Internal Revenue bulletin

Bulletin No. 2011-21
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HIGHLIGHTS OF THIS ISSUE

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

INCOME TAX

REG–118761–09, page 803.

Proposed regulations under section 267 of the Code provide guidance concerning the time for taking into account deferred losses on the sale or exchange of property between members of a controlled group.

EMPLOYEE PLANS

Notice 2011–41, page 798.

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 May 2011; the 24-month average segment rates; the funding transitional segment rates applicable for May 2011; and the minimum present value transitional rates for April 2011.

EXCISE TAX

Notice 2011–36, page 792.

The notice contains a request for comments regarding the employer responsibility provisions in section 4980H of the Code. Section 4980H, which was added to the Code by the Patient Protection and Affordable Care Act, provides that an applicable large employer (ALE) may be liable for an assessable payment if it fails to meet certain standards with respect to offering coverage to its full-time employees and at least one of its full-time employees is certified to the employer as having enrolled in health insurance through a State Exchange with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid. Comments must be submitted by June 17, 2011.

ADMINISTRATIVE

Rev. Proc. 2011–30, page 802.

Nonshareholder contribution to capital under section 118(a). This procedure provides a safe harbor under section 118(a) of the Code for certain awards received by corporate taxpayers under Department of Energy clean coal technology programs.

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

The IRS Mission

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

Introduction

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

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

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

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

The Bulletin is divided into four parts as follows:

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

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

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

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

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

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Part III. Administrative, Procedural, and Miscellaneous

Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (Section 4980H)

Notice 2011–36

Many provisions of the Patient Protection and Affordable Care Act (Affordable Care Act) that are designed to promote expanded, affordable health coverage become effective beginning in 2014. These include provisions for shared responsibility for employers regarding health coverage, coverage to be offered by State Exchanges, premium tax credits to assist individuals in purchasing coverage through State Exchanges, and related provisions. As part of the process of planning for implementation of these provisions, the Department of the Treasury (Treasury), the Department of Labor (DOL) and the Department of Health and Human Services (HHS) (collectively, the three Departments) are working in concert to develop regulations and other administrative guidance that will respond to questions and assist stakeholders with implementation.

I. PURPOSE

This request for comments is intended to initiate and inform the process of developing regulatory guidance regarding the shared employer responsibility provisions in § 4980H of the Internal Revenue Code (Code). Those provisions, which apply for months beginning after December 31, 2013, refer to certain standards relating to the offering of health coverage by employers to their full-time employees. Under § 4980H, an "applicable large employer" that does not meet those standards may be liable for an "assessable payment" if at least one of its full-time employees is certified as having enrolled in health insurance through a State Exchange with respect to which a premium tax credit under § 36B of the Code, a cost-sharing reduction under § 1402 of the Affordable Care Act, or an advance payment of such credit or reduction under § 1412 of the Affordable Care Act is allowed or paid.

This notice does not constitute guidance. Instead, it describes potential approaches, which could be incorporated in future proposed regulations, to certain discrete issues under § 4980H, particularly the issue of who is a full-time employee, and invites comments on these approaches. Treasury and the Internal Revenue Service (IRS) intend to publish such proposed regulations both on the § 4980H issues addressed in this notice and on a broader set of issues under § 4980H. This notice also invites comments on the interpretation of the 90-day limitation on waiting periods for group health plans and health insurance issuers offering group health insurance coverage under § 2708 of the Public Health Service (PHS) Act, and on how the interpretations of that section and of § 4980H should be coordinated. The three Departments are coordinating their efforts in developing the regulations and other guidance on the shared employer responsibility provisions (Treasury/IRS guidance), the 90-day limitation on waiting periods (three Department guidance), automatic enrollment for employees of large employers (DOL guidance),[1] and other Affordable Care Act provisions.

II. BACKGROUND

Section 4980H was added to the Code by § 1513 of the Affordable Care Act enacted March 23, 2010, Pub. L. No. 111–148, and amended by § 1003 of the Health Care and Education Reconciliation Act of 2010, enacted March 30, 2010, Pub. L. No. 111–152. Section 4980H is effective for months beginning after December 31, 2013.

Generally, § 4980H provides that an applicable large employer is liable for an assessable payment if any full-time employee is certified to receive an applicable premium tax credit or cost-sharing reduction and either (1) the employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage (MEC) under an eligible employer-sponsored plan (§ 4980H(a) liability)[2]; or (2) the employer offers its full-time employees (and their dependents) the opportunity to enroll in MEC under an eligible employer-sponsored plan that, with respect to a full-time employee who has been certified for the advance payment of an applicable premium tax credit or cost-sharing reduction, either is unaffordable within the meaning of § 36(B)(c)(2)(C)(i) or does not provide minimum value within the meaning of § 36(B)(c)(2)(C)(ii) (§ 4980H(b) liability). The definition of full-time employee is key in determining whether and, if so, to what extent, an employer may incur § 4980H(a) liability or § 4980H(b) liability. The annual assessable payment under § 4980H(a) is based on all (excluding the first 30) full-time employees, while the annual assessable payment under § 4980H(b) is based on the number of full-time employees who are certified to receive an advance payment of an applicable premium tax credit or cost-sharing reduction.

Section 4980H(c)(4) provides that a full-time employee with respect to any month is an employee who is employed on average at least 30 hours of service per week. An applicable large employer with respect to a calendar year is defined in section 4980H(c)(2) as an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.[3] For purposes of determining whether an employer is an applicable large employer, full-time equivalent employees (FTEs), which are determined based on the hours of service of employees who are not full-time, are taken into account.

[1] Section 18A of the Fair Labor Standards Act (FLSA), as added by § 1511 of the Affordable Care Act, requires employers subject to the FLSA that have more than 200 full-time employees and that offer enrollment in one or more health benefit plans to automatically enroll new full-time employees in one of the plans offered (subject to any waiting period authorized by law), and to continue the enrollment of current employees in the employer's plan. Under FLSA § 18A, which is enforced by the DOL, any automatic enrollment program must include adequate notice and the opportunity to opt out of any coverage in which the individual was automatically enrolled. Treasury/IRS and the DOL are coordinating the development of their respective guidance on the definitions of full-time employee for purposes of § 4980H and FLSA § 18A.

[2] MEC is defined in § 5000A(f) of the Code. The definition of "eligible employer-sponsored plan" in § 5000A(f)(2) applies for purposes of § 4980H.

[3] Section 4980H is effective for months beginning after December 31, 2013. For 2014, the first calendar year in which an employer could be an applicable large employer, the preceding calendar year is 2013.

This notice invites comments on a number of possible rules, definitions and approaches for interpreting and applying § 4980H. Section III of the notice addresses potential definitions of employer, employee and hours of service. Section IV describes a possible method for determining whether an employer is an applicable large employer for a calendar year, and thereby subject to § 4980H. Section V outlines possible rules that could be used to determine an employee's full-time status for purposes of calculating an employer's assessable payment under § 4980H. Section VI contains a more general request for comments, including comments on the interaction of the rules under § 4980H with certain other provisions of the Affordable Care Act.

III. DEFINITION OF EMPLOYER, EMPLOYEE, HOURS OF SERVICE

In the interests of simplicity and consistency, it is contemplated that the definitions of employer, employee and hours of service and the rules for calculating hours of service (as outlined below) would generally conform, to the extent consistent with the provisions and purposes of § 4980H, to well-established regulatory definitions and rules applicable to employer-provided health and pension benefits. Comments are invited on the following possible approaches to defining those terms.

A. How "Employer" Would Be Defined

For purposes of § 4980H, as under Code provisions generally, "employer" would mean the entity that is the employer of an employee under the common-law test. In addition, § 4980H provides that all entities treated as a single employer under § 414(b), (c), (m), or (o) are treated as a single employer for purposes of § 4980H. Section 4980H(c)(2)(C)(i). Thus, all employees of a controlled group under § 414(b) or (c), or an affiliated service group under § 414(m), are to be taken into account in determining whether any member of the controlled group or affiliated service group is an applicable large employer. Section 4980H also provides that an employer includes a predecessor employer (§ 4980H(c)(2)(C)(iii)) and that an employer not in existence during an entire preceding calendar year will be an applicable large employer for the current calendar year if it is reasonably expected to employ an average of at least 50 full-time employees (taking into account FTEs) on business days during the current calendar year. Section 4980H(c)(2)(C)(ii). (Section IV.C describes how FTEs are calculated for purposes of determining whether an employer is an applicable large employer.)

B. How "Employee" Would Be Defined

For purposes of § 4980H, as under Code provisions generally, "employee" would mean a worker who is an employee under the common-law test. (See Section IV.D for a special rule regarding seasonal employees described in § 4980H(c)(2)(B).) Section 414(n), which treats "leased employees", as defined in § 414(n)(2), as employees of the service recipient for various purposes, does not cross-reference § 4980H and accordingly would not apply to § 4980H.

C. Definition of "Hours of Service"

In general, § 4980H treats, with respect to a month, an employee who has an average of at least 30 hours of service per week as a full-time employee. It is contemplated that, for this purpose, proposed regulations would provide that 130 hours of service in a calendar month would be treated as the monthly equivalent of at least 30 hours of service per week.[4] As under existing Labor Regulations, an employee's hours of service would include the following: (1) each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and (2) each hour for which an employee is paid, or entitled to payment by the employer on account of a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence (29 C.F.R. § 2530.200b–2(a)) (except that it is contemplated that no more than 160 hours of service would be counted for an employee on account of any single continuous period during which the employee was paid or entitled to payment but performed no duties). The potential rules for determining hours of service in this Section III.C and section III.D, which are based on prior guidance under other provisions of the Affordable Care Act, would apply in determining an employee's status as full-time or not full-time and in calculating an employer's FTEs.

D. How Hours of Service Would Be Calculated

1. Calculation of hours for service for hourly employees

For employees paid on an hourly basis (hourly employees), the employer would be required to calculate actual hours of service from records of hours worked and hours for which payment is made or due (payment is made or due for vacation, holiday, illness, incapacity, etc., as described above).

2. Calculation of hours for service for non-hourly employees

For employees not paid on an hourly basis (non-hourly employees), the employer would be permitted to calculate the number of hours of service under any of the following three methods: (1) counting actual hours of service from records of hours worked and hours for which payment is made or due for vacation, holiday, illness, incapacity, etc., as described above; (2) using a days-worked equivalency method whereby the employee is credited with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service under the rule in Section III.C above; or (3) using a weeks-worked equivalency of 40 hours of service per week for each week for which the employee would be required to be credited with at least one hour of service under the rule in Section III.C above. These equivalents are based on Labor regulations at 29 C.F.R. § 2530.200b–2(a), modified as under prior guidance under other provisions of the Affordable Care Act.

Although an employer would be required to use one of these three methods for counting hours of service for

[4] This possible proposed standard of 130 hours of service per calendar month would take into account that the average month consists of more than four weeks (52x30/12=130).

all non-hourly employees, an employer need not use the same method for all non-hourly employees, but may apply different methods for different classifications of non-hourly employees, if the classifications are reasonable and consistently applied. In addition, an employer may change the method of calculating non-hourly employees' hours of service for each calendar year. For example, for all non-hourly employees, an employer may use the actual hours worked method for the calendar year 2014, but may use the days-worked equivalency method for counting hours of service for the calendar year 2015.

The number of hours of service calculated using the days-worked or weeks-worked equivalency method would be required to reflect generally the hours actually worked and the hours for which payment is made or due. An employer would not be permitted to use the days-worked or weeks-worked equivalency method if the result would be to substantially understate an employee's hours of service in a manner that would cause that employee not to be treated as full-time.

IV. DETERMINATION OF WHETHER AN EMPLOYER IS AN APPLICABLE LARGE EMPLOYER

This section of the notice describes the process for determining whether an employer is an applicable large employer in accordance with § 4980H. Comments are welcome.

A. Applicable Large Employer Status Determined Based upon Sum of Full-Time Employees and FTEs

Under § 4980H, an employer would not be subject to an assessable payment unless the employer is an applicable large employer. As noted above, § 4980H defines an applicable large employer, with respect to a calendar year, as an employer that employed an average of at least 50 FT employees on business days during the preceding calendar year. For purposes of this Section IV, the term "FT employees" means the sum of the employer's full-time employees and FTEs.

B. Full-Time Employees for Determining Applicable Large Employer Status

Section 4980H provides that full-time employee status is determined on a monthly basis. Under § 4980H, a full-time employee with respect to any month is an employee (including a seasonal employee) who is employed, on average, at least 30 hours of service per week (or, under the rules contemplated to be included in proposed regulations, at least 130 hours of service in the calendar month). An employee who is not a full-time employee under this standard (including a seasonal employee) for a given month is taken into account in the FTE calculation. Section 4980H(c)(2)(E).

C. Full-Time Equivalents for Determining Applicable Large Employer Status

In determining whether an employer is an applicable large employer for the current calendar year, § 4980H provides that the employer is required to calculate the number of FTEs it employed during the preceding calendar year and count each such FTE as one FT employee for that year. All employees (including seasonal employees) who were not full-time employees for any month in the preceding calendar year are included in calculating the employer's FTEs for that month. The number of FTEs for each calendar month in the preceding calendar year would be determined using the following steps:

(1) Calculate the aggregate number of hours of service (but not more than 120 hours of service for any employee) for all employees who were not full-time employees for that month.

(2) Divide the total hours of service in step (1) by 120. This is the number of FTEs for the calendar month.

In determining the number of FTEs for each calendar month, fractions would be taken into account. For example, if in a calendar month employees who are not full-time employees work 1,260 hours, there would be 10.5 FTEs for that month. However, after adding the 12 monthly full-time employee and FTE totals, and dividing by 12 (the amount in Section IV.E, step (4) below), all fractions would be disregarded. For example, 49.9 FT employees for the preceding calendar year would be rounded down to 49 FT employees (and thus the employer would not be an applicable large employer in the current calendar year).

D. Seasonal Employees

Section 4980H provides that seasonal employees are employees who perform labor or services on a seasonal basis as defined by the Secretary of Labor, including seasonal workers covered by 29 C.F.R. § 500.20(s)(1) and retail workers employed exclusively during holiday seasons. Section 4980H(c)(2)(B)(ii). If an employer's workforce exceeds 50 FT employees for 120 days or fewer during a calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal employees, the employer would not be an applicable large employer. It is contemplated that, for this purpose only, four calendar months would be treated as the equivalent of 120 days.

E. Calculating the Number of FT Employees

The steps in calculating the number of FT employees in the preceding calendar year, and thus whether the employer is an applicable large employer for the current calendar year, would be as follows:

(1) Calculate the number of full-time employees (including seasonal employees) for each calendar month in the preceding calendar year.

(2) Calculate the number of FTEs (including seasonal employees) for each calendar month in the preceding calendar year (as described in Section IV.C above).

(3) Add the number of full-time employees and FTEs calculated in steps (1) and (2) for each of the 12 months in the preceding calendar year.

(4) Add up the 12 monthly numbers in step (3) and divide the sum by 12. This is the average number of the employer's FT employees for the preceding calendar year. See Section IV.C above for rule regarding fractions and rounding.

(5) If the number of FT employees in step (4) is less than 50, the employer is not an applicable large employer for the current calendar year.

(6) If the number of FT employees in step (4) is 50 or more, determine whether the seasonal employee exception, as described in Section IV.D above, applies. If

the seasonal employee exception applies, the employer is not an applicable large employer for the current calendar year. If the seasonal exception does not apply, the employer is an applicable large employer for the current calendar year.

Examples. In all of the examples in this notice, employees are common law employees of the employer, and hours of service are computed following the rules in Section III.D above.

Example 1 — Hourly-paid employees. (i) Employer K's taxable year is the calendar year. Employer K's payroll records indicate that Employee A was an hourly employee who worked 173 hours per month for January through November of 2014, worked 93 hours in December of 2014 and was paid for 80 hours of annual leave in December of 2014 (for a total of 173 hours for December of 2014).

(ii) Employee A had more than 130 hours of service in each month in calendar year 2014.

(iii) Employee A was a full-time employee of Employer K for each month during calendar year 2014.

Example 2 — Non-hourly employee: days-worked equivalency. (i) Same facts as *Example 1*, except that in calendar year 2014, Employee B is a non-hourly employee who worked for Employer K five days per week for 50 weeks, and was paid 80 hours of vacation leave for two weeks (40 hours per week). Employer K applies the days-worked equivalency for Employee B.

(ii) Employee B is credited with 40 hours of service for each week in the 2014 calendar year (50 weeks worked and 2 weeks for which payment was made).

(iii) Employee B averaged at least 30 hours of service per week during each month in calendar year 2014.

(iv) Employee B is a full-time employee of Employer K in each month in calendar year 2014.

Example 3 — Applicable large employer. (i) In each month in calendar year 2014, Employer L has 20 full-time employees, 30 FTEs, and no seasonal employees.

(ii) Because Employer L has 50 FT employees (20 full-time employees + 30 FTEs) during each month of 2014 and the seasonal employee exception is not applicable, Employer L is an applicable large employer for calendar year 2015.

Example 4 — Seasonal employees. (i) In calendar year 2014, Employer N has 40 full-time employees for January through December none of whom are seasonal employees. In addition, Employer N also has 80 seasonal full-time employees that work for Employer N from September through December. Employer N has no FTEs.

(ii) Before applying the seasonal employee exemption, Employer N has 40 full-time employees during each of eight calendar months of 2014, and 120 full-time employees during each of four calendar months of 2014, resulting in an average of 66.5 employees for the year (rounded down to 66 full-time employees), an average greater than the average of at least 50 full-time employees required for applicable large employer status. However, in this example, Employer N's workforce exceeded 50 full-time employees (counting seasonal employees) for no more than four calendar months (treated as the equivalent of 120 days) in calendar year 2014, and the employees in excess of 50 during those months were seasonal workers.

(iii) Accordingly, because of the seasonal employee exemption, Employer N is not an applicable large employer for calendar year 2015.

Example 5 — Seasonal and other FTEs. (i) Same facts as in *Example 4*, except that Employer N has 20 FTEs in August, some of whom are seasonal employees.

(ii) The seasonal employee exemption is not available if the number of an employer's FT employees (including seasonal employees) exceeds 50 employees for more than 120 days during the calendar year. Employer N has at least 50 FT employees for a period greater than four calendar months (treated as the equivalent of 120 days) in calendar year 2014. Therefore, Employer N is not eligible for the seasonal employee exception. As a result, Employer N averages 68 FT employees in 2014: [(40 x 7) + (60 x 1) + (120 x 4)] ÷ 12 = 68.33, rounded down to 68.

(iii) Accordingly, Employer N is an applicable large employer for calendar year 2015.

V. POTENTIAL METHODS FOR DETERMINING FULL-TIME EMPLOYEES UNDER § 4980H

An applicable large employer's potential § 4980H(a) liability is determined by reference to the number of full-time employees employed for a given month, and an applicable large employer's potential § 4980H(b) liability is determined by reference to the number of full-time employees with respect to whom an applicable premium tax credit or cost-sharing reduction is allowed or paid for a given month. Under a month-to-month method for determining an applicable large employer's potential § 4980H liability, each employee's full-time status would be determined on a monthly basis (*i.e.*, an employee would be considered full-time for a month if the employee averaged at least 30 hours of service per week for the month (or, under the rules contemplated to be included in proposed regulations, had at least 130 hours of service for the month)).

A determination of full-time employee status on a monthly basis for purposes of calculating an employer's potential § 4980H liability may cause practical difficulties for employers, employees, and the State Exchanges. These difficulties include uncertainty and inability to predictably identify which employees are considered full-time and, consequently, inability to forecast or avoid potential § 4980H liability. This issue is particularly acute in circumstances in which employees have varying hours or employment schedules (*e.g.*, employees whose hours vary from month to month or who are employed for a limited period). If employer-sponsored coverage were limited to employees who satisfied the definition of full-time employee during a month, employees might move in and out of employer coverage as frequently as monthly, which would be undesirable from both the employee's and the employer's perspective, and could also create administrative challenges for the State Exchanges.

In order to address these concerns for employees and employers, and to give plan sponsors flexible and workable options as well as greater predictability, Treasury and the IRS are considering proposing possible alternatives to a month-by-month determination of full-time employee status for purposes of calculating an applicable large employer's potential assessable payment. One possible alternative would permit applicable large employers, at their option, to use a look-back/stability period safe harbor that would provide certainty as to which employees would be considered full-time for a particular coverage period. Such an approach also would be designed to give effect to the statutory provisions while accommodating a wide variety of current eligibility and enrollment practices in group health plans. Accordingly, this notice requests comments on the look-back/stability period safe harbor method described below, which Treasury and the IRS believe represents a reasonable interpretation of the statute.

Under the possible look-back/stability period safe harbor method, an employer would determine each employee's full-time status by looking back at a defined period of not less than three but not more than twelve consecutive calendar months, as chosen by the employer (the measurement period), to determine whether the employee averaged at least 30 hours of service per week (or, under the rules contemplated to be included in proposed regulations, at least 130 hours of service per calendar month) during the measurement period. If the employee were determined to be a full-time employee during the measurement period, then the employee would be treated as a full-time employee during a subsequent "stability period", regardless of the number of the employee's hours of service during the stability period, so long as he or she remained an employee. For an employee who was determined to be a full-time employee during the measurement period, the stability period would be a period of at least six consecutive calendar months that follows the measurement period and is no shorter in duration than the measurement period. If the employee was determined not to be a full-time employee during the measurement period, the employer would be permitted to treat the employee as not a full-time employee during a stability period that followed the measurement period, but the stability period could not exceed the measurement period.

Example 6 — Measurement period/stability period. (i) Employer M, an applicable large employer, did not hire any new employees in calendar year 2014. Employer M elects to use a 6-month measurement period and a 6-month stability period for purposes of determining its full-time employees. The first measurement period runs from January 1, 2014 through June 30, 2014 and the associated stability period runs from July 1, 2014 through December 31, 2014.

(ii) Employer M determines each employee's full-time status by looking back to determine whether the employee averaged at least 30 hours of service per week from January 1, 2014 through June 30, 2014 by totaling each employee's hours of service during that measurement period and dividing that total by the number of weeks in that measurement period.

(iii) The employees determined to be full-time based on their hours of service during the first measurement period are considered to be full-time for each month in the stability period from July 1, 2014 through December 31, 2014 for purposes of calculating Employer M's potential assessable payment under § 4980H for those months.

Treasury and IRS also request comments on other possible alternative methods of determining full-time employee status for purposes of calculating an applicable large employer's potential assessable payment.

For new employees who might not have been employed by the employer during the entire measurement period, or employees who move into full-time status during the year, it is currently anticipated that this safe harbor may apply only in a limited form. Comments are requested on potential rules for determining the full-time status of such employees. See also Section VI, below, which requests comments regarding the 90-day waiting period and its application to newly eligible employees.

In addition, comments are invited on the following possible provisions:

- To allow reasonable administrative time to perform the look-back calculation, notify employees of their eligibility, and enroll them in coverage, the stability period might not be required to commence immediately following the end of the measurement period. Instead, plans might be given the option of taking an administrative interval (for example, up to one month) between the end of the measurement period and the beginning of the stability period.
- Employers who select a measurement period of less than a year but select a stability period that is designed to provide coverage to employees on a plan year basis might be permitted to provide different stability periods for different groups of employees depending on the point during the plan year in which the employee is determined to be full-time. For example, employers using a three-month measurement period might be permitted to use a stability period of at least six consecutive months or, if greater, the number of calendar months remaining in the plan year.
- Employers might be given the option of starting the first measurement period for an employee on the employee's date of hire rather than on the first day of a calendar month, provided that the duration of the measurement period was uniform for all employees.
- To minimize opportunities for manipulation, employers might be limited in the frequency with which they could change their measurement and stability period.

If employers could use different measurement and stability periods for different portions of their work force, the potential for manipulation could be greater, and the resources required for the IRS to review and confirm employer compliance would be materially increased. The use of a single measurement period and a single stability period for all of an employer's employees would minimize these concerns. Accordingly, commenters are requested to take these issues into account in commenting on whether applicable large employers should generally be required to use the same measurement and stability periods for all employees. Comments are requested on whether there are circumstances (such as corporate transactions bringing new entities into the applicable large employer's controlled group or the use of different payroll systems for different groups of employees) in which it may be appropriate for the employer to apply different measurement and stability periods for different classifications of employees or for different entities within its controlled group.

VI. REQUEST FOR COMMENTS

A. General Request for Comments

As noted, the IRS and Treasury intend to issue proposed regulations on the employer shared responsibility provisions under § 4980H. To help inform those proposed regulations, comments are invited on the issues addressed in this notice. In addition, employers and other stakeholders have requested clarification of how the § 4980H(a) assessable payment provisions will be interpreted and applied, and how they should work together with the § 4980H(b) assessable payment provisions. As noted earlier, § 4980H(a) provides that the assessable payment under § 4980H(a) may apply to an employer that "fails to offer its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an employer-sponsored plan." It is contemplated that the proposed regulations would make clear that an employer offering coverage to all, or substantially all, of its full-time employees would not be subject to the § 4980H(a) assessable payment provisions. Comments are requested on the challenges employers may face in being able to offer coverage to certain categories of employees even after implementation of the changes made by the Affordable Care Act to the group insurance market, and on other situations where application of the § 4980H(a) assessable payment may not be appropriate. Comments are requested on whether there are appropriate exceptions that should be provided for under the employer responsibility provisions (for example, an exception to permit employers not to offer coverage to nonresident alien employees, who not are required to have coverage under the Affordable Care Act, or not to offer coverage to certain seasonal employees) and how any proposed exceptions would be consistent with the structure and purpose of the § 4980H(a) assessable payment provisions.

B. Request for Comments on the 90-Day Waiting Period Limitation

Section 1201 of the Affordable Care Act added a new § 2708 of the PHS Act, which provides that a group health plan and health insurance issuer offering group health insurance coverage shall not apply any waiting period that exceeds 90 days.[5] PHS Act § 2708 (42 U.S.C. § 300gg–7) is incorporated by reference into the Employee Retirement Income Security Act of 1974 (ERISA) under § 715 and into the Code under § 9815, enacted by § 1563 of the Affordable Care Act. Accordingly, the interpretation and application of § 2708 of the PHS Act is subject to the shared jurisdiction of the three Departments. Violations by group health plans are subject to the excise tax under § 4980D of the Code, as well as other civil enforcement remedies under ERISA and the PHS Act.

For purposes of § 2708 of the PHS Act, "waiting period" is defined under § 2704(b)(4) of the PHS Act to mean "with respect to a group health plan and an individual who is a potential participant or beneficiary in the plan, the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan." Identical definitions of "waiting period" appear in the Code and ERISA. See Code § 9801(b)(4); ERISA § 701(b)(4).[6] Joint final regulations under these three identical statutory provisions (which were added by HIPAA) define the term "waiting period" as "the period that must pass before coverage for an employee or dependent who is *otherwise eligible* to enroll under the terms of a group health plan can become effective [emphasis added]." See Treas. Reg. § 54.9801–3(a)(3)(iii); DOL Reg. 29 CFR 701–3(a)(3)(iii); HHS Reg. 45 CFR 146.111(a)(3)(iii).

The Departments request comments on the 90-day limitation on any waiting period under PHS Act § 2708, including comments on which employees are subject to the limitation, when a waiting period may apply consistent with the limitation, and how the 90-day limitation should be calculated. Comments are also requested on the application of the 90-day waiting period under PHS Act § 2708 to common employer eligibility and enrollment practices and the interaction between the interpretation of the Code § 4980H employer responsibility provisions and the calculation of the maximum permissible waiting period under PHS Act § 2708, including the following:

1. On April 8, 2011, the DOL held an open forum on issues relating to implementation of the automatic enrollment provisions of § 18A of the Fair Labor Standards Act. At that open forum and in other contexts, stakeholders have described arrangements or practices currently used by some group health plans to determine when an employee is eligible to enroll in the plan and when enrollment occurs. Comments are requested on how the 90-day waiting period under PHS Act § 2708 should be applied in the following situations (including appropriate modifications, if any, that should be made to an employer group health plan's eligibility and enrollment practices):
    a. Employees become eligible to enroll in the employer's group health plan when they are determined to have worked an average of a specified number of hours (*e.g.*, 30 hours per week) during a look-back measurement period (*e.g.*, a quarterly look-back measurement period) and are therefore considered to satisfy the plan's eligibility requirements. Once an employee is determined to be eligible to enroll in the group health plan, he or she is enrolled at the end of a 90-day waiting period during which the employer and the plan or issuer, as applicable, complete the enrollment process.
    b. Employees who are hired to work a full-time schedule become eligible to enroll in the employer's group health plan, subject to a 90-day service requirement, calculated from the date of hire. The plan or issuer does not permit mid-month enrollment but permits employees to enroll on the first day of the month (or the first day of a quarter) after completing 90 days of service.
    c. Employees covered by a collective bargaining agreement become eligible for coverage under a multiemployer health plan for a period (such as a calendar quarter) if they completed a specified number of hours during an earlier period (such as the previous calendar quarter, or the calendar quarter that began six months before the coverage quarter). The multiemployer health plan collects such an employee's hours worked from different employers that contribute to the plan. Under the terms of the multiemployer plan, excess hours may or may not be "banked" and available to maintain coverage for future quarters in which the employee does not meet the hours requirement.
    d. Employees become eligible to enroll in the employer's group health plan after completing a service-based "probationary" period of, for example, three to six months. The plan enrolls employees 90 days after the completion of the probationary period.
    e. Employees hired as seasonal workers or into certain other temporary or variable-hour categories of employment are not eligible to enroll in the employer's group health plan, even if such an employee works a sufficient number of hours to satisfy the plan's eligibility requirement for non-seasonal employees. To the extent that the status of this employee changes to one that is eligible to enroll in the plan, the employee is permitted to enroll 90 days after the change in sta-

[5] PHS Act § 2708 is effective for plan years beginning on or after January 1, 2014 and applies to both grandfathered and non-grandfathered plans.

[6] The Health Insurance Portability and Accountability Act of 1996 (HIPAA) added the definition of waiting period to the PHS Act, ERISA and the Code as part of the portability provisions. Under the HIPAA portability provisions, a waiting period is not taken into account in determining whether an individual has had a significant break in coverage (*i.e.*, a break of 63 or more days) that would nullify prior creditable coverage that would otherwise reduce the length of an allowed preexisting condition exclusion period.

tus. In some instances, the same seasonal or temporary employees may be rehired annually.

f. Part-time employees are offered coverage, but only after having worked for longer than a 90-day period.

2. What, if any, other service-based eligibility conditions do employers, plans, or issuers currently impose that could raise compliance issues under PHS Act § 2708? Are there any clarifications or interpretations that would be helpful to facilitate compliance? Should the 90-day waiting period provision be interpreted to require aggregation of discrete periods of service or should plans be permitted to require continuous service to satisfy the waiting period?
3. How should § 4980H be coordinated with the 90-day waiting period provision?

Comments must be submitted by June 17, 2011. Comments should include a reference to Notice 2011–36. Send submissions to CC:PA:LPD:PR (Notice 2011–36), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered **Monday through Friday** between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2011–36), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044, or sent electronically, via the following e-mail address: *Notice.comments@irscounsel.treas.gov*. Please include "Notice 2011–36" in the subject line of any electronic communication. All material submitted will be available for public inspection and copying.

NO INFERENCE

No inference should be drawn from any provision of this notice concerning any other provision of § 4980H or any other section of the Affordable Care Act.

DRAFTING INFORMATION

The principal author of this notice is Mireille Khoury of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Khoury at (202) 622–6080 (not a toll-free call).

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

Notice 2011–41

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 April 2011 is 5.58 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%
May	2011	6.03	5.43	6.03

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 April 2011 data is in Table I at the end of this notice. The spot first, second, and third segment rates for the month of April 2011 are, respectively, 1.93, 5.23, and 6.44. The three 24-month average corporate bond segment rates applicable for May 2011 are as follows:

First Segment	Second Segment	Third Segment
2.38	5.51	6.36

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 lookback month to May 2011, the funding segment rates are the three 24-month average corporate bond segment rates applicable for May 2011, 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 April 2011 is 4.50 percent. The Service has determined this rate as the average of the daily determinations of yield on the 30-year Treasury bond maturing in February 2041.

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%
May	2011	4.29	3.86		4.50

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 April 2011, taking into account the April 2011 30-year Treasury rate of 4.50 stated above, are as follows:

For Plan Years Beginning in	First Segment	Second Segment	Third Segment
2010	2.96	4.94	5.66
2011	2.44	5.08	6.05

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 April 2011
Derived from April 2011 Data

Maturity	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*	*Maturity*	*Yield*
0.5	0.44	20.5	6.03	40.5	6.49	60.5	6.65	80.5	6.73
1.0	0.75	21.0	6.05	41.0	6.50	61.0	6.66	81.0	6.73
1.5	1.07	21.5	6.07	41.5	6.51	61.5	6.66	81.5	6.74
2.0	1.41	22.0	6.09	42.0	6.51	62.0	6.66	82.0	6.74
2.5	1.76	22.5	6.11	42.5	6.52	62.5	6.66	82.5	6.74
3.0	2.12	23.0	6.13	43.0	6.52	63.0	6.67	83.0	6.74
3.5	2.47	23.5	6.15	43.5	6.53	63.5	6.67	83.5	6.74
4.0	2.79	24.0	6.17	44.0	6.53	64.0	6.67	84.0	6.74
4.5	3.09	24.5	6.18	44.5	6.54	64.5	6.67	84.5	6.74
5.0	3.36	25.0	6.20	45.0	6.54	65.0	6.67	85.0	6.75
5.5	3.61	25.5	6.21	45.5	6.55	65.5	6.68	85.5	6.75
6.0	3.84	26.0	6.23	46.0	6.55	66.0	6.68	86.0	6.75
6.5	4.04	26.5	6.24	46.5	6.56	66.5	6.68	86.5	6.75
7.0	4.22	27.0	6.25	47.0	6.56	67.0	6.68	87.0	6.75
7.5	4.38	27.5	6.27	47.5	6.56	67.5	6.69	87.5	6.75
8.0	4.53	28.0	6.28	48.0	6.57	68.0	6.69	88.0	6.75
8.5	4.66	28.5	6.29	48.5	6.57	68.5	6.69	88.5	6.75
9.0	4.79	29.0	6.30	49.0	6.58	69.0	6.69	89.0	6.76
9.5	4.90	29.5	6.31	49.5	6.58	69.5	6.69	89.5	6.76
10.0	5.00	30.0	6.33	50.0	6.58	70.0	6.70	90.0	6.76
10.5	5.10	30.5	6.34	50.5	6.59	70.5	6.70	90.5	6.76
11.0	5.19	31.0	6.35	51.0	6.59	71.0	6.70	91.0	6.76
11.5	5.27	31.5	6.36	51.5	6.60	71.5	6.70	91.5	6.76
12.0	5.34	32.0	6.37	52.0	6.60	72.0	6.70	92.0	6.76
12.5	5.41	32.5	6.38	52.5	6.60	72.5	6.71	92.5	6.76
13.0	5.47	33.0	6.38	53.0	6.61	73.0	6.71	93.0	6.76
13.5	5.53	33.5	6.39	53.5	6.61	73.5	6.71	93.5	6.77
14.0	5.58	34.0	6.40	54.0	6.61	74.0	6.71	94.0	6.77
14.5	5.63	34.5	6.41	54.5	6.62	74.5	6.71	94.5	6.77
15.0	5.68	35.0	6.42	55.0	6.62	75.0	6.71	95.0	6.77
15.5	5.72	35.5	6.43	55.5	6.62	75.5	6.72	95.5	6.77
16.0	5.76	36.0	6.43	56.0	6.63	76.0	6.72	96.0	6.77
16.5	5.80	36.5	6.44	56.5	6.63	76.5	6.72	96.5	6.77
17.0	5.84	37.0	6.45	57.0	6.63	77.0	6.72	97.0	6.77
17.5	5.87	37.5	6.46	57.5	6.64	77.5	6.72	97.5	6.77
18.0	5.90	38.0	6.46	58.0	6.64	78.0	6.72	98.0	6.78
18.5	5.93	38.5	6.47	58.5	6.64	78.5	6.73	98.5	6.78
19.0	5.96	39.0	6.48	59.0	6.64	79.0	6.73	99.0	6.78
19.5	5.98	39.5	6.48	59.5	6.65	79.5	6.73	99.5	6.78
20.0	6.01	40.0	6.49	60.0	6.65	80.0	6.73	100.0	6.78

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, §§ 118, 362.)

Rev. Proc. 2011–30

SECTION 1. PURPOSE

This revenue procedure provides a safe harbor under section 118(a) of the Internal Revenue Code for the treatment of certain awards regarding clean coal technology made by the National Energy Technology Laboratory (NETL), United States Department of Energy (DOE) to corporate taxpayers.

SECTION 2. BACKGROUND

Section 118(a) of the Code provides that in the case of a corporation, gross income does not include a contribution to the capital of the taxpayer.

Section 1.118–1 of the Income Tax Regulations provides that section 118 applies to contributions to capital made by a person other than a shareholder, for example, property contributed to a corporation by a governmental unit for the purpose of enabling the corporation to expand its operating facilities.

Section 362(c)(2) of the Code requires a basis reduction in a corporation's property when the corporation receives money from a nonshareholder as a contribution to its capital.

42 U.S.C. 15962 directs DOE to provide assistance for projects that advance efficiency, environmental performance, and cost competitiveness well beyond the level of technologies that are in commercial service or have been demonstrated on a scale that DOE determines is sufficient to demonstrate that commercial service is viable as of August 8, 2005. To implement this program, NETL issued a Financial Assistance Funding Opportunity Announcement for Clean Coal Power Initiative - Round 3 (DE-PS26–08NT43181 and DE-FOA–0000042, dated August 11, 2008, as amended by Amendment 005, dated June 9, 2009, and Amendment 006, dated July 16, 2009) (CCPI - Round 3). This guidance may be accessed electronically at: *http://www.energy.gov/recovery/documents/vDE-FOA–0000042.pdf*.

42 U.S.C. 17251 directs DOE to carry out a program to demonstrate technologies for the large-scale capture of carbon dioxide from industrial sources. To implement this program, NETL issued a Financial Assistance Funding Opportunity Announcement for Carbon Capture and Sequestration from Industrial Sources and Innovative Concepts for Beneficial CO_2 Use (DE-FOA–0000015, dated June 8, 2009, as amended by Amendment 001, dated July 17, 2009) (ICCS). This guidance may be accessed electronically at: *http://www.energy.gov/recovery/documents/DE-FOA–0000015.pdf*.

On September 27, 2010, NETL awarded assistance for a commercial-scale, oxy-combustion power plant and carbon dioxide sequestration facility (FutureGen 2.0). A project summary may be accessed electronically at: *http://www.recovery.gov/Transparency/RecipientReportedData/pages/RecipientProjectSummary508.aspx?AwardIdSur=115412&AwardType=Grants*.

Division A, Title IV of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (ARRA) appropriated $3.4 billion for Fossil Energy Research and Development, of which DOE allocated approximately $796 million to CCPI - Round 3, approximately $703 million to ICCS, and approximately $995 million to FutureGen 2.0.

SECTION 3. SCOPE

This revenue procedure applies to corporate taxpayers that receive an award from DOE funded in whole or in part by ARRA under CCPI - Round 3, ICCS, or FutureGen 2.0. This revenue procedure applies only if the corporate taxpayer has the right to retain ownership of its inventions made under an award, either by statute or under a waiver of patent rights from DOE.

This revenue procedure does not apply to noncorporate taxpayers. In addition, this revenue procedure does not apply to the portion of an award paid or incurred for non-capital expenditures (such as operating expenses) or for research and experimental expenditures under section 174 of the Code.

SECTION 4. PROCEDURE

The Internal Revenue Service will not challenge a corporate taxpayer's treatment of an award from DOE under CCPI - Round 3, ICCS, or FutureGen 2.0 as a nonshareholder contribution to the capital of the corporation under section 118(a) of the Code if the corporate taxpayer properly reduces the basis of its property under section 362(c)(2) and the regulations thereunder.

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective April 14, 2011.

SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is David McDonnell of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue procedure, contact Mr. McDonnell at (202) 622–3040 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Controlled Groups; Deferral of Losses

REG–118761–09

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance concerning the time for taking into account deferred losses on the sale or exchange of property between members of a controlled group. These proposed regulations affect members of a controlled group and their shareholders.

DATES: Written and electronic comments and requests for a public hearing must be received by July 20, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–118761–09), Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered to: CC:PA:LPD:PR Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–118761–09), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–118761–09).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Bruce A. Decker (202) 622–7790; concerning submissions of comments and/or requests for a public hearing, *Richard.A.Hurst@irscounsel.treas.gov*, or (202) 622–7180.

SUPPLEMENTARY INFORMATION:

Background

This document provides guidance concerning the Federal income tax treatment of deferred losses on the sale or exchange of property between members of a controlled group, including transactions in which the member acquiring the property subsequently recognizes a corresponding gain with respect to the property.

Section 267(a)(1) provides that no deduction shall be allowed for any loss on the sale or exchange of property between certain related persons. Section 267(f)(2) contains an exception for a loss on the sale or exchange of property between members of a controlled group. For this purpose, "controlled group" has the meaning defined in section 1563(a) except that "more than 50 percent" is substituted for "at least 80 percent" each place it appears. In the case of a sale or exchange of loss property between members of a controlled group, the loss is deferred rather than disallowed. Under section 267(f)(2)(B), the loss is deferred until the property is transferred outside of the controlled group and there would be recognition of loss under consolidated return principles or until such other time as may be prescribed in regulations.

The regulations under section 267(f) provide that the timing principles for intercompany sales or exchanges between members of a consolidated group (see generally §1.1502–13(c)(2)) apply to sales or exchanges of property at a loss between members of controlled group. See §1.267(f)–1(a)(2). The attribute redetermination rules applicable to transactions between members of a consolidated group (see §1.1502–13(c)(1)), however, do not apply to sales or exchanges between members of a controlled group. See §1.267(f)–1(a)(2)(i)(B)). For example, if a member of a consolidated group (S) holds land for investment and sells the land at a loss to another member of its consolidated group (B), and B develops the land and sells developed lots to unrelated customers, S's intercompany loss will be taken into account when B sells the property to the unrelated person. Furthermore, S's loss will be recharacterized as an ordinary loss, even though S's loss would otherwise be a capital loss given its separate-entity status as holding the property for investment. See §1.1502–13(c)(4)(i), (c)(7)(ii), *Example 2*. If B and S were members of a controlled group but not a consolidated group, S's loss would also be taken into account when B sells the parcel to an unrelated person, but S's loss would retain its character as a capital loss.

The attribute redetermination rule applicable to intercompany transactions between consolidated group members may have the effect of eliminating an intercompany loss with respect to a corporation's stock. For example, assume that S, a subsidiary in a consolidated group, owns 100 percent of the stock of T, a solvent corporation. S sells 30 percent of T's stock at a loss to B, the common parent of the consolidated group that includes S. In a subsequent, unrelated transaction (and before any change in the value of the T stock), T liquidates. The attribute redetermination rule of §1.1502–13(c)(1) recharacterizes S's intercompany loss to produce the same results to the consolidated group as a whole as if S and B were divisions of a single corporation. Under these facts, the subsequent liquidation of T, tax-free under section 332, would cause S's intercompany loss to be treated as a noncapital nondeductible amount. See §1.1502–13(f)(7), *Example 5(c)*.

Although the attribute redetermination rule generally does not apply to sales or exchanges between members of a controlled group, §1.267(f)–1(c)(1)(iv) contains a special rule with respect to losses that would have been redetermined to be a noncapital, nondeductible amount if the consolidated return attribute redetermination rule did apply. Under §1.267(f)–1(c)(1)(iv), if an intercompany loss between members of a consolidated group would have been redetermined to be a noncapital, nondeductible amount as a result of the attribute redetermination rule applicable to consolidated groups, but is not redetermined because the sale or exchange occurred between members of a controlled group (to which the attribute redetermination rule does not apply), then the loss will be deferred until S and B are no longer in a controlled group relationship. Thus, if the facts in the example in the preceding paragraph were the same, except that B was the parent of a controlled group that included S, rather than a consolidated group, under the principles of section 267(f), the IRS and Treasury Department believe that S's loss on the sale or exchange of T stock should be deferred until S and B (and their successors) are no longer in a controlled group relationship.

Furthermore, assume S1 and S2, both members of a consolidated group, each own 50 percent of the stock of T. If the basis of the T stock is greater than its value, a liquidation of T would generally result in non-recognition of the loss through the application of §1.1502–34 and section 332. In an attempt to avoid the non-recognition of the loss, either S1 or S2 may sell more than 20 percent of T's stock to a nonconsolidated, controlled group member in a transaction that is treated as a sale or exchange for federal income tax purposes. Thereafter, T is liquidated in an attempt to recognize a loss on 100 percent of the subsidiary's stock. The IRS and Treasury Department believe that in these situations, the loss should similarly be deferred until the buying and selling members are no longer in a controlled group relationship.

In a controlled group setting, taxpayers have noted that the current regulations do not allow S to take into account any amount of the intercompany loss when B recognizes a corresponding gain. For example, if S sells 30 percent of T's stock to B at a loss (in a transaction that is treated as a sale or exchange for federal income tax purposes) and T's stock appreciates between the time of the intercompany sale and a subsequent event that results in B's recognition of gain (that is T's liquidation), B would recognize a gain under section 331 at that time, but S's loss would remain deferred in its entirety. Accordingly, the IRS and the Treasury Department propose to modify the current regulations and allow S's intercompany loss to be taken into account to the extent that B recognizes a corresponding gain, in addition to the other events that result in acceleration.

Explanation of Provisions

These proposed regulations provide that, for purposes of determining whether a loss would be determined to be a noncapital, nondeductible amount under the principles of §1.1502–13, stock held by the selling member, stock held by the buying member, and stock held by all members of the seller's consolidated group as well as stock held by any member of a controlled group of which the seller is a member that was acquired from a member of the seller's consolidated group must be taken into account. In addition, certain losses on the sale or exchange of property between members of a controlled group, which have been deferred, are taken into account upon the occurrence of either of two events. The deferred loss is taken into account to the extent of any corresponding gain that the member acquiring the property recognizes with respect to the property. Alternatively, the deferred loss is taken into account when the parties to the transaction cease to be in a controlled group relationship. In the example, under the proposed regulations, S's loss will be recognized to the extent of the amount of corresponding gain recognized by B upon the event that results in recognition of that gain (that is T's liquidation).

Proposed Effective/Applicability Date

These proposed regulations will apply to loss redetermination events that occur after the date the regulations are published 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 is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations primarily affect controlled groups of corporations which tend to be larger businesses. 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 Internal Revenue Code, this regulation has been submitted to the Small Business Administration for comment on its impact on small governmental jurisdictions.

Comments and Requests for 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 rules and how they can be made easier to understand. All comments are available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written 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 Bruce A. Decker, Office of Associate Chief Counsel (Corporate), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

* * * * *

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 1.267(f)–1 is amended as follows:

1. Paragraph (c)(1)(iv) is revised.

2. Paragraph (l)(3) is redesignated as paragraph (l)(4) and paragraph (l)(3) is added.

The addition and revision read as follows:

§1.267(f)–1 Controlled Groups.

* * * * *

(c) * * *

(1) * * *

(iv) *B's item is excluded from gross income or noncapital and nondeductible*. To the extent S's loss would be redetermined to be a noncapital, nondeductible amount under the principles of §1.1502–13, but is not redetermined because of paragraph (c)(2) of this section (which generally renders the attribute redetermination rule inapplicable to sales between members of a controlled group), S's loss continues to be deferred. The preceding sentence does not apply, however, to the extent paragraph (c)(1)(iii) of this section applies as a result of a transfer of the property to certain related persons. If the loss is deferred, it is taken into account when S and B (including their successors) are no longer in a controlled group relationship or to the extent of any corresponding income or gain recognized by B with respect to the property, whichever occurs first. For example, if S sells all of the stock of corporation T to B at a loss (in a transaction that is treated as a sale or exchange for federal income tax purposes), and T subsequently liquidates in an unrelated transaction that qualifies under section 332, S's loss is deferred until S and B are no longer in a controlled group relationship. Similarly, if S owns all of the T stock, sells 30 percent of T's stock to B at a loss (in a transaction that is treated as a sale or exchange for federal income tax purposes), and T subsequently liquidates into S and B, S's loss on the sale is deferred until S and B (including their successors) are no longer in a controlled group relationship. If B recognizes any income or gain on amounts received in a distribution in complete liquidation of T, S will take into account its deferred loss on its sale of T stock to the extent of B's gain. For purposes of this paragraph, stock held by S, stock held by B, and stock held by all members of S's consolidated group as well as stock held by any member of a controlled group of which S is a member that was acquired from a member of S's consolidated group must be taken into account in determining whether a loss would be determined to be a noncapital, nondeductible amount under the principles of §1.1502–13.

* * * * *

(l) * * *

* * * * *

(3) *Loss redetermination events.* Paragraph (c)(1)(iv) of this section applies to loss redetermination events occurring after the date these regulations are published 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 April 20, 2011, 8:45 a.m., and published in the issue of the Federal Register for April 21, 2011, F.R. 22336)

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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