Internal Revenue
bulletin

Bulletin No. 2012-13
March 26, 2012

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. 2012–8, page 563.

Interest rates; underpayment and overpayments. The rates for interest determined under section 6621 of the Code for the calendar quarter beginning April 1, 2012, will be 3 percent for overpayments (2 percent in the case of a corporation), 3 percent for the underpayments, and 5 percent for large corporate underpayments. The rate of interest paid on the portion of a corporate overpayment exceeding $10,000 will be 0.5 percent.

REG–110980–10, page 581.

Proposed regulations under section 417 of the Code provide guidance relating to the minimum present value requirements applicable to partial annuity distribution options under defined benefit pension plans. The regulations would make changes under section 417(e) that would permit plans to simplify the treatment of certain optional forms of benefit that are paid partly in the form of an annuity and partly in a more accelerated form. A public hearing is scheduled for June 1, 2012.

Notice 2012–20, page 574.

This notice provides guidance relating to the portfolio interest exception, the short term debt exception under regulations section 1.6049–5(b)(10), and the excise tax under section 4701 in connection with the repeal of section 163(f)(2)(B) (the bearer debt repeal) of the Code. Notice 2006–99 superseded in part.

Notice 2012–22, page 576.

This notice advises State and local housing credit agencies that allocate low-income housing tax credits under section 42 of the Code, and States and other issuers of tax-exempt private activity bonds under section 141, of the population figures to use in calculating: (1) the 2012 calendar year population-based component of the State housing credit ceiling (Credit Ceiling) under section 42(h)(3)(C)(ii); (2) the 2012 calendar year volume cap (Volume Cap) under section 146; and (3) the 2012 volume limit (Volume Limit) under section 142(k)(5).

EMPLOYEE PLANS

REG–115809–11, page 598.

Proposed regulations under section 401 of the Code relate to the purchase of longevity annuity contracts under tax-qualified defined contribution plans under section 401(a), section 403(b) plans, individual retirement annuities and accounts (IRAs) under section 408, and eligible governmental section 457 plans. The regulations will provide the public with guidance necessary to comply with the required minimum distribution rules under section 401(a)(9). The regulations will affect individuals for whom a longevity annuity contract is purchased under these plans and IRAs (and their beneficiaries), sponsors and administrators of these plans, trustees and custodians of these IRAs, and insurance companies that issue longevity annuity contracts under these plans and IRAs. A public hearing is scheduled for June 1, 2012.

Notice 2012–24, page 578.

Weighted average interest rate update; corporate bond indices; 30-year Treasury securities; segment rates. This notice contains updates for the corporate bond weighted average interest rate for plan years beginning in March 2012; the 24-month average segment rates; the funding transitional segment rates applicable for March 2012; and the minimum present value transitional rates for February 2012.

(Continued on the next page)

Finding Lists begin on page ii.
Index for January through March begins on page iv.

Department of the Treasury
Internal Revenue Service

EXCISE TAX

REG–113770–10, page 587.

Proposed regulations under section 4191 of the Code provide guidance on the new excise tax on certain medical devices. Specifically, the proposed rules clarify what constitutes a "taxable medical device", what types of devices are exempt from the tax, and what types of sales of otherwise taxable devices may be exempt from the tax if certain requirements are met. Proposed regulations on the medical device excise tax, when finalized, will affect medical device manufacturers and importers, and some medical device distributors. A public hearing is scheduled for May 16, 2012.

Notice 2012–20, page 574.

This notice provides guidance relating to the portfolio interest exception, the short term debt exception under regulations section 1.6049–5(b)(10), and the excise tax under section 4701 in connection with the repeal of section 163(f)(2)(B) (the bearer debt repeal) of the Code. Notice 2006–99 superseded in part.

ADMINISTRATIVE

Announcement 2012–11, page 611.

This announcement withdraws a notice of proposed regulation (REG–208274–86, 1993–1 C.B. 822) under section 6039E of the Code which specifies the information that must be included and provide guidance on when the IRS may impose a $500 penalty for failure to provide that information. U.S. citizens who apply for passports from the Department of State are required by the IRS to provide certain information on the application form.

The IRS Mission

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

Introduction

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

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

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

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

The Bulletin is divided into four parts as follows:

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

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

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

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

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

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

Section 4221.—Certain Tax-Free Sales

A Notice of Proposed Rulemaking (NPRM) notes that the exemptions described in section 4221(a)(3) through (a)(6) will not apply to the tax imposed by section 4191, enacted by section 1405 of the Health Care and Reconciliation Act of 2010 (HCERA), Public Law 111–152 (124 Stat. 1029 (2010)), in conjunction with the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)). HCERA amended section 4221(a) of the Internal Revenue Code to limit the types of sales to be exempt from the tax imposed by section 4191 (effective for sales after December 31, 2012). See REG-113770-10, page 587.

A Notice of Proposed Rulemaking (NPRM) describes the circumstances under which the assembly or production of a "kit," as defined in the proposed regulations, constitutes further manufacture. See REG-113770-10, page 587.

Section 6416.—Certain Taxes on Sales and Services

A Notice of Proposed Rulemaking (NPRM) notes that tax paid with respect to certain specified uses and resales described in section 6416(a)(2) will not be deemed overpayments in the case of the tax imposed by section 4191, enacted by section 1405 of the Health Care and Reconciliation Act of 2010 (HCERA), Public Law 111–152 (124 Stat. 1029 (2010)), in conjunction with the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)). HCERA amended section 6416(b)(2) of the Internal Revenue Code to limit the types of sales and uses to be exempted from the tax imposed by section 4191 (effective for sales after December 31, 2012). See REG-113770-10, page 587.

Section 6621.—Determination of Rate of Interest

26 CFR 301.6621–1: Interest rate.

Interest rates; underpayment and overpayments. The rates for interest determined under section 6621 of the Code for the calendar quarter beginning April 1, 2012, will be 3 percent for overpayments (2 percent in the case of a corporation), 3 percent for the underpayments, and 5 percent for large corporate underpayments. The rate of interest paid on the portion of a corporate overpayment exceeding $10,000 will be 0.5 percent.

Rev. Rul. 2012–8

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

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

Section 6621(b)(1) provides that the Secretary will determine the federal short-term rate for the first month in each calendar quarter. Section 6621(b)(2)(A) provides that the federal short-term rate determined under section 6621(b)(1) for any month applies during the first calendar quarter beginning after that month. Section 6621(b)(2)(B) provides that in determining the addition to tax under section 6654 for failure to pay estimated tax for any taxable year, the federal short-term rate that applies during the third month following the taxable year also applies during the first 15 days of the fourth month following the taxable year. Section 6621(b)(3) provides that the federal short-term rate for any month is the federal short-term rate determined during that month by the Secretary in accordance with section 1274(d), rounded to the nearest full percent (or, if a multiple of 1/2 of 1 percent, the rate is increased to the next highest full percent).

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

The federal short-term rate determined in accordance with section 1274(d) during January 2012 is the rate published in Revenue Ruling 2012–7, 2012–6 I.R.B. 362, to take effect beginning February 1, 2012. The federal short-term rate, rounded to the nearest full percent, based on daily compounding determined during the month of January 2012 is 0 percent. Accordingly, an overpayment rate of 3 percent (2 percent in the case of a corporation) and an underpayment rate of 3 percent are established for the calendar quarter beginning April 1, 2012. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 for the calendar quarter beginning April 1, 2012, is 0.5 percent. The underpayment rate for large corporate underpayments for the calendar quarter beginning April 1, 2012, is 5 percent. These rates apply to amounts bearing interest during that calendar quarter.

The 3 percent rate also applies to estimated tax underpayments for the second calendar quarter in 2012. And, under section 6621(b)(2)(B), the federal short term rate of 3 percent applicable for March 2012 applies for the first 15 days in April 2012 to estimated tax underpayments made by an individual with a taxable year ending December 31.

Interest factors for daily compound interest for annual rates of 0.5 percent are published in Appendix A of this Revenue Ruling. Interest factors for daily compound interest for annual rates of 2 percent, 3 percent and 5 percent are published in Tables 57, 59, and 63 of Rev. Proc. 95–17, 1995–1 C.B. 611, 613, and 617.

Annual interest rates to be compounded daily pursuant to section 6622 that apply

for prior periods are set forth in the tables accompanying this revenue ruling.

DRAFTING INFORMATION

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

APPENDIX A

365 Day Year

0.5% Compound Rate 184 Days

Days	Factor	Days	Factor	Days	Factor
1	0.000013699	63	0.000863380	125	0.001713784
2	0.000027397	64	0.000877091	126	0.001727506
3	0.000041096	65	0.000890801	127	0.001741228
4	0.000054796	66	0.000904512	128	0.001754951
5	0.000068495	67	0.000918223	129	0.001768673
6	0.000082195	68	0.000931934	130	0.001782396
7	0.000095894	69	0.000945646	131	0.001796119
8	0.000109594	70	0.000959357	132	0.001809843
9	0.000123294	71	0.000973069	133	0.001823566
10	0.000136995	72	0.000986781	134	0.001837290
11	0.000150695	73	0.001000493	135	0.001851013
12	0.000164396	74	0.001014206	136	0.001864737
13	0.000178097	75	0.001027918	137	0.001878462
14	0.000191798	76	0.001041631	138	0.001892186
15	0.000205499	77	0.001055344	139	0.001905910
16	0.000219201	78	0.001069057	140	0.001919635
17	0.000232902	79	0.001082770	141	0.001933360
18	0.000246604	80	0.001096484	142	0.001947085
19	0.000260306	81	0.001110197	143	0.001960811
20	0.000274008	82	0.001123911	144	0.001974536
21	0.000287711	83	0.001137625	145	0.001988262
22	0.000301413	84	0.001151339	146	0.002001988
23	0.000315116	85	0.001165054	147	0.002015714
24	0.000328819	86	0.001178768	148	0.002029440
25	0.000342522	87	0.001192483	149	0.002043166
26	0.000356225	88	0.001206198	150	0.002056893
27	0.000369929	89	0.001219913	151	0.002070620
28	0.000383633	90	0.001233629	152	0.002084347
29	0.000397336	91	0.001247344	153	0.002098074
30	0.000411041	92	0.001261060	154	0.002111801
31	0.000424745	93	0.001274776	155	0.002125529
32	0.000438449	94	0.001288492	156	0.002139257
33	0.000452154	95	0.001302208	157	0.002152985
34	0.000465859	96	0.001315925	158	0.002166713
35	0.000479564	97	0.001329641	159	0.002180441
36	0.000493269	98	0.001343358	160	0.002194169
37	0.000506974	99	0.001357075	161	0.002207898
38	0.000520680	100	0.001370792	162	0.002221627
39	0.000534386	101	0.001384510	163	0.002235356
40	0.000548092	102	0.001398227	164	0.002249085
41	0.000561798	103	0.001411945	165	0.002262815
42	0.000575504	104	0.001425663	166	0.002276544
43	0.000589211	105	0.001439381	167	0.002290274
44	0.000602917	106	0.001453100	168	0.002304004
45	0.000616624	107	0.001466818	169	0.002317734
46	0.000630331	108	0.001480537	170	0.002331465
47	0.000644039	109	0.001494256	171	0.002345195
48	0.000657746	110	0.001507975	172	0.002358926
49	0.000671454	111	0.001521694	173	0.002372657

365 Day Year

0.5% Compound Rate 184 Days

Days	Factor	Days	Factor	Days	Factor
50	0.000685161	112	0.001535414	174	0.002386388
51	0.000698869	113	0.001549133	175	0.002400120
52	0.000712578	114	0.001562853	176	0.002413851
53	0.000726286	115	0.001576573	177	0.002427583
54	0.000739995	116	0.001590293	178	0.002441315
55	0.000753703	117	0.001604014	179	0.002455047
56	0.000767412	118	0.001617734	180	0.002468779
57	0.000781121	119	0.001631455	181	0.002482511
58	0.000794831	120	0.001645176	182	0.002496244
59	0.000808540	121	0.001658897	183	0.002509977
60	0.000822250	122	0.001672619	184	0.002523710
61	0.000835960	123	0.001686340		
62	0.000849670	124	0.001700062		

366 Day Year

0.5% Compound Rate 184 Days

Days	Factor	Days	Factor	Days	Factor
1	0.000013661	63	0.000861020	125	0.001709097
2	0.000027323	64	0.000874693	126	0.001722782
3	0.000040984	65	0.000888366	127	0.001736467
4	0.000054646	66	0.000902040	128	0.001750152
5	0.000068308	67	0.000915713	129	0.001763837
6	0.000081970	68	0.000929387	130	0.001777522
7	0.000095632	69	0.000943061	131	0.001791208
8	0.000109295	70	0.000956735	132	0.001804893
9	0.000122958	71	0.000970409	133	0.001818579
10	0.000136620	72	0.000984084	134	0.001832265
11	0.000150283	73	0.000997758	135	0.001845951
12	0.000163947	74	0.001011433	136	0.001859638
13	0.000177610	75	0.001025108	137	0.001873324
14	0.000191274	76	0.001038783	138	0.001887011
15	0.000204938	77	0.001052459	139	0.001900698
16	0.000218602	78	0.001066134	140	0.001914385
17	0.000232266	79	0.001079810	141	0.001928073
18	0.000245930	80	0.001093486	142	0.001941760
19	0.000259595	81	0.001107162	143	0.001955448
20	0.000273260	82	0.001120839	144	0.001969136
21	0.000286924	83	0.001134515	145	0.001982824
22	0.000300590	84	0.001148192	146	0.001996512
23	0.000314255	85	0.001161869	147	0.002010201
24	0.000327920	86	0.001175546	148	0.002023889
25	0.000341586	87	0.001189223	149	0.002037578
26	0.000355252	88	0.001202900	150	0.002051267
27	0.000368918	89	0.001216578	151	0.002064957
28	0.000382584	90	0.001230256	152	0.002078646
29	0.000396251	91	0.001243934	153	0.002092336
30	0.000409917	92	0.001257612	154	0.002106025
31	0.000423584	93	0.001271291	155	0.002119715
32	0.000437251	94	0.001284969	156	0.002133405
33	0.000450918	95	0.001298648	157	0.002147096
34	0.000464586	96	0.001312327	158	0.002160786
35	0.000478253	97	0.001326006	159	0.002174477
36	0.000491921	98	0.001339685	160	0.002188168
37	0.000505589	99	0.001353365	161	0.002201859
38	0.000519257	100	0.001367044	162	0.002215550

366 Day Year

0.5% Compound Rate 184 Days

Days	Factor	Days	Factor	Days	Factor
39	0.000532925	101	0.001380724	163	0.002229242
40	0.000546594	102	0.001394404	164	0.002242933
41	0.000560262	103	0.001408085	165	0.002256625
42	0.000573931	104	0.001421765	166	0.002270317
43	0.000587600	105	0.001435446	167	0.002284010
44	0.000601269	106	0.001449127	168	0.002297702
45	0.000614939	107	0.001462808	169	0.002311395
46	0.000628608	108	0.001476489	170	0.002325087
47	0.000642278	109	0.001490170	171	0.002338780
48	0.000655948	110	0.001503852	172	0.002352473
49	0.000669618	111	0.001517533	173	0.002366167
50	0.000683289	112	0.001531215	174	0.002379860
51	0.000696959	113	0.001544897	175	0.002393554
52	0.000710630	114	0.001558580	176	0.002407248
53	0.000724301	115	0.001572262	177	0.002420942
54	0.000737972	116	0.001585945	178	0.002434636
55	0.000751643	117	0.001599628	179	0.002448331
56	0.000765315	118	0.001613311	180	0.002462025
57	0.000778986	119	0.001626994	181	0.002475720
58	0.000792658	120	0.001640678	182	0.002489415
59	0.000806330	121	0.001654361	183	0.002503110
60	0.000820003	122	0.001668045	184	0.002516806
61	0.000833675	123	0.001681729		
62	0.000847348	124	0.001695413		

TABLE OF INTEREST RATES

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

OVERPAYMENTS AND UNDERPAYMENTS

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

TABLE OF INTEREST RATES

FROM JAN. 1, 1987 — DEC. 31, 1998

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 1987—Mar. 31, 1987	8%	21	575	9%	23	577
Apr. 1, 1987—Jun. 30, 1987	8%	21	575	9%	23	577
Jul. 1, 1987—Sep. 30, 1987	8%	21	575	9%	23	577
Oct. 1, 1987—Dec. 31, 1987	9%	23	577	10%	25	579
Jan. 1, 1988—Mar. 31, 1988	10%	73	627	11%	75	629
Apr. 1, 1988—Jun. 30, 1988	9%	71	625	10%	73	627
Jul. 1, 1988—Sep. 30, 1988	9%	71	625	10%	73	627
Oct. 1, 1988—Dec. 31, 1988	10%	73	627	11%	75	629
Jan. 1, 1989—Mar. 31, 1989	10%	25	579	11%	27	581
Apr. 1, 1989—Jun. 30, 1989	11%	27	581	12%	29	583
Jul. 1, 1989—Sep. 30, 1989	11%	27	581	12%	29	583
Oct. 1, 1989—Dec. 31, 1989	10%	25	579	11%	27	581
Jan. 1, 1990—Mar. 31, 1990	10%	25	579	11%	27	581
Apr. 1, 1990—Jun. 30, 1990	10%	25	579	11%	27	581
Jul. 1, 1990—Sep. 30, 1990	10%	25	579	11%	27	581
Oct. 1, 1990—Dec. 31, 1990	10%	25	579	11%	27	581
Jan. 1, 1991—Mar. 31, 1991	10%	25	579	11%	27	581
Apr. 1, 1991—Jun. 30, 1991	9%	23	577	10%	25	579
Jul. 1, 1991—Sep. 30, 1991	9%	23	577	10%	25	579
Oct. 1, 1991—Dec. 31, 1991	9%	23	577	10%	25	579
Jan. 1, 1992—Mar. 31, 1992	8%	69	623	9%	71	625
Apr. 1, 1992—Jun. 30, 1992	7%	67	621	8%	69	623
Jul. 1, 1992—Sep. 30, 1992	7%	67	621	8%	69	623
Oct. 1, 1992—Dec. 31, 1992	6%	65	619	7%	67	621
Jan. 1, 1993—Mar. 31, 1993	6%	17	571	7%	19	573
Apr. 1, 1993—Jun. 30, 1993	6%	17	571	7%	19	573
Jul. 1, 1993—Sep. 30, 1993	6%	17	571	7%	19	573
Oct. 1, 1993—Dec. 31, 1993	6%	17	571	7%	19	573
Jan. 1, 1994—Mar. 31, 1994	6%	17	571	7%	19	573
Apr. 1, 1994—Jun. 30, 1994	6%	17	571	7%	19	573
Jul. 1, 1994—Sep. 30, 1994	7%	19	573	8%	21	575
Oct. 1, 1994—Dec. 31, 1994	8%	21	575	9%	23	577
Jan. 1, 1995—Mar. 31, 1995	8%	21	575	9%	23	577
Apr. 1, 1995—Jun. 30, 1995	9%	23	577	10%	25	579
Jul. 1, 1995—Sep. 30, 1995	8%	21	575	9%	23	577
Oct. 1, 1995—Dec. 31, 1995	8%	21	575	9%	23	577
Jan. 1, 1996—Mar. 31, 1996	8%	69	623	9%	71	625
Apr. 1, 1996—Jun. 30, 1996	7%	67	621	8%	69	623
Jul. 1, 1996—Sep. 30, 1996	8%	69	623	9%	71	625
Oct. 1, 1996—Dec. 31, 1996	8%	69	623	9%	71	625
Jan. 1, 1997—Mar. 31, 1997	8%	21	575	9%	23	577
Apr. 1, 1997—Jun. 30, 1997	8%	21	575	9%	23	577
Jul. 1, 1997—Sep. 30, 1997	8%	21	575	9%	23	577
Oct. 1, 1997—Dec. 31, 1997	8%	21	575	9%	23	577
Jan. 1, 1998—Mar. 31, 1998	8%	21	575	9%	23	577
Apr. 1, 1998—Jun. 30, 1998	7%	19	573	8%	21	575
Jul. 1, 1998—Sep. 30, 1998	7%	19	573	8%	21	575
Oct. 1, 1998—Dec. 31, 1998	7%	19	573	8%	21	575

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT

NONCORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1999—Mar. 31, 1999	7%	19	573
Apr. 1, 1999—Jun. 30, 1999	8%	21	575
Jul. 1, 1999—Sep. 30, 1999	8%	21	575
Oct. 1, 1999—Dec. 31, 1999	8%	21	575
Jan. 1, 2000—Mar. 31, 2000	8%	69	623
Apr. 1, 2000—Jun. 30, 2000	9%	71	625
Jul. 1, 2000—Sep. 30, 2000	9%	71	625
Oct. 1, 2000—Dec. 31, 2000	9%	71	625
Jan. 1, 2001—Mar. 31, 2001	9%	23	577
Apr. 1, 2001—Jun. 30, 2001	8%	21	575
Jul. 1, 2001—Sep. 30, 2001	7%	19	573
Oct. 1, 2001—Dec. 31, 2001	7%	19	573
Jan. 1, 2002—Mar. 31, 2002	6%	17	571
Apr. 1, 2002—Jun. 30, 2002	6%	17	571
Jul. 1, 2002—Sep. 30, 2002	6%	17	571
Oct. 1, 2002—Dec. 31, 2002	6%	17	571
Jan. 1, 2003—Mar. 31, 2003	5%	15	569
Apr. 1, 2003—Jun. 30, 2003	5%	15	569
Jul. 1, 2003—Sep. 30, 2003	5%	15	569
Oct. 1, 2003—Dec. 31, 2003	4%	13	567
Jan. 1, 2004—Mar. 31, 2004	4%	61	615
Apr. 1, 2004—Jun. 30, 2004	5%	63	617
Jul. 1, 2004—Sep. 30, 2004	4%	61	615
Oct. 1, 2004—Dec. 31, 2004	5%	63	617
Jan. 1, 2005—Mar. 31, 2005	5%	15	569
Apr. 1, 2005—Jun. 30, 2005	6%	17	571
Jul. 1, 2005—Sep. 30, 2005	6%	17	571
Oct. 1, 2005—Dec. 31, 2005	7%	19	573
Jan. 1, 2006—Mar. 31, 2006	7%	19	573
Apr. 1, 2006—Jun. 30, 2006	7%	19	573
Jul. 1, 2006—Sep. 30, 2006	8%	21	575
Oct. 1, 2006—Dec. 31, 2006	8%	21	575
Jan. 1, 2007—Mar. 31, 2007	8%	21	575
Apr. 1, 2007—Jun. 30, 2007	8%	21	575
Jul. 1, 2007—Sep. 30, 2007	8%	21	575
Oct. 1, 2007—Dec. 31, 2007	8%	21	575
Jan. 1, 2008—Mar. 31, 2008	7%	67	621
Apr. 1, 2008—Jun. 30, 2008	6%	65	619
Jul. 1, 2008—Sep. 30, 2008	5%	63	617
Oct. 1, 2008—Dec. 31, 2008	6%	65	619
Jan. 1, 2009—Mar. 31, 2009	5%	15	569
Apr. 1, 2009—Jun. 30, 2009	4%	13	567
Jul. 1, 2009—Sep. 30, 2009	4%	13	567
Oct. 1, 2009—Dec. 31, 2009	4%	13	567
Jan. 1, 2010—Mar. 31, 2010	4%	13	567
Apr. 1, 2010—Jun. 30, 2010	4%	13	567
Jul. 1, 2010—Sep. 30, 2010	4%	13	567
Oct. 1, 2010—Dec. 31, 2010	4%	13	567
Jan. 1, 2011—Mar. 31, 2011	3%	11	565
Apr. 1, 2011—June 30, 2011	4%	13	567
Jul. 1, 2011—Sep. 30, 2011	4%	13	567
Oct. 1, 2011—Dec. 31, 2011	3%	11	565
Jan. 1, 2012—Mar. 31, 2012	3%	59	613
Apr. 1, 2012—Jun. 30, 2012	3%	59	613

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT

CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 1999—Mar. 31, 1999	6%	17	571	7%	19	573
Apr. 1, 1999—Jun. 30, 1999	7%	19	573	8%	21	575
Jul. 1, 1999—Sep. 30, 1999	7%	19	573	8%	21	575
Oct. 1, 1999—Dec. 31, 1999	7%	19	573	8%	21	575
Jan. 1, 2000—Mar. 31, 2000	7%	67	621	8%	69	623
Apr. 1, 2000—Jun. 30, 2000	8%	69	623	9%	71	625
Jul. 1, 2000—Sep. 30, 2000	8%	69	623	9%	71	625
Oct. 1, 2000—Dec. 31, 2000	8%	69	623	9%	71	625
Jan. 1, 2001—Mar. 31, 2001	8%	21	575	9%	23	577
Apr. 1, 2001—Jun. 30, 2001	7%	19	573	8%	21	575
Jul. 1, 2001—Sep. 30, 2001	6%	17	571	7%	19	573
Oct. 1, 2001—Dec. 31, 2001	6%	17	571	7%	19	573
Jan. 1, 2002—Mar. 31, 2002	5%	15	569	6%	17	571
Apr. 1, 2002—Jun. 30, 2002	5%	15	569	6%	17	571
Jul. 1, 2002—Sep. 30, 2002	5%	15	569	6%	17	571
Oct. 1, 2002—Dec. 31, 2002	5%	15	569	6%	17	571
Jan. 1, 2003—Mar. 31, 2003	4%	13	567	5%	15	569
Apr. 1, 2003—Jun. 30, 2003	4%	13	567	5%	15	569
Jul. 1, 2003—Sep. 30, 2003	4%	13	567	5%	15	569
Oct. 1, 2003—Dec. 31, 2003	3%	11	565	4%	13	567
Jan. 1, 2004—Mar. 31, 2004	3%	59	613	4%	61	615
Apr. 1, 2004—Jun. 30, 2004	4%	61	615	5%	63	617
Jul. 1, 2004—Sep. 30, 2004	3%	59	613	4%	61	615
Oct. 1, 2004—Dec. 31, 2004	4%	61	615	5%	63	617
Jan. 1, 2005—Mar. 31, 2005	4%	13	567	5%	15	569
Apr. 1, 2005—Jun. 30, 2005	5%	15	569	6%	17	571
Jul. 1, 2005—Sep. 30, 2005	5%	15	569	6%	17	571
Oct. 1, 2005—Dec. 31, 2005	6%	17	571	7%	19	573
Jan. 1, 2006—Mar. 31, 2006	6%	17	571	7%	19	573
Apr. 1, 2006—Jun. 30, 2006	6%	17	571	7%	19	573
Jul. 1, 2006—Sep. 30, 2006	7%	19	573	8%	21	575
Oct. 1, 2006—Dec. 31, 2006	7%	19	573	8%	21	575
Jan. 1, 2007—Mar. 31, 2007	7%	19	573	8%	21	575
Apr. 1, 2007—Jun. 30, 2007	7%	19	573	8%	21	575
Jul. 1, 2007—Sep. 30, 2007	7%	19	573	8%	21	575
Oct. 1, 2007—Dec. 31, 2007	7%	19	573	8%	21	575
Jan. 1, 2008—Mar. 31, 2008	6%	65	619	7%	67	621
Apr. 1, 2008—Jun. 30, 2008	5%	63	617	6%	65	619
Jul. 1, 2008—Sep. 30, 2008	4%	61	615	5%	63	617
Oct. 1, 2008—Dec. 31, 2008	5%	63	617	6%	65	619
Jan. 1, 2009—Mar. 31, 2009	4%	13	567	5%	15	569
Apr. 1, 2009—Jun. 30, 2009	3%	11	565	4%	13	567
Jul. 1, 2009—Sep. 30, 2009	3%	11	565	4%	13	567
Oct. 1, 2009—Dec. 31, 2009	3%	11	565	4%	13	567
Jan. 1, 2010—Mar. 31, 2010	3%	11	565	4%	13	567
Apr. 1, 2010—Jun. 30, 2010	3%	11	565	4%	13	567
Jul. 1, 2010—Sep. 30, 2010	3%	11	565	4%	13	567
Oct. 1, 2010—Dec. 31, 2010	3%	11	565	4%	13	567
Jan. 1, 2011—Mar. 31, 2011	2%	9	563	3%	11	565
Apr. 1, 2011—June 30, 2011	3%	11	565	4%	13	567
Jul. 1, 2011—Sep. 30, 2011	3%	11	565	4%	13	567
Oct. 1, 2011—Dec. 31, 2011	2%	9	563	3%	11	565
Jan. 1, 2012—Mar. 31, 2012	2%	57	611	3%	59	613

TABLE OF INTEREST RATES

FROM JANUARY 1, 1999 — PRESENT – Continued

CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			UNDERPAYMENTS		
		1995–1 C.B.			1995–1 C.B.	
	RATE	TABLE	PG	RATE	TABLE	PG
Apr. 1, 2012—Jun. 30, 2012	2%	57	611	3%	59	613

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS

FROM JANUARY 1, 1991 — PRESENT

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1991—Mar. 31, 1991	13%	31	585
Apr. 1, 1991—Jun. 30, 1991	12%	29	583
Jul. 1, 1991—Sep. 30, 1991	12%	29	583
Oct. 1, 1991—Dec. 31, 1991	12%	29	583
Jan. 1, 1992—Mar. 31, 1992	11%	75	629
Apr. 1, 1992—Jun. 30, 1992	10%	73	627
Jul. 1, 1992—Sep. 30, 1992	10%	73	627
Oct. 1, 1992—Dec. 31, 1992	9%	71	625
Jan. 1, 1993—Mar. 31, 1993	9%	23	577
Apr. 1, 1993—Jun. 30, 1993	9%	23	577
Jul. 1, 1993—Sep. 30, 1993	9%	23	577
Oct. 1, 1993—Dec. 31, 1993	9%	23	577
Jan. 1, 1994—Mar. 31, 1994	9%	23	577
Apr. 1, 1994—Jun. 30, 1994	9%	23	577
Jul. 1, 1994—Sep. 30, 1994	10%	25	579
Oct. 1, 1994—Dec. 31, 1994	11%	27	581
Jan. 1, 1995—Mar. 31, 1995	11%	27	581
Apr. 1, 1995—Jun. 30, 1995	12%	29	583
Jul. 1, 1995—Sep. 30, 1995	11%	27	581
Oct. 1, 1995—Dec. 31, 1995	11%	27	581
Jan. 1, 1996—Mar. 31, 1996	11%	75	629
Apr. 1, 1996—Jun. 30, 1996	10%	73	627
Jul. 1, 1996—Sep. 30, 1996	11%	75	629
Oct. 1, 1996—Dec. 31, 1996	11%	75	629
Jan. 1, 1997—Mar. 31, 1997	11%	27	581
Apr. 1, 1997—Jun. 30, 1997	11%	27	581
Jul. 1, 1997—Sep. 30, 1997	11%	27	581
Oct. 1, 1997—Dec. 31, 1997	11%	27	581
Jan. 1, 1998—Mar. 31, 1998	11%	27	581
Apr. 1, 1998—Jun. 30, 1998	10%	25	579
Jul. 1, 1998—Sep. 30, 1998	10%	25	579
Oct. 1, 1998—Dec. 31, 1998	10%	25	579
Jan. 1, 1999—Mar. 31, 1999	9%	23	577
Apr. 1, 1999—Jun. 30, 1999	10%	25	579
Jul. 1, 1999—Sep. 30, 1999	10%	25	579
Oct. 1, 1999—Dec. 31, 1999	10%	25	579
Jan. 1, 2000—Mar. 31, 2000	10%	73	627
Apr. 1, 2000—Jun. 30, 2000	11%	75	629
Jul. 1, 2000—Sep. 30, 2000	11%	75	629
Oct. 1, 2000—Dec. 31, 2000	11%	75	629
Jan. 1, 2001—Mar. 31, 2001	11%	27	581
Apr. 1, 2001—Jun. 30, 2001	10%	25	579
Jul. 1, 2001—Sep. 30, 2001	9%	23	577
Oct. 1, 2001—Dec. 31, 2001	9%	23	577

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS

FROM JANUARY 1, 1991 — PRESENT – Continued

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 2002—Mar. 31, 2002	8%	21	575
Apr. 1, 2002—Jun. 30, 2002	8%	21	575
Jul. 1, 2002—Sep. 30, 2002	8%	21	575
Oct. 1, 2002—Dec. 30, 2002	8%	21	575
Jan. 1, 2003—Mar. 31, 2003	7%	19	573
Apr. 1, 2003—Jun. 30, 2003	7%	19	573
Jul. 1, 2003—Sep. 30, 2003	7%	19	573
Oct. 1, 2003—Dec. 31, 2003	6%	17	571
Jan. 1, 2004—Mar. 31, 2004	6%	65	619
Apr. 1, 2004—Jun. 30, 2004	7%	67	621
Jul. 1, 2004—Sep. 30, 2004	6%	65	619
Oct. 1, 2004—Dec. 31, 2004	7%	67	621
Jan. 1, 2005—Mar. 31, 2005	7%	19	573
Apr. 1, 2005—Jun. 30, 2005	8%	21	575
Jul. 1, 2005—Sep. 30, 2005	8%	21	575
Oct. 1, 2005—Dec. 31, 2005	9%	23	577
Jan. 1, 2006—Mar. 31, 2006	9%	23	577
Apr. 1, 2006—Jun. 30, 2006	9%	23	577
Jul. 1, 2006—Sep. 30, 2006	10%	25	579
Oct. 1, 2006—Dec. 31, 2006	10%	25	579
Jan. 1, 2007—Mar. 31, 2007	10%	25	579
Apr. 1, 2007—Jun. 30, 2007	10%	25	579
Jul. 1, 2007—Sep. 30, 2007	10%	25	579
Oct. 1, 2007—Dec. 31, 2007	10%	25	579
Jan. 1, 2008—Mar. 31, 2008	9%	71	625
Apr. 1, 2008—Jun. 30, 2008	8%	69	623
Jul. 1, 2008—Sep. 30, 2008	7%	67	621
Oct. 1, 2008—Dec. 31, 2008	8%	69	623
Jan. 1, 2009—Mar. 31, 2009	7%	19	573
Apr. 1, 2009—Jun. 30, 2009	6%	17	571
Jul. 1, 2009—Sep. 30, 2009	6%	17	571
Oct. 1, 2009—Dec. 31, 2009	6%	17	571
Jan. 1, 2010—Mar. 31, 2010	6%	17	571
Apr. 1, 2010—Jun. 30, 2010	6%	17	571
Jul. 1, 2010—Sep. 30, 2010	6%	17	571
Oct. 1, 2010—Dec. 31, 2010	6%	17	571
Jan. 1, 2011—Mar. 31, 2011	5%	15	569
Apr. 1, 2011—Jun. 30, 2011	6%	17	571
Jul. 1, 2011—Sep. 30, 2011	6%	17	571
Oct. 1, 2011—Dec. 31, 2011	5%	15	569
Jan. 1, 2012—Mar. 31, 2012	5%	63	617
Apr. 1, 2012—Jun. 30, 2012	5%	63	617

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

FROM JANUARY 1, 1995 — PRESENT

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1995—Mar. 31, 1995	6.5%	18	572
Apr. 1, 1995—Jun. 30, 1995	7.5%	20	574
Jul. 1, 1995—Sep. 30, 1995	6.5%	18	572
Oct. 1, 1995—Dec. 31, 1995	6.5%	18	572

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

FROM JANUARY 1, 1995 — PRESENT – Continued

	RATE	1995–1 C.B. TABLE	PG
Jan. 1, 1996—Mar. 31, 1996	6.5%	66	620
Apr. 1, 1996—Jun. 30, 1996	5.5%	64	618
Jul. 1, 1996—Sep. 30, 1996	6.5%	66	620
Oct. 1, 1996—Dec. 31, 1996	6.5%	66	620
Jan. 1, 1997—Mar. 31, 1997	6.5%	18	572
Apr. 1, 1997—Jun. 30, 1997	6.5%	18	572
Jul. 1, 1997—Sep. 30, 1997	6.5%	18	572
Oct. 1, 1997—Dec. 31, 1997	6.5%	18	572
Jan. 1, 1998—Mar. 31, 1998	6.5%	18	572
Apr. 1, 1998—Jun. 30, 1998	5.5%	16	570
Jul. 1, 1998—Sep. 30, 1998	5.5%	16	570
Oct. 1, 1998—Dec. 31, 1998	5.5%	16	570
Jan. 1, 1999—Mar. 31, 1999	4.5%	14	568
Apr. 1, 1999—Jun. 30, 1999	5.5%	16	570
Jul. 1, 1999—Sep. 30, 1999	5.5%	16	570
Oct. 1, 1999—Dec. 31, 1999	5.5%	16	570
Jan. 1, 2000—Mar. 31, 2000	5.5%	64	618
Apr. 1, 2000—Jun. 30, 2000	6.5%	66	620
Jul. 1, 2000—Sep. 30, 2000	6.5%	66	620
Oct. 1, 2000—Dec. 31, 2000	6.5%	66	620
Jan. 1, 2001—Mar. 31, 2001	6.5%	18	572
Apr. 1, 2001—Jun. 30, 2001	5.5%	16	570
Jul. 1, 2001—Sep. 30, 2001	4.5%	14	568
Oct. 1, 2001—Dec. 31, 2001	4.5%	14	568
Jan. 1, 2002—Mar. 31, 2002	3.5%	12	566
Apr. 1, 2002—Jun. 30, 2002	3.5%	12	566
Jul. 1, 2002—Sep. 30, 2002	3.5%	12	566
Oct. 1, 2002—Dec. 31, 2002	3.5%	12	566
Jan. 1, 2003—Mar. 31, 2003	2.5%	10	564
Apr. 1, 2003—Jun. 30, 2003	2.5%	10	564
Jul. 1, 2003—Sep. 30, 2003	2.5%	10	564
Oct. 1, 2003—Dec. 31, 2003	1.5%	8	562
Jan. 1, 2004—Mar. 31, 2004	1.5%	56	610
Apr. 1, 2004—Jun. 30, 2004	2.5%	58	612
Jul. 1, 2004—Sep. 30, 2004	1.5%	56	610
Oct. 1, 2004—Dec. 31, 2004	2.5%	58	612
Jan. 1, 2005—Mar. 31, 2005	2.5%	10	564
Apr. 1, 2005—Jun. 30, 2005	3.5%	12	566
Jul. 1, 2005—Sep. 30, 2005	3.5%	12	566
Oct. 1, 2005—Dec. 31, 2005	4.5%	14	568
Jan. 1, 2006—Mar. 31, 2006	4.5%	14	568
Apr. 1, 2006—Jun. 30, 2006	4.5%	14	568
Jul. 1, 2006—Sep. 30, 2006	5.5%	16	570
Oct. 1, 2006—Dec. 31, 2006	5.5%	16	570
Jan. 1, 2007—Mar. 31, 2007	5.5%	16	570
Apr. 1, 2007—Jun. 30, 2007	5.5%	16	570
Jul. 1, 2007—Sep. 30, 2007	5.5%	16	570
Oct. 1, 2007—Dec. 31, 2007	5.5%	16	570
Jan. 1, 2008—Mar. 31, 2008	4.5%	62	616
Apr. 1, 2008—Jun. 30, 2008	3.5%	60	614
Jul. 1, 2008—Sep. 30, 2008	2.5%	58	612
Oct. 1, 2008—Dec. 31, 2008	3.5%	60	614
Jan. 1, 2009—Mar. 31, 2009	2.5%	10	564
Apr. 1, 2009—Jun. 30, 2009	1.5%	8	562
Jul. 1, 2009—Sep. 30, 2009	1.5%	8	562

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

FROM JANUARY 1, 1995 — PRESENT – Continued

	RATE	1995–1 C.B. TABLE	PG
Oct. 1, 2009—Dec. 31, 2009	1.5%	8	562
Jan. 1, 2010—Mar. 31, 2010	1.5%	8	562
Apr. 1, 2010—Jun. 30, 2010	1.5%	8	562
Jul. 1, 2010—Sep. 30, 2010	1.5%	8	562
Oct. 1, 2010—Dec. 31, 2010	1.5%	8	562
Jan. 1, 2011—Mar. 31, 2011	0.5%*		
Apr. 1, 2011—June 30, 2011	1.5%	8	562
Jul. 1, 2011—Sep. 30, 2011	1.5%	8	562
Oct. 1, 2011—Dec. 31, 2011	0.5%*		
Jan. 1, 2012—Mar. 31, 2012	0.5%*		
Apr. 1, 2012—Jun. 30, 2012	0.5%*		

Part III. Administrative, Procedural, and Miscellaneous

Guidance Regarding the Repeal of Section 163(f)(2)(B)

Notice 2012–20

PURPOSE

This notice provides guidance related to the repeal of section 163(f)(2)(B) of the Internal Revenue Code (Code) and related provisions enacted by section 502 of the Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111–147 (the HIRE Act). The Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) intend to issue regulations implementing the guidance provided in this notice.

SECTION 1. BACKGROUND

Issuers of debt obligations that are required to be in registered form but are not issued in registered form are subject to the disallowance of interest deductions under section 163(f) and the imposition of an excise tax under section 4701. Any gain on the sale or other disposition of such an obligation is generally treated under section 1287 as ordinary income rather than capital gain, and, under section 165(j), no deduction is permitted for any loss sustained. In addition, the exception from tax for U.S. source portfolio interest received by a nonresident alien or foreign corporation under section 871(h) and section 881(c) (portfolio interest exception) is generally not available with respect to interest paid on debt that is not issued in registered form (bearer debt).

The foregoing rules generally do not apply with respect to bearer debt that complies with the foreign-targeting rules of section 163(f)(2)(B) and the regulations thereunder. However, section 502 of the HIRE Act generally eliminated the various exceptions for foreign-targeted bearer debt, effective for obligations issued after March 18, 2012. As a result of this change in law, with respect to obligations issued after March 18, 2012, the portfolio interest exception will be available only for obligations issued in registered form.

In the case of debt obligations in registered form, the portfolio interest exception is generally available only if the United States person (U.S. person) who would otherwise be required to deduct and withhold tax from the interest under section 1441(a) (U.S. withholding agent) receives a statement (usually on Form W–8) indicating that the beneficial owner of the obligation is not a U.S. person. Under section 871(h)(5), this statement generally may be made by either the beneficial owner of the obligation or by a securities clearing organization, bank, or other financial institution that holds customers' securities in the ordinary course of its trade or business. With respect to obligations issued after March 18, 2012, section 871(h)(2)(B)(ii)(II) provides that the portfolio interest exception is available in the absence of such a statement if the Secretary has determined that such a statement is not required in order to carry out the purposes of the portfolio interest exception.

Section 1.871–14(e) provides that the portfolio interest exception is available for debt obligations in registered form that comply with certain foreign-targeting requirements if (1) the registered owner is a financial institution that holds customers' securities in the ordinary course of its trade or business; and (2) the U.S. withholding agent complies with certain simplified procedures to obtain, either from the financial institution or from a beneficial owner that is a member of a clearing organization, a certification that the beneficial owner is not a U.S. person. Notice 2006–99 announced, however, that Treasury and the IRS intended to amend § 1.871–14(e) to eliminate this exception for foreign-targeted registered obligations (FTROs), retroactive to the date of the notice. Notice 2006–99, 2006–2 C.B. 907. Regulations implementing the guidance provided in Notice 2006–99 have not been issued.

SECTION 2. IN GENERAL

Treasury and the IRS have received comments regarding issues arising from the repeal of section 163(f)(2)(B), including comments requesting guidance regarding when obligations will be considered to be in registered form and requesting clarification with respect to certain collateral consequences of the repeal of section 163(f)(2)(B). In addition, Treasury and the IRS are aware that the implementation of section 501 of the HIRE Act, which added new sections 1471 to 1474 (commonly known as FATCA) to the Code, may require changes to the documentation collected by foreign financial institutions (including qualified intermediaries) and withholding agents with respect to payees and account holders.

Section 3 of this notice provides guidance addressing when obligations will be considered to be in registered form. Section 4 of this notice provides interim guidance with respect to the application of the portfolio interest exception to certain obligations in registered form issued after March 18, 2012, and before January 1, 2014. Section 5 of this notice addresses the continued availability of the existing exception from reporting of interest or original issue discount under section 6049 for certain foreign-targeted short-term obligations. Finally, section 6 of this notice provides guidance with respect to procedures required to comply with the foreign-targeting rules of section 4701(b) as amended by section 502 of the HIRE Act.

SECTION 3. DEFINITION OF A REGISTRATION SYSTEM

For purposes of determining whether a bond is in registered form under section 163(f) and the portfolio interest exception, the principles of section 149(a)(3) apply. Section 163(f)(3). Section 149(a)(3) provides that a book entry bond is treated as in registered form if the right to the principal of, and stated interest on, the bond may be transferred only through a book entry consistent with regulations prescribed by the Secretary. In addition, § 1.871–14(c) provides that for purposes of the portfolio interest exception, the conditions for an obligation to be considered in registered form are identical to the conditions described in § 5f.103–1.

Generally under § 5f.103–1, an obligation is in registered form if: (i) the obligation is registered as to both principal and any stated interest with the issuer (or its agent) and any transfer of the obligation may be effected only by surrender of the old obligation and reissuance to the new

holder; (ii) the right to principal and stated interest with respect to the obligation may be transferred only through a book entry system maintained by the issuer or its agent; or (iii) the obligation is registered as to both principal and stated interest with the issuer or its agent and can be transferred both by surrender and reissuance and through a book entry system. An obligation is considered transferable through a book entry system if the ownership of an interest in the obligation is required to be reflected in a book entry, whether or not physical securities are issued. A "book entry" is a record of ownership that identifies the owner of an interest in the obligation. An obligation that would otherwise be considered to be in registered form is not considered to be in registered form as of a particular time if it can be converted at any time in the future into an obligation that is not in registered form.

Notice 2006–99 addressed an arrangement in which no physical certificates are issued and under which ownership interests in bonds are required to be represented only by book entries in a dematerialized book entry system maintained by a clearing organization. Notice 2006–99 provided that an obligation issued under such an arrangement would be treated as in registered form notwithstanding the ability of holders to obtain physical certificates in nonregistered form upon the termination of the business of the clearing organization without a successor.

For obligations issued after March 18, 2012, section 163(f)(3) provides that for purposes of section 163(f), a dematerialized book entry system or other book entry system specified by the Secretary will be treated as a book entry system described in section 149(a)(3). Comments have expressed concern that the explicit reference in new section 163(f)(3) to a "dematerialized book entry system" may create uncertainty with respect to obligations issued in a manner not specifically described in Notice 2006–99. In particular, comments requested guidance with respect to the treatment of obligations represented by a physical global security that is nominally in bearer form, but that is "immobilized" in a clearing system. In addition, comments have requested guidance regarding whether an obligation will be considered to be in registered form if holders may obtain physical certificates in nonregistered form in certain limited circumstances not described in Notice 2006–99.

Treasury and the IRS intend to issue regulations providing that an obligation will be considered to be in registered form if it is issued through: (i) a dematerialized book entry system in which beneficial interests are transferable only through a book entry system (as defined in § 5f.103–1(c)(2)) maintained by a clearing organization as defined in § 1.163–5(c)(2)(i)(B)(*4*) (or by an agent of the clearing organization); or (ii) a clearing system in which the obligation is effectively immobilized. An obligation will be considered to be effectively immobilized if: (1) the obligation is represented by one or more global securities in physical form that are issued to and held by a clearing organization as defined in § 1.163–5(c)(2)(i)(B)(*4*) (or by a custodian or depository acting as an agent of the clearing organization) for the benefit of purchasers of interests in the obligation under arrangements that prohibit the transfer of the global securities except to a successor clearing organization subject to the same terms; and (2) beneficial interests in the underlying obligation are transferable only through a book entry system maintained by the clearing organization (or an agent of the clearing organization).

An interest in an obligation will be considered to be transferable only through a book entry system if the interest would be considered transferable through a book entry system under § 5f.103–1(c)(2), except that holders may obtain physical certificates in bearer form in the following circumstances: (1) termination of the clearing organization's business without a successor; (2) default by the issuer; or (3) issuance of definitive securities at the issuer's request upon a change in tax law that would be adverse to the issuer but for the issuance of physical securities in bearer form. After the occurrence of one of the above circumstances, any obligation with respect to which a holder, or a group of holders acting collectively, has a right to obtain a physical certificate in bearer form will no longer be in registered form, regardless of whether any option to obtain a physical certificate in bearer form has actually been exercised. Treasury and the IRS request comments regarding whether any exceptions should be provided to this general rule.

SECTION 4. TEMPORARY EXTENSION OF PORTFOLIO INTEREST EXCEPTION TO FOREIGN-TARGETED REGISTERED OBLIGATIONS

As noted above, section 871(h)(2)(B) provides that the portfolio interest exception is generally available for holders of obligations in registered form only if a U.S. withholding agent receives a statement that the beneficial owner of the obligation is not a U.S. person. Under § 1.871–14(c)(2), a U.S. withholding agent generally is considered to have received a statement that satisfies this requirement if it receives a statement from the foreign beneficial owner, or it receives a statement from a withholding foreign partnership, a qualified intermediary, or a U.S. branch of a foreign bank or foreign insurance company indicating that the payment will be made to a foreign beneficial owner. A U.S. withholding agent may also rely upon a statement from a financial institution that holds customers' securities in the ordinary course of its trade or business when the financial institution provides a statement that it has received a withholding certificate on Form W–8 (or an acceptable substitute form) from each beneficial owner and attaches each form to its statement (including certificates from beneficial owners holding through other financial institutions acting as intermediaries with respect to the obligation). In each such case, the U.S. withholding agent must also satisfy the information reporting requirements of § 1.1461–1(c)(2) with respect to interest paid on the obligation. See §§ 1.1461–1(c)(2)(i) and 1.1441–2(a).

Comments have noted that presently there may be difficulties obtaining statements satisfying the requirements of § 1.871–14(c)(2) in certain foreign markets in which issuers and intermediaries have relied on the foreign-targeting rules of § 1.163–5(c)(2)(i)(D) for issuances of debt. In response to these comments, this notice provides as a limited transition rule that, notwithstanding Notice 2006–99, a withholding agent (as defined in § 1.1441–7(a)) paying interest on an obligation issued in registered form after March 18, 2012, and before January 1, 2014, may apply the foreign-targeted registered obligation rules of § 1.871–14(e) if the obligation satisfies the requirements

of those rules. For this purpose, a financial institution may certify that the beneficial owner of a payment of interest has not been a U.S. person (as described in § 1.871–14(e)(3)(i)(A)(*1*)(*i*)) if the financial institution has determined the non-U.S. status of the beneficial owner of interest on the obligation(s) covered by the certificate by obtaining either (1) a Form W–8 (or substitute form) satisfying the requirements of § 1.1441–1(e)(4), or (2) documentary evidence satisfying the requirements of § 1.6049–5(c). A withholding agent receiving such a certificate after the time described in § 1.871–14(e)(4)(ii)(A) may rely on the certificate to the extent permitted under § 1.1441–1(b)(7). As provided in § 1.871–14(e)(4)(i)(G), a withholding agent who receives a valid certificate described in § 1.871–14(e)(3)(i) that applies to a payment of portfolio interest on a foreign-targeted registered obligation is not required to report the interest payment on Form 1042–S.

SECTION 5. SHORT-TERM DEBT OBLIGATIONS

Section 6049 provides an exception from information reporting of interest or original issue discount with respect to debt obligations that have an original term of 183 days or less and that satisfy a number of other requirements intended to ensure that the debt is not held by U.S. non-exempt persons. Those requirements are provided in § 1.6049–5(b)(10) and include the following: (1) payments on the instrument must be made outside the United States by other than a U.S. middleman; (2) the instrument must have a principal amount of at least $500,000; (3) the instrument must satisfy the requirements of sections 163(f)(2)(B)(i) and (ii)(I) and the regulations thereunder; (4) the instrument must bear a specified legend stating that the holder represents that it is not, and does not hold on behalf of, a U.S. person that is a non-exempt recipient; and (5) if the instrument is in registered form, it must be registered in the name of an exempt recipient.

Comments have requested clarification on whether the short-term debt exception provided by § 1.6049–5(b)(10) will continue to be available after March 18, 2012, the effective date of the repeal of section 163(f)(2)(B) under section 502 of the HIRE Act. Treasury and the IRS intend to clarify that this short-term debt exception remains available by issuing regulations incorporating the foreign-targeting rules of § 1.163–5(c)(2)(i) into the regulations under section 6049 in place of the existing reference to section 163(f)(2)(B).

SECTION 6. CLARIFICATION OF EXCISE TAX EXCEPTION UNDER SECTION 4701(B)

Section 4701 imposes an excise tax on a "registration-required obligation" that is not in registered form. The amount of the excise tax is equal to one percent of the principal amount multiplied by the number of calendar years until the obligation reaches maturity. Prior to the enactment of the HIRE Act, section 4701(b) provided that the term "registration-required obligation" generally had the same meaning as when used in section 163(f), which set forth the terms under which an issuer would be entitled to claim a deduction for interest paid on a registration-required obligation.

In connection with repealing section 163(f)(2)(B), section 502 of the HIRE Act amended section 4701(b) to provide that registration would not be required for obligations issued after March 18, 2012, that meet criteria similar to the foreign targeting rules under existing section 163(f)(2)(B). Comments requested clarification regarding how closely the procedures required under the new exception under section 4701(b) will mirror the procedures required under section 163(f)(2)(B). Treasury and the IRS intend to provide in regulations that rules identical to the rules that currently apply under section 163(f)(2)(B) and the regulations thereunder will apply for purposes of section 4701(b) to obligations issued after March 18, 2012.

EFFECT ON OTHER DOCUMENTS

Section 4 of Notice 2006–99, 2006–2 C.B. 907, is superseded.

EFFECTIVE DATE

The regulations incorporating the guidance described in this notice will be effective for obligations issued after March 18, 2012.

DRAFTING INFORMATION

The principal author of this notice is Susan E. Massey of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact John Sweeney at (202) 622–3840 (not a toll-free call).

2012 Calendar Year Resident Population Figures

Notice 2012–22

This notice advises State and local housing credit agencies that allocate low-income housing tax credits under § 42 of the Internal Revenue Code, and States and other issuers of tax-exempt private activity bonds under § 141, of the population figures to use in calculating: (1) the 2012 calendar year population-based component of the State housing credit ceiling (Credit Ceiling) under § 42(h)(3)(C)(ii); (2) the 2012 calendar year volume cap (Volume Cap) under § 146; and (3) the 2012 volume limit (Volume Limit) under § 142(k)(5).

Generally, § 146(j) requires determining the population figures for the population-based component of both the Credit Ceiling and the Volume Cap for any calendar year on the basis of the most recent census estimate of the resident population of a State (or issuing authority) released by the U.S. Census Bureau before the beginning of the calendar year. Similarly, § 142(k)(5) bases the Volume Limit on the State population.

Sections 42(h)(3)(H) and 146(d)(2) require adjusting for inflation the population-based component of the Credit Ceiling and the Volume Cap. The adjustments for the 2012 calendar year are in Rev. Proc. 2011–52, 2011–45 I.R.B. 701. Section 3.08 of Rev. Proc. 2011–52 provides that, for calendar year 2012, the amount for calculating the Credit Ceiling under § 42(h)(3)(C)(ii) is the greater of $2.20 multiplied by the State population or $2,525,000. Further, section 3.15 of Rev. Proc. 2011–52 provides that the amount for calculating the Volume Cap under § 146(d)(1) for calendar year 2012 is the greater of $95 multiplied by the State population or $284,560,000.

For the 50 states, the District of Columbia, and Puerto Rico, the population figures for calculating the Credit Ceiling, the Volume Cap, and the Volume Limit for the 2012 calendar year are the resident population estimates released electronically by the U.S. Census Bureau on December 21, 2011, in Press Release CB11–215. For American Samoa, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands, the population figures for the 2012 calendar year are the 2010 population counts released electronically by the U.S. Census Bureau on August 24, 2011, in Press Releases CB11–CN.177, CB11–CN.179, CB11–CN.178, and CB11–CN.180, respectively.

For convenience, these figures are reprinted below.

Resident Population Figures

Alabama	4,802,740
Alaska	722,718
American Samoa	55,519
Arizona	6,482,505
Arkansas	2,937,979
California	37,691,912
Colorado	5,116,796
Connecticut	3,580,709
Delaware	907,135
District of Columbia	617,996
Florida	19,057,542
Georgia	9,815,210
Guam	159,358
Hawaii	1,374,810
Idaho	1,584,985
Illinois	12,869,257
Indiana	6,516,922
Iowa	3,062,309
Kansas	2,871,238
Kentucky	4,369,356
Louisiana	4,574,836
Maine	1,328,188
Maryland	5,828,289
Massachusetts	6,587,536
Michigan	9,876,187
Minnesota	5,344,861
Mississippi	2,978,512
Missouri	6,010,688
Montana	998,199
Nebraska	1,842,641
Nevada	2,723,322
New Hampshire	1,318,194
New Jersey	8,821,155
New Mexico	2,082,224
New York	19,465,197
North Carolina	9,656,401
North Dakota	683,932
Northern Mariana Islands	53,883
Ohio	11,544,951
Oklahoma	3,791,508
Oregon	3,871,859
Pennsylvania	12,742,886
Puerto Rico	3,706,690
Rhode Island	1,051,302
South Carolina	4,679,230
South Dakota	824,082
Tennessee	6,403,353
Texas	25,674,681
Utah	2,817,222
Vermont	626,431
Virginia	8,096,604
Virgin Islands, U.S.	106,405

Resident Population Figures	
Washington	6,830,038
West Virginia	1,855,364
Wisconsin	5,711,767
Wyoming	568,158

The principal authors of this notice are Julie Hanlon Bolton, Office of the Associate Chief Counsel (Passthroughs and Special Industries), and Timothy L. Jones, Office of the Associate Chief Counsel (Financial Institutions and Products). For further information regarding this notice, please contact Ms. Hanlon Bolton at (202) 622–3040 (not a toll-free call).

Update for Weighted Average Interest Rates, Yield Curves, and Segment Rates

Notice 2012–24

This notice provides guidance as to the corporate bond weighted average interest rate and the permissible range of interest rates specified under § 412(b)(5)(B)(ii)(II) of the Internal Revenue Code as in effect for plan years beginning before 2008. It also provides guidance on the corporate bond monthly yield curve (and the corresponding spot segment rates), and the 24-month average segment rates under § 430(h)(2). In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008, the 30-year Treasury weighted average rate under § 431(c)(6)(E)(ii)(I), and the minimum present value segment rates under § 417(e)(3)(D) as in effect for plan years beginning after 2007.

CORPORATE BOND WEIGHTED AVERAGE INTEREST RATE

Sections 412(b)(5)(B)(ii) and 412(l)(7)(C)(i), as amended by the Pension Funding Equity Act of 2004 and by the Pension Protection Act of 2006 (PPA), provide that the interest rates used to calculate current liability and to determine the required contribution under § 412(l) for plan years beginning in 2004 through 2007 must be within a permissible range based on the weighted average of the rates of interest on amounts invested conservatively in long term investment grade corporate bonds during the 4-year period ending on the last day before the beginning of the plan year.

Notice 2004–34, 2004–1 C.B. 848, provides guidelines for determining the corporate bond weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability. That notice establishes that the corporate bond weighted average is based on the monthly composite corporate bond rate derived from designated corporate bond indices. The methodology for determining the monthly composite corporate bond rate as set forth in Notice 2004–34 continues to apply in determining that rate. See Notice 2006–75, 2006–2 C.B. 366.

The composite corporate bond rate for February 2012 is 4.49 percent. Pursuant to Notice 2004–34, the Service has determined this rate as the average of the monthly yields for the included corporate bond indices for that month.

The following corporate bond weighted average interest rate was determined for plan years beginning in the month shown below.

For Plan Years Beginning in		Corporate Bond Weighted	Permissible Range		
Month	*Year*	Average	90%	to	100%
March	2012	5.61	5.05		5.61

YIELD CURVE AND SEGMENT RATES

Generally for plan years beginning after 2007 (except for delayed effective dates for certain plans under sections 104, 105, and 106 of PPA), § 430 of the Code specifies the minimum funding requirements that apply to single employer plans pursuant to § 412. Section 430(h)(2) specifies the interest rates that must be used to determine a plan's target normal cost and funding target. Under this provision, present value is generally determined using three 24-month average interest rates ("segment rates"), each of which applies to cash flows during specified periods. However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates. Section 430(h)(2)G) set forth a transitional rule applicable to plan years beginning in 2008 and 2009 under which the segment rates were blended with the corporate bond weighted average described above, including an election under § 430(h)(2)(G)(iv) for an employer to use the segment rates without the transitional rule.

Notice 2007–81, 2007–2 C.B. 899, provides guidelines for determining the monthly corporate bond yield curve, and the 24-month average corporate bond segment rates used to compute the target normal cost and the funding target. Pursuant to Notice 2007–81, the monthly corporate bond yield curve derived from February 2012 data is in Table I at the end of this notice. The spot first, second, and third segment rates for the month of February 2012 are, respectively, 1.56, 4.27, and 5.08. The three 24-month average corporate bond segment rates applicable for March 2012 are as follows:

First Segment	Second Segment	Third Segment
1.93	4.95	6.07

The transitional rule of § 430(h)(2)(G) does not apply to plan years beginning after December 31, 2009. Therefore, for a plan year beginning after 2009 with a look-back month to March 2012, the funding segment rates are the three 24-month average corporate bond segment rates applicable for March 2012, listed above without blending for any transitional period.

30-YEAR TREASURY SECURITIES INTEREST RATES

Section 417(e)(3)(A)(ii)(II) (prior to amendment by PPA) defines the applicable interest rate, which must be used for purposes of determining the minimum present value of a participant's benefit under § 417(e)(1) and (2), as the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe. Section 1.417(e)–1(d)(3) of the Income Tax Regulations provides that the applicable interest rate for a month is the annual rate of interest on 30-year Treasury securities as specified by the Commissioner for that month in revenue rulings, notices or other guidance published in the Internal Revenue Bulletin.

The rate of interest on 30-year Treasury securities for February 2012 is 3.11 percent. The Service has determined this rate as the average of the yield on the 30-year Treasury bond maturing in November 2041 determined each day through February 8, 2012, and the yield on the 30-year Treasury bond maturing in February 2042 determined each day for the balance of the month.

Generally for plan years beginning after 2007, § 431 specifies the minimum funding requirements that apply to multiemployer plans pursuant to § 412. Section 431(c)(6)(B) specifies a minimum amount for the full-funding limitation described in section 431(c)(6)(A), based on the plan's current liability. Section 431(c)(6)(E)(ii)(I) provides that the interest rate used to calculate current liability for this purpose must be no more than 5 percent above and no more than 10 percent below the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year. Notice 88–73, 1988–2 C.B. 383, provides guidelines for determining the weighted average interest rate. The following rates were determined for plan years beginning in the month shown below.

For Plan Years Beginning in		30-Year Treasury Weighted Average	Permissible Range		
Month	*Year*		90%	to	105%
March	2012	4.00	3.60		4.20

MINIMUM PRESENT VALUE SEGMENT RATES

Generally for plan years beginning after December 31, 2007, the applicable interest rates under § 417(e)(3)(D) are segment rates computed without regard to a 24-month average. For plan years beginning in 2008 through 2011, the applicable interest rates are the monthly spot segment rates blended with the applicable rate under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning in 2007. Notice 2007–81 provides guidelines for determining the minimum present value segment rates. Pursuant to that notice, the minimum present value transitional segment rates determined for February 2012, taking into account the February 2012 30-year Treasury rate of 3.11 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2011	1.87	4.04	4.69
2012	1.56	4.27	5.08

DRAFTING INFORMATION

The principal author of this notice is Tony Montanaro of the Employee Plans, Tax Exempt and Government Entities Division. Mr. Montanaro may be e-mailed at *RetirementPlanQuestions@irs.gov*.

Table I

Monthly Yield Curve for February 2012
Derived from February 2012 Data

Maturity	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*
0.5	0.49	20.5	4.94	40.5	5.09	60.5	5.16	80.5	5.19
1.0	0.79	21.0	4.95	41.0	5.10	61.0	5.16	81.0	5.19
1.5	1.06	21.5	4.95	41.5	5.10	61.5	5.16	81.5	5.19
2.0	1.31	22.0	4.96	42.0	5.10	62.0	5.16	82.0	5.19
2.5	1.53	22.5	4.96	42.5	5.10	62.5	5.16	82.5	5.19
3.0	1.72	23.0	4.97	43.0	5.10	63.0	5.16	83.0	5.19
3.5	1.90	23.5	4.97	43.5	5.10	63.5	5.16	83.5	5.19
4.0	2.08	24.0	4.98	44.0	5.11	64.0	5.16	84.0	5.19
4.5	2.26	24.5	4.98	44.5	5.11	64.5	5.16	84.5	5.19
5.0	2.44	25.0	4.98	45.0	5.11	65.0	5.16	85.0	5.19
5.5	2.62	25.5	4.99	45.5	5.11	65.5	5.16	85.5	5.19
6.0	2.81	26.0	4.99	46.0	5.12	66.0	5.17	86.0	5.19
6.5	2.99	26.5	5.00	46.5	5.12	66.5	5.17	86.5	5.19
7.0	3.17	27.0	5.00	47.0	5.12	67.0	5.17	87.0	5.19
7.5	3.34	27.5	5.01	47.5	5.12	67.5	5.17	87.5	5.19
8.0	3.51	28.0	5.01	48.0	5.12	68.0	5.17	88.0	5.19
8.5	3.67	28.5	5.02	48.5	5.12	68.5	5.17	88.5	5.19
9.0	3.81	29.0	5.02	49.0	5.13	69.0	5.17	89.0	5.20
9.5	3.95	29.5	5.02	49.5	5.13	69.5	5.17	89.5	5.20
10.0	4.07	30.0	5.03	50.0	5.13	70.0	5.17	90.0	5.20
10.5	4.19	30.5	5.03	50.5	5.13	70.5	5.17	90.5	5.20
11.0	4.29	31.0	5.04	51.0	5.13	71.0	5.17	91.0	5.20
11.5	4.38	31.5	5.04	51.5	5.13	71.5	5.17	91.5	5.20
12.0	4.46	32.0	5.04	52.0	5.13	72.0	5.18	92.0	5.20
12.5	4.53	32.5	5.05	52.5	5.13	72.5	5.18	92.5	5.20
13.0	4.60	33.0	5.05	53.0	5.14	73.0	5.18	93.0	5.20
13.5	4.65	33.5	5.05	53.5	5.14	73.5	5.18	93.5	5.20
14.0	4.70	34.0	5.06	54.0	5.14	74.0	5.18	94.0	5.20
14.5	4.74	34.5	5.06	54.5	5.14	74.5	5.18	94.5	5.20
15.0	4.78	35.0	5.06	55.0	5.14	75.0	5.18	95.0	5.20
15.5	4.81	35.5	5.07	55.5	5.14	75.5	5.18	95.5	5.20
16.0	4.83	36.0	5.07	56.0	5.15	76.0	5.18	96.0	5.20
16.5	4.85	36.5	5.07	56.5	5.15	76.5	5.18	96.5	5.20
17.0	4.87	37.0	5.08	57.0	5.15	77.0	5.18	97.0	5.20
17.5	4.89	37.5	5.08	57.5	5.15	77.5	5.18	97.5	5.20
18.0	4.90	38.0	5.08	58.0	5.15	78.0	5.18	98.0	5.20
18.5	4.91	38.5	5.08	58.5	5.15	78.5	5.18	98.5	5.20
19.0	4.92	39.0	5.09	59.0	5.15	79.0	5.18	99.0	5.20
19.5	4.93	39.5	5.09	59.5	5.15	79.5	5.18	99.5	5.20
20.0	4.94	40.0	5.09	60.0	5.15	80.0	5.19	100.0	5.20

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Modifications to Minimum Present Value Requirements for Partial Annuity Distribution Options Under Defined Benefit Pension Plans

REG–110980–10

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations providing guidance relating to the minimum present value requirements applicable to certain defined benefit pension plans. These proposed regulations would change the regulations regarding the minimum present value requirements for defined benefit plan distributions to permit plans to simplify the treatment of certain optional forms of benefit that are paid partly in the form of an annuity and partly in a more accelerated form. These regulations would affect sponsors, administrators, participants, and beneficiaries of defined benefit pension plans. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by May 3, 2012. Outlines of topics to be discussed at the public hearing scheduled for June 1, 2012, must be received by May 11, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–110980–10), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–110980–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–110980–10). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Peter J. Marks or Linda S. F. Marshall at (202) 622–6090; concerning submissions of comments, the hearing, and/or being placed on the building access list to attend the hearing, Oluwafunmilayo (Funmi) Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 401(a)(11) of the Internal Revenue Code (Code) provides that, in order for a defined benefit plan to qualify under section 401(a), and except as provided under section 417, in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant must be provided in the form of a qualified joint and survivor annuity. In the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a defined benefit plan must provide a qualified preretirement survivor annuity to the surviving spouse of such participant, except as provided under section 417.

Section 417(e)(1) provides that a plan may provide that the present value of a qualified joint and survivor annuity or a qualified preretirement survivor annuity will be immediately distributed if that present value does not exceed the amount that can be distributed without the participant's consent under section 411(a)(11). Section 417(e)(2) provides that, if the present value of the qualified joint and survivor annuity or the qualified preretirement survivor annuity exceeds the amount that can be distributed without the participant's consent under section 411(a)(11), then a plan may immediately distribute the present value of a qualified joint and survivor annuity or the qualified preretirement survivor annuity only if the participant and the spouse of the participant (or where the participant has died, the surviving spouse) consent in writing to the distribution.

Section 417(e)(3)(A) provides that the present value shall not be less than the present value calculated by using the applicable mortality table and the applicable interest rate.[1]

Section 417(e)(3)(B) of the Code, as amended by section 302 of Pension Protection Act of 2006 (PPA '06), Public Law 109–280, 120 Stat. 780 (2006), provides that the term "applicable mortality table" means a mortality table, modified as appropriate by the Secretary, based on the mortality table specified for the plan year under section 430(h)(3)(A) (without regard to section 430(h)(3)(C) or (3)(D)).

Section 417(e)(3)(C) of the Code, as amended by section 302 of PPA '06, provides that the term "applicable interest rate" means the adjusted first, second, and third segment rates applied under rules similar to the rules of section 430(h)(2)(C) of the Code for the month before the date of the distribution or such other time as the Secretary may prescribe by regulations. Under section 417(e)(3)(D), these rates are to be determined using the average yields for a month, rather than the 24-month average used under section 430(h)(2)(D). Section 417(e)(3)(D) also provides special rules applicable for plan years beginning in 2008 through 2011 under which the applicable interest rate is based on a blend of the interest rates under section 417(e)(3)(C) and the previously applicable 30-year Treasury rate.

Section 411(a)(13) of the Code, as added by section 701(b) of PPA '06, provides that an "applicable defined benefit plan" is not treated as failing to meet the requirements of section 417(e) with respect to accrued benefits derived from employer contributions solely because the present value of a participant's accrued benefit (or any portion thereof) may be, under the terms of the plan, equal to

[1] Under section 411(a)(11)(B), the same actuarial assumptions are used for purposes of determining whether the present value of a participant's nonforfeitable accrued benefit exceeds the maximum amount that can be immediately distributed without the participant's consent.

the amount expressed as the hypothetical account balance or as an accumulated percentage of such participant's final average compensation. Section 411(a)(13)(C) defines the term "applicable defined benefit plan" to mean a defined benefit plan under which the accrued benefit (or any portion thereof) is calculated as the balance of a hypothetical account maintained for the participant or as an accumulated percentage of the participant's final average compensation.

Section 1107(a)(2) of PPA '06 provides that a pension plan does not fail to meet the requirements of section 411(d)(6) by reason of a plan amendment to which section 1107 applies, except as provided by the Secretary of the Treasury. Section 1107 of PPA '06 applies to plan amendments made pursuant to the provisions of PPA '06 or regulations issued thereunder that are adopted no later than a specified date, generally the last day of the first plan year beginning on or after January 1, 2009.

Final regulations under section 417 relating to the qualified joint and survivor and qualified preretirement survivor annuity requirements were issued on August 22, 1988. The final regulations were amended on April 3, 1998, to reflect changes enacted by the Uruguay Round Agreements Act, Public Law 103–465 (GATT).

Section 1.417(e)–1(d)(1) provides that a defined benefit plan generally must provide that the present value of any accrued benefit and the amount of any distribution, including a single sum, must not be less than the amount calculated using the specified applicable interest rate and the specified applicable mortality table. The present value of any optional form of benefit cannot be less than the present value of the accrued benefit determined in accordance with the preceding sentence.

Section 1.417(e)–1(d)(6) provides an exception from the minimum present value requirements of section 417(e) and §1.417(e)–1(d). This exception applies to the amount of a distribution paid in the form of an annual benefit that either does not decrease during the life of the participant (or, in the case of a qualified preretirement survivor annuity, the life of the participant's spouse), or that decreases during the life of the participant merely because of the death of the survivor annuitant (but only if the reduction is to a level not below 50 percent of the annual benefit payable before the death of such survivor annuitant) or the cessation or reduction of Social Security supplements or qualified disability benefits.

Notice 2007–81, 2007–2 C.B. 899 (2007), (see §601.601(d)(2)(ii)(*b*) of this chapter) provides guidance on the corporate bond yield curve and the segment rates used under section 430, as well as the interest rates for determining minimum present values under section 417(e)(3), to implement changes to the funding rules and minimum present value requirements made in PPA '06.

Rev. Rul. 2007–67, 2007–2 C.B. 1047 (2007), (see §601.601(d)(2)(ii)(*b*) of this chapter) provides that the applicable mortality table for a given year applies to distributions with annuity starting dates that occur during stability periods that begin during that calendar year. Under Rev. Rul. 2007–67, the applicable mortality table for 2008 was based on a fixed blend of 50 percent of the static male combined mortality rates and 50 percent of the static female combined mortality rates promulgated under §1.430(h)(3)–1(c)(3) of the proposed regulations (which were later issued as final regulations). Rev. Rul. 2007–67 provides that updated section 417(e)(3) applicable mortality tables will be published for each calendar year in future guidance and, except as provided in that future guidance, will be determined from the section 430(h)(3)(A) tables on the same basis as the applicable mortality table for 2008.[2]

Rev. Rul. 2007–67 provides that an amendment to determine the applicable interest rate under the section 417(e)(3) rules in effect for plan years beginning on or after January 1, 2008, will not violate section 411(d)(6) solely because of a reduction in accrued benefits or a reduction in the amount of any distribution with an annuity starting date occurring during a plan year beginning in 2008 or in a subsequent year if the cause of such reduction is the substitution of the modified segment rates for the 30-year Treasury rate for the same period. Additionally, Rev. Rul. 2007–67 provides that a plan amendment to incorporate by reference the applicable mortality table under section 417(e)(3) that is prescribed by Rev. Rul. 2007–67 and by subsequent guidance will not violate section 411(d)(6) solely because of a reduction in accrued benefits or a reduction in the amount of any distribution with an annuity starting date occurring during a plan year beginning in 2008 or in a subsequent year if the cause of such reduction is the substitution of the applicable section 417(e)(3) mortality table for the prior applicable mortality table under section 417(e)(3).

Rev. Rul. 2007–67 also provides guidance regarding the applicable interest rate used under section 417(e)(3) pursuant to the PPA '06 changes. Pursuant to Rev. Rul. 2007–67, the rules of §§1.417(e)–1(d)(4) and 1.417(e)–1(d)(10)(*ii*) regarding the time for determining the applicable interest rate continue to apply for plan years beginning on or after January 1, 2008, without regard to the change in the basis for determining the applicable interest rate.

The Worker, Retiree, and Employer Recovery Act of 2008, Public Law 109–280 (120 Stat. 780 (2008)), amended section 415(b)(2)(E)(v) to provide that the applicable mortality table under section 417(e)(3)(B) applies for purposes of adjusting a benefit or limitation pursuant to section 415(b)(2)(B), (C), or (D).

Explanation of Provisions

Treatment of bifurcated accrued benefits

These proposed regulations would amend the current final regulations under section 417(e) to permit plans to simplify the treatment of certain optional forms of benefit that are paid partly in the form of an annuity that is excepted from the minimum present value requirements of section 417(e)(3) pursuant to §1.417(e)–1(d)(6) and partly in a more accelerated form. Where a defined benefit plan offers a single-sum distribution or other form of accelerated distribution as an optional form of benefit in addition to the required qualified joint and survivor annuity, many participants have been reluctant to elect lifetime payments to insure against unexpected longevity, choosing instead an accelerated distribution form in order to maximize their liquidity. How-

[2] Notice 2008–85, 2008–2 C.B. 905, sets forth the section 417(e)(3) applicable mortality tables for distributions with annuity starting dates that occur during stability periods that begin during calendar years 2009 through 2013.

ever, participants who elect a single sum or other accelerated form of distribution may face a greater challenge in protecting themselves against the risk of outliving their retirement savings.

The IRS and the Treasury Department believe that many participants would be better served by having the opportunity to elect to receive a portion of their retirement benefits in annuity form (which provides financial protection against unexpected longevity) while receiving accelerated payments for the remainder of the benefit to provide increased liquidity during retirement. Under current regulations, both portions of such a distribution option are subject to the minimum present value requirements of section 417(e)(3).

The proposed regulations would provide an exception to this rule in the case of a plan with a bifurcated accrued benefit as defined in the proposed regulations. Under this exception, such a plan is permitted to provide that, if a participant selects two different distribution options with respect to separate portions of the bifurcated accrued benefit, then the two different distribution options are treated as two separate optional forms of benefit for purposes of applying the requirements of section 417(e)(3). Thus, if this rule applies to treat two separate distribution options selected with respect to separate portions of a bifurcated accrued benefit as two separate optional forms of benefit, and one of those separate optional forms of benefit is exempt from the requirement to use the section 417(e)(3) assumptions, then that exemption would apply to that separate optional form of benefit. In such a case, the plan would have to apply the section 417(e)(3) assumptions only to the separate optional form of benefit that is not so exempted (rather than apply those assumptions to the entire optional form of benefit).

The primary impact of this proposed change would be to make it simpler and easier for a plan to offer an optional form of benefit that is a combination of a single-sum payment and an annuity. Allowing a plan to apply a bifurcated approach would permit the plan to use the section 417(e)(3) assumptions for the single-sum portion of the optional form and its usual annuity equivalence factors for the annuity portion (rather than being required to make a special calculation of the annuity portion using the section 417(e)(3) assumptions). Not only would this be simpler administratively, it would also yield a more intuitive result.

One type of plan with a bifurcated accrued benefit that would be eligible for this treatment is a plan that provides for two separate portions of the accrued benefit that are determined without regard to any election of optional form of benefit and permits a participant to choose different forms of benefit with respect to each of those portions of the accrued benefit. An example of such a plan is a plan that has been amended to accrue benefits under a different plan formula, where a participant's benefit is the sum of the participant's accrued benefit for years of service before the amendment date, determined under the pre-amendment plan terms, plus the participant's accrued benefit for years of service after the amendment date, determined under the post-amendment plan terms, with no interaction between the two formulas, and the plan permits a participant to make separate elections of optional forms of benefit with respect to each of those portions of the accrued benefit.

A second type of plan with a bifurcated accrued benefit that would be eligible for this treatment is a plan that provides for a participant to apply different distribution elections to different portions of the accrued benefit so that the amount of the distribution, with respect to the distribution election applied to its respective portion of the accrued benefit, is the *pro rata* portion of the amount of the distribution that would be determined if that distribution election had been applied to the entire accrued benefit. An example of such a plan is a plan that provides both a single-sum option and a joint and survivor option for the entire benefit, but allows a participant to select an optional form which is 25 percent of the full lump sum and 75 percent of the full joint and survivor annuity.

A third type of plan with a bifurcated accrued benefit that would be eligible for this treatment is a plan that provides a single-sum distribution option with respect to only a portion of the benefit and provides a separate benefit election for the remainder of the distribution. In order to satisfy the requirements to be this type of plan with a bifurcated accrued benefit, the amount of the distribution that is not paid in a single sum must be no less than the amount that would be payable under the rules described in the prior paragraph had a single sum election been available with respect to the entire accrued benefit, where the single sum is determined as the present value of the accrued benefit payable at normal retirement age (or the immediate annuity if the participant is older than normal retirement age) determined using the applicable interest rates and the applicable mortality table. An example of such a plan is a plan that provides that a participant can elect to receive in a single sum an amount equal to the employee contributions, accumulated with interest, with the remainder of the accrued benefit paid under one of the annuity optional forms of benefit available under the plan in an amount sufficient to satisfy the requirements under the proposed regulations.

As previously discussed, the proposed regulations would make the bifurcation of benefits for purposes of section 417(e)(3) conditional on the existence of plan terms that explicitly provide that, if a participant selects two different distribution options with respect to separate portions of the bifurcated accrued benefit, then the two different distribution options are treated as two separate optional forms of benefit for purposes of applying the requirements of section 417(e)(3). To provide for such bifurcated treatment, a plan sponsor would be required to amend its plan to provide for use of the plan factors that generally apply to annuity distributions instead of the section 417(e)(3) assumptions in these circumstances. Any plan amendment must comply with the requirements of section 411(d)(6). See the discussion in this preamble under the heading "Effective/Applicability Date."

The Treasury Department and the IRS recognize that additional modifications to the regulations under section 417(e)(3) are needed in light of the enactment of PPA '06. It is expected that additional proposed amendments to the regulations under section 417(e)(3) will be issued to reflect statutory changes and to make other clarifications.

Effective/Applicability Date

These regulations are proposed to be effective on the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

The changes under the proposed regulations are proposed to apply to distributions with annuity starting dates in plan years beginning after the publication date of final regulations. If the regulations are finalized as proposed and a plan that previously provided for a partial single-sum distribution together with a specified annuity distribution is amended to treat that distribution form as a bifurcated accrued benefit (and applies less favorable actuarial factors to the portion of the benefit that is not subject to section 417(e)(3)), then the plan must comply with the requirements of section 411(d)(6). This can be done by providing that, after the applicable amendment date under §1.411(d)–3(g)(4), the amount of each portion of a distribution is not less than the amount that would have been payable under the plan provisions in effect before the amendment applied to the participant's accrued benefit as of the applicable amendment date.

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on all aspects of these proposed regulations. In particular, the Treasury Department and the IRS request comments regarding whether the special rules in these proposed regulations regarding bifurcated accrued benefits should be extended to any types of benefits that are not covered by the rules in these proposed regulations. All comments will be available for public inspection or copying at *www.regulations.gov* or upon request. A public hearing has been scheduled for June 1, 2012, beginning at 10 a.m. in the Auditorium, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by May 3, 2012, and an outline of topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by May 11, 2012. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Peter J. Marks and Linda S. F. Marshall, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

* * * * *

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.417(e)–1 is amended by:

1. Redesignating paragraph (d)(1) as newly-designated paragraph (d)(1)(i) and revising the heading of the newly-designated paragraph (d)(1)(i).

2. Adding a new paragraph (d)(1)(ii).

3. Revising paragraphs (d)(7) and (d)(8)(i).

4. Adding a new paragraph (d)(8)(v).

The additions and revisions read as follows:

§1.417(e)–1 Restrictions and valuations of distributions from plans subject to sections 401(a)(11) and 417

* * * * *

(d) *Present value requirement*—(1) *General rule*—(i) *Defined benefit plans*. * * *

(ii) *Defined contribution plans*. Because the accrued benefit under a defined contribution plan equals the account balance, a defined contribution plan is not subject to the requirements of this paragraph (d), regardless of whether the requirements of section 401(a)(11) apply to the plan.

* * * * *

(7) *Permitted bifurcation of certain optional forms of benefit*—(i) *General rule*. A plan with a bifurcated accrued benefit (as described in paragraph (d)(7)(ii) of this section) is permitted to provide that, if a participant selects two different distribution options with respect to separate portions of the bifurcated accrued benefit, then the two different distribution options are treated as two separate optional forms of benefit for purposes of applying the requirements of section 417(e)(3) and this paragraph (d). Thus, if this paragraph (d)(7) applies to treat two separate distribution options selected with respect to separate portions of a bifurcated accrued benefit as two separate optional forms of benefit, and the exception from the application of paragraph (d) of this section that is contained in paragraph (d)(6) of this section applies to one of those optional forms of benefit, then this paragraph (d)

applies only to the optional form of benefit to which the exception under paragraph (d)(6) of this section does not apply.

(ii) *Bifurcated accrued benefit*—(A) *In general*. A plan provides a bifurcated accrued benefit within the meaning of this paragraph (d)(7)(ii) if the plan satisfies the requirements of paragraph (d)(7)(iii) of this section (relating to separately determined benefits), (d)(7)(iv) of this section (relating to separate distribution options for proportionate benefits), or (d)(7)(v) of this section (relating to single sum with separate distribution option for remainder).

(B) *Rules of operation*. If a plan provides a bifurcated accrued benefit within the meaning of this paragraph (d)(7)(ii), and one portion of the benefits under the plan would itself be a bifurcated accrued benefit if it were the entire accrued benefit, then the rules of paragraph (d)(7)(i) of this section may be re-applied to such portion.

(iii) *Separately determined benefits*. A plan satisfies the requirements of this paragraph (d)(7)(iii) if the plan provides for two separate portions of the accrued benefit that are determined without regard to any election of optional form of benefit and permits a participant to select different distribution options with respect to each of those portions of the accrued benefit.

(iv) *Separate elections for proportionate benefits*. A plan satisfies the requirements of this paragraph (d)(7)(iv) if—

(A) The plan provides for a participant to select one distribution option with respect to a portion of the accrued benefit and a different distribution option with respect to the remaining portion of the accrued benefit;

(B) The distribution option selected with respect to each of the separate portions of the accrued benefit is available with respect to the entire accrued benefit; and

(C) The amount of the distribution with respect to each distribution option applied to its respective portion of the accrued benefit is the *pro rata* portion of the amount of the distribution that would be determined if that distribution option had been applied to the entire accrued benefit.

(v) *Single sum with separate election for remainder*. A plan satisfies the requirements of this paragraph (d)(7)(v) if—

(A) The plan provides for a specified amount to be distributed in a single sum, with the remainder distributed as another distribution option payable under the plan;

(B) A single-sum distribution is not available with respect to the participant's entire accrued benefit; and

(C) The amount of the distribution that is not paid in a single sum is not less than the amount that would be payable if—

(*1*) A single sum election were available with respect to the entire accrued benefit, where the single sum is the present value of the accrued benefit payable at normal retirement age (or the immediate annuity if the participant is older than normal retirement age) determined using the applicable interest rates and the applicable mortality table;

(*2*) The participant elected to receive the specified amount in a single sum; and

(*3*) The rules of paragraph (d)(7)(iv) of this section were applied to determine the amount of the distribution that is not paid in a single sum.

(vi) *Examples*. The following examples illustrate the rules of this paragraph (d)(7). Unless otherwise indicated, these examples are based on the following assumptions: each plan is a single-employer defined benefit plan with a calendar-year plan year, a one-year stability period coinciding with the calendar year, and a one-month lookback used for determining the applicable interest rate. The normal retirement age is 65, and all participant elections are made with proper spousal consent. In addition, these examples reflect the amendments to sections 417 and 411 that were made in the Pension Protection Act of 2006, Public Law 109–280, 120 Stat. 780 (2006).

Example 1. (i) Plan B offers a number of optional forms of payment, including a qualified joint and survivor annuity and a single-sum payment. The single-sum payment is equal to the present value of the participant's immediate benefit (but no less than the present value of the participant's accrued benefit) using the applicable interest and mortality rates under section 417(e)(3). The amount of the joint and survivor annuity is determined using plan factors that are not based on the applicable interest and mortality rates under section 417(e)(3). Plan B permits a participant to elect to receive a percentage of the accrued benefit chosen by the participant as a single sum and the remainder in any annuity form provided under the plan, with both portions of the payment determined by multiplying the amount that would be payable if the entire benefit were paid in that form by the percentage that applies to that distribution option. Plan B provides that, with respect to a distribution that is paid partly in the form of a single sum and partly in the form of an annuity, the single sum and the annuity are treated as two separate optional forms of benefit for purposes of applying the provisions of the plan implementing the requirements of section 417(e)(3) and §1.417(e)–1(d). Assume that the December 2012 segment rates are 3.21%, 5.19% and 5.67% for purposes of this example.

(ii) Participant S retires at age 62 in 2013, with an accrued benefit of $1,000 per month payable as a straight life annuity at normal retirement age. Participant S is eligible for an unreduced early retirement benefit and can therefore collect a straight life annuity benefit of $1,000 per month beginning immediately. Alternatively, Participant S can elect to receive the benefit in other forms, including a single-sum payment of $153,852 (based on the applicable interest rate and mortality table under section 417(e), which are the 2013 applicable mortality table and the December 2012 segment rates), or a 100% joint and survivor annuity of $850 per month (based on the plan's annuity conversion factors). Participant S elects to receive 25% of the benefit in the form of a single-sum payment and the balance as a 100% joint and survivor annuity.

(iii) In accordance with paragraph (d)(7)(iv) of this section, Plan B provides for a bifurcated accrued benefit because Plan B provides for a participant to select a single-sum distribution with respect to a portion of the accrued benefit and an annuity distribution option with respect to the remaining portion of the accrued benefit. Each distribution option is available with respect to the entire accrued benefit, and the amount of the distribution with respect to each distribution option applied to its respective portion of the accrued benefit is the *pro rata* portion of the amount of the distribution that would be determined if that distribution option had been applied to the entire accrued benefit. Furthermore, Plan B provides that the two different distribution options selected with respect to each of those portions of the accrued benefit are treated as two separate optional forms of benefit for purposes of applying the provisions of Plan B implementing the requirements of section 417(e)(3) and §1.417(e)–1(d). Accordingly, Participant S receives a single sum payment equal to 25% of the full single sum amount, or $38,463. In addition, Participant S receives a 100% joint and survivor annuity in the amount of $637.50 per month, equal to 75% of the full joint and survivor benefit of $850 per month otherwise payable. The joint and survivor benefit is not subject to the minimum present value requirements of section 417(e)(3) because it is treated as a separate optional form of benefit under paragraph (d)(7)(i) of this section.

Example 2. (i) Plan C permits participants to elect a partial single sum equal to employee contributions, accumulated with interest. Any other amounts must be paid in the form of an annuity. Under the terms of Plan C, if a participant elects to receive this partial single sum, the annuity benefit payable to the participant is at least as great as the minimum amount determined pursuant to paragraph (d)(7)(v)(C) of this section. Plan C provides that, with respect to a distribution that is paid partly in the form of a single sum and partly in the form of an annuity, the single sum and the annuity are treated as two separate optional forms of benefit for purposes of applying the provisions of the plan implementing the requirements of section

417(e)(3) and §1.417(e)–1(d). Participant T retires at age 60 in 2013 with an accrued benefit of $1,500 per month payable as a straight life annuity payable at normal retirement age. Based on the plan's early retirement and optional form factors (which are not based on the applicable interest and mortality rates under section 417(e)(3)), Participant T's benefit commencing at age 60 in the form of a 10-year certain and continuous annuity would be $925 per month. Participant T elects to receive a single sum payment of $32,000 equal to T's accumulated contributions with interest, and the remainder as a 10-year certain and continuous annuity. Assume that the December 2012 segment rates are the same as those assumed in *Example 1*. Based on the applicable mortality table for 2013 and the December 2012 segment rates, the deferred annuity factor at age 60 for lifetime payments commencing at age 65 is 8.769.

(ii) In accordance with paragraph (d)(7)(v) of this section, Plan C provides for a bifurcated accrued benefit because Plan C provides for a specified amount to be distributed in a single sum, with the remainder distributed as another distribution option payable under the plan, a single-sum distribution is not available with respect to a participant's entire accrued benefit, and the amount of the distribution that is not paid in a single sum meets the requirements of paragraph (d)(7)(v)(C) of this section. Furthermore, Plan C provides that, with respect to a distribution that is paid partly in the form of a single sum and partly in the form of an annuity, the single sum and the annuity are treated as two separate optional forms of benefit for purposes of applying the provisions of the plan implementing the requirements of section 417(e)(3) and §1.417(e)–1(d). Accordingly, the rule for proportional benefits under paragraph (d)(7)(iv) of this section is applied to determine the minimum amount of Participant T's annuity as if a single sum payment were available, equal to the present value of T's full accrued benefit. If Plan C had offered a single sum payment option with respect to Participant T's full accrued benefit of $1,500 per month, the minimum present value based on the applicable mortality table for 2013 and the assumed December 2012 segment rates would have been $1,500 x 12 x the deferred annuity factor of 8.769, or $157,842. The single sum payment actually available to Participant T under the provisions of Plan C is the amount of accumulated contributions with interest, or $32,000 which represents 20.27% of the single sum value of Participant T's full accrued benefit ($32,000 ÷ $157,842 = 20.27%).

(iii) Therefore, the portion of T's accrued benefit not payable as a single sum must be at least as great as the amount based on the remaining 79.73% of T's benefit multiplied by the accrued benefit of $1,500 per month, or $1,195.95 per month payable at normal retirement age. Based on Plan C's early retirement and optional form factors, the annuity benefit payable to Participant T in the form of a 10-year certain and continuous annuity beginning at age 60 cannot be less than $925 times 79.73% or $737.50 per month. Participant T receives this in addition to the single sum payment of $32,000. The 10-year certain and continuous benefit is not subject to the minimum present value requirements of section 417(e)(3) because it is treated as a separate optional form of benefit under paragraph (d)(7)(i) of this section.

Example 3. (i) Plan D permits participants to elect a single-sum payment of up to $10,000 with the remaining benefit payable in the form of an annuity. Under the terms of Plan D, if a participant elects to receive this partial single sum, the annuity benefit payable to the participant is at least as great as the minimum amount determined pursuant to paragraph (d)(7)(v)(C) of this section. Plan D provides that, with respect to a distribution that is paid partly in the form of a single sum and partly in the form of an annuity, the single sum and the annuity are treated as two separate optional forms of benefit for purposes of applying the provisions of the plan implementing the requirements of section 417(e)(3) and §1.417(e)–1(d). Participant W retires in 2013 at age 55 with an accrued benefit of $1,000 per month payable at normal retirement age. Participant W is eligible for an unreduced early retirement benefit of $1,000 per month payable as a straight life annuity. Alternatively, based on Plan D's definition of actuarial equivalence (which is not based on the applicable interest and mortality rates under section 417(e)(3)), Participant W can receive an immediate benefit in the form of a 100% joint-and-survivor annuity of $800 per month. Participant W elects to receive a single sum payment of $10,000, with the balance of the benefit payable as a 100% joint-and-survivor annuity beginning at age 55. Assume that the December 2012 segment rates are the same as those assumed in *Example 1*. Based on the applicable mortality table for 2013 and the December 2012 segment rates, the deferred annuity factor at age 55 for lifetime payments commencing at age 65 is 6.558.

(ii) In accordance with paragraph (d)(7)(v) of this section, Plan D provides for a bifurcated accrued benefit because Plan D provides for a specified amount to be distributed in a single sum, with the remainder distributed as another distribution option payable under the plan, a single-sum distribution is not available with respect to a participant's entire accrued benefit, and the amount of the distribution that is not paid in a single sum meets the requirements of paragraph (d)(7)(v)(C) of this section.

Furthermore, Plan D provides that, with respect to a distribution that is paid partly in the form of a single sum and partly in the form of an annuity, the single sum and the annuity are treated as two separate optional forms of benefit for purposes of applying the provisions of the plan implementing the requirements of section 417(e)(3) and §1.417(e)–1(d). Accordingly, the rule for proportional benefits under paragraph (d)(7)(iv) of this section is applied to determine the minimum amount of Participant W's annuity as if a single sum payment were available, equal to the present value of W's full accrued benefit.

(iii) If Plan D had offered a single sum payment option with respect to Participant W's full accrued benefit of $1,000 per month, the minimum present value based on the applicable mortality table for 2013 and the assumed December 2012 segment rates would have been $1,000 x 12 x the deferred annuity factor of 6.558, or $78,696. The single sum payment actually available to Participant W under the provisions of Plan D is $10,000, which represents 12.71% of the single sum value of W's full accrued benefit ($10,000 ÷ $78,696 = 12.71%).

(iv) Therefore, the portion of Participant W's accrued benefit not payable as a single sum must be at least as great as the amount based on the remaining 87.29% of W's benefit multiplied by the accrued benefit of $1,000 per month, or $872.90 per month payable at normal retirement age. Based on Plan D's early retirement and optional form factors, the annuity benefit payable to Participant W in the form of a 100% joint-and-survivor annuity beginning at age 55 is no less than 87.29% x $800, or $698.32 per month. Participant W receives this in addition to the single sum payment of $10,000. The joint and survivor annuity benefit is not subject to the minimum present value requirements of section 417(e)(3) because it is treated as a separate optional form of benefit under paragraph (d)(7)(i) of this section.

Example 4. (i) Plan E was amended to freeze benefits under the traditional plan formula as of December 31, 2012, and to provide benefits under a cash balance formula beginning January 1, 2013. The plan provides that participants may elect separate distribution options for the portion of the benefit accrued under the traditional formula as of December 31, 2012, and the portion of the benefit earned under the cash balance formula. Furthermore, the plan provides that a participant may elect to receive a single-sum payment only with respect to the portion of the benefit earned under the cash balance formula. Plan E provides that the two distribution options selected with respect to the portion of the benefit accrued under the traditional formula as of December 31, 2012, and the portion of the benefit earned under the cash balance formula are treated as two separate optional forms of benefit for purposes of applying the provisions of Plan E implementing the requirements of section 417(e)(3) and §1.417(e)–1(d).

(ii) In accordance with paragraph (d)(7)(iii) of this section, Plan E provides for a bifurcated accrued benefit because the portion of the accrued benefit determined under the traditional formula and the portion of the accrued benefit determined under the cash balance formula are determined separately without regard to any election of optional form of benefit and Plan E permits a participant to select different distribution options with respect to both of those portions of the accrued benefit. Furthermore, as permitted by paragraph (d)(7)(i) of this section, Plan E provides that the two different distribution options selected with respect to each of those portions of the accrued benefit are treated as two separate optional forms of benefit for purposes of applying the provisions of Plan E implementing the requirements of section 417(e)(3) and §1.417(e)–1(d). Therefore, whether a participant elects to receive a single sum payment of the portion of the benefit earned under the cash balance formula does not affect whether the distribution elected with respect to the portion of the benefit earned as of December 31, 2012, is subject to the minimum present value requirements of section 417(e)(3).

Example 5. (i) The facts are the same as in *Example 4*, except that Plan E also permits a participant to elect, with respect to the cash balance portion of the benefit, to receive a percentage of the accrued benefit chosen by the participant as a single sum and the remainder in any annuity form provided under the plan, with both portions of the payment determined by multiplying the amount that would be payable if the entire benefit were paid in that form by the percentage that applies to that distribution option. Plan E provides that, with respect to such a distribution that is paid partly in the form of a single sum

and partly in the form of an annuity, the single sum and the annuity are treated as two separate optional forms of benefit for purposes of applying the provisions of the plan implementing the requirements of section 417(e)(3) and §1.417(e)–1(d). Participant X retires at age 65, with an accrued benefit under the traditional formula of $500 per month (earned as of December 31, 2012), and a cash balance hypothetical account of $45,000. Based on Plan E's actuarial equivalence factors, Participant X's accrued benefit derived from the cash balance hypothetical account is $320 per month, payable as a life annuity at normal retirement. Participant X elects to receive $15,000 of the current hypothetical account balance in the form of a single sum and to receive the remainder of the total accrued benefit as a life annuity.

(ii) Under the analysis set forth in *Example 4*, Plan E provides for a bifurcated accrued benefit in accordance with paragraph (d)(7)(iv)(C) of this section with respect to the portion of the accrued benefit attributable to the benefit accrued as of December 31, 2012, and the portion of the accrued benefit attributable to the benefit earned under the cash balance formula.

Furthermore, Plan E provides that the two different distribution options selected with respect to each of those portions of the accrued benefit are treated as two separate optional forms of benefit for purposes of applying the provisions of Plan E implementing the requirements of section 417(e)(3) and §1.417(e)–1(d). Thus, a separate distribution option may be chosen for each of these two portions, and section 417(e)(3) applies separately to each portion.

(iii) In accordance with paragraphs (d)(7)(ii)(B) and (d)(7)(iv) of this section, the portion of the accrued benefit under Plan E earned under the cash balance formula is also a bifurcated accrued benefit because Plan E provides for a participant to select a single-sum distribution with respect to a portion of the cash balance formula accrued benefit and an annuity distribution option with respect to the remaining portion of the cash balance formula accrued benefit, each distribution option is available with respect to the entire cash balance formula accrued benefit, and the amount of the distribution with respect to each distribution option applied to its respective portion of the cash balance formula accrued benefit is the *pro rata* portion of the amount of the distribution that would be determined if that distribution option had been applied to the entire cash balance formula accrued benefit. Furthermore, Plan E provides that the two different distribution options selected with respect to each of those portions of the cash balance formula accrued benefit are treated as two separate optional forms of benefit for purposes of applying the provisions of Plan E implementing the requirements of section 417(e)(3) and §1.417(e)–1(d). Thus, under paragraph (d)(7)(iv) of this section, 1/3 of the cash balance hypothetical account is paid as a single sum (that is, $15,000 ÷ $45,000), and the remaining 2/3 of the cash balance hypothetical account, or $30,000, is converted to an annuity benefit of 2/3 x $320, or $213.33 per month.

(iv) Participant X therefore receives a single sum payment of $15,000, representing the portion of the current hypothetical account balance that X elected to receive as a single sum. In addition, Participant X receives a monthly life annuity of $713.33 per month (equal to the $500 benefit attributable to the benefit earned as of December 31, 2012, plus the $213.33 portion of the cash balance benefit paid as an annuity). Participant X's election to receive a single sum payment of part of the benefit earned under the cash balance formula does not affect whether the remainder of Participant X's distribution is subject to the minimum present value requirements of section 417(e)(3).

(8) *Effective/applicability date*—(i) *In general*. Except as otherwise provided in this paragraph (d)(8), this paragraph (d) applies to distributions with annuity starting dates in plan years beginning on or after January 1, 1995.

* * * * *

(v) Paragraph (d)(7) of this section applies to distributions with annuity starting dates in plan years beginning on or after the date final regulations that finalize these proposed regulations are published in the **Federal Register**.

* * * * *

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

(Filed by the Office of the Federal Register on February 2, 2012, 8:45 a.m., and published in the issue of the Federal Register for February 3, 2012, 77 F.R. 5454)

Notice of Proposed Rulemaking and Notice of Public Hearing

Taxable Medical Devices

REG–113770–10

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Proposed Rulemaking and Notice of Public Hearing.

SUMMARY: This document contains proposed regulations that provide guidance on the excise tax imposed on the sale of certain medical devices under section 4191 of the Internal Revenue Code, enacted by the Health Care and Education Reconciliation Act of 2010 in conjunction with the Patient Protection and Affordable Care Act. The proposed regulations affect manufacturers, importers, and producers of taxable medical devices. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by May 7, 2012. Outlines of topics to be discussed at the public hearing scheduled for May 16, 2012, at 10 a.m., must be received by May 7, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–113770–10), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–113770–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–113770–10). The public hearing will be held on May 16, 2012, in the IRS Auditorium, beginning at 10 a.m., at the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Natalie Payne or Stephanie Bland, at (202) 622–3130; concerning submission of comments, the public hearing, and/or to be placed on the building access list to attend the public hearing, contact Oluwafunmilayo Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Statutory Provisions

This document contains proposed regulations that provide guidance on the excise tax imposed on the sale of certain medical devices under section 4191 of the Internal Revenue Code (Code), enacted by section 1405 of the Health Care and Education Reconciliation Act of 2010, Public Law 111–152 (124 Stat. 1029 (2010)), in conjunction with the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)) (jointly, the ACA).

Section 4191 imposes an excise tax on the sale of certain medical devices by the

manufacturer, producer, or importer of the device in an amount equal to 2.3 percent of the sale price. Section 4191 applies to sales of taxable medical devices after December 31, 2012.

Section 4191(b)(1) provides that, in general, a "taxable medical device" is any device, as defined in section 201(h) of the Federal Food, Drug & Cosmetic Act (FFDCA), (codified as amended at 21 U.S.C. 301 *et seq.* (2006)), that is intended for humans. Section 201(h) of the FFDCA provides generally that the term "device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, that is recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them; intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease; or intended to affect the structure or any function of the body, and that does not achieve its primary intended purposes through chemical action within or on the body and that is not dependent upon being metabolized for the achievement of its primary intended purposes.

Section 4191(b)(2) provides that the term "taxable medical device" does not include eyeglasses, contact lenses, hearing aids, and any other medical device determined by the Secretary to be of a type that is generally purchased by the general public at retail for individual use.

In addition, the ACA amended section 4221(a) to limit tax-free sales of taxable medical devices to sales (i) for use by the purchaser for further manufacture, or for resale by the purchaser to a second purchaser for use by such second purchaser in further manufacture, and (ii) for export, or for resale by the purchaser to a second purchaser for export. The ACA makes a corresponding amendment to section 6416(b)(2) with regard to claims for refund.

Manufacturers Excise Tax Rules Generally

The ACA added section 4191 to chapter 32, subtitle D of the Code, which relates to taxes imposed upon the sales of taxable articles by manufacturers, producers, and importers (commonly referred to as "manufacturers excise taxes"). Therefore, the existing rules governing chapter 32 apply to section 4191. The substantive regulations relating to manufacturers excise taxes are contained in part 48 (Manufacturers and Retailers Excise Tax Regulations) of Title 26 of the Code of Federal Regulations (CFR). The procedural regulations governing manufacturers excise taxes are contained in part 40 (Excise Tax Procedural Regulations) of 26 CFR.

The manufacturers excise tax rules are discussed in Part VII under "Explanation of Provisions," in this preamble. For additional information on the manufacturers excise tax rules generally, see chapter 5 of IRS Publication 510, "*Excise Taxes*," available at *http://www.irs.gov/publications/p510/ch05.html*.

Notice 2010–89

On December 27, 2010, the IRS published Notice 2010–89, 2010–52 I.R.B. 908, to request comments on the implementation and administration of the new tax under section 4191. The IRS and the Treasury Department received numerous comments in response to the notice and considered all comments in the drafting of the proposed regulations. The comments are discussed in more detail in this preamble. The IRS and the Treasury Department also consulted with the Food and Drug Administration (FDA) and the Centers for Medicare and Medicaid Services (CMS) in developing these regulations.

Explanation of Provisions

I. *Definition of "Taxable Medical Device"*

Section 4191(b)(1) links the definition of "taxable medical device" to the definition of "device" in section 201(h) of the FFDCA. The FDA generally administers the provisions of the FFDCA, including section 201(h) and other provisions relating to medical devices.

The FDA generally requires owners or operators of places of business (also called establishments) that are located in the United States, or in foreign countries that export devices to the United States, and that manufacture, prepare, propagate, compound, assemble, process, repackage, or relabel medical devices intended for human use to register their establishments and list their devices upon first entering into operation, and to update this information on an annual basis with the FDA. See sections 510(a)-(d), (i), and (j) of the FFDCA, 21 CFR 807.20, and 21 CFR 807.21.

Various commentators observed that the statutory definition of "taxable medical device" leaves uncertainty as to which devices are included in the definition. The proposed regulations address this concern by providing that for purposes of the medical device excise tax, a device defined in section 201(h) of the FFDCA that is intended for humans means a device that is listed as a device with the FDA under section 510(j) of the FFDCA and 21 CFR Part 807, pursuant to FDA requirements. The FDA listing requirements are longstanding. Further, device manufacturers must comply with these requirements as part of the FDA's device regulation process. Therefore, device manufacturers can be expected to know which devices fall within the definition.

The FDA has promulgated classification regulations for approximately 1,700 different generic types of devices. Each classification regulation includes one or more product codes that describe a subcategory of the device type described in the regulation. Currently, manufacturers may, in certain circumstances, list multiple different devices that fall within the same product code under a single listing. Therefore, all devices that are listed under a single product code listing in conjunction with the FDA's device listing requirement are "taxable medical devices" unless they fall within an exemption under section 4191(b)(2).

The proposed regulations also provide that if a device is not listed with the FDA but the FDA later determines that the device should have been listed as a device, the device will be deemed to have been listed as a device with the FDA as of the date the FDA notifies the manufacturer or importer in writing that corrective action with respect to listing is required.

II. *The Retail Exemption*

Section 4191(b)(2) provides that the term "taxable medical device" does not include eyeglasses, contact lenses, hearing aids, and any other medical device determined by the Secretary to be of a type that is generally purchased by the general

public at retail for individual use (the retail exemption).

The FDA has grouped each of the 1,700 classification regulations into 16 medical specialties (21 CFR, Parts 862–892). Each of these generic types of devices is assigned to one (or sometimes more than one) of three regulatory classes based on the level of control necessary to assure the safety and effectiveness of the device. The three classes of FDA devices are Class I (general controls), Class II (special controls), and Class III (pre-market approval). A number of device types that predate the enactment of the Medical Device Amendments to the Food, Drug, and Cosmetic Act of 1976 remain unclassified.

With regard to the retail exemption, section 4191 makes no reference to the three regulatory classes. Further, the Joint Committee on Taxation's Technical Explanation of the ACA makes clear that the FDA regulatory classes do not, by themselves, determine whether a device falls within the retail exemption. Specifically, the Technical Explanation states, "The exemption for such items is not limited by device class as defined in section 513 of the Federal Food, Drug, and Cosmetic Act." Rather, the Technical Explanation notes that the exemption could cover "Class I items such as certain bandages and tipped applicators, Class II items such as certain pregnancy test kits and diabetes testing supplies, and Class III items such as certain denture adhesives and snake bite kits." The Technical Explanation also emphasizes that "items would only be exempt if they are generally designed and sold for individual use." Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 111th Congress (JCS–2–11), March 2011, at 366.

The proposed regulations provide a facts and circumstances approach to evaluating whether a taxable medical device is of a type that is generally purchased by the general public at retail for individual use. Under the proposed regulations, a device is considered to be of a type generally purchased by the general public at retail for individual use if (i) the device is regularly available for purchase and use by individual consumers who are not medical professionals, and (ii) the device's design demonstrates that it is not primarily intended for use in a medical institution or office, or by medical professionals. The proposed regulations provide a set of non-exclusive factors for use in evaluating whether a taxable medical device is of a type that is generally purchased by the general public at retail for individual use. The proposed regulations also include a safe harbor provision.

The proposed regulations provide a non-exclusive list of factors to be considered in determining whether a device is regularly available for purchase and use by individual consumers who are not medical professionals. Those factors are (i) whether consumers who are not medical professionals can purchase the device through retail businesses that also sell items other than medical devices, including drug stores, supermarkets, and similar vendors; (ii) whether consumers who are not medical professionals can safely and effectively use the device for its intended medical purpose with minimal or no training from a medical professional; and (iii) whether the device is classified by the FDA under Subpart D of 21 CFR Part 890 (Physical Medicine Devices).

The proposed regulations also provide a non-exclusive list of factors to be considered in determining whether the design of a device demonstrates that it is primarily intended for use in a medical institution or office, or by medical professionals, and therefore not intended for purchase and use by individual consumers. Those factors are (i) whether the device generally must be implanted, inserted, operated, or otherwise administered by a medical professional; (ii) whether the cost to acquire, maintain, and/or use the device requires a large initial investment and/or ongoing expenditure that is not affordable for the average consumer; (iii) whether the device is a Class III device under the FDA system of classification; (iv) whether the device is classified by the FDA under certain parts or subparts of 21 CFR; and (v) whether the device qualifies as durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) for which payment is available exclusively on a rental basis under the Medicare Part B payment rules and is an "item requiring frequent and substantial servicing" as defined in 42 CFR 414.222. With regard to the regulatory classifications incorporated into the fourth factor described in this preamble, the IRS and the Treasury Department have determined, based on all the facts and circumstances, that the overwhelming majority of product codes that fall within these regulatory categories do not include devices that are of a type generally purchased by the general public at retail for individual use.

Whether a device is of a type generally purchased by the general public at retail for individual use is determined based on all relevant facts and circumstances. Thus, there may be relevant facts and circumstances in addition to the factors specifically identified in the proposed regulations.

To provide greater certainty, the proposed regulations also include a safe harbor provision that identifies certain categories of taxable medical devices that the IRS and the Treasury Department have determined fall within the retail exemption. The safe harbor includes (i) devices that are identified in the FDA's IVD Home Use Lab Tests (Over-the-Counter Tests) database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfIVD/Search.cfm*; (ii) devices described as "OTC" or "over the counter" devices in the relevant FDA classification regulation heading; (iii) devices that are described as "OTC" or "over the counter" devices in the FDA's product code name, the FDA's device classification name, or the "classification name" field in the FDA's device registration and listing database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfrl/rl.cfm*; and (iv) certain devices that qualify as DMEPOS for which payment is available on a purchase basis under Medicare Part B payment rules in accordance with the fee schedule published by CMS.

The IRS and the Treasury Department recognize the challenges involved in applying a facts and circumstances test to the wide array of devices that are potentially subject to the medical device excise tax, including for smaller manufacturers or importers for which the application of the retail exemption may determine whether they are subject to the tax at all. The IRS and the Treasury Department intend through the rulemaking process to continue their efforts to find ways to make the test easier to apply to particular cases and to provide certainty with respect to a substantial majority of devices. To that end, comments are requested on additional factors, examples, or safe harbors that could

be added to provide greater certainty for a larger number of devices. Comments are particularly requested on how to provide greater clarity with respect to taxable medical devices that are sold primarily or exclusively through specialty medical retailers that sell medical devices and related materials. Comments are also requested on whether the packaging and labeling of a taxable medical device, the terms and conditions of the manufacturer's warranty with respect to a device, and substantial sales of a device over the internet would be meaningful factors for use in establishing whether a device qualifies for the retail exception, and if so, how any such factor should be described and applied. Comments are also requested on other types of DMEPOS that should be considered for safe harbor treatment and how those items can be consistently and specifically identified. For example, "inexpensive equipment," as defined in 42 CFR 414.220(a)(1), appears to describe items that may meet the retail exception under an application of the facts and circumstances test. However, comments are requested on how devices that fall under the definition would be identified given that the CMS fee schedule categorizes "inexpensive equipment" together with other medical devices that appear not to fall within the retail exception.

The IRS and the Treasury Department received numerous comments suggesting that it is not feasible to base the retail exception on quantitative data that compares the relative number of sales of a certain taxable medical device at retail to the number of sales of the device to doctors' offices, hospitals, and other medical and health care providers and institutions. Several commentators stated that for a given device, numerical data on the proportion of sales to retail purchasers and to non-retail purchasers is often not available to the manufacturers and importers of the device, even with respect to the devices that they manufacture or import. Further, the commentators noted that even if the data is available, a rule that looks to industry-wide data regarding the percentage of retail and non-retail sales of a device would require an ongoing, resource-intensive effort to collect industry-wide sales information, and would not provide certainty to stakeholders because the data may change from year to year. In light of these difficulties, the proposed regulations do not adopt a market data approach to the retail exception.

One commentator suggested that the IRS and the Treasury Department provide a retail exception safe harbor based on a manufacturer's or importer's proportion of sales of a particular device at retail, compared to that manufacturer's or importer's overall sales of the device. Under this suggestion, if the retail sales of a particular device by a manufacturer or importer met or exceeded a certain ratio or percentage, as compared to overall sales by the manufacturer or importer of that device, then all sales of the device would be exempt from tax. The proposed regulations do not adopt this approach to the retail exception because the suggested safe harbor could result in inconsistent treatment of different manufacturers of the same device. The language of section 4191 applies the retail exception to types of devices, not to manufacturers and importers based on the nature of their distributions or sales.

Some commentators suggested that if the manufacturer or importer is able to determine that a particular taxable medical device is sold to consumers at retail, no tax should be imposed on any sale of that device, even if the device is not of a type that is generally purchased by the general public at retail for individual use. Such an approach would be contrary to the language of the statute. Therefore, the proposed regulations do not adopt this approach.

III. *Veterinary Devices*

The definition of "device" in section 201(h) of the FFDCA includes devices used in veterinary medicine. However, the definition of "taxable medical device" under section 4191 limits taxable medical devices to devices described in section 201(h) of the FFDCA that are "intended for humans." The proposed regulations further limit the definition of "taxable medical device" to devices that are listed with the FDA. Under existing FDA regulations, a device intended for use exclusively in veterinary medicine must be labeled as such and is not subject to several pre-market and post-market provisions of the FFDCA, including the listing requirement. Therefore, under the proposed regulations, devices intended for use exclusively in veterinary medicine are not "taxable medical devices."

A commentator has noted, however, that many medical devices used in veterinary practices are also used in human medicine. The commentator suggested that if the manufacturer can demonstrate that a device is sold for use in veterinary medicine, the excise tax should not be imposed on that sale. The proposed regulations do not adopt this suggestion because the statutory language does not limit the definition of "taxable medical device" to devices intended exclusively for humans. Therefore, a device that is intended for humans but that is also intended for use or used in veterinary medicine is a "taxable medical device" if it is listed as a device with the FDA pursuant to FDA requirements, and does not fall within an exemption under section 4191(b)(2), such as the retail exemption.

IV. *Dual Use Devices*

Devices That Have Medical and Non-Medical Uses

Many commentators expressed concern over the potential taxation of devices that have both medical and non-medical uses, such as latex gloves, and requested that the excise tax not be imposed on the sale of devices for non-medical uses.

Section 4191 imposes a tax upon the sale of a taxable medical device by the manufacturer, unless the sale is for export or further manufacture. In most instances, the manufacturer does not sell directly to the end user of the device. Therefore, the manufacturer does not typically know the identity of the end user at the time of sale. Further, commentators suggest that manufacturers would have difficulty tracking their products through the supply chain and determining the ultimate destination of their products once they are sold to a distributor. Commentators also stated that, in some cases, after the manufacturer sells a device to a distributor, the distributor may package and label the device for sale for non-medical uses.

Under the proposed regulations, the definition of "taxable medical device" is tied to the FDA's listing requirements for devices. Therefore, a device that is listed with the FDA pursuant to FDA requirements is a "taxable medical device," unless

it falls within an exemption under section 4191(b)(2), such as the retail exemption.

"Research Use Only" Devices

Several commentators stated that they manufacture devices that are used in clinical medicine to diagnose disease in humans, as well as in industrial laboratory work and laboratory research. Those commentators further stated that when sold for non-medical purposes, such devices are labeled "Research Use Only." The comments suggest that, although the devices labeled "Research Use Only" are physically suitable for clinical use, FDA regulations prohibit the use of devices with this label in a clinical setting for human medical purposes. The commentators requested that sales of devices that are labeled "Research Use Only" be exempt from the medical device excise tax because of the intended use of such devices.

The proposed regulations define "taxable medical device" as any device that is listed as a device with the FDA pursuant to FDA requirements. Under 21 CFR 807.65(f) of the FDA regulations, persons that "manufacture, prepare, propagate, compound, or process devices solely for use in research, teaching, or analysis and do not introduce such devices into commercial distribution" are exempt from the FDA's registration and listing requirements. See section 510(g) of the FFDCA. Accordingly, a device that is sold for use in research that is not listed because it satisfies the requirements of 21 CFR 807.65(f) is not a "taxable medical device" under the proposed regulations. In contrast, a device that is sold for use in research that is listed with the FDA pursuant to FDA requirements, such as a device not solely used in research or one that is introduced into commercial distribution, is a "taxable medical device" under the proposed regulations, unless it falls within an exemption under section 4191(b)(2), such as the retail exemption.

V. *Devices Approved by the FDA for Limited Use — Investigational Devices*

Several commentators requested an exemption for devices that are subject to an Investigational Device Exemption (IDE). The FDA permits the distribution of certain devices that the FDA has not yet approved for marketing under an IDE. See 21 CFR Part 812 for the FDA's regulatory provisions regarding the IDE. Devices under an IDE are exempt from the FDA's listing requirements. Accordingly, a device subject to an IDE is not a "taxable medical device" under the proposed regulations.

VI. *Dental Instruments and Equipment*

A commentator requested that the proposed regulations provide a blanket exclusion for dental instruments and equipment. The proposed regulations do not adopt this suggestion. There is no statutory basis for treating dental devices differently from other taxable medical devices. Many dental instruments and equipment items are subject to the FDA's listing requirement. Accordingly, those devices that are listed as devices with the FDA pursuant to FDA requirements are "taxable medical devices" under the proposed regulations, unless they fall within an exemption under section 4191(b)(2), such as the retail exemption.

VII. *Manufacturers Excise Tax Rules Generally; Application to Taxable Medical Devices*

The ACA added section 4191 to chapter 32; therefore, the existing rules governing chapter 32 apply to the medical device excise tax. Those rules are longstanding. They are contained in statutory and regulatory provisions, and have been developed further through revenue rulings, other published guidance, and case law.

Several commentators requested clarification on the existing manufacturers excise tax rules. This section provides an overview of the rules and addresses some of the manufacturers excise tax issues raised by commentators.

Liability for Tax; Definition of "Manufacturer" and "Importer"

In general, the manufacturer or importer of a taxable article is liable for the tax upon the sale of the article. Under chapter 32, the lease or use of a taxable article by the manufacturer is generally treated as a sale.

The term "manufacturer" means any person who produces a taxable article from scrap, salvage, or junk material, or from new or raw material, by processing, manipulating, or changing the form of an article or by combining or assembling two or more articles. A manufacturer that sells a taxable article in knockdown (that is, unassembled) condition is considered the manufacturer and is liable for tax on the sale of the article. For chapter 32 purposes, the term "manufacturer" also includes an "importer." The importer of a taxable article is any person who brings the article into the United States from a source outside the United States, or withdraws an article from a customs bonded warehouse for sale or use in the United States. See §48.0–2(a)(4) for the definitions of the terms "manufacturer" and "importer."

If more than one person is involved in the manufacture or importation of an item, such as a contract manufacturing arrangement, the determination of which person is the manufacturer or the importer is based on the facts and circumstances of the arrangement. The substance rather than the form of the transaction is determinative. See Rev. Rul. 58–134, 1958–1 C.B. 395, Rev. Rul. 60–42, 1960–1 C.B. 474, and *Polaroid v. U.S.*, 235 F2d. 276 (1st Cir. 1956), for rules regarding the determination of which party is the manufacturer for chapter 32 purposes. See Rev. Rul. 68–197, 1968–1 C.B. 455, and Rev. Rul. 82–40, 1982–1 C.B. 175, for rules regarding the determination of which party is the importer for chapter 32 purposes.

Some commentators suggested that, in determining who is liable for the tax, the IRS and the Treasury Department should apply either the section 954 contract manufacturing rules or the FDA's registration and listing rules under 21 CFR Part 807. The proposed regulations do not adopt these suggestions. As noted above, the existing chapter 32 framework includes definitions of "manufacturer" and "importer." Section 4191 does not provide alternate definitions for those terms. Accordingly, the definitions of "manufacturer" and "importer" under chapter 32 apply to section 4191.

Taxable event

Generally, the manufacturers excise tax attaches when the title to the taxable article passes from the manufacturer to a purchaser. When title passes is dependent upon the intention of the parties as gathered from the contract of sale and the attendant circumstances. In the case of a sale on

credit, the tax attaches whether or not the purchase price is actually paid. In the case of conditional or installment sales of a taxable article, the tax attaches to each partial payment. See §48.0–2(b) for the general rules regarding the attachment of tax.

Section 4218 imposes tax on certain uses of an article by the article's manufacturer. The tax attaches at the time the use begins. Under §48.4218–1(b), generally, if the manufacturer of a taxable article uses the article for any purpose other than in the manufacture of another taxable article, then the manufacturer is liable for tax on the article as if the manufacturer had sold it. However, if a manufacturer uses a taxable article in the testing of another article of its own manufacture, the use of the taxable article by the manufacturer is not a taxable use. See Rev. Rul. 76–119, 1976–1 C.B. 345. Section 48.4218–5 provides rules on how to calculate the price on which the tax is imposed in cases of the taxable use of an article by the manufacturer.

Several commentators requested guidance on whether taxable medical devices that are used as demonstration products are subject to the medical device excise tax. The provision or use of a taxable medical device as a demonstration product may constitute a taxable sale or use, depending on the facts and circumstances of the arrangement. For example, Rev. Rul. 72–563, 1972–2 C.B. 568, holds that a manufacturer has sold an article when it provides the article "free of charge" to another person for promotional purposes. In addition, Rev. Rul. 60–290, 1960–2 C.B. 331, holds that the use of a taxable article by its manufacturer for demonstration purposes is a taxable use for purposes of section 4218.

Leases

Under section 4217(a), the lease of a taxable article by the manufacturer is considered a sale. If, at the time of making the lease, the manufacturer is in the business of selling the same type and model of article in arm's length transactions, the tax attaches to each lease payment until the cumulative total of the tax payments equals the total tax. If, however, at the time of making the lease, the manufacturer is not engaged in the business of selling the same type and model of article in arm's length transactions, the tax attaches to each lease payment if the article is leased by the manufacturer. See section 4216(c), section 4217(b), §48.4216(c)–1, and §48.4217–2 for the rules regarding the attachment and payment of tax in the context of leases.

Under §48.4217–1, the term "lease" means a contract or agreement, written or verbal, that gives the lessee an exclusive, continuous right to the possession or use of a particular article for a period of time. The term includes any renewal or extension of a lease, or any subsequent lease of the article.

Sale price

The tax imposed under section 4191 is based on the price for which a taxable medical device is sold. Under section 48.4216(a)–1(a), the price for which a taxable article is sold includes the total consideration paid for the device, whether that consideration is in the form of money, services, or other things.

The taxable sale price of a taxable article also includes, among other things, any charge for coverings or containers (regardless of their nature), and any charge incident to placing the article in a condition to be packed and ready for shipment. However, the taxable sale price excludes (i) the manufacturers excise tax, whether or not it is stated as a separate charge; (ii) the actual cost of transportation, delivery, insurance, installation, and other expenses incurred by the manufacturer or importer in placing the article in the hands of the purchaser pursuant to a *bona fide* sale (the costs of transportation of goods to a warehouse before their *bona fide* sale are not excludable); (iii) discounts, rebates, and similar allowances actually granted to the purchaser; (iv) local advertising charges; and (v) charges for warranty paid at the purchaser's option. See section 4216(a) and §48.4216(a)–1 for the rules regarding the charges included in sale price. See sections 4216(a) and (e), §48.4216(a)–2, §48.4216(e)–1, §48.4216(e)–2, and §48.4216(e)–3 for the rules regarding exclusions from sale price.

The basic sale price rules assume that the manufacturer sells the taxable article in an arm's length transaction (that is, in a transaction between two unrelated parties) to a wholesale distributor that then sells the taxable article to a retailer that resells to consumers. However, if a manufacturer sells a taxable article other than to a wholesale distributor or at less than a fair market arm's length price, the taxable sale price is determined on a constructive sale price rather than the actual sale price. The constructive sale price rules are set forth in section 4216(b), in §48.4216(b)–1, §48.4216(b)–2, §48.4216(b)–3, and §48.4216(b)–4 of the regulations, and in numerous revenue rulings.

If a purchaser of a taxable article returns the article to the manufacturer under a warranty as to its quality or service and the manufacturer replaces the article with a new taxable article free of charge or at a reduced price, the tax on the new article is computed on the actual amount, if any, paid to the manufacturer for the new article. See §48.4216(a)–3(b) for the rules regarding replacements under warranty.

Several commentators requested clarification on how the sale price rules work in the context of taxable medical devices, particularly with regard to "bonus" goods and rebates. These commentators indicated that rebates are a common practice in the medical device industry. Under existing manufacturers tax rules, if a manufacturer sells taxable articles at the regular price and includes some of the same articles as a bonus, the tax imposed under section 4191 applies to the total price charged for the entire order. With regard to rebates, §48.4216(a)–3(c) provides that the tax must be based on the original price of the taxable article, unless the rebate has been made prior to the close of the period for which the tax is returned. However, if a manufacturer subsequently allows a rebate for taxable articles on which tax has been paid, the manufacturer is entitled to a credit or refund for that portion of the tax that is proportionate to the part of the price that is rebated. See Rev. Rul. 68–659, 1968–2 C.B. 511, and Rev. Rul. 69–73, 1969–1 C.B. 284, for applications of the rules regarding bonus goods, free goods, and rebates. See §48.4216(a)–3(c) for rules regarding readjustments in sale price for discounts, rebates, and bonuses.

Sales by persons other than the manufacturer

If title to, or ownership of, a taxable article passes from the manufacturer to a transferee by operation of law (such as

through an inheritance or as part of the sale of a business) or as a result of any transaction not taxable under chapter 32, tax attaches to the sale of the article by the transferee to the same extent and in the same manner as if the transferee were the manufacturer of the article. See section 4219 and §48.4219–1 for the rules regarding transfers of title to taxable articles by operation of law.

Tax-free sales for further manufacture and export

Under section 4221(a), the tax imposed by section 4191 does not apply to the sale of taxable medical devices for use by the purchaser for further manufacture (or for resale by the purchaser to a second purchaser for further manufacture) or for export (or for resale for export).

Under §48.4221–2(b), an article is sold for use in further manufacture if the article is sold for use by the purchaser as material in the production of, or as a component part of, another article taxable under chapter 32. Section 48.4221–2 sets forth rules governing tax-free sales of articles to be used or resold for further manufacture.

Under §48.0–2(a)(10), an article is exported if the article is severed from the mass of things belonging within the United States with the intention of uniting it with the mass of things belonging within some foreign country or within a possession of the United States. Section 48.4221–3 sets forth rules regarding tax-free sales of articles for export.

To make a tax-free sale for further manufacture or export, the manufacturer, the first purchaser, and in some cases the second purchaser must be registered by the IRS. A manufacturer or purchaser applies for registration by filing a Form 637, "*Application for Registration (For Certain Excise Tax Activities)*," in accordance with the instructions on the form. See §48.4222(a)–1 for the registration requirements for tax-free sales. Foreign purchasers of articles sold or resold for export are exempt from the registration requirement. See §48.4222(b)–1(b).

Generally, the purchaser of a taxable article must provide the purchaser's registration number to the manufacturer and certify the exempt purpose for which the article will be used. The information must be in writing and may be noted on the purchase order or other document furnished by the purchaser to the manufacturer in connection with the sale. See §48.4221–1(c).

A credit or refund of the manufacturers excise tax may be available if a tax-paid article is exported or used for an exempt purpose, such as further manufacture. See 6416 and the corresponding regulations for the conditions to allowance of a claim for credit or refund of tax and for the documentation required to support a claim for credit or refund.

Procedural rules

Part 40 of 26 CFR contains the procedural rules applicable to manufacturers excise taxes with regard to returns, deposits, and payments.

Subtitle F of the Code contains the procedural rules applicable to "internal revenue taxes" (including manufacturers excise taxes) with regard to assessment, collection, penalties, overpayments, refunds, and statutes of limitations.

VIII. *Other Issues Raised in Comments on Notice 2010–89*

Kits

Several commentators requested clarification on the taxation of kits, often referred to as "convenience kits." In general, a convenience kit is two or more different medical devices, or a combination of medical devices and other items, packaged together for the convenience of the user.

According to commentators, a number of different types of businesses, including device manufacturers and distributors, engage in the practice of creating such convenience kits. A manufacturer may assemble a kit containing a combination of items that it manufactures and items that it purchases from other manufacturers, importers, or distributors. A kit may also be assembled by a distributor that purchases the items contained in the kit from one or more manufacturers or importers. Some kits are designed to be used by medical or health care professionals for the performance of a particular medical procedure. Other kits are available to the general public at retail, such as first aid kits and home pregnancy test kits.

Several commentators expressed concern over the potential for double taxation when one or more taxable medical devices are included in a kit. Some commentators suggested that tax should not be imposed on both the taxable medical devices used as components of the kit and the kit itself. Other commentators recommended imposing tax on the taxable medical devices included in the kit, but not on the assembled kit. Other commentators suggested that the assembly of a kit does not constitute manufacture because the items included in the kit are not transformed.

Under the proposed regulations, a kit is a "taxable medical device" if the kit is listed as a device with the FDA pursuant to FDA requirements. The proposed regulations define "kit" as a set of two or more articles packaged in a single bag, tray, or box for the convenience of the end user.

Moreover, the existing manufacturers excise tax rules apply to kits in determining who is liable for the tax and which sale is subject to tax. Under these existing rules, if a manufacturer sells a taxable medical device to a distributor that uses the device to produce a kit that is a distinct taxable medical device, the distributor's assembly of the kit constitutes further manufacture because the distributor has created a new taxable article. The proposed regulations clarify that if a kit is a taxable medical device, then the use of other taxable medical devices in the assembly of the kit constitutes further manufacture by the person who assembles the kit.

In some circumstances, the manufacturer may make a tax-free sale of a taxable medical device to the distributor for use in the production or assembly of a kit; tax will attach, however, upon the sale of the kit by the distributor. If the manufacturer sells a taxable medical device to the distributor for use in the production or assembly of a kit at a tax-included price, the distributor may be eligible to claim a credit or refund for the overpayment of tax pursuant to section 6416(b)(3). The rules regarding tax-free sales for further manufacture and the credit and refund provisions of section 6416(b)(3) provide a mechanism for avoiding double taxation when a taxable medical device is included in a kit that is also a taxable medical device. See §48.4221–2(b) for the circumstances under which a taxable article is sold for use in further manufacture. See section 4221 and §48.4221–1, §48.4221–2, §48.4222(a)–1,

and §48.4223–1 for the rules regarding tax-free sales for further manufacture.

Generally, under §48.4216(a)–1(e), if a taxable and nontaxable article are sold by the manufacturer as a unit, the tax attaches to that portion of the unit that is properly allocable to the taxable article. In the case of a kit that is a separate taxable medical device, the taxable and nontaxable articles used in the kit's production or assembly have lost their identity as separate articles. Accordingly, the proposed regulations clarify that the provisions of §48.4216(a)–1(e) do not apply to the sale of kits that are separate taxable medical devices. The proposed regulations further clarify that under such circumstances, the entire sale price of the kit is subject to tax under section 4191.

Associated Devices and Components of Devices

Several commentators requested clarification on the tax treatment of an associated or secondary device that is sold with a primary device, such as a monitor that is sold as part of an x-ray system. Commentators also requested information on the tax treatment of components of a device.

Under the proposed regulations, the definition of "taxable medical device" is tied to the FDA's listing requirements for devices. Therefore, associated devices or components that are listed as devices with the FDA pursuant to FDA requirements are "taxable medical devices" for purposes of section 4191, unless they fall within an exemption under section 4191(b)(2), such as the retail exemption. However, if a manufacturer uses an associated device or component in creating a new device that must be listed with the FDA, then the rules under section 4221 and the corresponding regulations regarding further manufacture apply.

Combination products

Combination products are therapeutic and diagnostic products that combine drugs, devices, and/or biological products. See 21 CFR 3.2(e). The IRS and the Treasury Department received a comment regarding combination products consisting of a device component and a drug component, such as prefilled syringes and inhalers. The commentator suggested that the sale of a combination product should not be subject to the medical device tax if its drug component is taken into account in computing the branded prescription drug (BPD) fee enacted under section 9008 of the ACA. The commentator suggested that the combination product be subject to either the BPD fee or the medical device tax, but not both, based on the FDA's determination of a combination product's primary mode of action.

The ACA enacted both the medical device excise tax and the BPD fee, but provided no coordination between the provisions. Under the proposed regulations, the definition of "taxable medical device" is tied to the FDA's listing requirements for devices. In general, the annual BPD fee is allocated among covered entities engaged in the business of manufacturing or importing branded prescription drugs with aggregate branded prescription drug sales of over $5 million to specified government programs. See section 9008 of the ACA and 26 CFR Part 51. For this purpose, each branded prescription drug is identified based on its National Drug Code (NDC). Based on consultation with the FDA, the IRS and the Treasury Department anticipate that few, if any, combination products will be subject to both the medical device excise tax and the BPD fee. The IRS and the Treasury Department request comments on the extent to which combination products may be subject to the medical device excise tax and taken into account in computing the BPD fee, and the mechanisms by which any such impact could be avoided.

Contracts for medical software and IT systems

A commentator requested transition relief for sales contracts for medical software and IT systems. According to the commentator, sellers of software and IT systems frequently provide medical devices, such as medical device data systems, under long-term, multi-year contracts. Under these contracts, the manufacturer often delivers software and IT systems in stages, with partial payments due at various times during the contract term. The commentator requested that contracts, leases, and other agreements entered into before January 1, 2013, not be subject to the medical device excise tax, even if payments on the contract are received after December 31, 2012.

The proposed regulations apply the existing manufacturers excise tax rules for sales contracts. Under section 4216 and §48.4216(c)–1(b), generally, when a taxable article is sold under an installment payment contract with title reserved in the seller, or under another arrangement that creates a security interest and under which payments are to be made in installments, tax is computed and paid on each payment made by the purchaser. The tax payable with each payment is a percentage of each payment based on the rate of the tax, if any, in effect on the date the payment is due.

The proposed regulations do not adopt the request for transition relief. The statute was enacted on March 30, 2010, with an effective date of January 1, 2013. The statute did not provide an exception or special rule for sales pursuant to contracts in existence prior to the effective date of the tax. The proposed regulations track the statute.

Availability of IRS Documents

The IRS notice and revenue rulings cited in this preamble are published in the Internal Revenue Cumulative Bulletin and are available from the Superintendent of Documents, P.O. Box 979050, St. Louis, MO 63197–9000.

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for May 16, 2012, at 10 a.m., in the IRS Auditorium, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by May 7, 2012 and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by May 7, 2012. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the schedule of speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Natalie Payne, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 48 is proposed to be amended as follows:

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

Paragraph 1. The authority citation for part 48 is amended by adding entries in numerical order to read in part as follows:

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

Section 48.4191–1 also issued under 26 U.S.C. 4191.

Section 48.4191–2 also issued under 26 U.S.C. 4191(b)(2).

§48.0–1 [Amended]

Par. 2. The fourth sentence of §48.0–1 is amended by removing the language "and sporting goods" and adding "sporting goods, and taxable medical devices" in its place.

Par. 3. Subpart L, consisting of §§48.4191–1 and 48.4191–2, is added to read as follows:

Subpart L — Taxable Medical Devices

Sec.

48.4191–1 Imposition and rate of tax.

48.4191–2 Taxable medical device.

§48.4191–1 Imposition and rate of tax.

(a) *Imposition of tax*. Under section 4191(a), tax is imposed on the sale of any taxable medical device by the manufacturer, producer, or importer of the device. For the definition of the term *taxable medical device*, see §48.4191–2.

(b) *Rate of tax*. Tax is imposed on the sale of a taxable medical device at the rate of 2.3 percent of the price for which the device is sold. For the definition of the term *price*, see section 4216 and §§48.4216(a)–1 through 48.4216(e)–3.

(c) *Liability for tax*. The manufacturer, producer, or importer making the sale of a taxable medical device is liable for the tax imposed by section 4191(a). For rules relating to the determination of who the manufacturer, producer, or importer is for purposes of section 4191, see §48.0–2(a)(4). For the definition of the term *sale*, see §48.0–2(a)(5). For rules relating to the lease of an article by the manufacturer, producer, or importer, see section 4217 and §48.4217–1 through §48.4217–2. For rules relating to the use of an article by the manufacturer, producer, or importer, see section 4218 and §48.4218–1 through §48.4218–5.

(d) *Procedural rules*. For the procedural rules relating to section 4191, see part 40 of this chapter.

(e) *Tax-free sales for further manufacture or export*. For rules relating to tax-free sales of taxable medical devices for further manufacture or export, see section 4221 and §48.4221–1 through §48.4221–3.

(f) *Effective/applicability date*. This section applies to sales of taxable medical devices on and after January 1, 2013.

§48.4191–2 Taxable medical device.

(a) *Taxable medical device*—(1) *In general*. A taxable medical device is any device, as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act, that is intended for humans. For purposes of this section, a device defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act that is intended for humans means a device that is listed as a device with the Food and Drug Administration (FDA) under section 510(j) of the Federal Food, Drug, and Cosmetic Act and 21 CFR Part 807, pursuant to FDA requirements.

(2) *Devices that should have been listed with the FDA*. If a device is not listed as a device with the FDA but the FDA determines that the device should have been listed as a device, the device will be deemed to be listed as a device with the FDA as of the date the FDA notifies the manufacturer or importer in writing that corrective action with respect to listing is required.

(b) *Exemptions*—(1) *In general* . The term *taxable medical device* does not include eyeglasses, contact lenses, hearing aids, and any other device of a type that is generally purchased by the general public at retail for individual use (the retail exception).

(2) *Retail exemption*. A device will be considered to be of a type generally purchased by the general public at retail for individual use if it is regularly available for purchase and use by individual consumers who are not medical professionals, and if the design of the device demonstrates that it is not primarily intended for use in a

medical institution or office or by a medical professional. Whether a device is of a type described in the preceding sentence is evaluated based on all the relevant facts and circumstances. Factors relevant to this evaluation are listed in paragraphs (b)(2)(i) and (ii) of this section. There may be facts and circumstances that are relevant in evaluating whether a device is of a type generally purchased by the general public at retail for individual use in addition to those described in paragraphs (b)(2)(i) and (ii) of this section. The fact that a device is of a type that requires a prescription is not a factor in the determination of whether or not the device falls under the retail exemption.

(i) *Regularly available for purchase and use by individual consumers*. The following factors suggest that a device is of a type that is regularly available for purchase and use by individual consumers who are not medical professionals:

(A) Consumers who are not medical professionals can purchase the device through retail businesses that also sell items other than medical devices, such as drug stores, supermarkets, and similar vendors.

(B) Consumers who are not medical professionals can use the device safely and effectively for its intended medical purpose with minimal or no training from a medical professional.

(C) The device is classified by the FDA under Subpart D of 21 CFR Part 890 (Physical Medicine Devices).

(ii) *Primarily for use in a medical institution or office or by a medical professional*. The following factors suggest that the device is designed primarily for use in a medical institution or office or by a medical professional:

(A) The device generally must be implanted, inserted, operated, or otherwise administered by a medical professional.

(B) The cost to acquire, maintain, and/or use the device requires a large initial investment and/or ongoing expenditure that is not affordable for the average consumer.

(C) The device is a Class III device under the FDA system of classification.

(D) The device is classified by the FDA under—

(*1*) 21 CFR Part 862 (Clinical Chemistry and Clinical Toxicology Devices), 21 CFR Part 864 (Hematology and Pathology Devices), 21 CFR Part 866 (Immunology and Microbiology Devices), 21 CFR Part 868 (Anesthesiology Devices), 21 CFR Part 870 (Cardiovascular Devices), 21 CFR Part 874 (Ear, Nose, and Throat Devices), 21 CFR Part 876 (Gastroenterology — Urology Devices), 21 CFR Part 878 (General and Plastic Surgery Devices), 21 CFR Part 882 (Neurological Devices), 21 CFR Part 886 (Ophthalmic Devices), 21 CFR Part 888 (Orthopedic Devices), or 21 CFR Part 892 (Radiology Devices);

(*2*) Subpart B, Subpart D, or Subpart E of 21 CFR Part 872 (Dental Devices);

(*3*) Subpart B, Subpart C, Subpart D, Subpart E, or Subpart G of 21 CFR Part 884 (Obstetrical and Gynecological Devices); or

(*4*) Subpart B of 21 CFR Part 890 (Physical Medicine Devices).

(E) The device qualifies as durable medical equipment, prosthetics, orthotics, and supplies for which payment is available exclusively on a rental basis under the Medicare Part B payment rules, and is an "item requiring frequent and substantial servicing" as defined in 42 CFR 414.222.

(iii) *Safe Harbor*. The following devices will be considered to be of a type generally purchased by the general public at retail for individual use:

(A) Devices that are included in the FDA's online IVD Home Use Lab Tests (Over-the-Counter Tests) database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfIVD/Search.cfm*.

(B) Devices that are described as "OTC" or "over the counter" devices in the relevant FDA classification regulation heading.

(C) Devices that are described as "OTC" or "over the counter" devices in the FDA's product code name, the FDA's device classification name, or the "classification name" field in the FDA's device registration and listing database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfrl/rl.cfm*.

(D) Devices that qualify as durable medical equipment, prosthetics, orthotics, and supplies, as described in Subpart C of 42 CFR Part 414 (Parenteral and Enteral Nutrition) and Subpart D of 42 CFR Part 414 (Durable Medical Equipment and Prosthetic and Orthotic Devices), for which payment is available on a purchase basis under Medicare Part B payment rules, and are—

(*1*) "Prosthetic and orthotic devices," as defined in 42 CFR 414.202, that do not require implantation or insertion by a medical professional;

(*2*) "Parenteral and enteral nutrients, equipment, and supplies" as defined in 42 CFR 411.351 and described in 42 CFR 414.102(b);

(*3*) "Customized items" as described in 42 CFR 414.224;

(*4*) "Therapeutic shoes," as described in 42 CFR 414.228(c); or

(*5*) Supplies necessary for the effective use of DME, as described in section 110.3 of chapter 15 of the Medicare Benefit Policy Manual (Centers for Medicare and Medicaid Studies Publication 100–02).

(iv) *Examples*. The following examples illustrate the rules of this paragraph (b).

Example 1. X manufactures non-sterile absorbent tipped applicators. X sells the applicators to distributors Y and Z, which, in turn, sell the applicators to medical institutions and offices, medical professionals, and to retail establishments. The FDA requires manufacturers and importers of non-sterile absorbent tipped applicators to list the applicators as a device with the FDA. The applicators are classified by the FDA under 21 CFR Part 880 (General Hospital and Personal Use Devices) and product code KXF. Absorbent tipped applicators do not fall within a retail exception safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the absorbent tipped applicators are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis. Individual consumers who are not medical professionals can regularly purchase the absorbent tipped applicators at drug stores, supermarkets, cosmetic supply stores and other similar establishments, and can use the applicators safely and effectively for their intended medical purpose without training from a medical professional. Further, the absorbent tipped applicators do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not a Class III device, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not "items requiring frequent and substantial servicing" as defined in 42 CFR 414.222. Thus, the applicators have multiple factors that tend to show they are regularly available for purchase and use by individual consumers and none of the factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the applicators are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 2. X manufactures adhesive bandages. X sells the adhesive bandages to distributors Y and Z, which, in turn, sell the bandages to medical institutions and offices, medical professionals, and to retail

establishments. The FDA requires manufacturers and importers of adhesive bandages to list the bandages as a device with the FDA. The adhesive bandages are classified by the FDA under 21 CFR Part 880 (General Hospital and Personal Use Devices) and product code KGX. Adhesive bandages do not fall within a retail exception safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the adhesive bandages are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis. Individual consumers who are not medical professionals can regularly purchase the adhesive bandages at drug stores, supermarkets and other similar establishments, and can use the adhesive bandages safely and effectively for their intended medical purpose without training from a medical professional. Further, the adhesive bandages do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not Class III devices, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not "items requiring frequent and substantial servicing" as defined in 42 CFR 414.222. Thus, the bandages have multiple factors that tend to show they are regularly available for purchase and use by individual consumers and none of the factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the adhesive bandages are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 3. X manufactures snake bite suction kits. X sells the snake bite suction kits to distributors Y and Z, which, in turn, sell the kits to medical institutions and offices, medical professionals, and to retail establishments. The FDA requires manufacturers and importers of snake bite suction kits to list the kits as a device with the FDA. The FDA classifies the snake bit suction kits under 21 CFR Part 880 (General Hospital and Personal Use Devices) and product code KYP. Snake bite suction kits do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the snake bite suction kits are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis. Individual consumers who are not medical professionals can regularly purchase the snake bite suction kits at sporting goods stores, camping stores, and other similar establishments, and can use the kits safely and effectively for their intended medical purpose without training from a medical professional. Further, the snake bite suction kits do not need to be implanted, inserted, operated or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not Class III devices, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not "items requiring frequent and substantial servicing" as defined in 42 CFR 414.222. Thus, the snake bite suction kits have multiple factors that tend to show they are regularly available for purchase and use by individual consumers and none of the factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the snake bite suction kits are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 4. X manufactures denture adhesives. X sells the denture adhesives to distributors Y and Z, which, in turn, sell the adhesives to dental offices and retail establishments. The FDA requires manufacturers and importers of denture adhesives to list the adhesive as a device with the FDA. The FDA classifies the denture adhesives under 21 CFR Part 872 (Dental Devices) and product code KXX. The denture adhesives do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the denture adhesives are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis. Individual consumers who are not medical professionals can regularly purchase the denture adhesives at drug stores, supermarkets, and other similar establishments, and can use the adhesives safely and effectively for their intended medical purpose with minimal or no training from a medical professional. Further, the denture adhesives do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not Class III devices, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not "items requiring frequent and substantial servicing" as defined in 42 CFR 414.222. Thus, the denture adhesives have multiple factors that tend to show they are regularly available for purchase and use by individual consumers and none of the factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the denture adhesives are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 5. X manufactures mobile x-ray systems. X sells the x-ray systems to distributors Y and Z, which, in turn, sell the systems generally to medical institutions and offices, and medical professionals. The FDA requires manufacturers and importers of mobile x-ray systems to list the systems as a device with the FDA. The FDA classifies the mobile x-ray systems under 21 CFR Part 892 (Radiology Devices) and product code IZL. Mobile x-ray systems do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the mobile x-ray systems are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis. Individual consumers who are not medical professionals cannot regularly purchase the mobile x-ray systems at drug stores, supermarkets, and other similar establishments, and cannot use the x-ray systems safely and effectively for their intended medical purpose without training from a medical professional. Although the mobile x-ray systems are not Class III devices and are not "items requiring frequent and substantial servicing" as defined in 42 CFR 414.222, they need to be operated by a medical professional, require a large investment and/or ongoing expenditure, and are of a type classified by the FDA under 21 CFR Part 892 (Radiology Devices). Thus, the x-ray systems do not meet any of the factors that tend to show that they are regularly available for purchase and use by individual consumers. However, the x-ray systems do meet several of the factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the mobile x-ray systems are not devices that are of a type generally purchased by the general public at retail for individual use.

Example 6. X manufactures pregnancy test kits. X sells the kits to distributors Y and Z, which, in turn, sell the pregnancy test kits to medical institutions and offices, medical professionals, and to retail establishments. The FDA requires manufacturers and importers of pregnancy test kits to list the kits as a device with the FDA. The FDA classifies the kits under 21 CFR Part 862 (Clinical Chemistry and Clinical Toxicology Devices) and product code LCX. The pregnancy test kits are included in the FDA's online IVD Home Use Lab Tests (Over-the-Counter Tests) database. Therefore, the over the counter pregnancy test kits fall within the safe harbor set forth in paragraph (b)(2)(iii)(A) of this section. Further, the FDA product code name for LCX is "Kit, Test, Pregnancy, HCG, Over The Counter." Therefore, the pregnancy test kits also fall within the safe harbor set forth in paragraph (b)(2)(iii)(C) of this section. Accordingly, the pregnancy test kits are devices that are of a type generally purchased by the general public at retail for individual use.

Example 7. X manufactures blood glucose monitors, blood glucose test strips, and lancets. X sells the blood glucose monitors, test strips and lancets to distributors Y and Z, which, in turn, sell the monitors, test strips, and lancets to medical institutions and offices, medical professionals, and to retail establishments. The FDA requires manufacturers and importers of blood glucose monitors, test strips, and lancets to list the items as devices with the FDA. The FDA classifies the blood glucose monitors under 21 CFR Part 862 (Clinical Chemistry and Clinical Toxicology Devices) and product code NBW. The FDA classifies the test strips under 21 CFR Part 862 (Clinical Chemistry and Clinical Toxicology Devices) and product code NBW. The FDA classifies the lancets under 21 CFR 878 (General and Plastic Surgery Devices) and product code FMK. The blood glucose monitors and test strips are included in the FDA's online IVD Home Use Lab Tests (Over-the-Counter Tests) database. Therefore, the blood glucose monitors and test strips fall within the safe harbor set forth in paragraph (b)(2)(iii)(A) of this section. Further, the FDA product code name for NBW is "System, Test, Blood Glucose, Over the Counter." Therefore, the blood glucose monitors and test strips also fall within the safe harbor set forth in paragraph (b)(2)(iii)(C) of this section. In addition, the lancets are supplies necessary for the effective use of DME as described in chapter 15 of the Medicare Policy Benefit Manual. Therefore, the lancets fall within the safe harbor set forth in paragraph (b)(2)(iii)(D)(*5*) of this section. Accordingly, the blood glucose monitors, test strips, and lancets are devices that are of a type generally purchased by the general public at retail for individual use.

(c) *Effective/applicability date*. This section applies to sales of taxable medical devices on and after January 1, 2013.

Par. 4. Section 48.4221–1 is amended by adding paragraph (a)(2)(vii) to read as follows:

§48.4221–1 Tax-free sales; general rule.

(a) * * *

(2) * * *

(vii) The exemptions under section 4221(a)(3) through (a)(6) do not apply to the tax imposed by section 4191 (medical device tax).

* * * * *

Par. 5. Section 48.4221–2 is amended by adding headings to paragraphs (b)(1) and (b)(2) and adding paragraph (b)(3).

The additions read as follows:

(b) * * *

(1) *In general.* * * *

(2) *Material in the manufacture or production of another article.* * * *

(3) *Kits*—(i) The process of producing or assembling a kit that is a taxable medical device (as defined in §48.4191–2) constitutes further manufacture. Under such circumstances, the taxable and nontaxable articles used in the production or assembly of the kit lose their identity as separate articles once they are incorporated into the kit because the kit is a new taxable article. Accordingly, the provisions of §48.4216(a)–1(e) do not apply upon the sale of a kit that is a taxable medical device, and the entire sale price of the kit is subject to tax under section 4191.

(ii) For purposes of this section, the term *kit* means a set of two or more articles that is enclosed in a single package, such as a bag, tray, or box, for the convenience of a medical or health care professional or the end user. A kit may contain a combination of one or more taxable medical devices and other articles.

(iii) The following example illustrates the rule of this paragraph (b)(3).

Example. X is a manufacturer of scalpels. X is registered with the IRS as a manufacturer of taxable medical devices in accordance with §48.4222(a)–1. Y is a distributor of taxable medical devices. Y is registered with the IRS as a manufacturer of taxable medical devices and as a buyer of taxable medical devices for use in further manufacture in accordance with §48.4222(a)–1. Y purchases scalpels from X for inclusion in surgical kits that Y produces. Both the scalpels and the kits are "taxable medical devices" as defined in §48.4191–2. Accordingly, X may sell the scalpels to Y tax free, provided Y furnishes its registration number to X and certifies in writing that the scalpels will be used in further manufacture.

(iv) This paragraph (b)(3) applies to sales of taxable medical devices on and after January 1, 2013.

* * * * *

Par. 6. Section 48.6416(b)(2)–2 is amended by adding paragraph (a)(4) to read as follows:

§48.6416(b)(2)–2 Exportations, uses, sales and resales included.

(a) * * *

(4) Beginning on January 1, 2013, sections 6416(b)(2)(B), (C), (D), and (E) do not apply to any tax paid under section 4191 (medical device tax).

* * * * *

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

(Filed by the Office of the Federal Register on February 3, 2012, 11:15 a.m., and published in the issue of the Federal Register for February 7, 2012, 77 F.R. 6028)

Notice of Proposed Rulemaking and Notice of Public Hearing

Longevity Annuity Contracts

REG–115809–11

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the purchase of longevity annuity contracts under tax-qualified defined contribution plans under section 401(a) of the Internal Revenue Code (Code), section 403(b) plans, individual retirement annuities and accounts (IRAs) under section 408, and eligible governmental section 457 plans. These regulations will provide the public with guidance necessary to comply with the required minimum distribution rules under section 401(a)(9). The regulations will affect individuals for whom a longevity annuity contract is purchased under these plans and IRAs (and their beneficiaries), sponsors and administrators of these plans, trustees and custodians of these IRAs, and insurance companies that issue longevity annuity contracts under these plans and IRAs. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by May 3, 2012. Outlines of topics to be discussed at the public hearing scheduled for June 1, 2012 must be received by May 11, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–115809–11), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington D.C. 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–115809–11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C., or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–115809–11). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Jamie Dvoretzky at (202) 622–6060; concerning submission of comments, the hearing, and/or being placed on the building access list to attend the hearing, Oluwafunmilayo (Funmi) Taylor) at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). The collection of information in these proposed regulations is in §1.401(a)(9)–6, A–17(a)(6) (disclosure that a contract is intended to be a qualifying longevity annuity contract) and §1.6047–2 (an initial report must be prepared and an initial disclosure statement

must be furnished to qualifying longevity annuity contract owners, and an annual statement must be provided to qualifying longevity annuity contract owners and their surviving spouses containing information required to be furnished to the IRS). The information in §1.401(a)(9)–6, A–17(a)(6), is required in order to notify participants and beneficiaries, plan sponsors, and the IRS that the proposed regulations apply to a contract. The information in the annual statement in §1.6047–2 is required in order to apply the dollar and percentage limitations in §1.401(a)(9)–6, A–17(b) and §1.408–8, Q&A–12(b) and to comply with other requirements of the proposed regulations, and the information in the initial report and disclosure statement in §1.6047–2 is required in order for individuals to understand the features and limitations of a qualifying longevity annuity contract. The information would be used by plans and individuals to comply with the required minimum distribution rules.

Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:M:S; Washington, DC 20224. Comments on the collection of information should be received by April 3, 2012. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

Estimated total average annual recordkeeping burden: 35,661 hours.

Estimated average annual burden per response: 10 minutes.

Estimated number of responses: 213,966.

Estimated number of recordkeepers: 150.

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

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

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under sections 401(a)(9), 403(b)(10), 408(a)(6), 408(b)(3), 408A(c)(5), and 6047(d) of the Code.

Section 401(a)(9) prescribes required minimum distribution rules for a qualified trust under section 401(a). In general, under these rules, distribution of each participant's entire interest must begin by the required beginning date. The required beginning date generally is April 1 of the calendar year following the later of (1) the calendar year in which the participant attains age 70½ or (2) the calendar year in which the participant retires. However, the ability to delay distribution until the calendar year in which a participant retires does not apply in the case of a 5-percent owner or an IRA owner.

If the entire interest of the participant is not distributed by the required beginning date, section 401(a)(9)(A) provides that the entire interest of the participant must be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of the participant or lives of the participant and a designated beneficiary (or over a period not extending beyond the life expectancy of the participant or the life expectancy of the participant and a designated beneficiary). Section 401(a)(9)(B) prescribes required minimum distribution rules that apply after the death of the participant. Section 401(a)(9)(G) provides that any distribution required to satisfy the incidental death benefit requirement of section 401(a) is treated as a required minimum distribution.

Section 403(b) plans, IRAs described in section 408, and eligible deferred compensation plans under section 457(b) also are subject to the required minimum distribution rules of section 401(a)(9) pursuant to sections 408(a)(6) and (b)(3), 403(b)(10), and 457(d)(2), respectively, and the regulations under those sections. However, pursuant to section 408A(c)(5), the minimum distribution and minimum distribution incidental benefit (MDIB) requirements do not apply to Roth IRAs during the life of the participant.

Section 408(i) provides that the trustee of an individual retirement account and the issuer of an endowment contract or an individual retirement annuity must make reports regarding such account, contract, or annuity to the Secretary and to the individuals for whom the account, contract, or annuity is maintained with respect to such matters as the Secretary may require. Pursuant to this provision, the IRS prescribes Form 5498 (*IRA Contribution Information*), which requires annual reporting with respect to an IRA, including a statement of the fair market value of the IRA as of the prior December 31. Section 6047(d) states that the Secretary shall by forms or regulations require that the employer maintaining, or the plan administrator of, a plan from which designated distributions (as defined in section 3405(e)(1)) may be made, and any person issuing any contract under which designated distributions may be made, make returns and reports regarding the plan or contract to the Secretary, to the participants and beneficiaries of the plan or contract, and to such other persons as the Secretary may by regulations prescribe. These sections also provide that the Secretary may, by forms or regulations, prescribe the manner and time for filing these reports. Section 6693 prescribes monetary penalties for failure to comply with section 408(i), and sections 6652 and 6704 prescribe monetary penalties for failure to comply with section 6047(d).

Section 1.401(a)(9)–6 of the Income Tax Regulations sets forth the minimum distribution rules that apply to a defined benefit plan and to annuity contracts un-

der a defined contribution plan. Under §1.401(a)(9)–6, A–12, if an annuity contract held under a defined contribution plan has not yet been annuitized, the interest of a participant or beneficiary under that contract is treated as an individual account for purposes of section 401(a)(9). Thus, the value of that contract is included in the account balance used to determine required minimum distributions from the participant's individual account.

If an annuity contract has been annuitized, the periodic annuity payments must be nonincreasing, subject to certain exceptions that are set forth in §1.401(a)(9)–6, A–14. In addition, annuity payments must satisfy the MDIB requirement of section 401(a)(9)(G). Under §1.401(a)(9)–6, A–2(b), if a participant's sole beneficiary, as of the annuity starting date, is his or her spouse and the distributions satisfy section 401(a)(9) without regard to the MDIB requirement, the distributions to the participant are deemed to satisfy the MDIB requirement. However, if distributions are in the form of a joint and survivor annuity for a participant and a non-spouse beneficiary, the MDIB requirement is not satisfied unless the periodic annuity payment payable to the survivor does not exceed an applicable percentage of the amount that is payable to the participant, with the applicable percentage to be determined using the table in §1.401(a)(9)–6, A–2(c).

The regulations under sections 403(b)(10), 408(a)(6), 408(b)(3), 408A(c)(5), and 457(d)(2) prescribe how the required minimum distribution rules apply to other types of retirement plans and accounts. Section 1.403(b)–6(e)(1) provides that a section 403(b) contract must meet the requirements of section 401(a)(9). Section 1.403(b)–6(e)(2) provides, with certain exceptions, that the section 401(a)(9) required minimum distribution rules are applied to section 403(b) contracts in accordance with the provisions in §1.408–8. Section 1.408–8, Q&A–1, provides, with certain modifications, that an IRA is subject to the rules of §§1.401(a)(9)–1 through 1.401(a)(9)–9. One such modification is set forth in §1.408–8, Q&A–9, which prescribes a rule under which an IRA generally does not fail to satisfy section 401(a)(9) merely because the required minimum distribution with respect to the IRA is distributed instead from another IRA. Section 1.408A–6, Q&A–14(a), provides that no minimum distributions are required to be made from a Roth IRA during the life of the participant. Section 1.408A–6, Q&A–15, provides that a participant who is required to receive minimum distributions from his or her traditional IRA cannot choose to take the amount of the required minimum distributions from a Roth IRA. Section 1.457–6(d) provides that a section 457(b) eligible plan must meet the requirements of section 401(a)(9) and the regulations under that section.

On February 2, 2010, the Department of Labor, the IRS, and the Department of the Treasury issued a Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans in the **Federal Register** (75 FR 5253). That Request for Information included questions relating to how the required minimum distribution rules affect defined contribution plan sponsors' and participants' interest in the offering and use of lifetime income. In particular, the Request for Information asked whether there were changes to the rules that could or should be considered to encourage arrangements under which participants can purchase deferred annuities that begin at an advanced age (sometimes referred to as longevity annuities or longevity insurance).

A number of commentators identified the required minimum distribution rules as an impediment to the utilization of these types of annuities. One such impediment that they noted is the requirement that, prior to annuitization, the value of the annuity be included in the account balance that is used to determine required minimum distributions. This requirement raises the risk that, if the remainder of the account has been depleted, the participant would have to commence distributions from the annuity earlier than anticipated in order to satisfy the required minimum distribution rules. Some commentators stated that if the deferred annuity permits a participant to accelerate the commencement of benefits, then, in order to take that contingency into account, the premium would be higher for a given level of annuity income regardless of whether the participant actually commences benefits at an earlier date. Some commentators also noted that longevity annuities often do not provide a commutation benefit, cash surrender value, or other similar feature.

The Treasury Department and the IRS have concluded that there are substantial advantages to modifying the required minimum distribution rules in order to facilitate a participant's purchase of a deferred annuity that is scheduled to commence at an advanced age — such as age 80 or 85 — using a portion of his or her account. Under the proposed amendments to these rules, prior to annuitization, the participant would be permitted to exclude the value of a longevity annuity contract that meets certain requirements from the account balance used to determine required minimum distributions. Thus, a participant would never need to commence distributions from the annuity contract before the advanced age in order to satisfy the required minimum distribution rules and, accordingly, the contract could be designed with a fixed annuity starting date at the advanced age (and would not need to provide an option to accelerate commencement of the annuity).

Purchasing longevity annuity contracts could help participants hedge the risk of drawing down their benefits too quickly and thereby outliving their retirement savings. This risk is of particular import because of the substantial, and unpredictable, possibility of living beyond one's life expectancy. Purchasing a longevity annuity contract would also help avoid the opposite concern that participants may live beneath their means in order to avoid outliving their retirement savings. If the longevity annuity provides a predictable stream of adequate income commencing at a fixed date in the future, the participant would still face the task of managing retirement income over that fixed period until the annuity commences, but that task generally is far less challenging than managing retirement income over an uncertain period.

The Treasury Department and the IRS have concluded that any special treatment under the required minimum distribution rules to facilitate the purchase of such a longevity annuity contract should be limited to a portion of a participant's account balance, such as 25 percent. A percentage limit is necessary in order to be consistent with section 401(a)(9)(A), which requires the entire interest of each participant to be distributed, beginning by the required

beginning date, in accordance with regulations, over the life or life expectancy of the participant (or the participant and a designated beneficiary). The pattern of required minimum payments implemented in the existing regulations under section 401(a)(9) limits the extent to which tax-favored retirement savings can be used for purposes other than retirement income (such as transmitting accumulated wealth to a participant's heirs). Limiting the special treatment for a longevity annuity to those contracts purchased with no more than 25 percent of the account balance is consistent with the intent of section 401(a)(9)(A) because, for a typical participant who will need to draw down the entire account balance during the period prior to commencement of the annuity, the overall pattern of payments would not provide more deferral than would otherwise normally be available for lifetime payments under the section 401(a)(9)(A) rules.

However, because a participant is required to receive only required minimum distributions during the period before the annuity begins (and would not under these proposed regulations be required to draw down the entire remaining balance on an accelerated basis), the Treasury Department and the IRS have concluded that, in addition to the percentage limitation, the amount used to purchase an annuity for which the minimum distribution requirements would be eased should be subject to a dollar limitation, such as $100,000. This dollar limitation would be applied in order to constrain the extent to which the combination of payments from the account balance (determined by excluding the value of the annuity before the annuity commences) and later payments from the annuity contract might result in an overall pattern of payouts from the plan that permits undue deferral of distribution of the participant's entire interest.

Such a limit would still allow significant income to be provided beginning at age 85. For example, if at age 70 a participant used $100,000 of his or her account balance to purchase an annuity that will commence at age 85, the annuity could provide an annual income that is estimated to range between $26,000 and $42,000 (depending on the actuarial assumptions used by the issuer and the form of the annuity elected by the participant, such as whether the form elected is a straight life annuity or a joint and survivor annuity). These illustrations assume a three-percent interest rate, no pre-annuity-starting-date death benefit, use of the Annuity 2000 Mortality Table for males and females,[1] no indexation for inflation, and no load for expenses.

These amounts would be higher if the interest rate used by the issuer to determine the annuity amount were higher. For example, the $42,000 amount would be increased to approximately $50,000 if the annuity were purchased assuming a four-percent interest rate, rather than a three-percent rate.

In addition, a participant who purchases a contract before age 70 could obtain the same income with a lower premium or could obtain larger income with the same premium. For example, even assuming a three-percent interest rate, the $42,000 amount would be approximately $51,000 if the annuity were purchased at age 65 rather than age 70. Furthermore, a participant who purchases increments of annuities over his or her career could hedge the risk of interest-rate fluctuation by purchasing these increments in different interest rate environments and effectively averaging annuity purchase rates over time.

To facilitate compliance with the dollar and percentage limitations and other requirements that longevity annuity contracts must satisfy in order to qualify for the special treatment, certain disclosure and reporting requirements would apply for the issuers of these contracts. Because longevity annuities would not begin until contract owners reach an advanced age, annual statements would also serve as an important reminder to those owners (and persons assisting them with their financial affairs) of their right to receive the annuities.

Explanation of Provisions

These proposed regulations would modify the required minimum distribution rules in order to facilitate the purchase of deferred annuities that begin at an advanced age. The proposed regulations would apply to contracts that satisfy certain requirements, including the requirement that distributions commence not later than age 85. Prior to annuitization, the value of these contracts, referred to as "qualifying longevity annuity contracts" (QLACs), would be excluded from the account balance used to determine required minimum distributions.

I. *Definition of QLAC*

A. *Limitations on premiums*

The proposed regulations provide that, in order to constitute a QLAC, the amount of the premiums paid for the contract under the plan on a given date may not exceed the lesser of a dollar or a percentage limitation. The proposed regulations prescribe rules for applying these limitations to participants who purchase multiple contracts or make multiple premium payments for the same contract.

Under the dollar limitation, the amount of the premiums paid for a contract under the plan may not exceed $100,000. If, on or before the date of a premium payment, an employee has paid premiums for the same contract or for any other contract that is intended to be a QLAC and that is purchased for the employee under the plan or under any other plan, annuity or account, the $100,000 limit is reduced by the amount of those other premium payments.[2]

Under the percentage limitation, the amount of the premiums paid for a contract under the plan may not exceed an amount equal to 25 percent of the employee's account balance on the date of payment. If, on or before the date of a premium payment, an employee has paid premiums for the same contract or for any other contract that is intended to be a QLAC and that is held or purchased for the employee under the plan, the maximum amount under the 25-percent limit is reduced by the amount of those other payments.

For purposes of determining whether premiums for a contract exceed the dollar or percentage limitation, unless the plan administrator has actual knowledge to the

[1] If the annuity is provided under an employer plan, unisex mortality assumptions would be required.

[2] As discussed under the heading "II. IRAs," a contract that is purchased or held under a Roth IRA is not treated as a contract that is intended to be a QLAC (even if it otherwise meets the requirements to be a QLAC).

contrary, the plan administrator would generally be permitted to rely on an employee's representation of the amount of premiums paid on or before that date under any other contract that is intended to be a QLAC and that is purchased for an employee under any other plan, annuity, or account. However, this reliance is not available with respect to a plan, annuity, or account that is maintained by an employer (or an entity that is treated as a single employer with the employer under section 414(b), (c), (m), or (o)) with respect to purchases for an employee under any other plan, annuity, or account maintained by that employer.

If a premium for a contract causes the total premiums to exceed either the dollar or percentage limitation, the contract would fail to be a QLAC as of the date on which the excess premiums were paid. Thus, beginning on that date, the value of the contract would no longer be excluded from the account balance used to determine required minimum distributions.

For calendar years beginning on or after January 1, 2014, the dollar limitation would be adjusted at the same time and in the same manner as under section 415(d), except that (1) the base period would be the calendar year quarter beginning July 1, 2012, and (2) any increase that is not a multiple of $25,000 would be rounded to the next lowest multiple of $25,000. If a contract failed to be a QLAC immediately before an adjustment because the premiums exceeded the dollar limitation, an adjustment of the dollar limitation would not cause the contract to become a QLAC.

B. *Maximum age at commencement*

The proposed regulations provide that, in order to constitute a QLAC, the contract must provide that distributions under the contract commence not later than a specified annuity starting date set forth in the contract. The specified annuity starting date must be no later than the first day of the month coincident with or next following the employee's attainment of age 85. This age reflects the approximate life expectancy of an employee at retirement, and was recommended in a number of the comments received in response to the Request for Information. Any contract for which premiums are paid after the latest permissible specified annuity starting date would not be a QLAC, because such a contract could not require distributions to commence by that date.

The proposed regulations would permit a QLAC to allow a participant to elect an earlier annuity starting date than the specified annuity starting date. For example, if the specified annuity starting date under a contract were the date on which a participant attains age 85, the contract would not fail to be a QLAC solely because it allows the participant to commence distributions at an earlier date. On the other hand, these rules would not require a QLAC to provide an option to commence distributions before the specified annuity starting date, so that a QLAC could provide that distributions must commence only at the specified annuity starting date. For a given premium, such a contract could provide a substantially higher periodic annuity payment beginning on the specified annuity starting date than a contract with an acceleration option. Similarly, premiums could be lower for a given level of periodic annuity payment, leaving a larger portion of the remaining account balance for the participant to use for living expenses before the specified annuity starting date.

The proposed regulations provide that the maximum age may also be adjusted to reflect changes in mortality. The adjusted age (if any) would be prescribed by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*)). The Treasury Department and the IRS anticipate that such changes will not occur more frequently than the adjustment of the $100,000 limit described in subheading I.A. "Limitations on premiums." If a contract failed to be a QLAC immediately before an adjustment because it failed to provide that distributions must commence by the requisite age, an adjustment of the age would not cause the contract to become a QLAC.

C. *Benefits payable after death of the employee*

Under a QLAC, the only benefit permitted to be paid after the employee's death is a life annuity, payable to a designated beneficiary, that meets certain requirements. Thus, for example, a contract that provides a distribution form with a period certain or a refund of premiums in the case of an employee's death would not be a QLAC. These types of payments are inconsistent with the purpose of providing lifetime income to employees and their beneficiaries, as described in the Background section of this preamble. A contract that provides a given lifetime periodic annuity payment to an employee would be less expensive if it provided for a life annuity payable to a designated beneficiary upon the employee's death rather than additional features such as an optional single-sum death benefit. After paying a lower premium for such a life annuity, the employee would be able to retain a larger portion of his or her account, maximizing the employee's lifetime benefits, while also leaving larger death benefits for a beneficiary, from the remaining amount of the account.

The proposed regulations provide that if the sole beneficiary of an employee under the contract is the employee's surviving spouse, the only benefit permitted to be paid after the employee's death is a life annuity payable to the surviving spouse that does not exceed 100 percent of the annuity payment payable to the employee. The proposed regulations include a special exception that would allow a plan to comply with any applicable requirement to provide a qualified preretirement survivor annuity[3] (which would have an effect only if the employee has a substantially older spouse).

If the employee's surviving spouse is not the sole beneficiary under the contract,[4] the only benefit permitted to be paid after the employee's death is a life annuity payable to a designated beneficiary. In order to satisfy the MDIB requirements of section 401(a)(9)(G), the life annuity is not

[3] A qualified preretirement survivor annuity is defined in section 417(c)(2) as an annuity for the life of the surviving spouse the actuarial equivalent of which is not less than 50 percent of the portion of the account balance of the participant (as of the date of death) to which the participant had a nonforfeitable right (within the meaning of section 411(a) of the Code). Section 205(e)(2) of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829 (1974)), as amended (ERISA), includes a parallel definition. See Rev. Rul. 2012–3 for rules relating to qualified preretirement survivor annuities.

[4] If the surviving spouse is one of the designated beneficiaries, this rule is applied as if the contract were a separate contract for the surviving beneficiary, but only if certain conditions are satisfied, including a separate account requirement. See §1.401(a)(9)–8, A–2(a) and A–3.

permitted to exceed an applicable percentage of the annuity payment payable to the employee. The applicable percentage is determined under one of two alternative tables, and the determination of which table applies depends on the different types of death benefits that are payable to the designated beneficiary.

Under the first alternative, the applicable percentage is the percentage described in the existing table in §1.401(a)(9)–6, A–2(c). Because the existing applicable percentage table does not take into account the potential for a death benefit to be paid to the non-spouse designated beneficiary during the period between the required beginning date and the annuity starting date, this table is available only if, under the contract, no death benefits are payable to such a beneficiary if the employee dies before the specified annuity starting date. Furthermore, in order to address the possibility that an employee with a shortened life expectancy could accelerate the annuity starting date in order to avoid this rule, this table is available only if, under the contract, no benefits are payable in any case in which the employee selects an annuity starting date that is earlier than the specified annuity starting date under the contract and the employee dies less than 90 days after making that election, even if the employee's death occurs after his or her selected annuity starting date.

Under the second alternative, the applicable percentage is the percentage described in a new table set forth in the proposed regulations. The table is available for use when the contract provides a pre-annuity-starting-date death benefit to the non-spouse designated beneficiary. The table takes into account that a significant portion of the premium is used to provide death benefits to a designated beneficiary if death occurs during the deferral period between age 70½ and age 85. In order to limit the portion of the premium that is used to provide death benefits to a designated beneficiary, use of the table is limited to contracts under which any non-spouse designated beneficiary must be irrevocably selected as of the required beginning date. Accordingly, the applicable percentages in the table are based on the expected longevity for the designated beneficiary, determined as of the employee's required beginning date.

The Treasury Department and the IRS considered whether to prescribe a special rule under which a QLAC could provide for a pre-annuity-starting-date death benefit to a non-spouse designated beneficiary and also allow the designated beneficiary to be changed at any time before the annuity starting date. However, in order to satisfy the MDIB requirements in such a case, the applicable percentages would need to be much smaller than the percentages set forth in the special table. This is because a larger portion of the cost of the contract would be allocable to death benefits if, after the required beginning date and before the annuity starting date, the participant were able to replace a designated beneficiary who has died (or to replace a designated beneficiary who has a short life expectancy with one who has a longer life expectancy). Comments are requested on whether the proposed regulations should be modified to permit alternative death benefits that would be subject to such lower applicable percentages.

If the employee dies before the specified annuity starting date under the contract, the date by which benefits must commence to the designated beneficiary depends on whether the beneficiary is the employee's surviving spouse. If the sole beneficiary under the contract is the employee's surviving spouse, the life annuity is not required to commence until the employee's specified annuity starting date under the contract (in lieu of the otherwise applicable rule that would require distributions to commence by the later of the end of the calendar year following the calendar year in which the employee died or the end of the calendar year in which the employee would have attained age 70½). If the employee's sole beneficiary under the contract is not the surviving spouse, the life annuity payable to the designated beneficiary must commence by the last day of the calendar year immediately following the calendar year of the employee's death.

The proposed regulations include a rule for applying the limitations on amounts payable to a surviving spouse or a designated beneficiary in the event the employee dies before the annuity starting date. Under this rule, if the contract does not allow an employee to select an annuity starting date that is earlier than the date on which the annuity payable to the employee would have commenced under the contract if the employee had not died, the contract must nonetheless provide a way to determine the periodic annuity payments that would have been payable if payments to the employee had commenced immediately prior to the date on which benefit payments to the designated beneficiary commence.

D. *Other QLAC requirements*

Under the proposed regulations, a QLAC would not include a variable contract under section 817, equity-indexed contract, or similar contract, because the purpose of a QLAC is to provide a participant with a predictable stream of lifetime income. In addition, exposure to equity-based returns is available through control over the remaining portion of the account balance so that a participant can achieve adequate diversification.

The proposed regulations also provide that, in order to be a QLAC, the contract is not permitted to make available any commutation benefit, cash surrender value, or other similar feature. As in the case of the limitations on benefits payable after death, these limitations would allow an annuity contract to maximize the annuity payments that are made while a participant or beneficiary is alive. In addition, having a limited set of options available to purchasers would make these contracts more readily understandable and enhance purchasers' ability to compare products across providers. Ease of comparison will be particularly important to the extent that contracts provided under plans are priced on a unisex basis, while contracts offered under IRAs generally take gender into account in establishing premiums.

The proposed regulations provide that a contract is not a QLAC unless it states, when issued, that it is intended to be a "qualifying longevity annuity contract" or a "QLAC." This rule would ensure that the issuer, participant, plan sponsor, and IRS know that the rules applicable to QLACs apply to this contract.

The proposed regulations provide that distributions under a QLAC must satisfy the generally applicable section 401(a)(9) requirements relating to annuities at §1.401(a)(9)–6, other than the requirement that annuity payments commence on or before the employee's required beginning date. Thus, for example, the

limitation on increasing payments under §1.401(a)(9)–6, A–1(a), applies to the contract.

II. *IRAs*

The proposed regulations provide that, in order to constitute a QLAC, the amount of the premiums paid for the contract under an IRA on a given date may not exceed $100,000. If, on or before the date of a premium payment, a participant has paid premiums for the same contract or for any other contract that is intended to be a QLAC and that is purchased for the participant under the IRA or under any other IRA, plan, or annuity, the $100,000 limit is reduced by the amount of those other premium payments.

The proposed regulations also provide that in order to constitute a QLAC, the amount of the premiums paid for the contract under an IRA on a given date generally may not exceed 25 percent of a participant's IRA account balances. Consistent with the rule under which a required minimum distribution from an IRA could be satisfied by a distribution from another IRA (applied separately to traditional IRAs and Roth IRAs), the proposed regulations would allow a QLAC that could be purchased under an IRA within these limitations to be purchased instead under another IRA. Specifically, the amount of the premiums paid for the contract under an IRA may not exceed an amount equal to 25 percent of the sum of the account balances (as of December 31 of the calendar year before the calendar year in which a premium is paid) of the IRAs (other than Roth IRAs) that an individual holds as the IRA owner. If, on or before the date of a premium payment, an individual has paid other premiums for the same contract or for any other contract that is intended to be a QLAC and that is held or purchased for the individual under his or her IRAs, the premium payment cannot exceed the amount determined to be 25 percent of the individual's IRA account balances, reduced by the amount of those other premiums.

The proposed regulations provide that, for purposes of both the dollar and percentage limitations, unless the trustee, custodian, or issuer of an IRA has actual knowledge to the contrary, the trustee, custodian, or issuer may rely on the IRA owner's representations of the amount of the premiums (other than the premiums paid under the IRA) and, for purposes of applying the percentage limitation, the amount of the individual's account balances (other than the account balance under the IRA).

Under the proposed regulations, an annuity purchased under a Roth IRA would not be treated as a QLAC. This is because a Roth IRA (unlike a designated Roth account under a plan, as described in section 402A) is not subject to the section 401(a)(9)(A) requirement that the individual's benefits commence and be paid over the lives or life expectancy of the individual and a designated beneficiary (but, after the death of the individual, benefits must be paid under the same section 401(a)(9)(B) rules that apply to traditional IRAs). Because the rules of section 401(a)(9)(A) do not apply to a Roth IRA owner, a longevity annuity contract purchased using a portion of the individual's Roth IRA would not need to provide the right to accelerate payments in order to ensure compliance with those rules. Thus, there is no need to permit the value of a longevity annuity contract to be excluded from the account balance that is used to determine required minimum distributions during the life of a Roth IRA owner. Accordingly, the proposed regulations would not apply the rules regarding QLACs to Roth IRAs.

The proposed regulations would not preclude the use of assets in a Roth IRA to purchase a longevity annuity contract, nor would such a contract be subject to the same restrictions as a QLAC. For example, a longevity annuity contract purchased using assets of a Roth IRA could have an annuity starting date that is later than age 85 and offer features, such as a cash surrender right, that are not permitted under a QLAC. Although such a contract could not be excluded from the account balance used to determine required minimum distributions, this exclusion is not necessary because the required minimum distribution rules do not apply during the life of a Roth IRA owner.

In addition, the dollar and percentage limitations on premiums that apply to a QLAC would not take into account premiums paid for a contract that is purchased or held under a Roth IRA, even if the contract satisfies the requirements to be a QLAC. If a QLAC is purchased or held under a plan, annuity, contract, or traditional IRA that is later rolled over or converted to a Roth IRA, the QLAC would cease to be a QLAC (and would cease to be treated as intended to be a QLAC) after the date of the rollover or conversion. In that case, the premiums would then be disregarded in applying the dollar and percentage limitations to premiums paid for other contracts after the date of the rollover or conversion.[5]

Comments are requested on whether the regulations should be modified to apply the QLAC rules to a Roth IRA or to reduce the availability of the section 401(a)(9) relief for purchases of QLACs by the amount of assets that the individual holds in a Roth IRA. Comments are also requested as to whether any special rules should apply where a QLAC is purchased using assets of a Roth IRA, such as special disclosure in order to minimize any potential confusion.

III. *Section 403(b) plans*

The proposed regulations apply the tax-qualified plan rules, instead of the IRA rules, to the purchase of a QLAC under a section 403(b) plan. For example, the 25-percent limitation on premiums would be separately determined for each section 403(b) plan in which an employee participates. The proposed regulations also provide that the tax-qualified plan rules relating to reliance on representations, rather than the IRA rules, apply to the purchase of a QLAC under a section 403(b) plan.

The proposed regulations provide that, if the sole beneficiary of an employee under a contract is the employee's surviving spouse and the employee dies before the annuity starting date under the contract, a life annuity that is payable to the surviving spouse after the employee's death is permitted to exceed the annuity that would have been payable to the employee to the extent necessary to satisfy the requirement to provide a qualified preretirement sur-

[5] Section 1.408A–4, Q&A–14, describes the amount includible in gross income when part or all of a traditional IRA that is an individual retirement annuity described in section 408(b) is converted to a Roth IRA, or when a traditional IRA that is an individual retirement account described in section 408(a) holds an annuity contract as an account asset and the traditional IRA is converted to a Roth IRA. Those rules would also apply when a contract is rolled over from a plan into a Roth IRA.

vivor annuity (as discussed for qualified plans under subheading I.C. "Benefits payable after death of the employee"). A section 403(b) plan may be subject to this requirement under ERISA, whereas IRAs are generally not subject to this requirement. See §1.401(a)–20, Q&A–3(d), and §1.403(b)–5(e).

IV. *Section 457(b) plans*

Section 1.457–6(d) provides that an eligible section 457(b) plan must meet the requirements of section 401(a)(9) and the regulations under section 401(a)(9). Thus, these proposed regulations relating to the purchase of a QLAC under a tax-qualified defined contribution plan would automatically apply to an eligible section 457(b) plan. However, the rule relating to QLACs is limited to eligible governmental section 457(b) plans. Because section 457(b)(6) requires that an eligible section 457(b) plan that is not a governmental plan be unfunded, the purchase of an annuity contract under such a plan would be inconsistent with this requirement.

V. *Defined benefit plans*

Although defined benefit plans are subject to the minimum required distribution rules, they offer annuities which provide longevity protection. Because this protection is therefore already available, these proposed regulations would not apply to defined benefit plans.[6]

VI. *Disclosure and annual reporting requirements*

Under the proposed regulations, the issuer of a QLAC would be required to create a report containing the following information about the QLAC:

- A plain-language description of the dollar and percentage limitations on premiums;
- The annuity starting date under the contract, and, if applicable, a description of the employee's ability to elect to commence payments before the annuity starting date;
- The amount (or estimated amount) of the periodic annuity payment that is payable after the annuity starting date as a single life annuity (including, if an estimated amount, the assumed interest rate or rates used in making this determination), and a statement that there is no commutation benefit or right to surrender the contract in order to receive its cash value;
- A statement of any death benefit payable under the contract, including any differences between benefits payable if the employee dies before the annuity starting date and benefits payable if the employee dies on or after the annuity starting date;
- A description of the administrative procedures associated with an employee's elections under the contract, including deadlines, how to obtain forms, and where to file forms, and the identity and contact information of a person from whom the employee may obtain additional information about the contract; and
- Such other information that the Commissioner may require.

This report is not required to be filed with the Internal Revenue Service. Each issuer required to create a report would be required to furnish to the individual in whose name the contract has been purchased a statement containing the information in the report. This statement must be furnished prior to or at the time of purchase. In addition, in order to avoid duplicating state law disclosure requirements, the statement would not be required to include information that the issuer has already provided to the employee in order to satisfy any applicable state disclosure law. Comments are requested on whether the information listed is appropriate, and whether (and, if so, the extent to which) this list would duplicate disclosure requirements under existing state law. Comments are also requested on whether there is other information that should be included in the disclosure, such as the special tax attributes of a QLAC.

The proposed regulations prescribe annual reporting requirements under section 6047(d) which would require any person issuing any contract that states that it is intended to be a QLAC to file annual calendar-year reports and provide a statement to the individual in whose name the contract has been purchased regarding the status of the contract. The Commissioner will prescribe an applicable form and instructions for this purpose, which will contain the filing deadline and other information.

The report will be required to identify that the contract is intended to be a QLAC and to include, at a minimum, the following items of information:

- The name, address, and identifying number of the issuer of the contract, along with information on how to contact the issuer for more information about the contract;
- The name, address, and identifying number of the individual in whose name the contract has been purchased;
- If the contract was purchased under a plan, the name of the plan, the plan number, and the Employer Identification Number (EIN) of the plan sponsor;
- If payments have not yet commenced, the annuity starting date on which the annuity is scheduled to commence, the amount of the periodic annuity payable on that date, and whether that date may be accelerated; and
- The amount of each premium paid for the contract, along with the date of payment.[7]

Each issuer required to file the report with respect to a contract would also be required to provide to the individual in whose name the contract has been purchased a statement containing the information that is required to be furnished in the report. This requirement may be satisfied by providing the individual with a copy of the required form, or in another form that contains the following language: "This information is being furnished to the Internal Revenue Service." The statement is required to be furnished to the individual on or before January 31 following the calendar year for which the report is required.

An issuer that is subject to these annual reporting requirements must comply with

[6] See also Rev. Rul. 2012–4 (relating to rollovers to defined benefit plans).

[7] For IRAs, the fair market value of the account on December 31 must be provided to the IRA owners by January 31 of the following year. Trustees, custodians, and issuers are responsible for ensuring that all IRA assets (including those not traded on an established securities market or with otherwise readily determinable value) are valued annually at their fair market value. This includes the value of a contract that is intended to be a QLAC.

the requirements for each calendar year beginning with the year in which premiums are first paid and ending with the earlier of the year in which the individual for whom the contract has been purchased attains age 85 (as adjusted in calendar years beginning on or after January 1, 2014) or dies. However, if the individual dies and the sole beneficiary under the contract is the individual's spouse (so that the spouse's annuity might not commence until the individual would have attained age 85), the annual reporting requirement continues until the year in which the distributions to the spouse commence.

Proposed Effective Date

The proposed regulations regarding disclosure and reporting will be effective upon publication in the **Federal Register** of the Treasury decision adopting these rules as final regulations. Otherwise, these regulations are proposed to be effective for contracts purchased on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register** and for determining required minimum distributions for distribution calendar years beginning on or after January 1, 2013. Until regulations finalizing these proposed regulations are issued, taxpayers may not rely on the rules set forth in these proposed regulations (and the existing rules under section 401(a)(9) continue to apply).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these proposed regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that an insubstantial number of entities of any size will be impacted by the regulation. In addition, IRS and Treasury expect that any burden on small entities will be minimal because required disclosures are expected to take 10 minutes to prepare. In addition, the entities that will be impacted will be insurance companies, very few of which are small entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. Comments are requested on benefits payable to a non-spouse beneficiary (under the subheading "C. Benefits payable after death of the employee"), Roth IRAs (under the heading "II. IRAs"), and disclosure (under the heading "VI. Disclosure and annual reporting requirements"). Comments are also requested on whether an insurance product that provides guaranteed lifetime withdrawal benefits could constitute a QLAC, taking into account the rules precluding the use of a variable annuity and a commutation of benefits and the rules relating to the provision of benefits to a designated beneficiary after an employee's death (under which benefits can be paid only in the form of a life annuity). The IRS and the Treasury Department further request comments on all aspects of the proposed rules.

All comments will be available for public inspection and copying at *www.regulations.gov* or upon request. A public hearing has been scheduled for June 1, 2012, beginning at 1 p.m. in the Auditorium, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by May 3, 2012, and an outline of topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by May 11, 2012. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Cathy Pastor and Jamie Dvoretzky, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

* * * * *

Proposed Amendments to the Regulations

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

Part 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

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

Section 1.6047–2 is also issued under 26 U.S.C. 6047(d). * * *

Par. 2. Section 1.401(a)(9)–5 is amended by:

1. Revising paragraph A–3(a).

2. Redesignating paragraph A–3(d) as new paragraph A–3(e) and revising newly designated paragraph A–3(e).

3. Adding new paragraph A–3(d).

The revisions and addition read as follows:

§1.401(a)(9)–5 Required minimum distributions from defined contribution plans

* * * * *

A–3. (a) In the case of an individual account, the benefit used in determining the

required minimum distribution for a distribution calendar year is the account balance as of the last valuation date in the calendar year immediately preceding that distribution calendar year (valuation calendar year) adjusted in accordance with paragraphs (b), (c), and (d) of this A–3.

* * * * *

(d) The account balance does not include the value of any qualifying longevity annuity contract described in A–17 of §1.401(a)(9)–6 that is held under the plan. This paragraph (d) only applies for purposes of determining required minimum distributions for distribution calendar years beginning on or after January 1, 2013.

(e) If an amount is distributed from a plan and rolled over to another plan (receiving plan), A–2 of §1.401(a)(9)–7 provides additional rules for determining the benefit and required minimum distribution under the receiving plan. If an amount is transferred from one plan (transferor plan) to another plan (transferee plan) in a transfer to which section 414(l) applies, A–3 and A–4 of §1.401(a)(9)–7 provide additional rules for determining the amount of the required minimum distribution and the benefit under both the transferor and transferee plans.

* * * * *

Par. 3. Section 1.401(a)(9)–6 is amended by revising the last sentence in A–12(a) and adding Q&A–17 to read as follows:

§1.401(a)(9)–6 Required minimum distributions for defined benefit plans and annuity contracts.

* * * * *

A–12. (a) * * * See A–1(e) of §1.401(a)(9)–5 for rules relating to the satisfaction of section 401(a)(9) in the year that annuity payments commence, A–3(d) of §1.401(a)(9)–5 for rules relating to qualifying longevity annuity contracts described in A–17 of this section, and A–2(a)(3) of §1.401(a)(9)–8 for rules relating to the purchase of an annuity contract with a portion of an employee's account balance.

* * * * *

Q–17. What is a qualifying longevity annuity contract?

A–17. (a) *Definition of qualifying longevity annuity contract*. A qualifying longevity annuity contract (QLAC) is an annuity contract (that is not a variable contract under section 817, equity-indexed contract, or similar contract) that is purchased from an insurance company for an employee and that satisfies each of the following requirements—

(1) Premiums for the contract satisfy the requirements of paragraph (b) of this A–17;

(2) The contract provides that distributions under the contract must commence not later than a specified annuity starting date that is no later than the first day of the month coincident with or next following the employee's attainment of age 85;

(3) The contract provides that, after distributions under the contract commence, those distributions must satisfy the requirements of this section (other than the requirement in A–1(c) of this section that annuity payments commence on or before the required beginning date);

(4) The contract does not make available any commutation benefit, cash surrender right, or other similar feature;

(5) No benefits are provided under the contract after the death of the employee other than the life annuities payable to a designated beneficiary that are described in paragraph (c) of this A–17; and

(6) The contract, when issued, states that it is intended to be a QLAC.

(b) *Limitations on premium*—(1) *In general*. The premiums paid for the contract on a date do not exceed the lesser of the dollar limitation in paragraph (b)(2) of this A–17 or the percentage limitation in paragraph (b)(3) of this A–17.

(2) *Dollar limitation*. The dollar limitation is an amount equal to the excess of—

(i) $100,000, over

(ii) The sum of—

(A) The premiums paid before that date under the contract, and

(B) The premiums paid on or before that date under any other contract that is intended to be a QLAC and that is purchased for the employee under the plan, or any other plan, annuity, or account described in section 401(a), 403(a), 403(b), or 408 or eligible governmental section 457(b) plan.

(3) *Percentage limitation*. The percentage limitation is an amount equal to the excess of—

(i) 25 percent of the employee's account balance under the plan determined on that date, over

(ii) The sum of—

(A) The premiums paid before that date under the contract, and

(B) The premiums paid on or before that date under any other contract that is intended to be a QLAC and that is held or was purchased for the employee under the plan.

(c) *Payments after death of the employee*—(1) *Surviving spouse is sole beneficiary*—(i) *In general*. Except as provided in paragraph (c)(1)(ii)(B) of this A–17, if the sole beneficiary of an employee under the contract is the employee's surviving spouse, the only benefit permitted to be paid after the employee's death is a life annuity payable to the surviving spouse where the periodic annuity payment is not in excess of 100 percent of the periodic annuity payment that is payable to the employee (or, in the case of the employee's death before the employee's annuity starting date, the periodic annuity payment that would have been payable to the employee as of the date that benefits to the surviving spouse commence under paragraph (c)(1)(ii)(A) of this A–17).

(ii) *Death before employee's annuity starting date*. If the employee dies before the employee's annuity starting date and the employee's surviving spouse is the sole beneficiary under the contract—

(A) The life annuity, if any, payable to the surviving spouse under paragraph (c)(1)(i) of this A–17 must commence not later than the date on which the annuity payable to the employee would have commenced under the contract if the employee had not died; and

(B) The amount of the periodic annuity payment payable to the surviving spouse is permitted to exceed 100 percent of the periodic annuity payment that is payable to the employee to the extent necessary to satisfy the requirement to provide a qualified preretirement survivor annuity (as defined under section 417(c)(2) of the Internal Revenue Code (Code) or section 205(e)(2) of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829 (1974)), as amended (ERISA)) pursuant to sections 401(a)(11) and 417 of the Code or section 205(a)(2) of ERISA.

(2) *Surviving spouse is not sole designated beneficiary*—(i) *In general*. If the employee's surviving spouse is not the sole beneficiary under the contract, the only benefit permitted to be paid after the employee's death is a life annuity payable to a designated beneficiary where the periodic annuity payment is not in excess of the applicable percentage (determined under paragraph (c)(2)(iv) of this A–17) of the periodic annuity payment that is payable to the employee (or, in the case of the employee's death before the employee's annuity starting date, the applicable percentage of the periodic annuity payment that would have been payable to the employee as of the date that benefits to the designated beneficiary commence under this paragraph (c)(2)(i)). In addition, no benefit is permitted to be paid after the employee's death unless the contract satisfies the requirements of either paragraph (c)(2)(ii) or paragraph (c)(2)(iii) of this A–17. Moreover, except as provided in paragraph (c)(1)(ii)(A) of this A–17, in any case in which the employee dies before the employee's annuity starting date, any life annuity payable to a designated beneficiary must commence by the last day of the calendar year immediately following the calendar year of the employee's death.

(ii) *No pre-annuity starting date death benefit*. The contract satisfies the requirements of this paragraph (c)(2)(ii) if the contract provides that no benefit is permitted to be paid to a beneficiary other than the employee's surviving spouse after the employee's death—

(A) In any case in which the employee dies before the selected annuity starting date under the contract; and

(B) In any case in which the employee selects an annuity starting date that is earlier than the specified annuity starting date under the contract and the employee dies less than 90 days after making that election.

(iii) *Pre-annuity starting date death benefit*. The contract satisfies the requirements of this paragraph (c)(2)(iii) if the contract provides that in any case in which the beneficiary under the contract is not the employee's surviving spouse, benefits are payable to the beneficiary only if the beneficiary was irrevocably selected on or before the employee's required beginning date.

(iv) *Applicable percentage*. If the contract is described in paragraph (c)(2)(ii) of this A–17, the applicable percentage is the percentage described in the table in paragraph A–2(c) of this section. If the contract is described in paragraph (c)(2)(iii) (and not in (c)(2)(ii)) of this A–17, the applicable percentage is the percentage described in the table set forth in this paragraph (c)(2)(iv). The applicable percentage is based on the adjusted employee/beneficiary age difference, determined in the same manner as in paragraph A–2(c) of this section.

Adjusted employee/beneficiary age difference	Applicable percentage
2 years or less	100%
3	88%
4	78%
5	70%
6	63%
7	57%
8	52%
9	48%
10	44%
11	41%
12	38%
13	36%
14	34%
15	32%
16	30%
17	28%
18	27%
19	26%
20	25%
21	24%
22	23%
23	22%
24	21%
25 and greater	20%

(3) *Calculation of early annuity payments*. For purposes of paragraphs (c)(1)(i) and (c)(2)(i) of this A–17, to the extent the contract does not provide an option for the employee to select an annuity starting date that is earlier than the date on which the annuity payable to the employee would have commenced under the contract if the employee had not died, the contract must provide a way to determine the periodic annuity payment that would have been payable if the employee were to have an option to accelerate the payments and the payments had commenced to the employee immediately prior to the date that benefit payments to the surviving spouse or designated beneficiary commence.

(d) *Rules of application*—(1) *Reliance on representations*. For purposes of the limitation on premiums described in paragraphs (b)(2) and (b)(3) of this A–17, unless the plan administrator has actual knowledge to the contrary, the plan admin-

istrator may rely on an employee's representation (made in writing or such other form as may be prescribed by the Commissioner) of the amount of the premiums described in paragraphs (b)(2)(ii)(B) and (b)(3)(ii)(B) of this A–17, but only with respect to premiums that are not paid under a plan, annuity, or contract that is maintained by the employer or an entity that is treated as a single employer with the employer under section 414(b), (c), (m), or (o).

(2) *Consequences of excess premiums*. If a contract fails to be a QLAC solely because a premium for the contract exceeds the limits under paragraph (b) of this A–17 on the date of the payment of that premium, the contract is not a QLAC beginning on that date. In such a case, none of the value of the contract may be disregarded under §1.401(a)(9)–5, Q&A–3(d), as of the date on which the contract ceases to be a QLAC.

(3) *Dollar and age limitations subject to adjustments*—(i) *Dollar limitation*. In the case of calendar years beginning on or after January 1, 2014, the $100,000 amount under paragraph (b)(2)(i) of this A–17 will be adjusted at the same time and in the same manner as under section 415(d), except that the base period shall be the calendar quarter beginning July 1, 2012, and any increase under this paragraph (d)(3)(i) that is not a multiple of $25,000 shall be rounded to the next lowest multiple of $25,000.

(ii) *Age limitation*. The maximum age set forth in paragraph (a)(2) of this A–17 may also be adjusted to reflect changes in mortality, with any such adjusted age to be prescribed by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(*b*) of this chapter).

(iii) *Prospective application of adjustments*. If a contract fails to be a QLAC because it does not satisfy the dollar limitation in paragraph (b)(2) of this A–17 or the age limitation in paragraph (a)(2) of this A–17, any subsequent adjustment that is made pursuant to paragraph (d)(3)(i) or paragraph (d)(3)(ii) of this A–17 will not cause the contract to become a QLAC.

(4) *Multiple beneficiaries*. If an employee has more than one designated beneficiary under a QLAC, the rules in §1.401(a)(9)–8, A–2(a), apply for purposes of paragraphs (c)(1)(i) and (c)(2)(i) of this A–17.

(5) *Roth IRAs*. A contract that is purchased under a Roth IRA is not treated as a contract that is intended to be a QLAC for purposes of applying the dollar and percentage limitation rules in paragraphs (b)(2)(ii)(B) and (b)(3)(ii)(B) of this A–17. See §1.408A–6, A–14(d). If a QLAC is purchased or held under a plan, annuity, account, or traditional IRA, and that contract is later rolled over or converted to a Roth IRA, the contract is not treated as a contract that is intended to be a QLAC after the date of the rollover or conversion. Thus, premiums paid for the contract will not be taken into account under paragraph (b)(2)(ii)(B) or paragraph (b)(3)(ii)(B) of this A–17 after the date of the rollover or conversion.

(e) *Effective/applicability date*. This Q&A–17 applies to contracts purchased on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register** and for determining required minimum distributions for distribution calendar years beginning on or after January 1, 2013.

Par. 4. Section 1.403(b)–6 is amended by adding paragraph (e)(9) to read as follows:

§1.403(b)–6 Timing of distributions and benefits.

* * * * *

(e) * * *

(9) *Special rule for qualifying longevity annuity contracts*. The rules in §1.401(a)(9)–6, A–17(b) (relating to limitations on premiums for a qualifying longevity annuity contract (QLAC), and §1.401(a)(9)–6, A–17(d)(1) (relating to reliance on representations with respect to a QLAC), apply to the purchase of a QLAC under a section 403(b) plan (rather than the rules in §1.408–8, A–12(b) and (c)).

* * * * *

Par. 5. Section 1.408–8, Q&A–12, is added to read as follows:

§1.408–8 Distribution requirements for individual retirement plans.

* * * * *

Q–12. How does the special rule in §1.401(a)(9)–5, A–3(d), for a qualifying longevity annuity contract (QLAC), defined in §1.401(a)(9)–6, A–17, apply to an IRA?

A–12. (a) *General rule*. The special rule in §1.401(a)(9)–5, A–3, for a QLAC, defined in §1.401(a)(9)–6, A–17, applies to an IRA, subject to the exceptions set forth in this A–12. See §1.408A–6, A–14(d) for special rules relating to Roth IRAs.

(b) *Limitations on premium*—(1) *In general*. In lieu of the limitations described in §1.401(a)(9)–6, A–17(b), the premiums paid for the contract on a date are not permitted to exceed the lesser of the dollar limitation in paragraph (b)(2) of this A–12 or the percentage limitation in paragraph (b)(3) of this A–12.

(2) *Dollar limitation.* The dollar limitation is an amount equal to the excess of—

(i) $100,000, over

(ii) The sum of—

(A) The premiums paid before that date under the contract, and

(B) The premiums paid on or before that date under any other contract that is intended to be a QLAC and that is purchased for the IRA owner under the IRA, or any other plan, annuity, or account described in section 401(a), 403(a), 403(b), or 408 or eligible governmental section 457(b) plan.

(3) *Percentage limitation*. The percentage limitation is an amount equal to the excess of—

(i) 25 percent of the total account balances of the IRAs (other than Roth IRAs) that an individual holds as the IRA owner as of December 31 of the calendar year immediately preceding the calendar year in which a premium is paid, over

(ii) The sum of—

(A) The premiums paid before that date under the contract, and

(B) The premiums paid on or before that date under any other contract that is intended to be a QLAC and that is held or was purchased for the individual under those IRAs.

(c) *Reliance on representations.* For purposes of the limitations described in paragraphs (b)(2) and (b)(3) of this A–12, unless the trustee, custodian, or issuer of an IRA has actual knowledge to the contrary, the trustee, custodian, or issuer may rely on the IRA owner's representation (made in writing or such other form as may be prescribed by the Commissioner) of the amount of the premiums described in

paragraphs (b)(2)(ii)(B) and (b)(3)(ii)(B) of this A–12 that are not paid under the IRA, and the amount of the account balances described in paragraph (b)(3)(i) of this A–12, other than the account balance under the IRA.

(d) *Roth IRAs*. A contract that is purchased under a Roth IRA is not treated as a contract that is intended to be a QLAC for purposes of applying the dollar and percentage limitation rules in paragraphs (b)(2)(ii)(B) and (b)(3)(ii)(B) of this A–12. See §1.408A–6, A–14(d). If a QLAC is purchased or held under a plan, annuity, account, or traditional IRA, and that contract is later rolled over or converted to a Roth IRA, the contract is not treated as a contract that is intended to be a QLAC after the date of the rollover or conversion. Thus, premiums paid for the contract will not be taken into account under paragraph (b)(2)(ii)(B) or paragraph (b)(3)(ii)(B) of this A–12 after the date of the rollover or conversion.

(e) *Effective/applicability date*. This Q&A–12 applies to contracts purchased on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register** and for determining required minimum distributions for distribution calendar years beginning on or after January 1, 2013.

Par. 6. Section 1.408A–6 is amended by adding paragraph A–14(d) to read as follows:

§1.408A–6 Distributions.

* * * * *

A–14. * * *

(d) The special rules in §1.401(a)(9)–5, A–3, and §1.408–8, Q&A–12, for a QLAC, defined in §1.401(a)(9)–6, A–17, do not apply to a Roth IRA.

* * * * *

Par. 7. Section 1.6047–2 is added to read as follows:

§1.6047–2 Information relating to qualifying longevity annuity contracts.

(a) *Requirement and form of report*—(1) *In general*. Any person issuing any contract that states that it is intended to be a qualifying longevity annuity contract (QLAC), defined in §1.401(a)(9)–6, Q&A–17, shall make reports required by this section. This requirement applies only to contracts purchased or held under any plan, annuity, or account described in section 401(a), 403(a), 403(b), or 408 (other than a Roth IRA) or eligible governmental section 457(b) plan.

(2) *Initial disclosure*. The issuer shall be required to prepare a report identifying that the contract is intended to be a QLAC and containing the following information—

(i) A plain-language description of the dollar and percentage limitations on premiums;

(ii) The annuity starting date under the contract, and, if applicable, a description of the individual's ability to elect to commence payments before the annuity starting date;

(iii) The amount (or estimated amount) of the periodic annuity payment that is payable after the annuity starting date as a single life annuity (including, if an estimated amount, the assumed interest rate or rates used in making this determination), and a statement that there is no commutation benefit or right to surrender the contract in order to receive its cash value;

(iv) A statement of any death benefit payable under the contract, including any differences between benefits payable if the individual dies before the annuity starting date and benefits payable if the individual dies on or after the annuity starting date;

(v) A description of the administrative procedures associated with an individual's elections under the contract, including deadlines, how to obtain forms, and where to file forms, and the identity and contact information of a person from whom the individual may obtain additional information about the contract; and

(vi) Such other information as the Commissioner may require.

(3) *Annual report*. The issuer shall make annual calendar-year reports on the applicable form prescribed by the Commissioner for this purpose concerning the status of the contract. The report shall identify that the contract is intended to be a QLAC and shall contain the following information—

(i) The name, address, and identifying number of the issuer of the contract, along with information on how to contact the issuer for more information about the contract;

(ii) The name, address, and identifying number of the individual in whose name the contract has been purchased;

(iii) If the contract was purchased under a plan, the name of the plan, the plan number, and the Employer Identification Number (EIN) of the plan sponsor;

(iv) If payments have not yet commenced, the annuity starting date on which the annuity is scheduled to commence, the amount of the periodic annuity payable on that date, and whether that date may be accelerated;

(v) The amount of each premium paid for the contract, along with the date of the premium payment; and

(vi) Such other information as the Commissioner may require.

(b) *Manner and time for filing*—(1) *Initial disclosure*. The report required by paragraph (a)(2) of this section shall not be filed with the Internal Revenue Service.

(2) *Annual report*—(i) *Timing*. The report required by paragraph (a)(3) of this section shall be filed in accordance with the forms and instructions prescribed by the Commissioner. Such a report must be filed for each calendar year beginning with the year in which premiums for a contract are first paid and ending with the earlier of the year in which the individual in whose name the contract has been purchased attains age 85 (as adjusted pursuant to §1.401(a)(9)–6, A–17(d)(3)(ii)) or dies.

(ii) *Surviving spouse*. If the individual dies and the sole beneficiary under the contract is the individual's spouse (in which case the spouse's annuity would not be required to commence until the individual would have attained age 85), the report must continue to be filed for each calendar year until the calendar year in which the distributions to the spouse commence or in which the spouse dies, if earlier.

(c) *Issuer statements*. (1) *Initial disclosure*. Each issuer required to make a report required by paragraph (a)(2) of this section shall furnish to the individual in whose name the contract has been purchased a statement containing the information in the report. The statement shall be furnished at the time of purchase. The statement is not required to include information that the issuer has already provided to the individual in order to comply with any applicable state disclosure law.

(2) *Annual report*. Each issuer required to file the report required by paragraph

(a)(3) of this section shall furnish to the individual in whose name the contract has been purchased a statement containing the information required to be furnished in the report, except that such statement shall be furnished to a surviving spouse to the extent that the report is required to be filed under paragraph (b)(2)(ii) of this section. A copy of the required form may be used to satisfy the statement requirement of this paragraph (c)(2). If a copy of the required form is not used to satisfy the statement requirement of this paragraph (c)(2), the statement shall contain the following language: "This information is being furnished to the Internal Revenue Service." The statement required by this paragraph (c)(2) shall be furnished on or before January 31 following the calendar year for which the report required by paragraph (a)(3) of this section is required.

(d) *Effective/applicability date*. This section applies on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

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

(Filed by the Office of the Federal Register on February 2, 2012, 8:45 a.m., and published in the issue of the Federal Register for February 3, 2012, 77 F.R. 5443)

Information Reporting by Passport Applicants; Withdrawal

Announcement 2012–11

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking; notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide information reporting rules for certain passport applicants. These regulations do not provide information reporting rules for individuals applying to become permanent residents (green card holders). This document also withdraws the notice of proposed rulemaking (57 FR 61373) published in the **Federal Register** on December 24, 1992.

DATES: Comments and requests for a public hearing must be received by April 25, 2012.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–208274–86), room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–208274–86), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–208274–86).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Lynn Dayan or Quyen Huynh at (202) 622–3880; concerning submissions of comments and requests for public hearing, Oluwafunmilayo Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) and, pending receipt and evaluation of public comments approved by the Office of Management and Budget under control number 1545–1359. Comments on the collections of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:M:S, Washington, DC 20224. Comments on the collection of information should be received by March 26, 2012.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the duties of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in these proposed regulation is in § 301.6039E–1(b). The information is required to be provided by individuals who apply for a United States passport or a renewal of a United States passport. The information provided by passport applicants will be used by the IRS for tax compliance purposes.

Estimated total annual reporting burden: 1,213,354 hours.

Estimated average annual burden hours per respondent: four to ten minutes.

Estimated number of respondents: 12,133,537.

Estimated annual frequency of responses: one.

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

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

Background

This document contains proposed amendments to 26 CFR part 301 under section 6039E of the Internal Revenue Code. Section 6039E provides rules concerning information reporting by U.S. passport and permanent resident applicants, and requires specified federal agencies to provide certain information to the IRS.

On December 24, 1992, the Treasury Department and the IRS published a notice of proposed rulemaking

(REG–208274–86, 1993–1 C.B. 822) in the **Federal Register** (57 FR 61373) under section 6039E (the 1992 proposed regulations). The 1992 proposed regulations provided guidance for both passport and permanent resident applicants to comply with information reporting rules under section 6039E, and indicated the responsibilities of specified federal agencies to provide certain information to the IRS. No requests were received to testify on the 1992 proposed regulations and, accordingly, no public hearing was held. One written comment letter responding to the 1992 proposed regulations was received, which recommended modifications to Form 9003, "*Additional Questions to be Completed by All Applicants for Permanent Residence in the United States*". Because Form 9003 is no longer in use and these proposed regulations do not address information reporting rules for permanent resident applicants, the comment was not considered in drafting these regulations. The proposed regulations do not provide rules concerning information reporting by individuals applying to become permanent residents; therefore such individuals are not within the scope of the proposed regulations.

The information required to be provided by passport applicants under section 6039E is collected on the U.S. passport application form submitted by such applicants to the Department of State.

The proposed regulations also withdraw the 1992 proposed regulations.

Explanation of Provisions

The proposed regulations set forth rules concerning information reporting by passport applicants under section 6039E. Section 301.6039E–1(a) requires an individual applying for a U.S. passport (passport applicant), other than an individual who applies for an official passport, diplomatic passport or passport for use on other official U.S. government business, to provide certain information with his or her passport application.

Section 301.6039E–1(b)(1) describes the required information to be provided by passport applicants: the applicant's full name and, if applicable, previous name; address of regular or principal place of residence within the country of residence and, if different, mailing address; taxpayer identifying number (TIN); and date of birth. Section 301.6039E–1(b)(2) provides that the required information must be submitted with the passport application, regardless of where the applicant resides at the time it is submitted.

Section 301.6039E–1(c) provides guidance on the circumstances under which the IRS may impose a $500 penalty amount on any passport applicant who fails to provide the required information.

Section 301.6039E–1 is proposed to be applicable to passport applications submitted after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

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

Comments and Request for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the "Addresses" heading. The IRS and the Treasury Department request comments on all aspects of the proposed rules. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

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

* * * * *

Withdrawal of Proposed Regulations

Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (INTL–978–86; REG–208274–86) that was published in the **Federal Register** on December 24, 1992 (57 FR 61373) is withdrawn.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301— PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding an entry in numerical order to read in part as follows:

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

Section 301.6039E–1 also issued under 26 U.S.C. 6039E.

Par. 2. Section 301.6039E–1 is added to read as follows:

§ 301.6039E–1 Information reporting by passport applicants.

(a) *In general.* Every individual who applies for a U.S. passport (passport applicant), other than an individual who applies for a U.S. passport for use in diplomatic, military, or other official U.S. government business, shall include with his or her passport application the information described in paragraph (b) of this section.

(b) *Required information*—(1) *In general.* The information required under paragraph (a) of this section shall include the following information:

(i) The passport applicant's full name and, if applicable, previous name;

(ii) Address of the passport applicant's regular or principal place of residence within the country of residence and, if different, mailing address;

(iii) The passport applicant's taxpayer identifying number (TIN), if such a number has been issued to the passport applicant. A TIN means the individual's social security number (SSN) issued by the Social Security Administration. A passport applicant who does not have an SSN must enter zeros in the appropriate space on the passport application; and

(iv) The passport applicant's date of birth.

(2) *Time for furnishing information*. A passport applicant must provide the information required by this section at the time of submitting his or her passport application, whether by personal appearance or mail, to the Department of State (including United States Embassies and Consular posts abroad).

(c) *Penalties*—(1) *In general*. If the information required by paragraph (b)(1) of this section is incomplete or incorrect, or the information is not timely filed, then the passport applicant shall be subject to a penalty equal to $500 per application. Before assessing a penalty under this section, the IRS will ordinarily provide to the passport applicant written notice of the potential assessment of the $500 penalty, requesting the information being sought, and offering the applicant an opportunity to explain why such information was not provided at the time the passport application was submitted. A passport applicant has 60 days (90 days if the notice is addressed to an applicant outside the United States) to respond to the notice. If, after considering all the surrounding circumstances, the passport applicant demonstrates to the satisfaction of the Commissioner or his delegate that the failure is due to reasonable cause and not due to willful neglect, then the IRS will not assess the penalty.

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

Example. C, a citizen of the United States, makes an error in supplying information on his passport application. Based on the nature of the error and C's timely response to correct the error after being contacted by the IRS, and considering all the surrounding circumstances, the Commissioner concludes that the mistake is due to reasonable cause and not due to willful neglect. Accordingly, no penalty is assessed.

(d) *Effective/applicability date*. The rules of this section apply to passport applications submitted after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

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

(Filed by the Office of the Federal Register on January 25, 2012, 8:45 a.m., and published in the issue of the Federal Register for January 26, 2012, 77 F.R. 3964)

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2011–27 through 2011–52 is in Internal Revenue Bulletin 2011–52, dated December 27, 2011.

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Key to Abbreviations:

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

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