Internal Revenue
bulletin

Bulletin No. 2010-2
January 11, 2010

HIGHLIGHTS OF THIS ISSUE

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

INCOME TAX

Rev. Rul. 2010–1, page 248.

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 January 2010.

Notice 2010–1, page 251.

This notice provides that after a Code section 338(g) or 338(h)(10) election, new target and old target are treated as the same corporation for purposes of section 807(e)(4).

Notice 2010–2, page 251.

This notice provides additional guidance regarding the application of section 382 of the Code and other provisions of law to corporations whose instruments are acquired and disposed of by the Treasury Department pursuant to the Emergency Economic Stabilization Act of 2008, (EESA). Notice 2009–38 amplified and superseded.

Notice 2010–3, page 253.

This notice modifies Notice 2008–55 to extend the date by which an initial liquidity facility may be added to support certain auction rate preferred stock to December 31, 2010. Notice 2008–55 modified.

Notice 2010–4, page 253.

This notice provides guidance and limited penalty relief to middlemen and trustees for transition year reporting for widely held mortgage trusts (WHMTs). The notice also provides guidance on the preparation of Forms 1099 and written tax information statements and on furnishing tax information packages for certain non-mortgage widely held fixed investment trusts (NMWHFITs). The notice also provides guidance on trust interest holders' (TIHs') treatment of transition payments.

Notice 2010–5, page 256.

This notice provides for funds that otherwise qualify for the exception under sections 1.148(d)(1)(i) through (v) to guarantee bonds in an amount equal to 500% of the cost of the assets of the fund. The notice also solicits public comment with respect to this change.

EXEMPT ORGANIZATIONS

Rev. Proc. 2010–9, page 258.

Determination letters and rulings. This document sets forth procedures for issuing determination letters and rulings on the exempt status of organizations under sections 501 and 521 of the Code. The procedures also apply to the revocation and modification of determination letters or rulings, and provide guidance on the exhaustion of administrative remedies for purposes of declaratory judgment under section 7428. Rev. Proc. 2009–9 superseded.

TAX CONVENTIONS

Announcement 2010–2, page 271.

This document is a Competent Authority Agreement entered into on October 1, 2009, by the competent authorities of the United States of America and Germany with respect to the taxation of certain consular employees under the U.S.-Germany income tax treaty and protocol.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

ADMINISTRATIVE

Rev. Proc. 2010–11, page 269.
The purpose of this procedure is to modify the conditions established in Rev. Proc. 80–59, 1980–2 C.B. 855, under which a trustee of a blind trust meets the requirements of section 102(f)(3) of the Appendix to Title 5 of the United States Code (or any successor provision of the United States Code) may execute and file an income tax return on behalf of any individual described in section 101(f) of the Appendix to Title 5 of the United States Code (or any successor provision of the United States Code) ("eligible individual"). Rev. Proc. 80–59 modified and superseded.

The IRS Mission

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

Introduction

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

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

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

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

The Bulletin is divided into four parts as follows:

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

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

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

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

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

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

Section 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 2009. See Rev. Rul. 2010-1, page 248.

Section 280G.—Golden Parachute Payments

Federal short-term, mid-term, and long-term rates are set forth for the month of December 2009. See Rev. Rul. 2010-1, page 248.

Section 338.—Certain Stock Purchases Treated as Asset Acquisitions

After a section 338 election, is new target treated as the same corporation as old target for purposes of section 807(e)(4). See Notice 2010-1, page 251.

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 2009. See Rev. Rul. 2010-1, page 248.

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 2009. See Rev. Rul. 2010-1, page 248.

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 2009. See Rev. Rul. 2010-1, page 248.

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 2009. See Rev. Rul. 2010-1, page 248.

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 2009. See Rev. Rul. 2010-1, page 248.

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 2009. See Rev. Rul. 2010-1, page 248.

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 2009. See Rev. Rul. 2010-1, page 248.

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 2009. See Rev. Rul. 2010-1, page 248.

After a section 338 election, is new target treated as the same corporation as old target for purposes of section 807(e)(4). See Notice 2010-1, page 251.

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 2009. See Rev. Rul. 2010-1, page 248.

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.)

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 January 2010.

Rev. Rul. 2010–1

This revenue ruling provides various prescribed rates for federal income tax purposes for January 2010 (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, and before December 31, 2013, 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 deemed rate of return for transfers made during calendar year 2010 to pooled income funds described in § 642(c)(5) that have been in existence for less than 3 taxable years immediately preceding the taxable year in which the transfer was made.

REV. RUL. 2010–1 TABLE 1

Applicable Federal Rates (AFR) for January 2010

	Period for Compounding			
	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term				
AFR	.57%	.57%	.57%	.57%
110% AFR	.63%	.63%	.63%	.63%
120% AFR	.68%	.68%	.68%	.68%
130% AFR	.74%	.74%	.74%	.74%
Mid-term				
AFR	2.45%	2.44%	2.43%	2.43%
110% AFR	2.70%	2.68%	2.67%	2.67%
120% AFR	2.95%	2.93%	2.92%	2.91%
130% AFR	3.20%	3.17%	3.16%	3.15%
150% AFR	3.69%	3.66%	3.64%	3.63%
175% AFR	4.32%	4.27%	4.25%	4.23%
Long-term				
AFR	4.11%	4.07%	4.05%	4.04%
110% AFR	4.53%	4.48%	4.46%	4.44%
120% AFR	4.94%	4.88%	4.85%	4.83%
130% AFR	5.36%	5.29%	5.26%	5.23%

REV. RUL. 2010–1 TABLE 2

Adjusted AFR for January 2010

	Period for Compounding			
	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term adjusted AFR	.63%	.63%	.63%	.63%
Mid-term adjusted AFR	1.79%	1.78%	1.78%	1.77%
Long-term adjusted AFR	4.01%	3.97%	3.95%	3.94%

REV. RUL. 2010–1 TABLE 3

Rates Under Section 382 for January 2010

Adjusted federal long-term rate for the current month	4.01%
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.)	4.14%

REV. RUL. 2010–1 TABLE 4

Appropriate Percentages Under Section 42(b)(1) for January 2010

Note: Under Section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, and before December 31, 2013, shall not be less than 9%.

Appropriate percentage for the 70% present value low-income housing credit	7.76%
Appropriate percentage for the 30% present value low-income housing credit	3.32%

REV. RUL. 2010–1 TABLE 5

Rate Under Section 7520 for January 2010

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	3.0%

REV. RUL. 2010–1 TABLE 6

Deemed Rate for Transfers to New Pooled Income Funds During 2010

Deemed rate of return for transfers during 2010 to pooled income funds that have been in existence for less than 3 taxable years	4.6%

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 2009. See Rev. Rul. 2010-1, page 248.

Section 7520.—Valuation Tables

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of December 2009. See Rev. Rul. 2010-1, page 248.

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 2009. See Rev. Rul. 2010-1, page 248.

Part III. Administrative, Procedural, and Miscellaneous

Section 807(e)(4) Exception for § 338 Regulations

Notice 2010–1

Section 1.338–1(b)(1) of the Income Tax Regulations provides that after an election under § 338(g) or § 338(h)(10) of the Internal Revenue Code, new target is generally treated as a new corporation unrelated to old target for purposes of subtitle A of the Code. Section 1.338–1(b)(2) provides exceptions for provisions in subtitle A under which new target and old target are treated as the same corporation. Sections 1.338–1(b)(2)(i) through (vii) enumerate seven such exceptions. Section 1.338–1(b)(2)(viii) authorizes the addition of other exceptions by designation of such in the Internal Revenue Bulletin. This notice designates such an exception.

Section 807(e)(4)(A) provides that in the case of a "qualified foreign contract," the amount of the reserve under § 807 is not less than the minimum reserve required by the laws, regulations, or administrative guidance of the regulatory authority of the foreign country in which the foreign life insurance branch of the domestic life insurance company has its principal place of business. For this purpose, § 807(e)(4)(B) defines a "qualified foreign contract" as a contract issued by a foreign life insurance branch (which has its principal place of business in a foreign country) of a domestic life insurance company if (1) the contract is issued on the life or health of a resident of that country; (2) the domestic life insurance company was required by the foreign country (as of the time it began operations in the country) to operate in the country through a branch; and (3) the foreign country is not contiguous to the United States.

The Internal Revenue Service and Treasury believe it would be inappropriate to treat new target as a new corporation unrelated to old target for purposes of § 807(e)(4)(B). The fact that § 1.338–1(b)(1) would otherwise treat new target as a new corporation for Federal income tax purposes does not result in a change in the terms of the contracts that are qualified foreign contracts within the meaning of § 807(e)(4)(B), nor does it alter the requirements of the regulatory authority of the foreign country that were in effect when old target's foreign life insurance branch began operations in that country. *Cf.* § 1.338–1(b)(2)(vii) (treating new target and old target as the same corporation for purposes of electing to use an insurance company's historical loss payment pattern to compute discounted unpaid losses).

Accordingly, pursuant to the authority of § 1.338–1(b)(2)(viii), for purposes of § 807(e)(4), new target and old target, within the meaning of § 1.338–2(c)(17), are treated as the same corporation.

This notice is effective for qualified stock purchases occurring on or after December 10, 2009. In addition, taxpayers may elect to apply this notice to any qualified stock purchase with respect to which the election under § 338(g) or § 338(h)(10) is due on or after such date by treating new target and old target as the same corporation for purposes of § 807(e)(4).

The principal author of this notice is Jean Brenner of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, contact Ms. Brenner at (202) 622–4732 (not a toll-free call).

Application of Section 382 to Corporations Whose Instruments are Acquired and Disposed of by the Treasury Department Under Certain Programs Pursuant to the Emergency Economic Stabilization Act of 2008

Notice 2010–2

This notice provides additional guidance regarding the application of section 382 of the Internal Revenue Code and other provisions of law to corporations whose instruments are acquired and disposed of by the Treasury Department pursuant to the Emergency Economic Stabilization Act of 2008, P.L. 110–343 (EESA). This notice amplifies and supersedes Notice 2009–38, 2009–18 I.R.B. 901, to provide additional guidance.

I. PURPOSE

The Internal Revenue Service (Service) and Treasury Department (Treasury) intend to issue regulations implementing certain of the rules as described below. Pending the issuance of further guidance, taxpayers may rely on the rules set forth in this notice to the extent provided herein.

Section 101(a)(1) of EESA authorizes the Secretary to establish the Troubled Asset Relief Program (TARP). Section 102(a) of EESA authorizes the Secretary to also establish a program to guarantee troubled assets. This notice provides guidance to corporate issuers with respect to Treasury's acquisition of instruments pursuant to the following EESA programs: (i) the Capital Purchase Program for publicly-traded issuers (Public CPP); (ii) the Capital Purchase Program for private issuers (Private CPP); (iii) the Capital Purchase Program for S corporations (S Corp CPP); (iv) the Targeted Investment Program (TARP TIP); (v) the Asset Guarantee Program; (vi) the Systemically Significant Failing Institutions Program; (vii) the Automotive Industry Financing Program; and (viii) the Capital Assistance Program for publicly-traded issuers (TARP CAP). Unless otherwise specified below, a reference to "the Programs" shall include any of the various EESA programs described in the preceding sentence.

II. BACKGROUND

Section 382(a) of the Internal Revenue Code (Code) provides that the taxable income of a loss corporation for a year following an ownership change may be offset by pre-change losses only to the extent of the section 382 limitation for such year. An ownership change occurs with respect to a corporation if it is a loss corporation on a testing date and, immediately after the close of the testing date, the percentage of stock of the corporation owned by one or more 5-percent shareholders has increased by more than 50 percentage points over the lowest percentage of stock of such corporation owned by such shareholders at any time during the testing period. See section 1.382–2T(a)(1) of the Income Tax Regulations. Section 382(m) of the Code provides that the Secretary shall prescribe

such regulations as may be necessary or appropriate to carry out the purposes of sections 382 and 383. Section 7805(a) of the Code provides that except where such authority is expressly given to any person other than an officer or employee of Treasury, the Secretary shall prescribe all needful rules and regulations for the enforcement of Title 26, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

Section 101(c)(5) of EESA provides that the Secretary is authorized to issue such regulations and other guidance as may be necessary or appropriate to carry out the purposes of EESA.

Except as otherwise provided, any definitions and terms used in this notice have the same meaning as they do in section 382 of the Code (and the regulations thereunder) or in EESA, as applicable. Unless otherwise specified, a reference to "section" is to the particular section of the Code or regulations.

III. GUIDANCE REGARDING CORPORATIONS WHOSE INSTRUMENTS ARE ACQUIRED BY TREASURY PURSUANT TO EESA

Taxpayers may rely on the rules described in this Section III to the extent provided below.

RULES:

A. *Characterization of instruments (other than warrants) issued to Treasury*. Any instrument issued to Treasury pursuant to any of the Programs except TARP CAP, whether owned by Treasury or subsequent holders, shall be treated for all Federal income tax purposes as an instrument of indebtedness if denominated as such, and as stock described in section 1504(a)(4) if denominated as preferred stock. No instrument so denominated shall be treated as stock for purposes of section 382 while held by Treasury or by other holders, except that preferred stock described in section 1504(a)(4) will be treated as stock for purposes of section 382(e)(1). In the case of any instrument issued to Treasury pursuant to TARP CAP, the appropriate classification of such instrument shall be determined by applying general principles of Federal tax law.

B. *Characterization of warrants issued to Treasury*. For all Federal income tax purposes, any warrant to purchase stock issued to Treasury pursuant to any of the Programs except Private CPP and S Corp CPP, whether owned by Treasury or subsequent holders, shall be treated as an option (and not as stock). While held by Treasury, such warrant will not be deemed exercised under section 1.382–4(d)(2). For all Federal income tax purposes, any warrant to purchase stock issued to Treasury pursuant to the Private CPP shall be treated as an ownership interest in the underlying stock, which shall be treated as preferred stock described in section 1504(a)(4). For all Federal income tax purposes, any warrant issued to Treasury pursuant to the S Corp CPP shall be treated as an ownership interest in the underlying indebtedness.

C. *Value-for-value exchange*. For all Federal income tax purposes, any amount received by an issuer in exchange for instruments issued to Treasury under the Programs shall be treated as received, in its entirety, as consideration for such instruments.

D. *Section 382 treatment of stock acquired by and redeemed from Treasury*. For purposes of section 382, with respect to any stock (other than preferred stock described in section 1504(a)(4)) issued to Treasury pursuant to the Programs (either directly or upon the exercise of a warrant), the ownership represented by such stock on any date on which it is held by Treasury shall not be considered to have caused Treasury's ownership in the issuing corporation to have increased over its lowest percentage owned on any earlier date. Except as provided in the following sentence, such stock is considered outstanding for purposes of determining the percentage of stock owned by other 5-percent shareholders on any testing date. For purposes of measuring shifts in ownership by any 5-percent shareholder on any testing date occurring on or after the date on which an issuing corporation redeems stock held by Treasury that had been issued to Treasury pursuant to the Programs (either directly or upon the exercise of a warrant), the stock so redeemed shall be treated as if it had never been outstanding.

E. *Section 382 treatment of stock sold by Treasury to public shareholders*. If Treasury sells stock that was issued to it pursuant to the Programs (either directly or upon the exercise of a warrant) and the sale creates a public group ("New Public Group"), the New Public Group's ownership in the issuing corporation shall not be considered to have increased solely as a result of such a sale. A New Public Group's ownership shall be treated as having increased to the extent the New Public Group increases its ownership pursuant to any transaction other than a sale of stock by Treasury, including pursuant to a stock issuance described in section 1.382–3(j)(2) or a redemption (see section 1.382–2T(j)(2)(iii)(C)). Such stock is considered outstanding for purposes of determining the percentage of stock owned by other 5-percent shareholders on any testing date, and section 382 (and the regulations thereunder) shall otherwise apply to the New Public Group in the same manner as with respect to other public groups.

F. *Section 382(l)(1) not applicable with respect to capital contributions made by Treasury pursuant to the Programs*. For purposes of section 382(l)(1), any capital contribution made by Treasury pursuant to the Programs shall not be considered to have been made as part of a plan a principal purpose of which was to avoid or increase any section 382 limitation.

G. *Certain exchanges*. Paragraphs (C), (D), (E), and (F), but not paragraphs (A) and (B), of this notice apply to "Covered Instruments" as though such instruments were issued directly to Treasury under the Programs. For purposes of this notice, the term "Covered Instrument" means any instrument acquired by Treasury in exchange for an instrument that was issued to Treasury under the Programs. In addition, the term also includes any instrument acquired by Treasury in exchange for a Covered Instrument. General principles of Federal tax law determine the characterization of all Covered Instruments.

IV. RELIANCE ON NOTICE

Taxpayers may rely on the rules described in Section III of this notice. These rules will continue to apply unless and until there is additional guidance. Any future contrary guidance will not apply to any instrument (i) issued to Treasury pursuant to the Programs, or acquired by Treasury in an exchange described in Section III(G) of this notice, prior to the publication of that

guidance, or (ii) issued to Treasury pursuant to the Programs, or acquired by Treasury in an exchange described in Section III(G) of this notice, under a binding contract entered into prior to the publication of that guidance. In exercising its authority under EESA in this notice, Treasury and the Service intend no implication regarding the Federal income tax results that would obtain with respect to instruments that are not specifically described in this notice. Accordingly, the Federal income tax consequences of instruments not described in this notice continue to be determined based upon the application of general principles of Federal tax law to the specific facts and circumstances of each case.

V. EFFECT ON OTHER DOCUMENTS

This notice amplifies and supersedes Notice 2009–38, 2009–18 I.R.B. 901.

DRAFTING INFORMATION

The principal author of this notice is Rubin B. Ranat of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, contact Rubin B. Ranat at (202) 622–7530 (not a toll-free call).

Auction Rate Preferred Stock—Extension of Date for Addition of a Liquidity Facility

Notice 2010–3

This notice modifies Notice 2008–55, 2008–27 I.R.B. 11 (July 7, 2008), to extend the date by which an initial liquidity facility may be added to support certain auction rate preferred stock from December 31, 2009 to December 31, 2010.

SECTION 1. Background

In Notice 2008–55, the Internal Revenue Service (IRS) provided guidance regarding the effect of adding certain liquidity facilities to support certain auction rate preferred stock on the equity character of the stock for Federal income tax purposes. In Notice 2008–55, the IRS confirmed that the IRS will not challenge the equity characterization of the auction rate preferred stock as a result of adding a liquidity facility agreement if certain requirements are satisfied. Among other requirements under Notice 2008–55, the auction rate preferred stock must have been outstanding on February 12, 2008, or issued after that date to refinance, directly or indirectly, auction rate preferred stock that was outstanding on that date. In addition, the liquidity facility must be an initial liquidity facility with respect to the auction rate preferred stock that is entered into on or before December 31, 2009, or a liquidity facility that renews, replaces, or extends such an initial liquidity facility, either directly or in a series of liquidity facilities.

SECTION 2. Scope and Application

This notice extends the time period during which an initial liquidity facility can be entered into under § 3.2 of Notice 2008–55 from December 31, 2009 until December 31, 2010.

SECTION 3. Effect on Other Guidance

This notice modifies Notice 2008–55.

SECTION 4. Drafting Information

The principal author of this notice is Alfred C. Bishop of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, please contact Mr. Bishop at (202) 622–7930.

WHFIT Transition Guidance

Notice 2010–4

SECTION I: PURPOSE

This notice provides guidance to trustees, middlemen and trust interest holders (TIHs) of widely held fixed investment trusts (WHFITs) regarding the WHFIT reporting rules in § 1.671–5 of the Income Tax Regulations. Specifically, this notice provides (1) guidance on transition payments (as defined in Section III below) and limited penalty relief for trustees and middlemen required to file Forms 1099 and furnish written tax information statements under the widely held mortgage trust (WHMT) safe harbor in § 1.671–5(g); (2) guidance regarding the TIHs' treatment of the transition payments; (3) guidance regarding the inclusion of WHFIT interest, dividend, and miscellaneous income in the summary totals on Forms 1099; (4) guidance regarding the format of the written tax information statement provided to TIHs under § 1.671–5(e); and (5) guidance regarding the obligations of trustees and middlemen with respect to reporting under the WHFIT rules for certain non-mortgage WHFITs (NMWHFITs).

SECTION II: BACKGROUND

Section 1.671–5 provides the WHFIT reporting rules. A WHFIT is an arrangement classified as a trust under § 301.7701–4(c), provided that: (i) the trust is a United States person under § 7701(a)(30)(E); (ii) the beneficial owners of the trust are treated as owners under subpart E, part I, subchapter J, chapter 1 of the Code; and (iii) at least one interest in the trust is held by a middleman. See § 1.671–5(b)(22). A WHMT is a WHFIT, the assets of which consist only of mortgages, regular interests in a REMIC, interests in another WHMT, reasonably required reserve funds, amounts received with respect to these assets, and during a brief initial funding period, cash and short-term contracts to purchase these assets. See § 1.671–5(b)(23).

Trustees of fixed investment trusts frequently do not know the identities of the beneficial owners of the trust interests because the trust interests are often held in the name of a middleman. Thus, trustees are unable to communicate tax information directly to the beneficial owners of the trust interests. The WHFIT reporting rules in § 1.671–5 provide rules that specifically require the sharing of tax information among trustees, middlemen, and beneficial owners of the trust interests. To accomplish this, § 1.671–5 generally requires trustees to make trust tax information available to middlemen. Sections 1.671–5(d) and (e) require middlemen, and in some cases, trustees, to file a Form 1099 with the IRS and to furnish a written tax information statement to a TIH for the trust interests that the trustee or middleman holds on behalf of, or for the account of, the TIH.

Section 1.671–5(n) provides that the WHFIT reporting rules are applicable January 1, 2007. The preamble to the

final regulations under § 1.671–5 (T.D. 9308, 2007–1 C.B. 523 [71 FR 78351] (December 29, 2006)) informed trustees and middlemen that the IRS would not impose any penalties that would otherwise apply as a result of a failure to comply with the WHFIT reporting rules with respect to the 2007 calendar year in cases where the trustee or middleman was unable to change its information reporting systems to comply with the WHFIT reporting rules. In September of 2008, the IRS and the Treasury Department issued Notice 2008–77, 2008–40 I.R.B. 814, which informed trustees and middlemen of WHFITs that the IRS would not assert penalties as a result of a failure to comply with the WHFIT reporting rules with respect to calendar year 2008.

Except as provided in Section III below, trustees and middlemen must comply with the WHFIT reporting rules for calendar year 2009.

SECTION III: TRANSITION PAYMENTS AND LIMITED PENALTY RELIEF FOR TRUSTEES AND MIDDLEMEN REPORTING UNDER THE WHMT SAFE HARBOR

The WHMT safe harbor in § 1.671–5(g) provides safe harbor reporting rules for trustees of certain WHMTs. If a trustee reports WHMT items in accordance with the safe harbor, the information provided by a middleman or trustee with respect to WHMT items on the Forms 1099 required to be filed with the IRS and on the written tax information statement furnished to the TIH must be determined as provided in § 1.671–5(g)(2). For the purpose of determining the timing of when an item of trust income that is attributable to a TIH is included on the Form 1099 filed for that TIH, the WHMT safe harbor looks to the record date for the payment rather than the actual payment date. See § 1.671–5(g)(2)(ii). Further, the regulations require that a TIH be provided with information regarding the amount of the gross income and separately provided with information regarding the amount of the expenses of a WHMT that are attributable to the TIH. See § 1.671–5(g)(1)(iii)(C).

Prior to the effective date of the WHFIT reporting rules, many trustees and middlemen reported income from a WHMT to a beneficial owner based on payment dates and amounts rather than based on record dates and amounts as required under the WHMT safe harbor. As a result, when a trustee or middleman transitions to the new reporting rules, some income might not be reported to the IRS on Forms 1099 and some income and expense information may not be furnished to TIHs. These omissions could occur where the record date for a payment falls in a year prior to the first year of reporting under the WHMT safe harbor and the payment date falls in the first year of reporting under the safe harbor. For example, income received by many WHMTs for December 2008 and payable to record holders as of December 31, 2008, was paid on January 15, 2009. The income and expenses which relate to the December 31st record date and January 15th payment date were not included on the Form 1099 or written tax information statement for 2008 under the reporting method used by the trustees and middlemen for 2008 if the trustees and middlemen were reporting based on the payment date, which occurred in 2009. If the trustees or middlemen transition to the WHMT safe harbor for 2009, absent the rules contained in this Section III, the income and expenses also would not be included by trustees and middlemen in calculating trust income for 2009 under the safe harbor because they would be reporting based on the record date, which occurred in 2008.

To address this problem, trustees and middlemen must report as provided in this Section III in the first year that the trustee or middleman transitions from reporting based on payment dates to reporting based on record dates under the WHMT safe harbor. For purposes of this notice, a Transition Payment is any payment (gross income less applicable expenses) that has (1) a payment date in the first year that the trustee or middleman transitions to reporting under § 1.671–5(g)(2) of the WHMT safe harbor ("transition year"); and (2) a record date in a year prior to the transition year. Trustees and middlemen that are transitioning to reporting under the WHMT safe harbor must include information with respect to Transition Payments on Forms 1099 filed with the IRS for the transition year, if information for these payments has not previously been included on a Form 1099 for a prior year. Additionally, the trustee or middleman must include information with respect to Transition Payments in the written tax information statement furnished to the TIH for the transition year. Although § 1.671–5(g)(1)(iii)(C) requires middlemen and trustees reporting under the WHMT safe harbor to provide TIHs with information regarding gross income and separately provide information regarding the expenses of the WHMT attributable to the TIH, trustees and middlemen may report net amounts with respect to Transition Payments. The trustee or middleman need not separately identify the information with respect to the Transition Payments on the Form 1099 or on the written tax information statement.

Trustees and middlemen also must provide the TIH with a statement that explains that (i) the WHFIT is transitioning from reporting based on payment dates to reporting based on record dates to comply with the newly applicable WHFIT reporting rules; (ii) to effect this transition, the information reported on the statement and to the IRS includes information with respect to Transition Payments and that a Transition Payment is a payment that had a record date in a prior year and payment date in the current year, which was not previously included on a prior Form 1099; and (iii) the TIH must include the Transition Payment in computing its taxable income for the transition year as a § 481(a) adjustment to prevent omission of income caused by the reporting transition (see Section IV below).

The IRS and the Treasury Department recognize that trustees and middlemen may not have adequate time to modify their reporting systems to report Transition Payments that span the 2008 and 2009 calendar years as required under this Section III. Accordingly, the IRS will not impose any penalties on trustees and middlemen for 2009 for a failure to comply with §§ 1.671–5(d), (e), and (g)(2) with respect to TIHs in a WHMT. However, trustees and middlemen must continue to comply with §§ 6041 through 6050W to the extent applicable, and this notice does not provide penalty relief with respect to a failure to comply with those reporting sections. In addition, a trustee or middleman must report Transition Payments as required under this Section III in the first year that the trustee or middleman transi-

tions to reporting under the WHMT safe harbor, regardless of whether the trustee transitions for 2009 or 2010.

SECTION IV: TREATMENT OF TRANSITION PAYMENTS BY THE TIHs

A change from recognizing trust income in the year of the payment date to the year of the record date in accordance with the transition to record date reporting under the WHMT safe harbor is a change in method of accounting under § 446(e) and § 1.446–1(e)(2)(ii)(a). A taxpayer generally must secure the consent of the Commissioner before changing a method of accounting for federal income tax purposes. Section 446(e) and § 1.446–1(e)(2)(i). Section 1.446–1(e)(3)(ii) authorizes the Commissioner to prescribe administrative procedures setting forth the limitations, terms, and conditions deemed necessary to permit a taxpayer to obtain consent to change a method of accounting. Section 481(a) requires those adjustments necessary to prevent amounts from being duplicated or omitted when the taxpayer's taxable income is computed under a method of accounting different from the method used to compute taxable income for the preceding taxable year.

In accordance with § 1.446–1(e)(3)(ii), the Commissioner hereby grants consent to a cash method TIH who included income on its individual income tax return consistent with the amount reported on a Form 1099 for the year prior to the transition year, to change its method of accounting for trust income from recognizing the income based on the payment date to recognizing the income based on the record date in accordance with the transition to record date reporting under the WHMT safe harbor. The Transition Payment reported on a TIH's Form 1099 and written tax information statement for the transition year is an adjustment required under § 481(a). The entire amount of the § 481(a) adjustment (*i.e.*, the Transition Payment) must be taken into account in computing a TIH's taxable income for the transition year. A TIH who changes its method of accounting for the trust income in accordance with this section does not need to file a Form 3115, *Application for Change in Accounting Method*.

SECTION V: WHFIT INTEREST AND DIVIDEND INCOME MAY BE INCLUDED IN THE SUMMARY TOTALS PROVIDED TO THE IRS ON FORMS 1099

Middlemen and trustees have also indicated that they provide the IRS with a summary total for interest, dividends and miscellaneous payments made to a TIH during the calendar year on the relevant Form 1099. These middlemen and trustees have questioned whether including WHFIT items of income in these summary totals is permissible under § 1.671–5(d) or whether a separate Form 1099 must be filed to report WHFIT income to the IRS. This notice informs middlemen and trustees that WHFIT income that is appropriately reported on a Form 1099–INT, a Form 1099–DIV, or a Form 1099–MISC under § 1.671–5(d) may be included in the summary total on the Form 1099 filed with the IRS.

SECTION VI: PROCEDURES FOR FURNISHING THE WRITTEN TAX INFORMATION STATEMENT TO BENEFICIAL OWNERS UNDER REGULATION § 1.671–5

(a) *Electronic statements.*

Section 1.671–5(k) provides that the information reporting sections in subpart B, part III, subchapter A, chapter 61, of the Code (§§ 6041 through 6050W) and the regulations thereunder are incorporated into the WHFIT rules to the extent those provisions are not inconsistent with the WHFIT reporting rules.

Effective March 9, 2002, § 401 of the Job Creation and Worker Assistance Act of 2002, an off-Code provision, removed the paper delivery impediment by authorizing all payee statements required by §§ 6041 through 6050W to be furnished electronically. Additionally, § 4.5.1 of Rev. Proc. 2008–36, 2008–33 I.R.B. 340, provides that if a person is required to furnish a written statement (Copy B or acceptable substitute) to a recipient, then the statement may be furnished electronically instead of on paper. Provided that the trustee or middleman has followed the rules and procedures outlined in § 4.5.1 of Rev. Proc. 2008–36, a trustee or middleman may provide electronically the written tax information statement required to be furnished to a beneficial owner under § 1.671–5(e).

(b) *Composite statements*.

Section 4.2.1 of Rev. Proc. 2008–36 indicates that a composite recipient statement may be used for certain Forms 1099 and provides the rules for providing such a composite statement. Composite statements that meet the requirements of § 4.2.1 of Rev. Proc. 2008–36 may be used to provide the WHFIT information required to be furnished to beneficial owners under the WHFIT reporting rules, provided that the information required to be provided to the beneficial owner that is not required to be reported to the IRS on Forms 1099 also is included in an accompanying statement.

(c) *Summary totals*.

As noted above, it is permissible for middlemen and trustees to include income from a WHFIT in the summary totals on Forms 1099–INT, Forms 1099–DIV, and Forms 1099–MISC, when these forms are provided to the IRS. Middlemen and trustees may also include income from a WHFIT in a summary total provided to a beneficial owner, but only if the summary total is accompanied by sufficient information to enable the beneficial owner to properly report its items of income, deduction and credits from the WHFIT on its federal income tax return and such information satisfies the requirements of § 1.671–5(e) as modified by the reporting safe harbors in §§ 1.671–5(f) and (g) and for the transition year, satisfies Section III of this notice.

However, the deadline for furnishing WHFIT information to a TIH may differ from that for furnishing information with respect to other securities that the middleman may hold for the TIH. Where WHFIT information is included in a summary total with information regarding securities that are required to be reported at an earlier date, the inclusion of WHFIT information on the statement does not alter the earlier deadline. Additionally, if the amount of WHFIT income is determined to be different than what was reported on the earlier date, a corrected Form 1099 must be sent to the TIH.

SECTION VII: FURNISHING TAX INFORMATION PACKAGES FOR CERTAIN NMWHFITS

There are a number of royalty trusts and commodity trusts that meet the definition of a WHFIT. The IRS and the Treasury Department have been asked to clarify the application of the WHFIT rules with respect to furnishing TIHs in a royalty trust or a commodity trust with information necessary to properly report the tax consequences of their ownership interest in the trust. Under the structure of the WHFIT reporting rules, trustees are to make trust information available to middlemen. See § 1.671–5(c). The middlemen are then required to provide Forms 1099 to the IRS and to furnish written tax information statements to TIHs on whose behalf or account the middleman holds an interest in the WHFIT or acts as an intermediary. See §§ 1.671–5(d) and (e).

TIHs in royalty and commodity trusts need certain information (*e.g.*, cost depletion schedules) in order for them to properly report the tax consequences of ownership of a trust interest. Historically, some royalty trusts have distributed annual tax packages or booklets to TIHs that included this information. In some cases, the trustee of a royalty trust makes this information available on an Internet website.

Middlemen are concerned that the WHFIT rules now require them to publish and mail this information, which was formerly provided by the trustees of these trusts. Middlemen have inquired whether they can provide this additional information by providing a TIH with the address of an Internet website where the information can be found. Until further guidance is issued, the IRS and the Treasury Department have determined that providing the TIH of a royalty or commodity trust with the address of an Internet website where the information can be found is sufficient to meet the requirements of § 1.671–5(e) if the trustee or middleman also informs the TIH that a written tax information package will be provided if requested and the middleman or trustee does in fact furnish a written package if requested. This does not, however, relieve trustees and middlemen of any requirement to provide the IRS and TIHs with individualized calculation of the items of income that are required to be reported to the IRS on a Form 1099.

It has been suggested that the IRS and the Treasury Department clarify the application of the WHFIT reporting rules to royalty and commodity trusts. One suggested clarification is to limit the burden on middlemen to providing the IRS with appropriate Forms 1099 and providing TIHs with statements regarding the information provided on the Form 1099, and to require trustees to maintain an Internet website capable of providing investor-specific information for other items that are required to be provided to the TIH under § 1.671–5(e) but are not required to be included on the Form 1099. The IRS and the Treasury Department request comments regarding this suggestion and also welcome any alternative suggestions on how trustees and middlemen should share the reporting burden. The IRS and the Treasury Department also request comments on whether there are other types of NMWHFITs from which TIHs need significant information to report the tax consequences of ownership of an interest in the NMWHFIT on their individual tax returns and suggestions on how this information could best be provided.

Comments should include a reference to Notice 2010–4. Send submissions to CC:PA:LPD:RU (Notice 2010–4), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to CC:PA:LPD:RU (Notice 2010–4), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the following email address: *Comments@irscounsel.treas.gov*. Please include the notice number 2010–4 in the subject line of any electronic communication. All materials submitted will be available for public inspection and copying.

SECTION VIII: EFFECTIVE DATE

This notice is effective on December 17, 2009.

SECTION IX: DRAFTING INFORMATION

The principal author of this notice is Michala P. Irons of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Michala P. Irons at (202) 622–3050 (not a toll-free call).

Arbitrage Treatment of Certain Guarantee Funds

Notice 2010–5

This notice describes proposed rules that the Internal Revenue Service (IRS) and the Department of the Treasury expect to issue regarding whether certain perpetual trust funds created and controlled by States that are pledged as credit enhancement to guarantee tax-exempt bonds will be treated as replacement proceeds of the guaranteed bonds for purposes of the arbitrage investment restrictions on tax-exempt bonds under § 148 of the Internal Revenue Code (Code). (Unless noted, section references in this notice are to the Code and the Income Tax Regulations.) Such rules are intended to provide further flexibility to State and local governments to obtain credit enhancement for tax-exempt bonds in recognition of credit constraints in the municipal bond market. This notice affects certain state guarantee programs that support local public schools and other governmental purposes.

In addition, this notice solicits public comments regarding provisions of the regulations under § 148 that may impede an issuer's ability to obtain credit enhancement for tax-exempt bonds.

SECTION 2. BACKGROUND

In general, the interest on bonds issued by State and local governments is excludable from gross income under § 103(a) if certain requirements are met. Section 148 imposes arbitrage investment restrictions on tax-exempt bonds that limit the investment of proceeds of tax-exempt bonds in higher-yielding investments and that require issuers to rebate certain excess earnings above the yield on tax-exempt bonds to the Federal Government. The arbitrage restrictions apply to ordinary proceeds derived from the sale of tax-exempt bonds

and investment earnings thereon. In addition, the arbitrage restrictions apply to a special type of tax-exempt bond proceeds, known as "replacement proceeds," as a result of their use as security for tax-exempt bonds or other nexus to tax-exempt bonds. These special replacement proceeds include, among other things, certain "pledged funds" that are pledged to secure repayment of tax-exempt bonds with a reasonable assurance of availability for such purpose. One special exception to the treatment of pledged funds as replacement proceeds covers certain perpetual trust funds under certain parameters and under a specified size limitation, as described further herein.

In particular, § 148(a) defines an arbitrage bond as any bond issued as part of an issue any portion of the proceeds of which are reasonably expected (at the time of issuance of the bond) to be used directly or indirectly (1) to acquire higher yielding investments or (2) to replace funds which were used directly or indirectly to acquire higher yielding investments. Section 148(a) further provides that a bond is an arbitrage bond if an issuer intentionally uses any portion of the proceeds of the issue of which such bond is a part to acquire higher yielding investments or to replace funds which were used directly or indirectly to acquire higher yielding investments. In addition, § 148(f) requires that issuers rebate certain excess earnings on proceeds of tax-exempt bonds to the Federal Government. Under §§ 1.148–2(a) and 1.148–3(a) of the Income Tax Regulations, "proceeds" for these purposes means "gross proceeds". Section 1.148–1(b) defines "gross proceeds" to include proceeds and replacement proceeds of an issue.

Section 1.148–1(c)(1) defines "replacement proceeds" as amounts that have a sufficiently direct nexus to a tax-exempt bond issue or to the governmental purpose of a tax-exempt bond issue to conclude that the amounts would have been used for that governmental purpose if the proceeds of the bond issue were not used or to be used for that governmental purpose. Section 1.148–1(c)(1) further provides that replacement proceeds include, but are not limited to, sinking funds, pledged funds, and other replacement proceeds described in § 1.148–1(c)(4) to the extent that those funds or amounts are held by or derived from a substantial beneficiary of the issue. Section 1.148–1(c)(1) defines a substantial beneficiary of an issue to include the issuer of such issue, any related party to the issuer and, if the issuer is not a State, the State in which the issuer is located. Section 1.148–1(c) further provides, however, that a person is not a substantial beneficiary of an issue solely because it is a guarantor under a qualified guarantee.

Section 1.148–1(c)(3)(i) defines a "pledged fund" as any amount that is directly or indirectly pledged to pay principal or interest on the issue. Although a pledge need not be cast in any particular form, it must, in substance provide reasonable assurance that the amount will be available to pay principal or interest on the issue even if the issuer encounter financial difficulties.

Section §1.148–11(d)(1) provides a special exception to the treatment of funds as pledged funds for arbitrage purposes for certain perpetual trust funds if the requirements and limitations enumerated in §§ 1.148–11(d)(1)(i) through (vi) are satisfied. Specifically, § 1.148–11(d)(1) provides that a guarantee by a fund created and controlled by a State and established pursuant to such State's constitution does not cause the amounts in such fund to be pledged funds treated as replacement proceeds for purposes of § 148 if: (i) substantially all of the corpus of the fund consists of nonfinancial assets, revenues derived from these assets, gifts, and bequests, (ii) the fund corpus may be invaded only to support specifically designated essential governmental functions (the "designated functions") carried on by a political subdivision with general taxing powers; (iii) substantially all of the available income of the fund is required to be applied annually to support the designated functions; (iv) the issue of bonds guaranteed consists of general obligation bonds that are not private activity bonds substantially all of the proceeds of which are to be used for the designated functions; (v) the fund satisfied all of requirements in §§ 1.148–11(d)(1)(i) through (iii) on August 16, 1986; and (vi) the guarantee is not attributable to a deposit to the fund after May 14, 1989, unless the deposit is attributable to the sale or other disposition of fund assets or unless prior to the deposit, the outstanding amount of the bonds guaranteed by the fund did not exceed 250 percent of the lower of the cost or fair market value of the fund.

The recent financial crisis has resulted in significant volatility in the fair market value of assets in these perpetual trust funds and has constrained the availability of credit enhancement in the municipal bond market. As a result, certain perpetual trust funds that otherwise could provide credit enhancement under the special exception to the arbitrage restrictions for eligible pledged funds under § 1.148–11(d)(1) have been limited in their capacity to provide guarantees for tax-exempt bonds at a time when there is a significant need for such guarantees.

SECTION 3. SCOPE AND APPLICATION

The IRS and the Department of the Treasury intend to issue proposed regulations to amend § 1.148–11(d)(1)(vi) in its entirety to provide that, as of the sale date of the tax-exempt bonds to be guaranteed, the amount of the bonds to be guaranteed by the fund plus the then-outstanding amount of bonds previously guaranteed by the fund may not exceed a total amount equal to 500 percent of the total costs of the assets held by the fund as of December 16, 2009.

SECTION 4. RELIANCE ON THIS NOTICE

This notice may be relied upon for bonds sold on or after December 16, 2009 and before the effective date of future regulations or other public administrative guidance under § 148 addressing or otherwise affecting funds described in § 1.148–11(d)(1) and this notice.

SECTION 5. REQUEST FOR COMMENTS

Before any notice of proposed rulemaking is issued with respect to the guidance provided in this notice, consideration will be given to any written public comments on this notice that are submitted. In addition, the Treasury Department and the IRS specifically request comments regarding provisions of the regulations under § 148 that may impede an issuer's ability to obtain credit enhancement and how those provisions should

be amended. Comments should be submitted in writing and can be emailed to *notice.comments@irscounsel.treas.gov* (include "Notice 2010–5" in the subject line) or mailed to Office of Associate Chief Counsel (Financial Institutions and Products), Re: Notice 2010–5, CC:FIP:B5, Room 3547, 1111 Constitution Avenue, NW, Washington, DC 20224. Comments that are submitted will be made available to the public.

SECTION 6. DRAFTING INFORMATION

The principal authors of this notice are Aviva M. Roth and Johanna Som de Cerff, Office of the Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and the Treasury Department participated in its development. For further information regarding this notice, contact Johanna Som de Cerff at (202) 622–3980 (not a toll-free call).

26 CFR 601.201: Rulings and determination letters.

Rev. Proc. 2010–9

TABLE OF CONTENTS

SECTION 1. WHAT IS THE PURPOSE OF THIS REVENUE PROCEDURE?

This revenue procedure sets forth procedures for issuing determination letters and rulings on the exempt status of organizations under §§ 501 and 521 of the Internal Revenue Code other than those subject to Rev. Proc. 2010–6, 2010–1 I.R.B. 193 (relating to pension, profit-sharing, stock bonus, annuity, and employee stock ownership plans). Generally, the Service issues these determination letters and rulings in response to applications for recognition of exemption from Federal income tax. These procedures also apply to revocation or modification of determination letters or rulings. This revenue procedure also provides guidance on the exhaustion of administrative remedies for purposes of declaratory judgment under § 7428 of the Code.

Description of terms used in this revenue procedure

.01 For purposes of this revenue procedure—

(1) the term "Service" means the Internal Revenue Service.

(2) the term "application" means the appropriate form or letter that an organization must file or submit to the Service for recognition of exemption from Federal income tax under the applicable section of the Internal Revenue Code. *See* section 3 for information on specific forms.

(3) the term "EO Determinations" means the office of the Service that is primarily responsible for processing initial applications for tax-exempt status. It includes the main EO Determinations office located in Cincinnati, Ohio, and other field offices that are under the direction and control of the Manager, EO Determinations.

(4) the term "EO Technical" means the office of the Service that is primarily responsible for issuing letter rulings to taxpayers on exempt organization matters, and for providing technical advice or technical assistance to other offices of the Service on exempt organization matters. The EO Technical office is located in Washington, DC.

(5) the term "Appeals Office" means any office under the direction and control of the Chief, Appeals. The purpose of the Appeals Office is to resolve tax controversies, without litigation, on a fair and impartial basis. The Appeals Office is independent of EO Determinations and EO Technical.

(6) the term "determination letter" means a written statement issued by EO Determinations or an Appeals Office in response to an application for recognition of exemption from Federal income tax under §§ 501 and 521. This includes a written statement issued by EO Determinations or an Appeals Office on the basis of advice secured from EO Technical pursuant to the procedures prescribed herein and in Rev. Proc. 2010–5, 2010–1 I.R.B. 165.

(7) the term "ruling" means a written statement issued by EO Technical in response to an application for recognition of exemption from Federal income tax under §§ 501 and 521.

Updated annually

.02 This revenue procedure is updated annually, but may be modified or amplified during the year.

SECTION 2. NATURE OF CHANGES AND RELATED REVENUE PROCEDURES

Rev. Proc. 2009–9 is superseded and the processing of applications is now centralized

.01 This revenue procedure updates Rev. Proc. 2009–9, 2009–2 I.R.B. 256, which is hereby superseded.

(1) The responsibility for processing applications is now centralized in the EO Determinations office in Cincinnati, Ohio. Key district offices no longer exist.

(2) Although applications are generally processed in the Cincinnati office, some applications may be processed in other EO Determinations offices or referred to EO Technical.

Related revenue procedures

.02 This revenue procedure supplements Rev. Proc. 76–34, 1976–2 C.B. 656, with respect to the effects of § 7428 of the Code on the classification of organizations under §§ 509(a) and 4942(j)(3). Rev. Proc. 80–27, 1980–1 C.B. 677, sets forth procedures under which exemption may be recognized on a group basis for subordinate organizations affiliated with and under the general supervision and control of a central organization. Rev. Proc. 72–5, 1972–1 C.B. 709, provides information for religious and apostolic organizations seeking recognition of exemption under § 501(d). General procedures for requests for a determination letter or ruling are provided in Rev. Proc. 2010–4, 2010–1 I.R.B. 122. User fees for requests for a determination letter or ruling are set forth in Rev. Proc. 2010–8, 2010–1 I.R.B. 234.

SECTION 3. WHAT ARE THE PROCEDURES FOR REQUESTING RECOGNITION OF EXEMPT STATUS?

In general

.01 An organization seeking recognition of exempt status under § 501 or § 521 is required to submit the appropriate application. In the case of a numbered application form, the current version of the form must be submitted. A central organization that has previously received recognition of its own exemption can request a group exemption letter by submitting a letter application with Form 8718, *User Fee for Exempt Organization Determination Letter Request. See* Rev. Proc. 80–27.

User fee

.02 An application must be submitted with the correct user fee, as set forth in Rev. Proc. 2010–8.

Form 1023 application

.03 An organization seeking recognition of exemption under § 501(c)(3) and §§ 501(e), (f), (k), (n) or (q) must submit a completed Form 1023. In the case of an organization that provides credit counseling services, see § 501(q) of the Code.

Form 1024 application

.04 An organization seeking recognition of exemption under §§ 501(c)(2), (4), (5), (6), (7), (8), (9), (10), (12), (13), (15), (17), (19) or (25) must submit a completed Form 1024 with Form 8718. In the case of an organization that provides credit counseling services and seeks recognition of exemption under section 501(c)(4), see § 501(q) of the Code.

Letter application

.05 An organization seeking recognition of exemption under §§ 501(c)(11), (14), (16), (18), (21), (22), (23), (26), (27) or (28) or under § 501(d) must submit a letter application with Form 8718.

Form 1028 application

.06 An organization seeking recognition of exemption under § 521 must submit a completed Form 1028 with Form 8718.

Form 8871 notice for political organizations

.07 A political party, a campaign committee for a candidate for federal, state or local office, and a political action committee are all political organizations subject to tax under § 527. To be tax-exempt, a political organization may be required to notify the Service that it is to be treated as a § 527 organization by electronically filing Form 8871, *Political Organization Notice of Section 527 Status*. For details, go to the IRS website at *www.irs.gov/polorgs*.

Requirements for a substantially completed application

.08 A substantially completed application, including a letter application, is one that:

(1) is signed by an authorized individual.

(2) includes an Employer Identification Number (EIN).

(3) includes a statement of receipts and expenditures and a balance sheet for the current year and the three preceding years (or the years the organization was in existence, if less than four years). If the organization has not yet commenced operations, or has not completed one accounting period, a substantially completed application generally includes a proposed budget for two full accounting periods and a current statement of assets and liabilities.

(4) includes a detailed narrative statement of proposed activities, including each of the fundraising activities of a § 501(c)(3) organization, and a narrative description of anticipated receipts and contemplated expenditures.

(5) includes a copy of the organizing or enabling document that is signed by a principal officer or is accompanied by a written declaration signed by an authorized individual certifying that the document is a complete and accurate copy of the original or otherwise meets the requirements of a "conformed copy" as outlined in Rev. Proc. 68–14, 1968–1 C.B. 768.

(6) if the organizing or enabling document is in the form of articles of incorporation, includes evidence that it was filed with and approved by an appropriate state official (*e.g.*, stamped "Filed" and dated by the Secretary of State). Alternatively, a copy of the articles of incorporation may be submitted if accompanied by a written declaration signed by an authorized individual that the copy is a complete and accurate copy of the original copy that was filed with and approved by the state. If a copy is submitted, the written declaration must include the date the articles were filed with the state.

(7) if the organization has adopted by-laws, includes a current copy. The by-laws need not be signed if submitted as an attachment to the application for recognition of exemption. Otherwise, the by-laws must be verified as current by an authorized individual.

(8) is accompanied by the correct user fee and Form 8718, when applicable.

Terrorist organizations not eligible to apply for recognition of exemption

.09 An organization that is identified or designated as a terrorist organization within the meaning of § 501(p)(2) of the Code is not eligible to apply for recognition of exemption.

SECTION 4. WHAT ARE THE STANDARDS FOR ISSUING A DETERMINATION LETTER OR RULING ON EXEMPT STATUS?

Exempt status must be established in application and supporting documents

.01 A favorable determination letter or ruling will be issued to an organization only if its application and supporting documents establish that it meets the particular requirements of the section under which exemption from Federal income tax is claimed.

Determination letter or ruling based solely on administrative record

.02 A determination letter or ruling on exempt status is issued based solely upon the facts and representations contained in the administrative record.

(1) The applicant is responsible for the accuracy of any factual representations contained in the application.

(2) Any oral representation of additional facts or modification of facts as represented or alleged in the application must be reduced to writing over the signature of an officer or director of the taxpayer under a penalties of perjury statement.

(3) The failure to disclose a material fact or misrepresentation of a material fact on the application may adversely affect the reliance that would otherwise be obtained through issuance by the Service of a favorable determination letter or ruling.

Exempt status may be recognized in advance of actual operations

.03 Exempt status may be recognized in advance of the organization's operations if the proposed activities are described in sufficient detail to permit a conclusion that the organization will clearly meet the particular requirements for exemption pursuant to the section of the Internal Revenue Code under which exemption is claimed.

(1) A mere restatement of exempt purposes or a statement that proposed activities will be in furtherance of such purposes will not satisfy this requirement.

(2) The organization must fully describe all of the activities in which it expects to engage, including the standards, criteria, procedures or other means adopted or planned for carrying out the activities, the anticipated sources of receipts, and the nature of contemplated expenditures.

(3) Where the organization cannot demonstrate to the satisfaction of the Service that it qualifies for exemption pursuant to the section of the Internal Revenue Code under which exemption is claimed, the Service will generally issue a proposed adverse determination letter or ruling. *See also* section 7 of this revenue procedure.

No letter if exempt status issue in litigation or under consideration within the Service

.04 A determination letter or ruling on exempt status will not ordinarily be issued if an issue involving the organization's exempt status under § 501 or § 521 is pending in litigation, is under consideration within the Service, or if issuance of a determination letter or ruling is not in the interest of sound tax administration. If the Service declines to issue a determination or ruling to an organization seeking exempt status under § 501(c)(3), the organization may be able to pursue a declaratory judgment under § 7428 provided that it has exhausted its administrative remedies.

Incomplete application

.05 If an application does not contain all of the items set out in section 3.08, the Service may return it to the applicant for completion.

(1) In lieu of returning an incomplete application, the Service may retain the application and request additional information needed for a substantially completed application.

(2) In the case of an application under § 501(c)(3) that is returned incomplete, the 270-day period referred to in § 7428(b)(2) will not be considered as starting until the date a substantially completed Form 1023 is refiled with or remailed to the Service. If the application is mailed

to the Service and a postmark is not evident, the 270-day period will start to run on the date the Service actually receives the substantially completed Form 1023. The same rules apply for purposes of the notice requirement of § 508.

(3) Generally, the user fee will not be refunded if an incomplete application is filed. *See* Rev. Proc. 2010–8, section 10.

Even if application is complete, additional information may be required

.06 Even though an application is substantially complete, the Service may request additional information before issuing a determination letter or ruling.

(1) If the application involves an issue where contrary authorities exist, an applicant's failure to disclose and distinguish contrary authorities may result in requests for additional information, which could delay final action on the application.

(2) In the case of an application under § 501(c)(3), the period of time beginning on the date the Service requests additional information until the date the information is submitted to the Service will not be counted for purposes of the 270-day period referred to in § 7428(b)(2).

Expedited handling

.07 Applications are normally processed in the order of receipt by the Service. However, expedited handling of an application may be approved where a request is made in writing and contains a compelling reason for processing the application ahead of others. Upon approval of a request for expedited handling an application will be considered out of its normal order. This does not mean the application will be immediately approved or denied. Circumstances generally warranting expedited processing include:

(1) A grant to the applicant is pending and the failure to secure the grant may have an adverse impact on the organization's ability to continue to operate.

(2) The purpose of the newly created organization is to provide disaster relief to victims of emergencies such as flood and hurricane.

(3) There have been undue delays in issuing a determination letter or ruling caused by a Service error.

SECTION 5. WHAT OFFICES ISSUE AN EXEMPT STATUS DETERMINATION LETTER OR RULING?

EO Determinations issues a determination letter in most cases

.01 Under the general procedures outlined in Rev. Proc. 2010–4, EO Determinations is authorized to issue determination letters on applications for exempt status under §§ 501 and 521.

Certain applications referred to EO Technical

.02 EO Determinations will refer to EO Technical those applications that present issues which are not specifically covered by statute or regulations, or by a ruling, opinion, or court decision published in the Internal Revenue Bulletin. In addition, EO Determinations will refer those applications that have been specifically reserved by revenue procedure or by other official Service instructions for handling by EO Technical for purposes of establishing uniformity or centralized control of designated categories of cases. EO Technical will notify the applicant organization upon receipt of a referred application, and will consider each such application and issue a ruling directly to the organization.

Technical advice may be requested in certain cases

.03 If at any time during the course of consideration of an exemption application by EO Determinations the organization believes that its case involves an issue on which there is no published precedent, or there has been non-uniformity in the Service's handling of similar cases, the organization may request that EO Determinations either refer the application to EO Technical or seek technical advice from EO Technical. *See* Rev. Proc. 2010–5, section 4.04.

Technical advice must be requested in certain cases

.04 If EO Determinations proposes to recognize the exemption of an organization to which EO Technical had issued a previous contrary ruling or technical advice, EO Determinations must seek technical advice from EO Technical before issuing a determination letter. This does

not apply where EO Technical issued an adverse ruling and the organization subsequently made changes to its purposes, activities, or operations to remove the basis for which exempt status was denied.

SECTION 6. WITHDRAWAL OF AN APPLICATION

Application may be withdrawn prior to issuance of a determination letter or ruling

.01 An application may be withdrawn upon the written request of an authorized individual at any time prior to the issuance of a determination letter or ruling. Therefore, an application may not be withdrawn after the issuance of a proposed adverse determination letter or ruling.

(1) When an application is withdrawn, the Service will retain the application and all supporting documents. The Service may consider the information submitted in connection with the withdrawn request in a subsequent examination of the organization.

(2) Generally, the user fee will not be refunded if an application is withdrawn. *See* Rev. Proc. 2010–8, section 10.

§ 7428 implications of withdrawal of application under § 501(c)(3)

.02 The Service will not consider the withdrawal of an application under § 501(c)(3) as either a failure to make a determination within the meaning of § 7428(a)(2) or as an exhaustion of administrative remedies within the meaning of § 7428(b)(2).

SECTION 7. WHAT ARE THE PROCEDURES WHEN EXEMPT STATUS IS DENIED?

Proposed adverse determination letter or ruling

.01 If EO Determinations or EO Technical reaches the conclusion that the organization does not satisfy the requirements for exempt status pursuant to the section of the Internal Revenue Code under which exemption is claimed, the Service will generally issue a proposed adverse determination letter or ruling, which will:

(1) Include a detailed discussion of the Service's rationale for the denial of tax-exempt status.

(2) Advise the organization of its opportunity to appeal or protest the decision and request a conference.

Appeal of a proposed adverse determination letter issued by EO Determinations

.02 A proposed adverse determination letter issued by EO Determinations will advise the organization of its opportunity to appeal the determination by requesting Appeals Office consideration. To do this, the organization must submit a statement of the facts, law and arguments in support of its position within 30 days from the date of the adverse determination letter. The organization must also state whether it wishes an Appeals Office conference. Any determination letter issued on the basis of technical advice from EO Technical may not be appealed to the Appeals Office on issues that were the subject of the technical advice.

Protest of a proposed adverse ruling issued by EO Technical

.03 A proposed adverse ruling issued by EO Technical will advise the organization of its opportunity to file a protest statement within 30 days and to request a conference. If a conference is requested, the conference procedures outlined in Rev. Proc. 2010–4, section 12, are applicable.

Final adverse determination letter or ruling where no appeal or protest is submitted

.04 If an organization does not submit a timely appeal of a proposed adverse determination letter issued by EO Determinations, or a timely protest of a proposed adverse ruling issued by EO Technical, a final adverse determination letter or ruling will be issued to the organization. The final adverse letter or ruling will provide information about the filing of tax returns and the disclosure of the proposed and final adverse letters or rulings.

How EO Determinations handles an appeal of a proposed adverse determination letter

.05 If an organization submits an appeal of the proposed adverse determination letter, EO Determinations will first review the appeal, and if it determines that the organization qualifies for tax-exempt status issue a favorable exempt status determination letter. If EO Determinations maintains its adverse position after reviewing the appeal, it will forward the appeal and the exemption application case file to the Appeals Office.

Consideration by the Appeals Office

.06 The Appeals Office will consider the organization's appeal. If the Appeals Office agrees with the proposed adverse determination, it will either issue a final adverse determination or, if a conference was requested, contact the organization to schedule a conference. At the end of the conference process, which may involve the submission of additional information, the Appeals Office will either issue a final adverse determination letter or a favorable determination letter. If the Appeals Office believes that an exemption or private foundation status issue is not covered by published precedent or that there is non-uniformity, the Appeals Office must request technical advice from EO Technical in accordance with Rev. Proc. 2010–5, section 4.04.

If a protest of a proposed adverse ruling is submitted to EO Technical

.07 If an organization submits a protest of a proposed adverse exempt status ruling, EO Technical will review the protest statement. If the protest convinces EO Technical that the organization qualifies for tax-exempt status, a favorable ruling will be issued. If EO Technical maintains its adverse position after reviewing the protest, it will either issue a final adverse ruling or, if a conference was requested, contact the organization to schedule a conference. At the end of the conference process, which may involve the submission of additional information, EO Technical will either issue a final adverse ruling or a favorable exempt status ruling.

An appeal or protest may be withdrawn

.08 An organization may withdraw its appeal or protest before the Service issues a final adverse determination letter or ruling. Upon receipt of the withdrawal request, the Service will complete the processing of the case in the same manner as if no appeal or protest was received.

Appeal or protest and conference rights not applicable in certain situations

.09 The opportunity to appeal or protest a proposed adverse determination letter or ruling and the conference rights described above are not applicable to matters where delay would be prejudicial to the interests of the Service (such as in cases involving fraud, jeopardy, the imminence of the expiration of the statute of limitations, or where immediate action is necessary to protect the interests of the Government).

SECTION 8. DISCLOSURE OF APPLICATIONS AND DETERMINATION LETTERS AND RULINGS

Sections 6104 and 6110 of the Code provide rules for the disclosure of applications, including supporting documents, and determination letters and rulings.

Disclosure of applications, supporting documents, and favorable determination letters or rulings

.01 The applications, any supporting documents, and the favorable determination letter or ruling issued are available for public inspection under § 6104(a)(1) of the Code. However, there are certain limited disclosure exceptions for a trade secret, patent, process, style of work, or apparatus if the Service determines that the disclosure of the information would adversely affect the organization.

(1) The Service is required to make the applications, supporting documents, and favorable determination letters or rulings available upon request. The public can request this information by submitting Form 4506–A, *Request for Public Inspection or Copy of Exempt or Political Organization IRS Form.*

(2) The exempt organization is required to make its exemption application, supporting documents, and determination letter or ruling available for public inspection without charge. For more information about the exempt organization's disclosure obligations, *see* Publication 557, *Tax-Exempt Status for Your Organization.*

Disclosure of adverse determination letters or rulings

.02 The Service is required to make adverse determination letters and rulings available for public inspection under § 6110 of the Code. Upon issuance of the final adverse determination letter or ruling to an organization, both the proposed adverse determination letter or ruling and the final adverse determination letter or ruling will be released under § 6110.

(1) These documents are made available to the public after the deletion of names, addresses, and any other information that might identify the taxpayer. *See* § 6110(c) for other specific disclosure exemptions.

(2) The final adverse determination letter or ruling will enclose Notice 437, *Notice of Intention to Disclose,* and redacted copies of the final and proposed adverse determination letters

or rulings. Notice 437 provides instructions if the organization disagrees with the deletions proposed by the Service.

Disclosure to State officials when the Service refuses to recognize exemption under § 501(c)(3)

.03 The Service may notify the appropriate State officials of a refusal to recognize an organization as tax-exempt under § 501(c)(3). *See* § 6104(c) of the Code. The notice to the State officials may include a copy of a proposed or final adverse determination letter or ruling the Service issued to the organization. In addition, upon request by the appropriate State official, the Service may make available for inspection and copying the exemption application and other information relating to the Service's determination on exempt status.

Disclosure to State officials of information about § 501(c)(3) applicants

.04 The Service may disclose to State officials the name, address, and identification number of any organization that has applied for recognition of exemption under § 501(c)(3).

SECTION 9. REVIEW OF DETERMINATION LETTERS BY EO TECHNICAL

Determination letters may be reviewed by EO Technical to assure uniformity

.01 Determination letters issued by EO Determinations may be reviewed by EO Technical, or the Office of the Associate Chief Counsel (Passthroughs and Special Industries) (for cases under § 521), to assure uniform application of the statutes or regulations, or rulings, court opinions, or decisions published in the Internal Revenue Bulletin.

Procedures for cases where EO Technical takes exception to a determination letter

.02 If EO Technical takes exception to a determination letter issued by EO Determinations, the manager of EO Determinations will be advised. If EO Determinations notifies the organization of the exception taken, and the organization disagrees with the exception, the file will be returned to EO Technical. The referral to EO Technical will be treated as a request for technical advice and the procedures in Rev. Proc. 2010–5 will be followed.

SECTION 10. DECLARATORY JUDGMENT PROVISIONS OF § 7428

Actual controversy involving certain issues

.01 Generally, a declaratory judgment proceeding under § 7428 of the Code can be filed in the United States Tax Court, the United States Court of Federal Claims, or the district court of the United States for the District of Columbia with respect to an actual controversy involving a determination by the Service or a failure of the Service to make a determination with respect to the initial or continuing qualification or classification of an organization under § 501(c)(3) (charitable, educational, etc.); § 170(c)(2) (deductibility of contributions); § 509(a) (private foundation status); § 4942(j)(3) (operating foundation status); or § 521 (farmers cooperatives).

Exhaustion of administrative remedies

.02 Before filing a declaratory judgment action, an organization must exhaust its administrative remedies by taking, in a timely manner, all reasonable steps to secure a determination from the Service. These include:

(1) the filing of a substantially completed application Form 1023 or group exemption request under § 501(c)(3) pursuant to section 3.08 of this revenue procedure or the request for a determination of foundation status pursuant to Rev. Proc. 76–34;

(2) in appropriate cases, requesting relief pursuant to Treas. Reg. 301.9100–1 of the Procedure and Administration Regulations regarding the extension of time for making an election or application for relief from tax (*see* Rev. Proc. 92–85, 1992–2 C.B. 490);

(3) the timely submission of all additional information requested by the Service to perfect an exemption application or request for determination of private foundation status; and

(4) exhaustion of all administrative appeals available within the Service pursuant to section 7 of this revenue procedure.

Not earlier than 270 days after seeking determination

.03 An organization will in no event be deemed to have exhausted its administrative remedies prior to the earlier of:

(1) the completion of the steps in section 10.02, and the sending by the Service by certified or registered mail of a final determination letter or ruling; or

(2) the expiration of the 270-day period described in § 7428(b)(2) in a case where the Service has not issued a final determination letter or ruling and the organization has taken, in a timely manner, all reasonable steps to secure a determination letter or ruling.

Service must have reasonable time to act on an appeal or protest

.04 The steps described in section 10.02 will not be considered completed until the Service has had a reasonable time to act upon an appeal or protest as the case may be.

Final determination to which § 7428 applies

.05 A final determination to which § 7428 of the Code applies is a determination letter or ruling, sent by certified or registered mail, which holds that the organization is not described in § 501(c)(3) or § 170(c)(2), is a public charity described in a part of § 509 or § 170(b)(1)(A) other than the part under which the organization requested classification, is not a private foundation as defined in § 4942(j)(3), or is a private foundation and not a public charity described in a part of § 509 or § 170(b)(1)(A).

SECTION 11. EFFECT OF DETERMINATION LETTER OR RULING RECOGNIZING EXEMPTION

Effective date of exemption

.01 A determination letter or ruling recognizing exemption is usually effective as of the date of formation of an organization if its purposes and activities prior to the date of the determination letter or ruling were consistent with the requirements for exemption. However, special rules under § 508(a) of the Code may apply to an organization applying for exemption under § 501(c)(3), and special rules under § 505(c) may apply to an organization applying for exemption under §§ 501(c)(9), (17), or (20).

(1) If the Service requires the organization to alter its activities or make substantive amendments to its enabling instrument, the exemption will be effective as of the date specified in a determination letter or ruling.

(2) If the Service requires the organization to make a nonsubstantive amendment, exemption will ordinarily be recognized as of the date of formation. Examples of nonsubstantive amendments include correction of a clerical error in the enabling instrument or the addition of a dissolution clause where the activities of the organization prior to the determination letter or ruling are consistent with the requirements for exemption.

Reliance on determination letter or ruling

.02 A determination letter or ruling recognizing exemption may not be relied upon if there is a material change, inconsistent with exemption, in the character, the purpose, or the method of operation of the organization. Also, a determination letter or ruling may not be relied upon if it was based on any inaccurate material factual representations. *See* section 12.01.

SECTION 12. REVOCATION OR MODIFICATION OF DETERMINATION LETTER OR RULING RECOGNIZING EXEMPTION

A determination letter or ruling recognizing exemption may be revoked or modified by (1) a notice to the taxpayer to whom the determination letter or ruling was issued, (2) enactment of legislation or ratification of a tax treaty, (3) a decision of the United States Supreme Court, (4) the issuance of temporary or final regulations, or (5) the issuance of a revenue ruling, revenue procedure, or other statement published in the Internal Revenue Bulletin.

Revocation or modification of a determination letter or ruling may be retroactive

.01 The revocation or modification of a determination letter or ruling recognizing exemption may be retroactive if the organization omitted or misstated a material fact, operated in a manner materially different from that originally represented, or, in the case of organizations to which § 503 of the Code applies, engaged in a prohibited transaction with the purpose of diverting corpus or income of the organization from its exempt purpose and such transaction involved a substantial part of the corpus or income of such organization. In certain cases an organization may seek relief from retroactive revocation or modification of a determination letter or ruling under § 7805(b). Requests for § 7805(b) relief are subject to the procedures set forth in Rev. Proc. 2010–4.

(1) Where there is a material change, inconsistent with exemption, in the character, the purpose, or the method of operation of an organization, revocation or modification will ordinarily take effect as of the date of such material change.

(2) In the case where a determination letter or ruling is issued in error or is no longer in accord with the Service's position and § 7805(b) relief is granted (*see* sections 13 and 14 of Rev. Proc. 2010–4), ordinarily, the revocation or modification will be effective not earlier than the date when the Service modifies or revokes the original determination letter or ruling.

Appeal and conference procedures in the case of revocation or modification of exempt status letter

.02 In the case of a revocation or modification of a determination letter or ruling, the appeal and conference procedures are generally the same as set out in section 7 of this revenue procedure, including the right of the organization to request that EO Determinations or the Appeals Office seek technical advice from EO Technical. However, appeal and conference rights are not applicable to matters where delay would be prejudicial to the interests of the Service (such as in cases involving fraud, jeopardy, the imminence of the expiration of the statute of limitations, or where immediate action is necessary to protect the interests of the Government).

(1) If the case involves an exempt status issue on which EO Technical had issued a previous contrary ruling or technical advice, EO Determinations generally must seek technical advice from EO Technical.

(2) EO Determinations does not have to seek technical advice if the prior ruling or technical advice has been revoked by subsequent contrary published precedent or if the proposed revocation involves a subordinate unit of an organization that holds a group exemption letter issued by EO Technical, the EO Technical ruling or technical advice was issued under the Internal Revenue Code of 1939 or prior revenue acts, or if the ruling was issued in response to Form 4653, *Notification Concerning Foundation Status.*

SECTION 13. EFFECT ON OTHER REVENUE PROCEDURES

Rev. Proc. 2009–9 is superseded.

SECTION 14. EFECTIVE DATE

This revenue procedure is effective January 11, 2010.

SECTION 15. PAPERWORK REDUCTION ACT

The collection of information for a letter application under section 3.05 of this revenue procedure has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545–2080. All other collections of information under this revenue procedure have been approved under separate OMB control numbers.

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

The collection of this information is required if an organization wants to be recognized as tax-exempt by the Service. We need the information to determine whether the organization meets the legal requirements for tax-exempt status. In addition, this information will be used to help the Service delete certain information from the text of an adverse determination letter or ruling before it is made available for public inspection, as required by § 6110.

The time needed to complete and file a letter application will vary depending on individual circumstances. The estimated average time is 10 hours.

Books and records relating to the collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. The rules governing the confidentiality of letter applications are covered in § 6104.

DRAFTING INFORMATION

The principal author of this revenue procedure is Matthew Giuliano of the Exempt Organizations, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, please contact the TE/GE Customer Service office at (877) 829–5500 (a toll-free call).

26 CFR 601.602: Forms and Instructions.
(Also: Part I, Section 6012; 1.6012–1.)

Rev. Proc. 2010–11

SECTION 1. PURPOSE

The purpose of this revenue procedure is to modify the conditions established in Rev. Proc. 80–59, 1980–2 C.B. 855, under which a trustee of a blind trust that meets the requirements of section 102(f)(3) of the Appendix to Title 5 of the United States Code (or any successor provision of the United States Code) may execute and file an income tax return on behalf of any individual described in section 101(f) of the Appendix to Title 5 of the United States Code (or any successor provision of the United States Code) ("eligible individual").

SECTION 2. CHANGES

This revenue procedure modifies and supersedes Revenue Procedure 80–59, by eliminating the requirement that an eligible individual receive advance permission from the Service for the trustee to make the income tax return on behalf of the eligible individual prior to filing of the eligible individual's income tax return. This revenue procedure requires the eligible individual to submit with the relevant income tax return both the letter requesting permission for the trustee to make the income tax return on behalf of the eligible individual and a power of attorney. The revenue procedure further provides that permission will be granted automatically where the blind trust meets the requirements of section 102(f)(3) of the Appendix to Title 5 of the United States Code (or any successor provision of the United States Code).

SECTION 3. BACKGROUND

.01 Section 102(f)(4)(B) of the Appendix to Title 5 of the United States Code provides that, in the case of a trust created for the benefit of an eligible individual, an asset placed in trust will not be considered a financial interest of the individual for purposes of section 208 of Title 18 of the United States Code, and any other conflict of interest statutes or regulations, if certain requirements are met, including giving the trustee the power to prepare on behalf of the individual the personal income tax return and similar returns which may contain information relating to the trust.

.02 Section 1.6012–1(a)(5) of the Income Tax Regulations, concerning returns made by agents, permits a return to be made by an agent if the taxpayer requests permission, in writing, and the appropriate IRS official determines that good cause exists for permitting an agent to make the return. That section provides that whenever a return is made by an agent it must be accompanied by a power of attorney (or copy thereof) authorizing the agent to represent the principal in making the return.

.03 Section 601.504(a) of the Conference and Practice Requirements, Statement of Procedural Rules, provides that a power of attorney is required when the taxpayer wishes to authorize a recognized representative to represent the taxpayer before the Internal Revenue Service or perform the following acts on behalf of the taxpayer: (1) Offer or execute either a waiver of restriction on assessment or collection of a deficiency in tax or a waiver of notice of disallowance of a claim for credit or refund on behalf of the taxpayer, (2) Execute a consent to extend the statutory period for assessment or collection of a tax on behalf of the taxpayer, (3) Execute a closing agreement on behalf of the taxpayer, (4) Receive (but not endorse or collect) a check in payment of any refund of taxes, penalties or interest on behalf of the taxpayer, or (5) Sign a tax return under certain conditions.

.04 Section 601.506(a) of the Conference and Practice Requirements, Statement of Procedural Rules, provides that any notice or communication (or a copy thereof) required or permitted to be given to a taxpayer in any matter before the Service shall be given to the taxpayer and, unless restricted by the taxpayer, to the taxpayer's recognized representative.

SECTION 4. APPLICATION

.01 An eligible individual who has an interest in a blind trust that meets the requirements of section 102(f)(3) of the Appendix to Title 5 of the United States Code (or any successor provision of the United States Code) must request permission, in writing, for the trustee of the blind trust to execute and file the Federal income tax return of the eligible individual.

.02 Both the letter requesting permission and a power of attorney (or copy thereof) that grants the trustee authority to sign the return, to receive (but not endorse or collect) a refund check, to execute a waiver of restriction on assessment or collection, to execute a waiver of notice of disallowance, to execute a consent to extend the period for assessment or collection, and to execute a closing agreement must be submitted to the Internal Revenue Service with the eligible individual's Federal income tax return when the tax return is filed.

.03 The eligible individual who has an interest in a blind trust that meets the requirements of section 102(f)(3) of the Appendix to Title 5 of the United States Code (or any successor provision of the United States Code), and who submits the written request for permission and power of attorney consistent with paragraph .02 above, will be considered to have shown good cause for having the return filed by the trustee, and will be deemed to have been granted such permission. The eligible individual must submit a separate request for permission for the trustee to execute and file the Federal income tax return each taxable year.

.04 Notwithstanding the provisions of section 601.506(a) of the Conference and Practice Requirements, Statement of Procedural Rules, all notices or other written communication required or permitted to be given to the eligible individual will be given only to the trustee.

SECTION 5. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 80–59 is modified and superseded.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective for income tax returns due (including any extension of time to file) on or after the date of its publication in the Internal Revenue Bulletin.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Richard Goldstein of the Office of Associate Chief Counsel (Procedure & Administration). For further

information regarding this revenue procedure, contact Steve Coleman at (202) 622–4910 (not a toll-free call).

Part IV. Items of General Interest

German Consular Employees MAP Agreement

Announcement 2010–2

The following is a copy of the Competent Authority Agreement entered into on October 1, 2009, by the competent authorities of the United States of America and Germany with respect to the taxation of certain consular employees under the U.S.-Germany income tax treaty and protocol.

The text of the Competent Authority Agreement is as follows:

COMPETENT AUTHORITY AGREEMENT

The Competent Authorities of the United States and Germany enter into the following agreement ("Agreement") concerning the taxation of certain consular employees under the Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, signed at Bonn on August 29, 1989, as amended by the Protocol, signed at Berlin on June 1, 2006 (the "Tax Treaty").

This Agreement is entered into pursuant to paragraph 3(a)(aa) of Article 1 and paragraph 3 of Article 25 (Mutual Agreement Procedure) of the Tax Treaty. Paragraph 3(a)(aa) of Article 1 provides that the Contracting States may agree that any question arising as to the interpretation or application of the Tax Treaty and, in particular, whether a taxation measure is within the scope of the Tax Treaty, shall be determined exclusively in accordance with the provisions of Article 25 of the Tax Treaty.

Paragraph 1(b) of Article 19 (Government Service) of the Tax Treaty provides that remuneration paid by the State for which the services are provided (the "sending State") shall be taxable only in the Contracting State in which the services are rendered (the "receiving State") if the individual is a resident of the receiving State who: (i) is a national of the receiving State, or (ii) did not become a resident of the receiving State solely for the purpose of rendering the services (*i.e.*, the individual was a resident of the receiving State prior to being hired, even if the individual is a national of the sending State). By these terms, the remuneration of certain consular employees of the United States working in Germany who are U.S. nationals would be taxable in Germany, and the remuneration of certain consular employees of Germany working in the United States who are German nationals would be taxable in the United States.

Article XIX of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, signed at Washington on December 8, 1923 (the "Consular Treaty") provides: "All consular officers and employees, nationals of the State appointing them shall be exempt from the payment of taxes on the salary, fees, or wages received by them in compensation for their consular services."

It has come to the attention of the Competent Authorities that, in light of the Consular Treaty, difficulties have arisen as to whether the taxation of the remuneration of consular employees of the United States and Germany who are nationals of the sending State but residents of the receiving State and who fall outside the scope of the Vienna Convention on Consular Relations (such consular employees hereinafter referred to as "resident consular employees") is within the scope of the Tax Treaty.

Paragraph 2(b) of Article 1 (General Scope) of the Tax Treaty provides that the Tax Treaty shall not restrict in any manner any exemption accorded by any other agreement to which the Contracting States are a party.

Under the authority of Paragraph 3(a)(aa) of Article 1 of the Tax Treaty, the Competent Authorities agree that Article XIX of the Consular Treaty constitutes an "exemption" accorded by the Consular Treaty within the meaning of Paragraph 2(b) of Article 1 of the Tax Treaty. The Competent Authorities further note that it is the view of the Governments of Germany and the United States that Article XIX provides an exemption from income tax in the receiving State for resident consular employees, as that term is defined herein. Therefore, such resident consular employees are not subject to Paragraph 1(b) of Article 19 of the Tax Treaty. Thus, in accordance with Article 1 of the Tax Treaty, taxation of the remuneration of such employees is not within the scope of the Tax Treaty. Article XIX of the Consular Treaty applies and the remuneration of such resident consular employees of the United States working in Germany who are U.S. (or dual) nationals is exempt from tax in Germany, and the remuneration of such resident consular employees of Germany working in the United States who are German (or dual) nationals is exempt from tax in the United States.

Barry B. Shott
United States Competent Authority

Date: _____

Dieter Eimermann
German Competent Authority

Date: _____

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

Numerical Finding List[1]

Bulletins 2010–1 through 2010–2

Announcements:

Notices:

Revenue Procedures:

Revenue Rulings:

[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2009–27 through 2009–52 is in Internal Revenue Bulletin 2009–52, dated December 28, 2009.

Finding List of Current Actions on Previously Published Items[1]

Bulletins 2010–1 through 2010–2

Notices:

2008-55
Modified by
Notice 2010-3, 2010-2 I.R.B. *253*

2009-38
Amplified and superseded by
Notice 2010-2, 2010-2 I.R.B. *251*

Revenue Procedures:

80-59
Modified and superseded by
Rev. Proc. 2010-11, 2010-2 I.R.B. *269*

87-35
Obsoleted by
Rev. Proc. 2010-3, 2010-1 I.R.B. *110*

2009-1
Superseded by
Rev. Proc. 2010-1, 2010-1 I.R.B. *1*

2009-2
Superseded by
Rev. Proc. 2010-2, 2010-1 I.R.B. *90*

2009-3
Superseded by
Rev. Proc. 2010-3, 2010-1 I.R.B. *110*

2009-4
Superseded by
Rev. Proc. 2010-4, 2010-1 I.R.B. *122*

2009-5
Superseded by
Rev. Proc. 2010-5, 2010-1 I.R.B. *165*

2009-6
Superseded by
Rev. Proc. 2010-6, 2010-1 I.R.B. *193*

2009-7
Superseded by
Rev. Proc. 2010-7, 2010-1 I.R.B. *231*

2009-8
Superseded by
Rev. Proc. 2010-8, 2010-1 I.R.B. *234*

2009-9
Superseded by
Rev. Proc. 2010-9, 2010-2 I.R.B. *258*

2009-25
Superseded by
Rev. Proc. 2010-3, 2010-1 I.R.B. *110*

[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2009–27 through 2009–52 is in Internal Revenue Bulletin 2009–52, dated December 28, 2009.

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