you will have to pay the 10% additional income tax on early distributions with respect to the earnings allocated to the payment that you do not roll over (including amounts withheld for income tax), unless one of the exceptions listed below applies. This tax is in addition to the regular income tax on the earnings not rolled over.

The 10% additional income tax does not apply to the following payments from the Plan:

- Payments made after you separate from service if you will be at least age 55 in the year of the separation
- Payments that start after you separate from service if paid at least annually in equal or close to equal amounts over your life or life expectancy (or the lives or joint life expectancy of you and your beneficiary)
- Payments made due to disability
- Payments after your death
- Payments of ESOP dividends
- Corrective distributions of contributions that exceed tax law limitations
- Cost of life insurance paid by the Plan
- Payments made directly to the government to satisfy a federal tax levy
- Payments made under a qualified domestic relations order (QDRO)
- Payments up to the amount of your deductible medical expenses
- Certain payments made while you are on active duty if you were a member of a reserve component called to duty after September 11, 2001 for more than 179 days
- Payments of certain automatic enrollment contributions requested to be withdrawn within 90 days of the first contribution.

If I do a rollover to a Roth IRA, will the 10% additional income tax apply to early distributions from the IRA?

If you receive a payment from a Roth IRA when you are under age 59½, you will have to pay the 10% additional income tax on early distributions on the earnings paid from the Roth IRA, unless an exception applies or the payment is a qualified distribution. In general, the exceptions to the 10% additional income tax for early distributions from a Roth IRA listed above are the same as the exceptions for early distributions from a plan. However, there are a few differences for payments from a Roth IRA, including:

- There is no special exception for payments after separation from service.
- The exception for qualified domestic relations orders (QDROs) does not apply (although a special rule applies under which, as part of a divorce or separation agreement, a tax-free transfer may be made directly to a Roth IRA of a spouse or former spouse).
- The exception for payments made at least annually in equal or close to equal amounts over a specified period applies without regard to whether you have had a separation from service.
- There are additional exceptions for (1) payments for qualified higher education expenses, (2) payments up to $10,000 used in a qualified first-time home purchase, and (3) payments for health insurance premiums after you have received unemployment compensation for 12 consecutive weeks (or would have been eligible to receive unemployment compensation but for self-employed status).

Will I owe State income taxes?

This notice does not describe any State or local income tax rules (including withholding rules).

SPECIAL RULES AND OPTIONS

If you miss the 60-day rollover deadline

Generally, the 60-day rollover deadline cannot be extended. However, the IRS has the limited authority to waive the deadline under certain extraordinary circumstances, such as when external events prevented you from completing the rollover by the 60-day rollover deadline. To apply for a waiver, you must file a private letter ruling request with the IRS. Private letter ruling requests require the payment of a nonrefundable user fee. For more information, see IRS Publication 590–A, *Contributions to Individual Retirement Arrangements (IRAs)*.

If your payment includes employer stock that you do not roll over

If you receive a payment that is not a qualified distribution and you do not roll it over, you can apply a special rule to payments of employer stock (or other employer securities) that are paid in a lump sum after separation from service (or after age 59½, disability, or the participant's death). Under the special rule, the net unrealized appreciation on the stock included in the earnings in the payment will not be taxed when distributed to you from the Plan and will be taxed at capital gain rates when you sell the stock. If you do a rollover to a Roth IRA for a nonqualified distribution that includes employer stock (for example, by selling the stock and rolling over the proceeds within 60 days of the distribution), you will not have any taxable income and the special rule relating to the distributed employer stock will not apply to any subsequent payments from the Roth IRA or employer plan. Net unrealized appreciation is generally the increase in the value of the employer stock after it was acquired by the Plan. The Plan administrator can tell you the amount of any net unrealized appreciation.

If you receive a payment that is a qualified distribution that includes employer stock and you do not roll it over, your basis in the stock (used to determine gain or loss when you later sell the stock) will equal the fair market value of the stock at the time of the payment from the Plan.

If you have an outstanding loan that is being offset

If you have an outstanding loan from the Plan, your Plan benefit may be offset by the amount of the loan, typically when your employment ends. The loan offset amount is treated as a distribution to you at the time of the offset and, if the distribution is a nonqualified distribution, the earnings in the loan offset will be taxed (including the 10% additional income tax on early distributions, unless an exception applies) unless you do a 60-day rollover in the amount of the earnings in the loan offset to a Roth IRA or designated Roth account in an employer plan.

If you receive a nonqualified distribution and you were born on or before January 1, 1936

If you were born on or before January 1, 1936, and receive a lump sum distribution that is not a qualified distribution and that you do not roll over, special rules for calculating the amount of the tax on the earnings in the payment might apply to you. For more information, see IRS Publication 575, *Pension and Annuity Income*.

If you receive a nonqualified distribution, are an eligible retired public safety officer, and your pension payment is used to pay for health coverage or qualified long-term care insurance

If the Plan is a governmental plan, you retired as a public safety officer, and your retirement was by reason of disability or was after normal retirement age, you can exclude from your taxable income nonqualified distributions paid directly as premiums to an accident or health plan (or a qualified long-term care insurance contract) that your employer maintains for you, your spouse, or your dependents, up to a maximum of $3,000 annually. For this purpose, a public safety officer is a law enforcement officer, firefighter, chaplain, or member of a rescue squad or ambulance crew.

If you are not a plan participant

Payments after death of the participant. If you receive a distribution after the participant's death that you do not roll over, the distribution will generally be taxed in the same manner described elsewhere in this notice. However, whether the payment is a qualified distribution generally depends on when the participant first made a contribution to the designated Roth account in the Plan. Also, the 10% additional income tax on early distributions and the special rules for public safety officers do not apply, and the special rule described under the section "If you receive a nonqualified distribution and you were born on or before January 1, 1936" applies only if the participant was born on or before January 1, 1936.

If you are a surviving spouse. If you receive a payment from the Plan as the surviving spouse of a deceased participant, you have the same rollover options that the participant would have had, as described elsewhere in this notice. In addition, if you choose to do a rollover to a Roth IRA, you may treat the Roth IRA as your own or as an inherited Roth IRA.

A Roth IRA you treat as your own is treated like any other Roth IRA of yours, so that you will not have to receive any required minimum distributions during your lifetime and earnings paid to you in a nonqualified distribution before you are age 59½ will be subject to the 10% additional income tax on early distributions (unless an exception applies).

If you treat the Roth IRA as an inherited Roth IRA, payments from the Roth IRA will not be subject to the 10% additional income tax on early distributions. An inherited Roth IRA is subject to required minimum distributions. If the participant had started taking required minimum distributions from the Plan, you will have to receive required minimum distributions from the inherited Roth IRA. If the participant had not started taking required minimum distributions, you will not have to start receiving required minimum distributions from the inherited Roth IRA until the year the participant would have been age 70½.

If you are a surviving beneficiary other than a spouse. If you receive a payment from the Plan because of the participant's death and you are a designated beneficiary other than a surviving spouse, the only rollover option you have is to do a direct rollover to an inherited Roth IRA. Payments from the inherited Roth IRA, even if made in a nonqualified distribution, will not be subject to the 10% additional income tax on early distributions. You will have to receive required minimum distributions from the inherited Roth IRA.

Payments under a qualified domestic relations order. If you are the spouse or a former spouse of the participant who receives a payment from the Plan under a qualified domestic relations order (QDRO), you generally have the same options the participant would have (for example, you may roll over the payment as described in this notice).

If you are a nonresident alien

If you are a nonresident alien and you do not do a direct rollover to a U.S. IRA or U.S. employer plan, instead of withholding 20%, the Plan is generally required to withhold 30% of the payment for federal income taxes. If the amount withheld exceeds the amount of tax you owe (as may happen if you do a 60-day rollover), you may request an income tax refund by filing Form 1040NR and attaching your Form 1042–S. See Form W–8BEN for claiming that you are entitled to a reduced rate of withholding under an income tax treaty. For more information, see also IRS Publication 519, *U.S. Tax Guide for Aliens*, and IRS Publication 515, *Withholding of Tax on Nonresident Aliens and Foreign Entities*.

Other special rules

If a payment is one in a series of payments for less than 10 years, your choice whether to make a direct rollover will apply to all later payments in the series (unless you make a different choice for later payments).

If your payments for the year (only including payments from the designated Roth account in the Plan) are less than $200, the Plan is not required to allow you to do a direct rollover and is not required to withhold for federal income taxes. However, you can do a 60-day rollover.

Unless you elect otherwise, a mandatory cashout from the designated Roth account in the Plan of more than $1,000 will be directly rolled over to a Roth IRA chosen by the Plan administrator or the payor. A mandatory cashout is a payment from a plan to a participant made before age 62 (or normal retirement age, if later) and without consent, where the participant's benefit does not exceed $5,000 (not including any amounts held under the plan as a result of a prior rollover made to the plan).

You may have special rollover rights if you recently served in the U.S. Armed Forces. For more information, see IRS Publication 3, *Armed Forces' Tax Guide*.

FOR MORE INFORMATION

You may wish to consult with the Plan administrator or payor, or a professional tax advisor, before taking a payment from the Plan. Also, you can find more detailed information on the federal tax treatment of payments from employer plans in: IRS Publication 575, *Pension and Annuity Income*; IRS Publication 590–A, *Contributions to Individual Retirement Arrangements (IRAs)*; IRS Publication 590–B, *Distributions from Individual Retirement Arrangements (IRAs)*; and IRS Publication 571, *Tax-Sheltered Annuity Plans* (403(b) Plans). These publications are available from a local IRS office, on the web at *www.irs.gov*, or by calling 1-800-TAX-FORM.

Individual Shared Responsibility Payment Hardship Exemptions that May Be Claimed on a Federal Income Tax Return Without Obtaining a Hardship Exemption Certification from the Marketplace

Notice 2014–76

PURPOSE

This notice identifies the hardship exemptions from the individual shared responsibility payment under § 5000A of the Internal Revenue Code that a taxpayer may claim on a Federal income tax return without obtaining a hardship exemption certification from the Health Insurance Marketplace (Marketplace).

BACKGROUND

For each month beginning after December 31, 2013, § 5000A requires individuals to have minimum essential health coverage for themselves and any nonexempt family member whom the taxpayer may claim as a dependent, qualify for an exemption, or include an individual shared responsibility payment with their Federal income tax return.

Section 5000A(e)(5) and § 1.5000A–3(h) of the Income Tax Regulations, as finalized concurrently with this notice, provide that, in general, an individual is exempt from § 5000A for a month if he or she has in effect a hardship exemption certification issued by the Marketplace certifying that the individual has suffered a hardship (as that term is defined in 45 CFR 155.605(g)) affecting the individual's capability to obtain minimum essential coverage in that month. Section 1.5000A–3(h)(3), as finalized concurrently with the issuance of this notice, provides that an individual may claim a hardship exemption on the individual's Federal income tax return without obtaining a hardship exemption certification from the Marketplace if the individual is eligible for a hardship exemption described in guidance released by the Department of Health and Human Services (HHS) and the exemption is allowed pursuant to guidance published by the Treasury Department and the Internal Revenue Service (IRS). As discussed in the preamble to the final regulations released concurrently, this notice provides a complete list of hardship exemptions that may be claimed on a Federal income tax return without obtaining a hardship exemption certification, rather than listing specific exemptions in the regulations.

DISCUSSION

In several pieces of published guidance, HHS has identified hardships affecting an individual's ability to obtain minimum essential coverage, which, pursuant to guidance issued by the Treasury Department and the IRS, permits a qualifying individual to claim a hardship exemption on a Federal income tax return without obtaining a hardship exemption certification from the Marketplace. This notice recognizes the following hardships identified by HHS and allows a qualifying individual (or the taxpayer who may claim a qualifying individual as a dependent) to claim a hardship exemption on a Federal income tax return without obtaining a hardship exemption certification from the Marketplace. Individuals seeking a hardship exemption that is not on this list can apply for an exemption through the Marketplace.

A. *Two or more members of a family whose combined cost of employer-sponsored coverage is considered unaffordable*. In 45 CFR 155.605(g)(5), HHS provides that an individual is eligible for a hardship exemption if the individual satisfies the following requirements: (1) the individual's required contribution for self-only coverage does not exceed the required contribution percentage of household income in § 5000A(e)(1)(A), (2) the combined required contribution for self-only coverage for two or more employed members of the individual's family exceeds the required contribution percentage of household income, and (3) the required contribution for family coverage that the employed members of the individual's tax household could enroll in through an employer exceeds the required contribution percentage of household income. An individual meeting these requirements for any month in a taxable year may claim a hardship exemption on a Federal income tax return for the taxable year without obtaining a hardship exemption certification. This hardship exemption was identified previously by the Treasury Department and the IRS in final regulations published on August 30, 2013 (TD 9632, 78 FR 53646).

B. *Gross income below the applicable return filing threshold*. In guidance released on September 18, 2014, HHS provides that that all individuals with gross income below their applicable filing threshold (as specified in § 6012(a)(1)) are entitled to a hardship exemption. *See* HHS Centers for Medicare & Medicaid Services, Shared Responsibility Guidance—Filing Threshold Hardship Exemption (Sept. 18, 2014) (available at *www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Filing-Threshold-Exemption-Guidance-9-18-14.pdf*). See also 45 CFR 155.605(g)(3). HHS intends to release additional guidance clarifying that this hardship exemption applies only to an individual who may not be claimed as a dependent by another individual. An individual eligible for this hardship exemption who files a Federal income tax return may claim a hardship exemption on the return for the taxable year without obtaining a hardship exemption certification.

C. *Individuals who obtained minimum essential coverage during the 2014 open enrollment period*.

1. In guidance released on October 28, 2013, HHS provides that an individual is eligible for a hardship exemption if the individual enrolled in coverage through the Marketplace prior to the close of the initial open enrollment period (Mar. 31, 2014). *See* HHS Centers for Medicare & Medicaid Services, Shared Responsibility Provision Question and Answer (Oct. 28, 2013) (available at *www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/enrollment-period-faq-10-28-2013.pdf*). This hardship exemption was identified previously by the Treasury Department and the IRS in proposed regulations published on January 27, 2014 (REG–141036–13, 79 FR 4302).

2. In guidance released on March 26, 2014, HHS provides that an individual who was "in line" to enroll in coverage through the Marketplace on March 31, 2013, will be treated as having enrolled in coverage by March 31, 2014. For purposes of the March 26, 2014, HHS guidance, the term "in line" refers to individuals for whom HHS had received paper applications by April 7, 2014, or who tried to enroll during the open enrollment period but did not complete the process by March 31, 2014. Accordingly, individuals in that situation are eligible for the hardship exemption described in the HHS letter of October 28, 2013. *See* HHS Centers for Medicare & Medicaid Services, Guidance for Issuers on People "In Line" for the Federally-facilitated Marketplace at the end of the Initial Open Enrollment Period (Mar. 26, 2014) (available at *www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/in-line-SEP-3-26-2014.pdf*).

3. In guidance released on May 2, 2014, HHS provides that an individual is eligible for a hardship exemption if the individual enrolled outside the Marketplace in minimum essential coverage for 2014 that is effective on or before May 1, 2014. *See* HHS Centers for Medicare & Medicaid Services, Special Enrollment Periods and Hardship Exemptions for Persons Meeting Certain Criteria (May 2, 2014) (available at *www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/SEP-and-hardship-FAQ-5-1-2014.pdf*).

4. An individual meeting the requirements in paragraph C.1, C.2, or C.3 of this notice may claim a hardship exemption on a Federal income tax return without obtaining a hardship exemption certification for months in 2014 before the month when the individual's coverage became effective.

D. *Certain individuals who applied for CHIP coverage during the open enrollment period for 2014*. In guidance released on March 31, 2014, HHS provides that an individual is eligible for a hardship exemption if the individual applied for coverage under the Children's Health Insurance Program (CHIP) during the open enrollment period for 2014 and was found eligible for CHIP but had a gap in coverage prior to the effective date of the CHIP coverage. *See* HHS Centers for Medicare & Medicaid Services, Shared Responsibility Provision Question and Answer (Mar. 31, 2014) (available at *www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/shared-responsibility-FAQ-3-30-2014.pdf*). An individual meeting these requirements may claim a hardship exemption on a Federal income tax return without obtaining a hardship exemption certification for months in 2014 before the month in which the individual's CHIP coverage became effective.

E. *Individuals eligible for services through an Indian Health Care Provider*. In guidance released on September 18, 2014, HHS provides that an individual is eligible for a hardship exemption if the individual is eligible for services through an Indian health care provider (as defined in 42 CFR 447.50) or is eligible for services through Indian Health Service in accordance with 25 U.S.C. 1680c(a), (b), or (d)(3). *See* HHS Centers for Medicare & Medicaid Services, Shared Responsibility Guidance—Exemption for Individuals Eligible for Services through an Indian Health Care Provider (Sept. 18, 2014) (available at *www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/guidance-exemption-certain-AIAN.pdf*). *See also* 45 CFR 155.605(g)(6). An individual meeting the requirements described above may claim a hardship exemption on a Federal income tax return for a month in a taxable year that includes a day on which the individual is eligible for services through an Indian health care provider or the Indian Health Service without obtaining a hardship exemption certification.

F. *Certain individuals residing in a state that did not expand Medicaid eligibility under section 2001(a) of the Affordable Care Act*. In guidance released on November 21, 2014, HHS provides that an individual is eligible for a hardship exemption for 2014 if at any time during 2014 the individual resided in a state that did not expand Medicaid coverage and the individual's household income, within the meaning of § 36B, is below 138 percent of the applicable federal poverty level for the individual's family size. *See* HHS Centers for Medicare & Medicaid Services, Guidance on Hardship Exemptions for Persons Meeting Certain Criteria (Nov. 21, 2014) (available at *www.cms.gov*). An individual meeting the requirements of this hardship exemption may claim an exemption on a 2014 Federal income tax return without obtaining a hardship exemption certification.

EFFECTIVE DATE

This notice applies to taxable years beginning after December 31, 2013.

DRAFTING INFORMATION

The principal author of this notice is John B. Lovelace of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this notice contact Mr. Lovelace at (202) 317-7006 (not a toll-free number).

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26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability. (Also §§ 36B, 5000A, 1.36B–2T, 1.36B–3, 1.5000A–3.)

Rev. Proc. 2014–62

SECTION 1. PURPOSE

This revenue procedure provides indexing adjustments for certain provisions under sections 36B and 5000A of the Internal Revenue Code. In particular, it updates the Applicable Percentage Table in § 36B(b)(3)(A)(i) to provide the Applicable Percentage Table for 2016. This table is used to calculate an individual's premium tax credit. This revenue procedure also updates the required contribution percentage in § 36B(c)(2)(C)(i)(II) for plan years beginning after calendar year 2015. This percentage is used to determine whether an individual is eligible for affordable employer-sponsored minimum essential coverage under § 36B. This revenue procedure uses the methodology described in Section 4 of Rev. Proc. 2014–37, 2014–33 I.R.B. 363, to index the Applicable Percentage Table and the § 36B required contribution percentage for the 2016 year. Rev. Proc. 2014–37 provides indexing adjustments for these amounts for the 2015 year. Additionally, this revenue procedure cross-references the required contribution percentage under § 5000A(e)(1)(A) for plan years beginning after calendar year 2015, as determined under guidance issued by the Department of Health and Human Services. This percentage is used to determine whether an individual is eligible for an exemption from the individual shared responsibility payment because of a lack of affordable minimum essential coverage.

SECTION 2. ADJUSTED ITEMS

.01 *Applicable Percentage Table for 2016*. For taxable years beginning in 2016, the Applicable Percentage Table for purposes of § 36B(b)(3)(A)(i) and § 1.36B–3T(g) is:

Household income percentage of Federal poverty line:	Initial percentage	Final percentage
Less than 133%	2.03%	2.03%
At least 133% but less than 150%	3.05%	4.07%
At least 150% but less than 200%	4.07%	6.41%
At least 200% but less than 250%	6.41%	8.18%
At least 250% but less than 300%	8.18%	9.66%
At least 300% but not more than 400%	9.66%	9.66%

.02 *Section 36B Required Contribution Percentage for 2016*. For plan years beginning in 2016, the required contribution percentage for purposes of § 36B(c)(2)(C)(i)(II) and § 1.36B–2T(c)(3)(v)(C) is 9.66%.

.03 *Section 5000A Required Contribution Percentage*. In the proposed Notice of Benefit and Payment Parameters for 2016, 79 Fed. Reg. ____ (November 21, 2014), for plan years beginning in 2016, the Department of Health and Human Services (HHS) announced that the Section 5000A required contribution percentage for purposes of § 5000A(e)(1)(A) and § 1.5000A–3(e)(2) is 8.13%. If HHS announces a different percentage when it finalizes its proposed rule, this revenue procedure will be updated to cross-reference the final percentage announced by HHS. *See* Exchange and Insurance Market Standards for 2015 and beyond, 79 Fed. Reg. 30239, 30302 (May 27, 2014), for further information on the computation methodology and publication approach for the Section 5000A required contribution percentage.

SECTION 3. EFFECTIVE DATE

This revenue procedure is effective for taxable years and plan years beginning after December 31, 2015.

SECTION 4. DRAFTING INFORMATION

The principal author of this revenue procedure is Arvind Ravichandran of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, contact Mr. Ravichandran at (202) 317-4718 (not a toll-free number).

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.
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[1]A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2014–01 through 2014–26 is in Internal Revenue Bulletin 2014–26, dated June 30, 2014.

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