Internal Revenue bulletin

Bulletin No. 2001–30
July 23, 2001

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.

EMPLOYEE PLANS

Notice 2001–42, page 70.
Qualified plans; remedial amendment period. This notice provides a remedial amendment period under section 401(b) of the Code with respect to the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). This remedial amendment period is conditioned on the timely adoption of "good faith" EGTRRA plan amendments. The GUST remedial amendment period for individually designed plans is not being extended. Rev. Procs. 2000–20 and 2001–6 modified.

Announcement 2001–77, page 83.
Qualified plans; determination letters. This announcement describes steps the Service is taking to simplify the application procedures for determination letters on the qualification of pension, profit-sharing, stock bonus, and annuity plans under sections 401(a) and 403(a) of the Code.

EXEMPT ORGANIZATIONS

Announcement 2001–78, page 87.
A list is provided of organizations now classified as private foundations.

ADMINISTRATIVE

Notice 2001–43, page 72.
This notice provides transitional relief and guidance to certain U.S. withholding agents making payments to nonqualified intermediaries (NQIs) and foreign trusts for implementing the new withholding regulations under section 1441 of the Code. These regulations, which were published as T.D. 8734 (1997–2 C.B. 109) and T.D. 8881 (2000–23 I.R.B. 1158), apply to payments made after December 31, 2000. Announcement 2000–48 modified. Notice 2001–4 modified.

Notice 2001–44, page 77.
Notional principal contract (NPC). The IRS and the Treasury Department are soliciting comments on the appropriate method for including in income or deducting contingent nonperiodic payments made pursuant to a notional principal contract and the treatment of such inclusions or deductions.

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 by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are consolidated 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 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 first 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 first Bulletin of the succeeding semiannual period, respectively.

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Part III. Administrative, Procedural, and Miscellaneous

Amendment of Qualified Plans for the Economic Growth and Tax Relief Reconciliation Act of 2001

Notice 2001–42

I. Purpose

This notice provides guidance concerning amendments to plans qualified under §§ 401(a) and 403(a) of the Internal Revenue Code related to the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16 ("EGTRRA"). Changes made by EGTRRA to the Code provisions related to qualified plans include changes that require plan amendment to preserve qualification and changes that require plan amendment only if the plan sponsor chooses to change the plan.

The effects of this notice are to:

- avoid further delays in amending plans for GUST[1];
- prevent disruption of the GUST determination letter process that has already been undertaken by thousands of plan sponsors;
- facilitate timely adoption of EGTRRA plan amendments;
- ensure that plan terms reflect the actual operation of the plan;
- allow plan sponsors to minimize the cost and burden of adopting EGTRRA plan amendments;
- provide plan sponsors with the opportunity to retroactively amend their "good faith" EGTRRA plan amendments, if necessary; and
- facilitate the timely amendment of master and prototype ("M&P") and volume submitter plans ("pre-approved plans") for GUST and EGTRRA.

Specifically, this notice provides the following:

- The GUST remedial amendment period for individually designed plans, which ends on the last day of the 2001 plan year, is not being extended. However, a separate, later remedial amendment period is being provided for EGTRRA.
- The GUST remedial amendment period provided to prior adopters of pre-approved plans and employers that timely certify their intent to adopt a pre-approved plan that has been restated for GUST will be treated as not expiring earlier than December 31, 2002. This change will simplify the determination of the GUST amendment deadline for these plans and facilitate timely amendment of the plans for GUST and EGTRRA.
- A plan is required to have a "good faith" EGTRRA plan amendment in effect for a year if:
  (1) the plan is required to implement a provision of EGTRRA for the year, or the plan sponsor chooses to implement an optional provision of EGTRRA for the year, and
  (2) the plan language, prior to the amendment, is not consistent either with the provision of EGTRRA or with the operation of the plan in a manner consistent with EGTRRA, as applicable.
- Before the end of August 2001, the Service will publish sample EGTRRA plan amendments that plan sponsors and sponsors of pre-approved plans can adopt or use in drafting individualized plan amendments. A sample EGTRRA plan amendment, or a plan amendment that is materially similar to a sample EGTRRA plan amendment, will be a "good faith" EGTRRA plan amendment.
- Plan provisions that are amended by a timely "good faith" EGTRRA plan amendment or that automatically reflect a statutory EGTRRA change (for example, as a result of permitted incorporation by reference) have a remedial amendment period ending no earlier than the end of the 2005 plan year in which any needed retroactive remedial EGTRRA plan amendments may be adopted.
- "Good faith" EGTRRA plan amendments must be adopted no later than the later of (1) the end of the plan year in which the amendments are required to be, or are optionally, put into effect or (2) the end of the GUST remedial amendment period. In limited situations, earlier amendment may be required to avoid a decrease or elimination of benefits prohibited by § 411(d)(6).
- Individually designed plans submitted for GUST determination letters may reflect the changes made by EGTRRA. Also, pre-approved plans submitted for GUST determination letters may include EGTRRA amendments in the form of a separate, clearly identified addendum to the plan (or basic plan document) and/or adoption agreement that is limited to the provisions of EGTRRA. However, until further notice, determination, opinion, and advisory letters will not consider the EGTRRA changes.

II. Background

Section 401(b). Section 401(b) and the regulations thereunder provide a remedial amendment period during which an amendment to a disqualifying provision may be made retroactively effective, under certain circumstances, to comply with the requirements of § 401(a). Section 1.401(b)–1(b)(3) authorizes the Commissioner to designate as a disqualifying provision under § 401(b) a plan provision that either (1) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements, or (2) is integral to a qualification requirement that has been changed. Section 1.401(b)–1(c)(3) authorizes the Commissioner to impose limits and provide additional rules regarding the amendments that may be made within the remedial amendment period with respect to a plan provision designated as a disqualifying provision. Section 1.401(b)–1(f) grants the Commissioner the discretion to extend the remedial amendment period.

[1] The term "GUST" refers to the following:
- the Uruguay Round Agreements Act, Pub. L. 103-465;
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353;
- the Small Business Job Protection Act of 1996, Pub. L. 104-188;
- the Taxpayer Relief Act of 1997, Pub. L. 105-34 ("TRA '97");
- the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206; and
- the Community Renewal Tax Relief Act of 2000, Pub. L. 106-554 ("CRA").

The GUST Remedial Amendment Period and Determination Letter Program. The remedial amendment period for GUST disqualifying provisions for individually designed plans generally ends on the last day of the first plan year beginning on or after January 1, 2001 ("the 2001 plan year"). Many sponsors of individually designed plans have already amended or are in the process of amending plans for GUST.

Sponsors of pre-approved plans were required to submit these plans to the Service by December 31, 2000. The Service is currently reviewing and issuing opinion and advisory letters for pre-approved plans that have been amended for GUST. Section 19 of Rev. Proc. 2000–20, 2000–6 I.R.B. 553, as modified by Rev. Proc. 2000–27, 2000–26 I.R.B. 1272, provides an extension of the GUST remedial amendment period for employers that have adopted a pre-approved plan, or certified their intent to adopt a pre-approved plan that has been restated for GUST, by the end of the 2001 plan year. If the requirements for the extension are satisfied, the GUST remedial amendment period for the employer's plan will not end before the end of the 12th month beginning after the date on which the Service issues a GUST opinion or advisory letter for the pre-approved plan.

EGTRRA. EGTRRA, which was enacted on June 7, 2001, includes numerous changes to the qualified plan rules. Almost all of these changes are effective in years beginning after December 31, 2001. While many of the changes are not mandatory, a plan sponsor that chooses to implement an optional provision of EGTRRA will have to amend its plan to conform plan provisions to plan operation.

White Paper on Future Determination Letter Process. The Service is considering the design of the Employee Plans determination letter process and will publish in the near future a white paper that explores some options for long-term changes and alternatives to the current process. Some of the options in the white paper will deal with the timing of plan amendments to comply with law changes and the application of the remedial amendment provisions of § 401(b).

III. Remedial Amendment Period for EGTRRA

Designation as Disqualifying Provisions. A plan provision is hereby designated as a disqualifying provision under § 1.401(b)–1(b) if:

(1) the plan provision either (i) causes the plan to fail to satisfy the qualification requirements of the Code because of a change in those requirements made by EGTRRA or (ii) is integral to a qualification requirement that has been changed by EGTRRA; and

(2) if a "good faith" EGTRRA plan amendment is required to be in effect with respect to the provision, the plan provision was added or changed by a "good faith" EGTRRA plan amendment adopted no later than the later of (i) the end of the plan year in which the EGTRRA change in the qualification requirements is required to be, or is optionally, put into effect under the plan or (ii) the end of the GUST remedial amendment period for the plan.

Extension of the EGTRRA Remedial Amendment Period. The remedial amendment period under § 401(b) for a disqualifying provision described in the preceding paragraph shall not end prior to the last day of the first plan year beginning on or after January 1, 2005 ("the 2005 plan year").

Good Faith EGTRRA Plan Amendments. A plan is required to have a "good faith" EGTRRA plan amendment in effect for a year if:

(1) the plan is required to implement a provision of EGTRRA for the year, or the plan sponsor chooses to implement an optional provision of EGTRRA for the year, and

(2) the plan language, prior to the amendment, is not consistent either with the provision of EGTRRA or with the operation of the plan in a manner consistent with EGTRRA, as applicable.

For purposes of this notice, a plan amendment is a "good faith" EGTRRA plan amendment if the amendment represents a reasonable effort to take into account all of the requirements of the applicable EGTRRA provision and does not reflect an unreasonable or inconsistent interpretation of the provision. A plan amendment that merely incorporates by reference an EGTRRA change in a qualification requirement that would not otherwise be permitted to be incorporated by reference is not a "good faith" EGTRRA plan amendment.

Section 411(d)(6). Section 411(d)(6) generally prohibits plan amendments that decrease accrued benefits or have the effect of eliminating or reducing an early retirement benefit or retirement-type subsidy, or eliminating an optional form of benefit, for benefits attributable to service before the amendment.

EGTRRA does not provide relief from the requirements of § 411(d)(6) for plan amendments adopted as a result of EGTRRA changes in the plan qualification requirements. Therefore, in order to have a provision effective for a plan year, a plan may have to be amended for provisions of EGTRRA before the time when "good faith" EGTRRA plan amendments would otherwise be required under this notice. However, a plan amendment that eliminates or decreases benefits that have not yet accrued does not violate § 411(d)(6).

For example, in a top-heavy defined contribution plan, only those non-key employees who are participants and have not separated from service by the end of the plan year must receive the top-heavy minimum benefit. (See § 1.416–1, Q&A M–10.) A benefit that is conditioned on employment at the end of the plan year does not accrue until the participant satisfies the end-of-the-plan-year employment requirement. Thus, the top-heavy minimum benefit in a defined contribution plan that provides minimum contributions only to non-key employees who have not separated from service by the end of the plan year does not accrue until the end of the plan year. A "good faith" amendment of such a plan that modifies the plan's top-heavy rules in accordance with § 613 of EGTRRA will not result in an impermissible decrease of accrued minimum benefits provided the amendment is adopted before the end of the 2002 plan year.

In a top-heavy defined benefit plan, under §1.416–1, Q&A M–4, only those non-key employees who are participants and have at least one thousand hours of service for an accrual computation period must accrue the top-heavy minimum benefit for that accrual computation period. (In a top-heavy defined benefit plan that credits benefit accrual service using the

elapsed time method described in § 1.410(a)–7, minimum benefits must be credited for all periods of service required to be credited for benefit accrual.) A benefit that is conditioned on completion of one thousand hours of service does not accrue until the participant satisfies the service requirement. Thus, the top-heavy minimum benefit in a defined benefit plan that provides minimum benefits only to non-key employees who have at least one thousand hours of service in an accrual computation period does not accrue until the participant has one thousand hours of service in the period. A "good faith" amendment of a defined benefit plan that modifies the plan's top-heavy rules in accordance with § 613 of EGTRRA will not be treated as impermissibly decreasing accrued minimum benefits provided the amendment is adopted on or before May 31, 2002, or, in the case of a plan that credits service using elapsed time, March 31, 2002.

Effect of This Section. A plan amendment to a disqualifying provision described in this section III can be made retroactively effective within the EGTRRA remedial amendment period to the extent necessary either to satisfy the qualification requirements as amended by EGTRRA, as interpreted in published guidance, or to make the plan provisions consistent with plan operation. To the extent necessary, such a remedial amendment may be made retroactively effective as of the effective date of the "good faith" EGTRRA plan amendment or, where the plan provision automatically reflects the EGTRRA change, as of the effective date of the change.

No Extension of GUST Remedial Amendment Period. The EGTRRA remedial amendment period applies only to disqualifying provisions described in this section. It does not extend the GUST remedial amendment period.

IV. Sample EGTRRA Plan Amendments

Publication of Sample "Good Faith" EGTRRA Plan Amendments. Before the end of August 2001, the Service will publish sample EGTRRA plan amendments that can be adopted verbatim or used in drafting individualized plan amendments for individually designed and pre-approved plans. The sample EGTRRA plan amendments will be for both the required and optional changes under EGTRRA. Additional guidance on amending pre-approved plans will be included with the sample EGTRRA amendments. A sample EGTRRA plan amendment, or a plan amendment that is materially similar to a sample EGTRRA plan amendment, will be a "good faith" EGTRRA plan amendment for purposes of this notice. However, plan amendments will not fail to be "good faith" plan amendments merely because they differ materially from the sample EGTRRA plan amendments.

Possible Subsequent Required Amendments. Plans amended by adoption of the sample EGTRRA amendments may have to be amended again within the EGTRRA remedial amendment period to continue to satisfy the plan qualification requirements as amended by EGTRRA.

V. Effect on Determination Letter Programs and Reliance

In General. Until further notice, determination, opinion and advisory letters will not consider and may not be relied on with respect to the EGTRRA changes. However, an employer's ability to rely on a favorable determination, opinion, or advisory letter will not be adversely affected by the timely adoption of "good faith" EGTRRA plan amendments.

Individually Designed Plans. Individually designed plans submitted for GUST determination letters may incorporate the changes made by EGTRRA; however the GUST determination letter will not extend to amendments incorporating EGTRRA provisions.

Pre-Approved Plans. M&P sponsors and volume submitter practitioners may amend pre-approved plans for EGTRRA through the adoption of a separate, clearly identified addendum to the plan (or basic plan document) and/or adoption agreement that is limited to the provisions of EGTRRA. The sample EGTRRA plan amendments will provide additional guidance on the amendment of pre-approved plans. Until further notice, EGTRRA amendments of pre-approved plans should not be submitted to the Service.

Determination Letter Applications for Pre-Approved Plans. Until further notice, determination letter applications for pre-approved plans that include EGTRRA amendments in a form other than a separate, clearly identified addendum to the plan (or basic plan document) and/or adoption agreement that is limited to the provisions of EGTRRA will be treated as individually designed plans.

VI. Extension of 12-Month Period Under Rev. Proc. 2000–20

The extended GUST remedial amendment period available to certain adopters of pre-approved plans is determined by reference to the date on which the Service issues a favorable GUST opinion or advisory letter for the pre-approved plan. Pursuant to this notice, if the requirements of section 19 of Rev. Proc. 2000–20, as modified, and Announcement 2001–77, page 83, this bulletin, are satisfied, the extension of the GUST remedial amendment period thereunder will be treated as not expiring earlier than December 31, 2002. This change will simplify the determination of the GUST remedial amendment deadline for pre-approved plans and facilitate timely amendment of the plans for GUST and EGTRRA.

VII. Effect on Other Documents

Rev. Proc. 2000–20 and Rev. Proc. 2001–6, 2001–1 I.R.B. 194, are modified.

DRAFTING INFORMATION

The principal drafter of this notice is James Flannery of Employee Plans. For further information regarding this notice, please contact Employee Plans' taxpayer assistance telephone service at (202) 283-9516 or (202) 283-9517, between the hours of 1:30 p.m. and 3:30 p.m. Eastern Time, Monday through Thursday. Mr. Flannery may be reached at (202) 283-9613. These telephone numbers are not toll-free.

Guidance on Implementation of Withholding and Reporting Regulations

Notice 2001–43

This notice provides guidance on the implementation of the withholding and reporting regulations (T.D. 8734, 1997–2 C.B. 109, and T.D. 8881, 2000–23 I.R.B. 1158). Specifically, this notice:

(1) provides a temporary alternative procedure for withholding and reporting on

payments made to certain nonqualified intermediaries (NQIs) and foreign trusts, which is available only for payments made to NQIs or foreign trusts on or after January 1, 2001, and before January 1, 2002;

(2) clarifies and corrects sections 1.1441–6(b)(1) and 301.6114–1 of the regulations, which require disclosure of certain treaty based return positions;

(3) adds a new alternative convention for converting payments in foreign currency into U.S. dollars to those listed in section 1.1441–3(e)(2);

(4) modifies section III. A. 1. of Notice 2001–4, 2001–2 I.R.B. 267, to permit an applicant for a qualified intermediary agreement that has been issued a QI-EIN to represent that it is a qualified intermediary (QI) until the IRS revokes its QI-EIN and to permit an applicant that has been issued a QI-EIN before January 1, 2002, to apply all of the provisions of the QI agreement beginning January 1, 2001;

(5) clarifies section III. C. of Notice 2001–4, which provides documentation and reporting relief for simple and grantor trusts; and

(6) modifies Announcement 2000–48, 2000–23 I.R.B. 1243, to permit a branch of a QI to act as a qualified intermediary under the QI's home country know-your-customer (KYC) rules if the branch is located in a country for which KYC rules have been submitted to IRS for approval.

1. Transitional relief for certain nonqualified intermediaries and foreign trusts.

In October 1997, Treasury and the IRS issued T.D. 8734, 1997–2 C.B. 109 (modified by T.D. 8881, 2000–23 I.R.B. 1158), which provided comprehensive regulations under chapter 3 (sections 1441–1445) and subpart G of subchapter A of chapter 61 (sections 6041–6050S) of the Internal Revenue Code. These regulations, which became effective on January 1, 2001, were developed after years of discussion with the U.S. and foreign financial services industry regarding how to improve compliance with the U.S. withholding rules without unduly impeding foreign investments in the United States or burdening financial institutions.

A key component of the new rules is the introduction of the qualified intermediary (QI) concept. In basic terms, a QI is a foreign financial institution that enters into an agreement with the IRS to verify the beneficial ownership of payments of U.S. source income for purposes of determining whether any reductions in the statutory 30 percent U.S. withholding tax rate under sections 871 and 881 are appropriate. To make this determination, a QI generally may rely on the documentation that it collects under the bank regulatory rules requiring it to establish the identity and residency of its account holders ("know your customer" (KYC) rules). The QI is required to transmit "pooled" information (but generally not the identity of its non-U.S. customers) to the U.S. withholding agent to enable the withholding agent to determine the correct amount of tax to withhold on payments made to the QI's customers. The QI is also required to report certain pooled information to the IRS, as specified in the regulations. By allowing QIs to transmit information on a pooled basis, the regulations reduce the QI's compliance burden (by minimizing the amount of information that is required to be reported to the IRS) and protect the QI's customer base (by minimizing the amount of information that must be reported to the U.S. withholding agent, who will often be a competitor of the QI).

Sections 1.1441–1(e)(3)(iii) and (iv) of the regulations require a nonqualified intermediary (NQI) to supply the U.S. withholding agent or a QI with customer-specific documentation, rather than pooled information, to establish that its customers qualify for a reduction in the statutory 30 percent withholding rate.

The NQI does this by attaching appropriate documentation and a withholding statement identifying customers and allocating payments among them to an intermediary certificate that it forwards to the U.S. withholding agent or QI. To ensure the proper withholding and reporting of a payment, the U.S. withholding agent or QI must receive this intermediary certificate before it makes a payment of a reportable amount (as defined in section 1.1441–1(e)(3)(vi)) to the NQI. Finally, unless its withholding agent has done so, the NQI must report payment information to the IRS on Forms 1042 and 1042–S and must send the foreign income recipient a corresponding Form 1042–S. In the same way, foreign simple trusts and foreign grantor trusts are required to forward to the U.S. withholding agent or QI a flow-through withholding certificate with attached documentation and a withholding statement identifying beneficiaries and grantors and to report payment information to the IRS.

Treasury and the IRS understand that, despite significant efforts by U.S. withholding agents and QIs to establish automated systems to process information received from NQIs and foreign trusts for withholding and reporting purposes, in some cases these systems are not yet fully operational. Treasury and the IRS have been advised, however, that the automated systems in those cases will be fully operational before the end of 2001. Accordingly, Treasury and the IRS believe that limited relief is warranted to ensure a smooth transition into the new withholding procedures. Treasury and the IRS emphasize, however, that the NQI and foreign trust documentation and reporting rules in the regulations are central to the appropriate administration of the U.S. withholding regulations, and U.S. withholding agents and QIs are expected to complete the development of automated systems that will ensure compliance with these rules.

To achieve a smoother transition period for withholding agents that make payments to NQIs and foreign trusts, the IRS will permit a withholding agent and NQI or foreign trust to apply the alternative procedures of section 1.1441–1(e)(3)(iv)(D) of the regulations as modified below for calendar year 2001, provided the withholding agent and NQI or foreign trust comply with all the conditions set forth below. This modified alternative procedure may not be used by flow-through entities or U.S. branches described in section 1.1441–1(e)(3)(iv)(D)(*8*) of the regulations. (See sections III. C. and IV. of Notice 2001–4, 2001–2 I.R.B. 267 for certain other relief provisions relating to trusts and partnerships.) A withholding agent may use this modified alternative procedure only for payments made to NQIs and to foreign simple or grantor trusts. This modified alternative procedure may not be used by a withholding agent if the withholding

agent would be responsible for filing fewer than 250 Forms 1042–S for calendar year 2001 without using this modified alternative procedure. This modified alternative procedure may not be used for payments to U.S. nonexempt recipients.

An NQI or foreign trust and its withholding agent that comply with the conditions set forth below may rely on this notice for payments made on or after January 1, 2001, and before January 1, 2002: (1) to permit pooled basis reporting on Form 1042–S instead of the payee specific reporting otherwise required under the alternative procedure of section 1.1441–1(e)(3)(iv)(D); and (2) to permit the NQI or foreign trust to provide the withholding agent with a withholding statement containing the beneficial owner information required under sections 1.1441–1(e)(3)(iv)(C)(*1*) and (D)(*2*) after a payment is made but no later than January 31, 2002.

In order to qualify for this transitional relief, the following conditions must be met:

(1) The withholding agent submits a notification no later than January 31, 2002, that it is using the temporary alternative procedure under this notice. Notifications should be sent to:

Internal Revenue Service
Pre-Filing Services LM:PFT:PF
New Mint Building, 3rd Floor
1111 Constitution Avenue, NW
Washington, DC 20224

(2) The withholding agent includes the following in its notification under penalties of perjury:

(a) a statement listing the NQIs and foreign trusts that are participating with the withholding agent in using the temporary alternative procedure under this notice;

(b) a statement (i) that during 2001 the withholding agent was engaged in the building and implementation of computerized information systems for transfer and processing of withholding statement information between the withholding agent and the NQI or foreign trust and for Form 1042–S reporting to the IRS, and (ii) that they were relying on completion of those systems for purposes of complying with section 1.1441–1(e)(3)(iii) and (iv) of the regulations;

(c) a representation that the withholding agent has exercised its best efforts to complete those systems;

(d) a statement that those systems are not capable of complying with the requirements of section 1.1441–1(e)(3)(iii) and (iv) regarding timely provision of withholding statement information by the NQI or foreign trust and Form 1042–S reporting by the withholding agent for calendar year 2001;

(e) a statement of the number of Forms 1042–S that the withholding agent would be responsible for filing for calendar year 2001 if it were not using this modified alternative procedure; and

(f) a representation that the systems will be capable of complying with those withholding statement and Form 1042–S reporting requirements for calendar year 2002.

(3) The withholding agent and NQI or foreign trust comply with all applicable requirements of section 1.1441–1(e)(3)(iv)(D) of regulations, except as modified by conditions (4), (5) and (6).

(4) The NQI or foreign trust provides the withholding agent with withholding rate pool information prior to the payment of a reportable amount in accordance with section 1.1441–1(e)(3)(iv)(D)(*2*) of the regulations. The NQI or foreign trust must also provide appropriate documentation with respect to its customers to the withholding agent prior to the payment being made. The NQI or foreign trust need not, however, provide the withholding statement information identifying and classifying foreign persons as required by sections 1.1441–1(e)(3)(iv)(C)(*1*) and (D)(*2*) and assigning each listed foreign person to a withholding rate pool as required by section 1.1441–1(e)(3)(iv)(D)(*2*) prior to payment. The NQI or foreign trust is required to provide that withholding statement information to the withholding agent no later than January 31, 2002. The NQI or foreign trust must provide the withholding agent with withholding statement information allocating the income in each withholding rate pool to each payee within the pool no later than January 31, 2002, as required under sections 1.1441–1(e)(3)(iv)(C)(*2*) and (D)(*3*) of the regulations.

(5) The withholding agent withholds and timely files Forms 1042–S based on the withholding rate pool information provided by the NQI or foreign trust.

(6) The withholding agent submits a copy of the withholding statement that it receives from the NQI or foreign trust (which must identify each beneficial owner of payments to the NQI or foreign trust and allocate payments among these beneficial owners) for calendar year 2001 to the IRS at the address stated in condition (1) on or before the due date for filing Forms 1042–S for calendar year 2001.

If the NQI or foreign trust fails to provide the withholding statement information required under condition (4) by January 31, 2002, for any withholding rate pool, then the withholding agent may apply the provisions of sections 1.1441–1(e)(3)(iv)(D)(*4*), (*5*), (*6*), and (*7*). The NQI or foreign trust will be responsible for withholding, filing Form 1042 and filing Forms1042–S for each beneficial owner for which it has received payments.

The IRS will accept the pooled basis reporting and withholding statements filed under this temporary procedure in lieu of the payee specific reporting otherwise required of an NQI or foreign trust and its withholding agent only if the NQI or foreign trust and its withholding agent satisfy all of the conditions set forth above. The withholding agent and NQI or foreign trust must retain all records, documentation and other evidence relevant to the above conditions for the same retention period as would be required for information relevant to an audit of Form 1042–S for calendar year 2001. In determining on audit whether a withholding agent has exercised its best efforts to complete building and implementing their information systems, the IRS will take into account all the facts and circumstances including the efforts and performance of similarly situated withholding agents.

2. Disclosing treaty based return positions.

Section 1.1441–6(b)(1) of the regulations provides that withholding under sections 1441, 1442 and 1443 on a payment to a foreign person is eligible for reduction under the terms of an income tax treaty only to the extent that the payment is treated as derived by a resident of an applicable treaty jurisdiction, such resident is a beneficial owner, and all other requirements for benefits under the treaty are satisfied. It provides further that if the beneficial owner is a person related to the

withholding agent within the meaning of section 482, the beneficial owner's withholding certificate must contain a representation that the beneficial owner will file the statement required under section 301.6114–1(d) if applicable. This requirement applies only to amounts of income subject to withholding received during the calendar year that exceed $500,000 in the aggregate.

Section 301.6114–1(a) of the regulations provides that if a taxpayer takes a return position that a tax treaty overrules or modifies any provision of the Internal Revenue Code and thereby effects a reduction of any tax at any time, the taxpayer shall disclose such return position on a statement attached to the return. If a tax return would not otherwise be required to be filed, a return must nevertheless be filed to make this disclosure. For this purpose, the taxpayer's taxable year is deemed to be the calendar year, unless the taxpayer has established or timely chooses to establish a different taxable year. The taxpayer must make the disclosure statement on a fully completed Form 8833 (*Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)*) attached to the return.

Section 301.6114–1(b) provides that reporting is required unless it is expressly waived, and it further provides a nonexclusive list of particular positions for which reporting is required. Among the positions listed are those described in section 301.6114–1(b)(4)(ii)(C) or (D).

Paragraph (b)(4)(ii)(C) requires a taxpayer to report a position taken under a treaty that contains a limitation on benefits provision if: (1) the treaty exempts from tax or reduces the rate of tax on income subject to withholding; (2) the income is received by a foreign person other than an individual or State that is the beneficial owner of the income and the foreign person is related to the person obligated to pay the income within the meaning of sections 267(b) and 707(b)(5); (3) the income exceeds $500,000; and (4) the foreign person meets the requirements of the limitation on benefits provision. Paragraph (b)(4)(ii)(D) requires reporting a position taken under a treaty that imposes any other conditions for the entitlement to treaty benefits if the position is that such conditions are met.

Section 301.6114–1(c) lists positions for which reporting is expressly waived. Paragraph (c)(1)(i) waives reporting for the position that a treaty has reduced the rate of withholding tax otherwise applicable to a particular type of income subject to withholding to the extent that the income is beneficially owned by an individual or a State. Paragraph (c)(2) waives reporting by an individual who receives payments or income items during the taxable year that do not exceed $10,000 in the aggregate.

Taxpayers have requested guidance on the scope of the reporting required under section 301.6114–1(b) in the case of treaty claims for exemption or reduced rates of tax on income subject to withholding made by foreign persons that are not individuals or States. Taxpayers have expressed concerns that:

(1) Because paragraph (c)(1)(i) of that section waives reporting only for individuals and States, it is unclear whether taxpayers that are not individuals or States and that are not required to report under paragraph (b)(4)(ii)(C) are required nevertheless to disclose treaty based return positions described in paragraph (b)(4)(ii) under the general rule of paragraph (b).

(2) Because paragraph (c)(2) waives reporting only for individuals who receive less than the threshold amount, taxpayers that are not individuals must report under paragraph (b)(4)(ii)(D) even when they have received *de minimis* amounts of income subject to withholding.

(3) Because the representation under section 1.1441–6(b)(1) is required when the beneficial owner is related to the withholding agent within the meaning of section 482 and the filing under section 301.6114–1(b)(4)(ii)(C) is required when the beneficial owner is related to the person obligated to pay the income within the meaning of sections 267(b) and 707(b), it is unclear how the representation requirement coordinates with the filing requirement.

(4) Because section 1.1441–6(b)(1) states that the filing requirement applies only to amounts received during the calendar year that exceed $500,000 in the aggregate and section 301.6114–1(b)(1) permits a taxpayer to adopt a taxable year for filing different from the calendar year, it is unclear how a fiscal year taxpayer is to report those amounts.

To address these concerns, Treasury and the IRS intend to amend sections 1.1441–6(b)(1) and 301.6114–1 of the regulations, as described below, effective January 1, 2001.

(1) Treasury and the IRS intend to amend section 301.6114–1(c) to provide that reporting is waived for taxpayers that are taking a treaty based return position described in section 301.6114–1(b)(4)(ii), unless those taxpayers are described in paragraph (b)(4)(ii)(A) and (B), or (C) or (D).

(2) Treasury and the IRS intend to amend section 301.6114–1(c) to waive reporting under section 301.6114–(b)(4)(ii)(D) for taxpayers that are not individuals or States and that receive amounts of income subject to withholding that do not exceed $10,000 in the aggregate.

(3) Treasury and the IRS intend to amend section 1.1441–6(b)(1) to conform the representation requirement to the filing requirement of section 301.6114–1(b)(4)(ii)(C). Thus, section 1.1441–6(b)(1) will require a representation if the taxpayer takes the position under a treaty that contains a limitation on benefits provision that the treaty exempts from tax or reduces the rate of tax on income subject to withholding, the income is received by a foreign person other than an individual or State that is the beneficial owner of the income, the foreign person is related to the person obligated to pay the income within the meaning of sections 267(b) and 707(b), the income exceeds $500,000 in the aggregate, and the foreign person meets the requirements of the limitation on benefits provision.

(4) Treasury and the IRS intend to amend section 1.1441–6(b)(1) to conform to section 301.6114–1(b)(1) by changing the rule that the filing requirement applies only to amounts received during the calendar year that exceed $500,000 in the aggregate. The conformed rule will provide that the filing requirement applies only to income received during the taxpayer's taxable year that exceeds $500,000 in the aggregate.

A taxpayer that is required to make the disclosure statement on Form 8833 under

sections 301.6114–1 (b)(4)(ii)(A) and (B) or (C) or (D) taking into account the modifications described in the notice will be considered to have timely filed Form 8833 if, in the case of a calendar year taxpayer, the taxpayer files the Form 8833 with its return for its taxable year ending on December 31, 2001, or in the case of a fiscal year taxpayer, the taxpayer files Form 8833 with its return for its first taxable year ending after December 31, 2001.

Taxpayers may rely on the authority of this notice until the regulations are amended.

3. Converting payments in foreign currency to U.S. dollars.

Section 1.1441–3(e)(2) provides that if an amount subject to tax is paid in a currency other than the U.S. dollar, the amount of withholding under section 1441 shall be determined by applying the applicable rate of withholding to the foreign currency amount and converting the amount withheld into U.S. dollars at the spot rate on the date of payment. A withholding agent that makes regular or frequent payments in foreign currency is permitted to use a month end spot rate or a monthly average spot rate.

Certain withholding agents that make regular and frequent payments in foreign currency have expressed concern that the permitted conversion conventions can expose them to currency risks that would require management by means of hedging transactions. Also, they have expressed concern that permitted conventions can require multiple accounting adjustments when payment amounts in the base currency are adjusted or corrected in the course of processing and settlement. They have suggested that using the spot rate on the day of deposit of the amount of tax withheld would eliminate the currency risks and the need for those accounting adjustments.

In response to those concerns, Treasury and the IRS intend to amend section 1.1441–3(e)(2) to add the suggested alternative conversion convention to the conventions already permitted. Section 1.1441–3(e)(2) will permit a withholding agent that makes regular or frequent payments in foreign currency to convert the amount withheld into U.S. dollars at the spot rate on the day the tax is deposited provided that the deposit is made within seven days of the date of payment. As is the case with the conversion conventions currently in the regulations, taxpayers using this alternative convention must do so consistently for all nondollar amounts withheld and from year to year. Such convention cannot be changed without the consent of the Commissioner. Taxpayers may rely on the authority of this notice until the regulations are amended.

4. Representing QI status and applying QI agreement beginning January 1, 2001.

Section III. A. 1. of Notice 2001–4 provides that an applicant that has submitted a QI application before January 1, 2001, may represent on Form W-8IMY that it is a QI without being in possession of a fully executed QI agreement until June 30, 2001. It further provides that an applicant that has submitted a QI application after December 31, 2000, may represent on Form W-8IMY that it is a QI until the end of the sixth full month after the month in which it submits its QI application. Applicants have been issued QI-EINs upon application to permit them to complete Forms W-8IMY. Finally, it provides that a potential QI may apply all of the provisions of the QI agreement beginning January 1, 2001, provided that it submits its application before July 1, 2001.

Taxpayers have requested extension of the time during which an applicant may represent that it is a QI without being in possession of a fully executed QI agreement and extension of the July 1, 2001, application deadline for application of the QI agreement beginning January 1, 2001, in order to allow adequate time for the process of review and execution by both the applicants and the IRS.

In response, this notice modifies those provisions of Notice 2001–4. An applicant to which IRS has issued a QI-EIN may represent on Form W–8IMY that it is a QI without being in possession of a fully executed QI agreement until the IRS revokes its QI-EIN. The IRS will revoke an applicant's QI-EIN if the applicant does not execute and return its QI agreement to the IRS within a reasonable time after the IRS has sent the QI agreement to the applicant for signature. An applicant to which the IRS has issued a QI-EIN before January 1, 2002, may apply all of the provisions of the QI agreement beginning January 1, 2001.

5. Documentation and reporting relief for simple and grantor trusts.

The QI agreement generally requires a QI to obtain a Form W-8IMY from a foreign simple or grantor trust together with appropriate documentation from beneficiaries and grantors and requires the QI to file separate Forms 1042–S for each beneficiary or grantor.

Section III. C. of Notice 2001–4, 2001–2 I.R.B. 267, provides documentation and reporting relief for simple and grantor trusts. It permits a QI to treat the beneficiaries or grantors as direct account holders, and thus permits them to be incorporated into the pooled basis reporting permitted for direct account holders rather than requiring separate Forms 1042–S for each of them, provided three criteria are met. (1) The QI must be required, pursuant to the applicable KYC rules, to determine the identity of the beneficiaries or owners of foreign simple or grantor trusts. (2) The QI must obtain the type of documentation set forth in the appropriate KYC attachment to the agreement. (3) The QI must obtain a valid Form W–8BEN from the beneficiary or owner of the trust.

Some QIs have suggested that the scope of criterion (1) may be unclear, because local KYC rules in certain jurisdictions require the QI to determine the identity of the beneficiaries or owners of foreign simple or grantor trusts, but do not require the QI to obtain documentation confirming their identities. These QIs have expressed the concern that the reporting relief for trusts may be unavailable in such jurisdictions.

This notice clarifies that criterion (1) is satisfied if the local KYC rules require the QI to determine the identity of trust beneficiaries and grantors, even if those rules do not require the QI to obtain documentation confirming their identities. The QI must nevertheless obtain any documentation necessary to satisfy criterion (2), which is based on the applicable KYC documentation.

6. Branches permitted to apply QI's home country KYC.

Announcement 2000–48, 2000–23 I.R.B. 1243, provides that the IRS gener-

ally will not extend the QI system to any country that does not have KYC rules or that has unacceptable KYC rules. The IRS will, however, permit a branch of a financial institution (but not a separate juridical entity affiliated with the financial institution) located in such a country to act as a QI if the branch is part of an entity organized in a country that has acceptable KYC rules and the entity agrees to apply its home country KYC rules to the branch.

Taxpayers have requested that this rule be extended to include branches of QIs in countries for which KYC rules have been submitted to IRS for approval during the time those rules are pending approval.

In response, this notice modifies Announcement 2000–48. IRS will permit a branch of a financial institution (but not a separate juridical entity affiliated with the financial institution) to act as a QI if the branch is located in a country identified by the IRS as a jurisdiction awaiting approval of KYC rules on the IRS website at *www.irs.ustreas.gov*, if the branch is part of an entity organized in a country that has acceptable KYC rules and if the entity agrees to apply its home country KYC rules to the branch. The branch will be permitted to act as a QI under this rule only for the period of time during which the jurisdiction in which it is located is identified as awaiting approval. If the IRS approves the KYC rules of the jurisdiction, then the branch must apply the KYC rules of the jurisdiction beginning on the date that an attachment to the QI agreement for the jurisdiction is posted on the IRS website at *www.irs.ustreas.gov*.

Contact Information

For further information regarding this notice, contact Carl Cooper or Laurie Hatten-Boyd of the Office of the Associate Chief Counsel (International), Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224. Mr. Cooper and Ms. Hatten-Boyd may be contacted by telephone at 202-622-3840 (not a toll-free call).

Notional Principal Contracts

Notice 2001–44

I. PURPOSE

The IRS and the Treasury Department are soliciting comments on the appropriate method for the inclusion into income or deduction of contingent nonperiodic payments made pursuant to a notional principal contract and the treatment of such inclusions or deductions.

II. BACKGROUND

A. In General

Section 1.446–3 of the Income Tax Regulations provides rules on the timing of inclusion of income and deductions for amounts paid or received pursuant to notional principal contracts. T.D. 8491, 1993–2 C.B. 215. The regulations define a notional principal contract ("a NPC") as a "financial instrument that provides for the payment of amounts by one party to another at specified intervals calculated by reference to a specified index upon a notional principal amount, in exchange for specified consideration or a promise to pay similar amounts." Section 1.446–3(c)(1)(i). Payments made pursuant to NPCs are divided into three categories (periodic, nonperiodic, and termination payments), and the regulations provide separate timing regimes for each. However, no guidance is provided in the regulations for the timing of inclusion or deduction of contingent nonperiodic payments made under NPCs. In addition, neither § 1.446–3 nor any other section provides specific rules governing the character of the various types of payments that could be made pursuant to a NPC.

The lack of comprehensive guidance in this area of the law has created significant uncertainty for taxpayers. For some, this uncertainty adds a considerable burden to the tax compliance process, and may discourage certain taxpayers from entering into NPCs. Other taxpayers welcome the ability to pick and choose among various tax law theories as to the character and timing of NPC payments, but this can lead to a whipsaw of the government. Both result in lack of confidence in the tax system, and inefficiencies in the capital markets.

The IRS and Treasury have reviewed several methods for including into income or deducting contingent nonperiodic payments made pursuant to NPCs. In evaluating each method, the IRS and Treasury have considered the extent to which it reflects certain fundamental tax policy principles. These policy principles include: whether the method provides sufficient certainty as to the amount and timing of inclusions or deductions (certainty/clarity); whether the method is complex, and the compliance and administrability burden created by that complexity (administrability); whether the method creates or increases inconsistencies in the tax treatment of financial instruments with similar economic characteristics (neutrality); whether the method creates or increases inconsistencies in the tax treatment of different taxpayers entering into the same instruments (symmetry); whether the method accurately reflects the accretion or reduction in economic wealth in the period in which the taxpayer is measuring the tax consequence of being a party to the NPC (economic accuracy); and whether the method is flexible enough to readily accommodate new financial arrangements (flexibility). It is clear that these principles are frequently in conflict, and there is no method of accounting that would satisfy all the criteria. However, the examination of an accounting method in the light of these principles can highlight the strengths and weaknesses of the method and inform the rulemaking process.

The methods the IRS and Treasury are considering for the inclusion into income or deduction of contingent nonperiodic payments made pursuant to NPCs are described below under the following headings: the Noncontingent Swap Method; the Full Allocation Method; the Modified Full Allocation Method; and the Mark-to-Market Method. The IRS and Treasury are seeking comments on the relative merits of each of these methods, as well as suggestions as to other methods that may be superior to these methods with respect to the fundamental tax policy principles listed above. The IRS and Treasury are interested in what authority taxpayers believe exists for mandating any and each of these methods.

Although this notice is addressing the timing issues regarding NPCs with a contingent component, the IRS and Treasury are aware that there must be some coordination between the existing NPC rules and any new applicable rules. The IRS and Treasury are interested in comments on the need to revise the current rules for NPCs and related instruments if new rules for contingent NPCs are introduced. The IRS and Treasury are also interested in

whether taxpayers believe it is necessary to develop rules on a much wider range of instruments before any kind of rule is issued with respect to contingent NPCs, which are only one specific type of instrument, *i.e.*, whether the proliferation of individualized rules is more harmful than helpful in this area.

The IRS and Treasury are interested in comments from taxpayers as to the appropriateness of special, simplified rules for short-term or standardized contracts, and what form the simplified rules should take. If taxpayers suggest that a simplified rule should be provided for certain contracts, the IRS and Treasury are interested in what kind of test should be used to determine whether the simplified rule applies.

In addition to reviewing methods for the timing of income and expense with respect to contingent nonperiodic payments, the IRS and Treasury are considering what the character should be for all types of payments made pursuant to NPCs. In the current tax law, the distinction between capital gain and ordinary income is significant in two ways. First, taxpayers cannot offset capital losses against ordinary income (with a small exception for individuals). One policy reason for the rule against offsetting of capital losses against ordinary income is that taxpayers are able to choose the timing of their sales or exchanges of capital assets much more easily than the timing of their ordinary income or loss ("cherry picking"). They could, therefore, sell their loss assets at a time when they are expecting large amounts of ordinary income while deferring recognition on their gain assets. Second, for individuals, long-term capital gains are taxed at lower rates than ordinary income.

In determining whether particular payments made pursuant to a NPC should most appropriately be characterized as capital or as ordinary, attention should be given to the goals of minimizing cherry picking of character results and consistent application of the policy rationale for the current capital gains preference. In addition, in the financial products area, it is particularly important to pay attention to the neutrality principle, *i.e.*, consistent treatment of different instruments with similar economic characteristics. There is almost limitless flexibility in the design of derivatives, and tax rules that provide for differences in tax treatment that do not reflect economic differences may produce inappropriate tax consequences. For example, some taxpayers are permitted to treat certain payments received pursuant to forward and option contracts as capital. If these taxpayers entered into NPCs with the same economic characteristics as the options or forwards contracts, but did not receive the same tax character treatment, tax-advantaged products might develop to arbitrage the tax differences between the various instruments. The particular problem the IRS and Treasury face with regard to neutrality is that the existing rules for various financial instruments are so inconsistent with each other, that it is difficult to decide, when developing rules for new instruments that can mimic many types of instruments, which set of existing rules should be followed. The IRS and Treasury are interested in comments on how the neutrality principle can best be given consistent effect for complex financial instruments.

The IRS and Treasury invite comments on the appropriate policy considerations for making character designations for NPC payments, as well as the application of those principles illustrated by the examples in the notice. The IRS and Treasury also seek comments on: the authority governing the character of NPC payments and whether and what legislative change may be necessary to rationalize the rules.

The IRS and Treasury are aware that the definition of NPC as provided in § 1.446–3 covers only one class of the possible notional principal contracts that are transacted in the marketplace. For example, a contract that provides for a single payment at maturity based on some notional amount and specified index may not be covered by the definition because there are no "payments" made at "specified intervals." Such a contract is sometimes called a "bullet swap." There may be little difference in economics between a NPC as defined in § 1.446–3 and a series of bullet swaps, yet the payments made under one are covered by the regulation, whereas the payments under the other may not. The IRS and Treasury seek comments on how the tax accounting methods described in this notice, or other methods, could be made applicable to a broader group of contracts that serve similar purposes as NPCs. The IRS and Treasury also seek comments on the appropriate character of payments made pursuant to contracts similar to NPCs.

A. Methods for Determining the Timing of Payments under NPCs

1. *The Noncontingent Swap Method*

a. *Timing*. The noncontingent swap ("NCS") method provides an approach to accruing contingent payments made pursuant to a NPC. The method provides techniques for taxpayers to convert the contingent nonperiodic payment provided for in the NPC into a noncontingent periodic amount. The method would provide rules for creating a payment schedule that spreads the recognition of income or deduction of this noncontingent amount over the life of the NPC on a constant yield basis.

b. *Illustration*. This method is illustrated using the following example of a simple equity swap contract, on a notional amount of 100 shares of XYZ stock, entered into on January 1, 2001, between A and B with the following terms:

A pays B:

Every six months until expiration – any dividend payments to the holder of one share of XYZ times 100.

At expiration, December 31, 2002 – any appreciation in a share of XYZ since contract inception times 100.

B pays A:

Every six months until expiration – 7.00% (annual rate) of notional amount at inception.

At expiration, December 31, 2002 – any depreciation in a share of XYZ since contract inception times 100.

The contingent payment is equal to the appreciation or depreciation in the value of a share during the period between the inception and expiration of the contract, multiplied by 100 shares. The payments are netted, and only the net amounts are transferred. The net payments can flow from either A to B or from B to A.

Under the NCS method, the cost of hedging the exposure to the contingent NPC payment is used as a proxy for the contingent payment itself. The cost of hedging the contingent payment under the NPC is the current price of a portfolio of financial assets that, if liquidated on December 31, 2002, will exactly cover the cost of the contingent payment. This approach has been chosen because if a party

to a contingent NPC assumed the hedging cost, both counterparties would be in the same position as if the contingent future obligation were actually paid. This hedging cost is therefore deemed to be paid, for example, by A to B, in satisfaction of the contingent obligation (for purposes of making calculations under the NCS method). The NCS method then provides a mechanism for amortizing this deemed payment by A to B into B's income throughout the life of the swap. It should be noted that the hedge transaction need not be entered into by either A or B. The deemed hedge merely provides a computational mechanism for converting the contingent payment into a fixed payment. Further details regarding this illustration, with computations of the hedging cost and the amounts of deductions and income inclusions, are provided in the Appendix.

c. *Policy Considerations*. The NCS method has the policy advantage of being certain and clear in many cases. It depends, however, on the ability to establish the cost of hedging the contingent payment exposures using forward pricing analysis. The methodology may be difficult to administer and apply in other cases because of the subjectivity in pricing forward contracts where there is no active market. This problem may be partially overcome by requiring appropriate record keeping and information reporting. The NCS method provides relative neutrality of tax treatment compared to contingent debt, but does not provide neutrality of tax treatment as compared to forwards and options, or as compared to ownership of the underlying equity (in the example of an equity NPC). Given that for many NPCs, at least one counterparty is on a mark-to-market method of accounting with respect to the NPC under § 475 of the Internal Revenue Code, in many cases there would be asymmetry of tax treatment between counterparties. The NCS method does not accurately reflect the change in economic position over time of either counterparty as a result of being a party to the NPC, because the schedule that determines inclusions and deductions is fixed at the outset and, in the simplest description of the method, does not change with market conditions. Finally, it is unclear how flexible the method is in accommodating variations in NPCs and related instruments.

d. *Request for Comments*.

(i) The IRS and Treasury request comments on a number of aspects of this method. The amount of inclusions and deductions under this method could significantly diverge from market prices as the swap runs its course. The ability of this method to meet the policy principles outlined above may be reduced unless the counterparties to the swap are required to revise their payment schedules with changes in market conditions. The IRS and Treasury invite comments on if and when it would be appropriate to require taxpayers to make such revisions to the payment schedule (*e.g.*, every three years), or if the underlying index changes a certain percentage from its level at the inception of the contract, or both. Comments are also solicited on the treatment of adjustments resulting from updated projections. For example, should adjustments from updated projections be taken into account in the year of the updated projections or should they be spread over the remaining term of the NPC?

The IRS and Treasury are aware that the more frequently payment schedules are required to be updated, the more the method begins to resemble a mark-to-market method. We are seeking comments on the relative effectiveness of the NCS method, given the inaccuracies that are possible when only one market observation is required at the inception of the contract, and the fact that as the number of adjustments to that initial observation is increased, the benefits of using this technique (*e.g.*, certainty of tax result) decline.

(ii) The IRS and Treasury also request comments on the treatment of contingent payments that are made prior to their expected payment date, and how this should be coordinated with the treatment of revised payment schedules.

(iii) The character of payments generated by the NCS method is unclear under current law. The IRS and Treasury are seeking comments on what the character of payments under the NCS method would be under current law, both originally projected payments and any periodic revisions (see (i), above). In addition, comments are solicited on whether it would be appropriate to change or clarify the character rules, either statutorily or through regulations, so that the various policy goals can be achieved

(iv) One commentator suggested an interpretation of § 1234A that would conform the character treatment of NPCs with the character of the underlying position or positions. Comments would be welcome on the desirability of this approach, including the authority for its adoption under current law, and the feasibility of administration.

(v) More generally, comments are invited on the problem of mismatching of the character of payments and receipts and on methods of avoiding or minimizing such mismatches.

2. *The Full Allocation Method*

a. *Timing*. Under the full allocation method, taxpayers would not include or deduct any payment that is required to be made under the NPC (periodic, nonperiodic, contingent, and noncontingent) until the taxable year in which all contingencies are resolved. When the final contingency is resolved, the parties would treat all payments as made or received in the year of the resolution of the contingency.

b. *Policy Considerations*. This method has the policy advantages of being certain, clear, and administrable. The method provides partial neutrality of tax treatment compared to options and forwards, and compared to ownership of the underlying equity, but does not provide neutrality of tax treatment compared to contingent debt. There would be asymmetry of tax treatment between the counterparties if only one party to the contingent NPC were on a mark-to-market method of accounting with respect to the NPC. The full allocation method does not reflect the change in economic position over time of either counterparty as a result of being a party to the NPC, because all tax consequences are postponed until the contract matures, is terminated, etc. This result is particularly open for manipulation to the extent taxpayers have the ability to terminate a contract if it has decreased in value but can retain the contract if it has increased in value. Finally, it would appear that the method is flexible enough to accommodate many financial instruments, although it is unclear whether the method would be appropriate for all forms of NPCs and related contracts.

c. *Request for Comments*. The IRS and Treasury request comments on a number of aspects of this method:

(i) The IRS and Treasury are aware that this method permits complete deferral for taxpayers entering into NPCs with contingent elements, in contrast to the accrual method required for NPCs without such contingent elements. However, even though the full allocation method would create discontinuities between different types of NPCs, it is somewhat consistent with the treatment of both straight equity and certain other derivatives, such as options and forward contracts, as noted above. The IRS and Treasury are soliciting comments on whether the inconsistency between contingent and noncontingent NPCs could be mitigated through the use of an anti-abuse rule (and on what the nature and scope of such an anti-abuse rule might be), or whether a more global change in the treatment of derivatives would be necessary to overcome this problem.

(ii) It is unclear how current law would characterize the various payments made pursuant to a contingent NPC under the full allocation method. Based on one interpretation of § 1234A, it is possible that taxpayers could elect the character of their NPC payments by terminating their NPC early or holding it until maturity. Comments are solicited on how taxpayers could be prevented from manipulating the character of payments made pursuant to a NPC under current law if the full allocation method is required. Comments are also solicited on whether and how a modification of current law could improve the character treatment of payments made pursuant to a contingent NPC under the full allocation method.

(iii) The IRS and Treasury seek comments on how the full allocation method should apply when contingencies under a NPC are resolved at a time other than at the maturity of the contract.

3. *Modified Full Allocation Method*

a. *Timing*. Under this method, each party to a NPC would offset any noncontingent payments made by that party in a taxable year against any payments received in that year with respect to the NPC, but would not be able to claim a deduction if the amount received were less than the amount paid out. Any net deductions with respect to the NPC would be deferred until all contingencies are resolved. In effect, this method accords with those tax principles that provide for income to be recognized when received and deductions to be deferred until all contingencies with respect to that deduction are resolved. However, this method modifies the effects of these principles by first determining income on an annual net basis.

b. *Policy Considerations*. This method has the advantages of being certain and clear, and being relatively easy to administer. However, the method does not provide for neutrality of tax treatment with respect to any financial instrument or combination of instruments that have economic characteristics similar to a contingent NPC. The method does not accurately reflect the change in economic position over time of a counterparty subject to the method because of the differing treatment of net receipts and payments under the NPC. In addition, there would be asymmetry of tax treatment of the counterparties to the NPC if one of the parties were subject to the mark-to-market method of accounting with respect to the NPC. Finally, it is unclear how flexible the method would be in accommodating variations in NPCs and related instruments.

c. *Request for Comments*. The IRS and Treasury request comments on a number of aspects of this method:

(i) The IRS and Treasury are aware that the modified full allocation method may result in mismatching of income and deductions. This is because income from the NPC would be recognized when received while deductions would be deferred until all contingencies are resolved. The IRS and Treasury are seeking assistance in developing rules to ensure that the asymmetrical treatment of the income and deductions under this method does not lead to undesirable consequences for either taxpayers or the government.

(ii) It is unclear how the payments made pursuant to a NPC would be characterized under the modified full allocation method. It is possible that application of current law to the modified full allocation method could result in differences in character for current inclusions and for gains or losses on final settlement of the NPC. For example, a taxpayer may be taxable currently on net receipts as ordinary income but have an offsetting capital loss subject to loss limitations on the final settlement of the NPC. Mismatches of timing and character could be reduced if deductions were permitted in years before the resolution of all contingencies, in a manner similar to the treatment of unreversed inclusions under § 1296(a)(2). The IRS and Treasury request comments on ways to avoid this mismatching of character, and whether a regime similar to that used under § 1296(a)(2) would be administratively burdensome to implement.

(iii) The IRS and Treasury seek comments on how the modified full allocation method should apply when contingencies under a NPC are resolved at a time other than at the maturity of the contract.

4. *Mark-to-Market Method*

a. *Timing*. Under this method, taxpayers would mark their NPCs to market and recognize gain or loss at year end, or when the contract is terminated, assigned, etc.

b. *Policy Considerations*. The mark-to-market method has the advantages of being certain and clear with respect to timing and character. It would likely, however, be difficult to administer for non-exchange traded instruments to the extent that there is no consensus on the fair market value of the NPC. This problem may be partially overcome by requiring appropriate record keeping and information reporting. The mark-to-market method does not provide neutrality of tax treatment compared to almost any financial instrument or combination of instruments or compared to the underlying property. It would, however, provide equitable tax treatment between counterparties. The mark-to-market method accurately reflects the change in economic position over time of both counterparties as a result of being a party to the NPC, to the extent that the mark is accurate. Finally, the mark-to-market method is the most flexible of the methods, as it is constrained only by the ability to provide a consistent system for measuring the market value of instruments.

c. *Request for Comments*. The IRS and Treasury request comments on a number of aspects of this method:

(i) The IRS and Treasury are interested in comments generally on the benefits and burdens of imposing a mark-to-market regime.

(ii) The IRS and Treasury are interested in what the character of a gain or

loss on a mark would be under current law, and how the law may be modified to ensure appropriate characterization of the mark, based on policy principles.

(iii) The IRS and Treasury are interested in comments on what authority taxpayers believe exists to mandate a mark-to-market regime for NPCs. We are also requesting comments on whether this regime should be made elective if another regime is used as the primary regime.

(iv) The IRS and Treasury seek comments on how to ensure that the values taxpayers use as market values are truly related to the market, and are not subject to consistently biased manipulation by taxpayers. It appears that substantial investment has been made by the financial community into technology that enables a regular mark-to-market of many types of derivatives.[1] The IRS and Treasury are requesting comments on how a valuation regime could be developed to ensure some consistency by a single taxpayer with different NPCs, and between taxpayers.

C. Recordkeeping and Information Reporting

The IRS and Treasury are seeking comments on what kinds of record keeping and information reporting would be necessary for each and any of the methods of accounting for contingent NPCs that would enable the IRS to verify the inclusions and deductions of counterparties to contingent NPCs and minimize the compliance burdens for taxpayers. In particular, the IRS and Treasury are interested in the following:

1. Are there any special kinds of information necessary for the IRS to obtain from taxpayers in order to verify their tax return positions with respect to contingent NPCs?

2. If there are special kinds of information relating to tax return positions for contingent NPCs, how should that information be made available to the IRS? Is it sufficient for taxpayers to keep detailed books and records which an agent can request if necessary? Or should specific information be required to be reported with the tax return? If the information is reported with a tax return, what form should the reporting take?

3. Is there sufficient justification to require third party reporting with respect to any of the methods of accounting for NPCs, particularly for the NCS method and the mark-to-market method? Should counterparties who are dealers be required to report their marks to nondealer counterparties under the mark-to-market method?

4. If certain types of record keeping or information reporting are recommended in comments to the IRS and Treasury, what would be the appropriate penalties for failure to keep the required records or provide the information?

III. REQUEST FOR COMMENTS

Written comments are requested to be submitted no later than November 20, 2001, to CC:FIP (Notice 2001–44), room 4300, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Comments may be hand delivered between the hours of 8 a.m. and 5 p.m. to CC:FIP (Notice 2001–44), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by submitting comments directly to the IRS Internet site at *http://www.irs.gov/tax_regs/regslist.html.* All comments will be available for public inspection and copying.

DRAFTING INFORMATION

The principal authors of this notice are: Elizabeth Handler and Dale S. Collinson, Office of Associate Chief Counsel (Financial Institutions and Products), Internal Revenue Service; Viva Hammer, Office of the Tax Legislative Counsel, Office of Tax Policy, United States Department of the Treasury; and Matthew J. Eichner, Office of Tax Analysis, Office of Tax Policy, United States Department of the Treasury. However, other personnel from the IRS and Treasury Department participated in its development. For further information regarding this notice contact Viva Hammer at (202) 622-0869 or Dale Collinson at (202) 622-3900 (not toll-free calls).

APPENDIX

The method described in Section II.B.1.b. is illustrated using the following example of a simple equity swap contract on a notional amount of 100 shares of XYZ stock, entered into on January 1, 2001, between A and B with the following terms:

A pays B:

Every six months until expiration – any dividend payments to the holder of one share of XYZ times 100.

At expiration, December 31, 2002 – any appreciation in a share of XYZ since contract inception times 100.

B pays A:

Every six months until expiration – 7.00% (annual rate) of notional amount at inception.

At expiration, December 31, 2002 – any depreciation in a share of XYZ since contract inception times 100.

Assume that the market price of a share of XYZ was $975 at the inception of the contract, and the forward price for future delivery of a share of XYZ was $1,062. For computational purposes only, A is deemed under the NCS method to have hedged itself by entering into a forward contract at the inception of the NPC for the purchase of 100 shares of XYZ, in exchange for $106,200, on December 31, 2002. In order to make the $106,200 payment, A would need to set aside at the inception of the contract an amount that equals the present value of $106,200, *i.e.*, $92,547 (based on a 7% annual interest rate compounded semiannually).

With this forward contract in place, A would be able to make the required payment to party B.[2] However, the arrangement described thus far would involve A committing more funds to building the hedge than is absolutely necessary. A is required to pay B only the difference be-

[1] Much of the impetus for this has come from the Statement of Financial Accounting Standards No. 133, *Accounting for Derivative Instruments and Hedging Activities*, as amended by Statement of Financial Accounting Standards No. 138, which requires that an entity recognize all derivatives as either assets or liabilities in the statement of financial position and measure those instruments at fair value. However, this is not the only source of interest in technology to enable a regular marking of derivatives. Treasury departments of many corporations require a tool to assess the impact of financial stress on their portfolios, and this requires a mechanism for marking their securities in various scenarios. In addition, in a different context entirely, mutual funds must have some mechanism for regularly assessing the value of their portfolios (including derivatives) as they have to report a daily net asset value.

[2] The terms of the contract require B to make a payment to A if the XYZ stock decreases in value. Because forward pricing for investment property such as corporate stock always assumes an increase in price, the method would also assume at the outset that the contingent payment would be made by A to B.

tween the price of the shares on December 31, 2002, and the price of the shares on January 1, 2001, and not the entire value of the shares on December 31, 2002. For example, suppose that the price of the 100 XYZ shares has risen to $110,000 by expiration of the NPC. If this happens, A would be obligated to pay B $12,500. A would purchase the shares pursuant to the forward contract for $106,200, sell them for $110,000, and pay party B the $12,500 required under the terms of the swap. The remaining $97,500 in proceeds would belong to A. This $97,500 (the market price of the shares on January 1, 2001) would always remain in A's possession at maturity no matter how the value of XYZ stock changes through the life of the NPC. Therefore, simply entering into a forward contract for the purchase of the XYZ stock is not an exact hedge for A's commitment under the swap contract. To further refine the hedge, A could borrow the present value of $97,500, *i.e.*, $84,966 on January 1, 2001. Borrowing this amount would mean that the cost of assembling the hedge would be ($92,547 - $84,966), or $7,582.

The net cash flow from these two transactions - purchasing the forward contract and borrowing the present value of the current price of the 100 shares - would always enable A to exactly make the payment due to B under the NPC on December 31, 2002, no less and no more. If the share price rises to $1,000 by December 31, 2002, A would sell the stock delivered in satisfaction of the forward contract for $100,000, pay $2,500 to B and repay the loan with the remaining $97,500. If, instead, the price were to fall to $935 by December 31, 2002, A would actually receive $4,000 from B which, in combination with the proceeds from selling the stock delivered under the forward contract for $93,500, would allow A to repay the loan balance of $97,500.

Once the present value of A's deemed hedge for the contingent payment is determined, this amount must be amortized into B's income. This can be done by deeming A to provide to B a zero coupon bond with a present value of $7,582. Such a bond has a face value, payable at maturity, of $8,700 (assuming again an annual rate of 7.00% and compounded semiannually).

The original issue discount (OID) is found by multiplying the present value of the bond at the beginning of each six month period by the periodic rate, 7.00%/2 or 3.50%:

Period Ending	OID	Present Value of Bond (at end of period)
6/30/01	$265 [= $7,582 * 3.50%]	$7,847 [= $7,582 + $265]
12/31/01	$275 [= $7,847 * 3.50%]	$8,122 [= $7,847 + $275]
6/30/02	$284	$8,406
12/31/02	$294	$8,700

Note that the total OID sums to $1,118, precisely the difference between the present value of the bond ($7,582) and the face value of the bond ($8,700).

This OID is the first component of income for each period; amortization of the principal of $7,582 is the other piece. The following table summarizes the annuity calculation:

Period Ending	Payment	Interest	Principal	Balance (end of period)
6/30/01	$2,064	$265 [= $7,582 x 3.5%]	$1,799 [= $2,064 - $265	$5,783 [= $7,582 - $1,799]
12/31/01	$2,064	$202	$1,862	$3,921
6/30/02	$2,064	$137	$1,927	$1,994
12/31/02	$2,064	$120	$1,994	$0

The principal allocated to each period is then added to the OID to reach a total income allocation for the period. This would become the "payment schedule" which determines the tax inclusions required for B through the life of the contingent NPC.

Period Ending	OID	Principal	Income
6/30/01	$265	$1,799	$2,064
12/31/01	$275	$1,862	$2,137
6/30/02	$284	$1,927	$2,211
12/31/02	$294	$1,994	$2,288
Total			$8,700

Part IV. Items of General Interest

Simplification of Employee Plans Determination Letter Application Procedures

Announcement 2001–77

The Service is simplifying its application procedures for determination letters on the qualification of pension, profit-sharing, stock bonus, and annuity plans under §§ 401(a) and 403(a) of the Internal Revenue Code. These changes will give plan sponsors the flexibility to request a determination letter that considers either the form of the plan only or both the form of the plan and compliance with the requirements of §§ 401(a)(4), 401(a)(26), and 410(b). The Service is also modifying its procedures to facilitate plan compliance with new final regulations on the use of cross-testing in the application of the nondiscrimination requirements of § 401(a)(4).

Specifically, the Service is:

- Modifying its procedures and revising the determination letter application forms to give plan sponsors the option to request determination letters without furnishing information on how plans satisfy the nondiscrimination requirements of § 401(a)(4), the additional participation requirements of § 401(a)(26) or the minimum coverage requirements of § 410(b).
- Modifying its procedures to allow adopting employers of nonstandardized master and prototype (M&P) plans or certain volume submitter plans to rely on a favorable opinion or advisory letter with respect to most qualification requirements without requesting a determination letter.
- Modifying its procedures to allow an employer maintaining a multiple employer plan to rely on a favorable determination letter for the plan with respect to most qualification requirements without submitting a separate Form 5300.
- Encouraging practitioners to highlight the changes to plans that have previously received favorable determination letters.
- Making available, during the second half of 2001, and updating periodically, a list of the M&P plans and volume submitter specimen plans that were submitted to the Service for GUST[1] advisory and opinion letters by December 31, 2000, indicating the dates on which opinion and advisory letters were issued or the applications were withdrawn.
- Allowing practitioners to amend volume submitter specimen plans to reflect the recently published final regulations on cross-testing.
- Allowing plan sponsors to request determination letters that take into account the final regulations on cross-testing, beginning August 22, 2001.

The Service is also taking a number of other steps to improve the efficiency of its case processing. The changes described in this announcement are separate from any long-term changes to the determination letter program that may result from the Service's ongoing study of the future of the Employee Plans determination letter program. The Service expects to publish a white paper as part of this study in the near future.

SECTION I. CHANGES TO DETERMINATION LETTER APPLICATION PROCEDURES AND FORMS

A. Current Procedures

Under current procedures, plans are generally reviewed for compliance with form and operational coverage and nondiscrimination requirements, including, for example, the ratio-percentage test of § 410(b)(1). In addition, at the election of the plan sponsor, a plan may also be reviewed for compliance with the average benefit test of § 410(b)(2) and the nondiscriminatory availability of benefits, rights and features requirement and the general test for nondiscrimination in amount of contributions or benefits of § 401(a)(4).

[1] The term "GUST" refers to:
- the Uruguay Round Agreements Act, Pub. L. 103-465;
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353;
- the Small Business Job Protection Act of 1996, Pub. L. 104-188;
- the Taxpayer Relief Act of 1997, Pub. L. 105-34;
- the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206; and
- the Community Renewal Tax Relief Act of 2000, Pub. L. 106-554 ("CRA").

Applicants must file Schedule Q (Form 5300), *Nondiscrimination Requirements,* providing demographic data for coverage and nondiscrimination requirements to be considered by the Service in reviewing the plan.

B. New Procedures

Under the new procedures, plan sponsors can elect to have a plan reviewed for compliance with the form requirements only or with both the form requirements and the coverage and nondiscrimination requirements of §§ 401(a)(4), 401(a)(26) and 410(b) that the plan sponsor elects to have considered. For example, a plan sponsor no longer must provide demographic data for the ratio-percentage test, but may choose to do so to have compliance with § 410(b) considered in the determination letter. Thus, the filing of Schedule Q is now optional.

C. Revised Application Forms

The following forms are being revised:
Form 5300, *Application for Determination for Employee Benefit Plan*
Schedule Q (Form 5300), *Nondiscrimination Requirements*
Form 5307, *Application for Determination for Adopters of Master or Prototype, Regional Prototype or Volume Submitter Plans*
Form 5309, *Application for Determination of Employee Stock Ownership Plan*
Form 5310, *Application for Determination for Terminating Plan*
Form 5310–A, *Notice of Plan Merger or Consolidation, Spinoff, or Transfer of Plan Assets or Liabilities; Notice of Qualified Separate Lines of Business*
Form 6088, *Distributable Benefits From Employee Benefit Pension Plans*
Form 6406, *Short Form Application for Determination for Minor Amendment of Employee Benefit Plan*
Form 8717, *User Fee for Employee Plan Determination Letter Request*.

Form 5303, *Application for Determination for Collectively Bargained Plan*, currently used to apply for a determination letter for a collectively bargained plan, is eliminated. Applications previously submitted using Form 5303 will now be submitted using Form 5300.

D. Draft Forms Will Be Available on the Internet

To assist entities developing software used in preparing determination letter applications, as well as plan sponsors and practitioners, the Service will soon post draft Forms 5300, 5307, 5310, 6406, and Schedule Q to: *http://www.irs.gov/ep*. Although the Service does not anticipate making changes to the content of these draft forms, users are cautioned that these forms are subject to substantive and formatting changes before final versions are available. It is anticipated that final forms will be available in August.

E. Changes to Forms 5300, 5307, 5310, and Schedule Q

The following are the principal changes regarding Forms 5300, 5307, 5310, and Schedule Q:

1. Schedule Q, an optional form, must be attached to Form 5300 or Form 5307 if the applicant wishes to request a determination letter that covers one or more of certain coverage and nondiscrimination requirements.
2. Certain questions are being eliminated from the Schedule Q, including those related to § 401(a)(26). A determination letter application for a defined benefit plan will be reviewed for compliance with § 401(a)(26) if the application requests consideration of § 410(b), or if a cover letter requests consideration of § 401(a)(26) and the applicant provides data supporting the request.
3. Questions related to the ratio-percentage test under § 410(b) and the nondiscriminatory amount design-based safe harbors under § 401(a)(4) are included in Forms 5300 and 5307 as optional questions.
4. Questions related to the minimum coverage requirements, including the average benefit test, and the nondiscriminatory amounts requirement, including the general test and the design-based safe harbors, are being added to Form 5310. Form 5310 applicants will continue to be required to demonstrate compliance with the minimum coverage and nondiscriminatory amounts requirements, including the average benefit and general tests, unless the conditions described in section 12.04 of Rev. Proc. 2001–6, 2001–1 I.R.B. 194, have been satisfied. Applicants may file Schedule Q with Form 5310 to request a determination that covers any of the other nondiscrimination requirements addressed by the Schedule Q, such as the requirement that a plan not discriminate in the availability of benefits, rights and features under the plan.

F. Changes Regarding Favorable Determination Letters

Under current procedures, determination letters may include separate caveats indicating that the applicant has demonstrated that the plan satisfies specific coverage and nondiscrimination requirements, such as the average benefit test and the general test. However, the actual scope of reliance on a favorable determination letter is based on the information and demonstrations submitted with the application and the failure of an applicant to retain this information might limit the scope of reliance. (See section 21.01 of Rev. Proc. 2001–6.) The use of multiple caveats has sometimes resulted in confusion and administrative complications.

To improve the quality of the letters and processing efficiency, the Service will generally discontinue the use of separate caveats for the coverage and nondiscrimination requirements. The extent of reliance on a favorable letter will not change. Thus, a letter may be relied on with regard to specific determination requests made with the application, provided the relevant information and demonstrations are retained by the applicant.

G. Effective Dates and Transition Rules

1. Determination letter applications filed before July 23, 2001, must comply with the procedures in Rev. Proc. 2001–6 and the current determination letter application forms.
2. Between July 23, 2001, and December 31, 2001, applicants requesting determination letters on Form 5300 or 5307 may choose to:
   - submit the revised Form 5300 or 5307 either including or omitting the revised Schedule Q, once the forms are finalized;
   - submit the current Form 5300 or 5307 with the current Schedule Q, following the procedures in Rev. Proc. 2001–6;
   - submit the current Form 5300 or 5307 omitting Schedule Q; or
   - submit the current Form 5300 or 5307 with the current Schedule Q, completing only Part I of the Schedule Q and those line items relating to the specific coverage and nondiscrimination requirements for which the applicant requests a determination.

   In the latter two cases, the applicant must include a cover letter indicating that the determination requested is only on the form of the plan or on both the form of the plan and those issues selected on Schedule Q. If this information is not included in the cover letter, the Service will not contact the applicant but will assume the omission or partial completion of the Schedule Q correctly reflects the scope of the determination requested by the applicant.
3. Determination letter applications filed on Form 5310 before January 1, 2002, must comply with the procedures in Rev. Proc. 2001–6 and the current forms.
4. Determination letter applications filed after December 31, 2001, must be submitted on the revised forms.

H. User Fees

The user fee for an application will continue to be based on the form on which the application is submitted and whether the application involves a determination of the average benefit or general test.

SECTION II. CHANGES TO RELIANCE PROCEDURES FOR ADOPTING EMPLOYERS OF M&P AND VOLUME SUBMITTER PLANS

A. Current Reliance Procedures

Under current procedures, an employer that adopts a nonstandardized M&P plan or a volume submitter plan must request a determination letter to have reliance. An employer that adopts a standardized M&P plan (including paired plans) generally must request a determination letter to have reliance if the employer maintains another plan.

B. New Reliance Procedures

Adopting employers of M&P and volume submitter plans can rely on a favor-

able opinion or advisory letter issued to the M&P sponsor or volume submitter practitioner as described below if the employer adopts a plan that is identical to an approved M&P or specimen plan and chooses only options permitted under the terms of the approved plan. These employers can forego filing Form 5307 and rely on a favorable opinion or advisory letter issued to the M&P sponsor or volume submitter practitioner with respect to the qualification requirements, except as provided in 1 through 5 of this paragraph B and in paragraph C of this section, below.

1. Except as provided herein, adopting employers of nonstandardized M&P plans and volume submitter plans cannot rely on a favorable opinion or advisory letter with respect to the requirements of:
   (a) § 401(a)(4), 401(a)(26), 401(l), 410(b) or 414(s); or
   (b) if the employer maintains or has ever maintained another plan covering some of the same participants[2], § 415 or 416.
2. Adopting employers of nonstandardized M&P plans and volume submitter plans can rely on the opinion or advisory letter with respect to the requirements of §§410(b) and 401(a)(26) (other than the § 401(a)(26) requirements that apply to a prior benefit structure) if 100 percent of all nonexcludable employees benefit under the plan.
3. Nonstandardized M&P plans must give adopting employers the option to elect a safe harbor allocation or benefit formula and a safe harbor compensation definition. Adopting employers of nonstandardized M&P plans that elect a safe harbor allocation or benefit formula and a safe harbor compensation definition can rely on an opinion letter with respect to the nondiscriminatory amounts requirement under § 401(a)(4) and the requirements of §§ 401(k) and 401(m) (except where the M&P plan is a safe harbor § 401(k) plan that provides for the safe harbor contribution to be made under another plan).
4. Adopting employers of nonstandardized safe harbor M&P plans (which require adopting employers to elect a safe harbor allocation or benefit formula) are entitled to the same reliance as adopting employers of nonstandardized plans except that they have automatic reliance with respect to the nondiscriminatory amounts requirement if they elect a safe harbor definition of compensation.
5. Adopting employers of standardized M&P plans (including paired plans) that maintain or have ever maintained another plan can rely on a favorable opinion letter except with respect to the requirements of §§ 415 and 416 and the requirements of § 401(a)(26) that apply to prior benefit structures.

[2] For this purpose, whether an employer maintains or has ever maintained another plan will be determined using principles consistent with section 6.02 of Rev. Proc. 2000-20, 2000-6 I.R.B. 553.

C. Other Limitations and Conditions on Reliance

1. An adopting employer of an M&P or volume submitter plan can rely on a favorable opinion or advisory letter only if the letter has taken into account the requirements of GUST and the plan has been amended to the extent necessary to comply with the requirements of § 314(e) of CRA, relating to changes to the definition of compensation under §§ 414(s) and 415(c)(3). In addition, if the opinion or advisory letter is a "GUST I" letter (as defined in Rev. Proc. 2000–27, 2000–26 I.R.B. 1272), the plan must have been amended to the extent necessary to comply with the requirements of GUST that are effective after 1998.
2. An adopting employer can rely on a favorable opinion or advisory letter for a plan that amends or restates a plan of the employer only if the plan that is being amended or restated satisfies the qualification requirements as in effect prior to GUST and the operational compliance requirements of GUST, and the GUST amendments are retroactively effective to the extent required.
3. An adopting employer cannot rely on an opinion or advisory letter for a plan if the repealed family aggregation rules continued to apply under the plan after 1996 or if the repealed § 415(e) limits continued to apply under the plan after 1999. The continued application of these rules and limits in years following their repeal could cause a plan to fail to satisfy one or more requirements of § 401(a).
4. An adopting employer cannot rely on an advisory letter issued after the date the employer adopts the GUST-amended plan.
5. An adopting employer can rely on an opinion or advisory letter only if the employer has not added any terms to the approved M&P or volume submitter plan document and has not modified or deleted any terms of the document other than choosing options permitted under the document or, in the case of an M&P plan, amending the document as permitted under sections 5.07 and 5.11 of Rev. Proc. 2000–20. Thus, for example, in the case of a volume submitter plan, the employer's plan must be identical to the approved specimen plan except as the result of the employer's selection among options that are permitted under the terms of the approved specimen plan.
6. An adopting employer cannot rely on an opinion or advisory letter if the adopting employer has modified the terms of the plan's approved trust in a manner that would cause the plan to fail to be qualified.

D. Reliance Equivalent to Determination Letter

To the extent an employer can rely on a favorable opinion or advisory letter pursuant to this announcement or Rev. Proc. 2000–20 and Rev. Proc. 2001–6, the opinion or advisory letter shall be equivalent to a favorable determination letter. For example, the favorable opinion or advisory letter shall be treated as a favorable determination letter for purposes of section 21 of Rev. Proc. 2000–6, regarding the effect of a determination letter, and section 5.01(4) of Rev. Proc. 2001–17, 2001–7 I.R.B. 589, regarding the definition of "favorable letter" for purposes of the Employee Plans Compliance Resolution System.

E. Change to Conditions for Extended Remedial Amendment Period

The GUST remedial amendment period generally ends on the last day of the first plan year beginning on or after January 1, 2001. However, certain plans may be eligible for an extended remedial amendment period under the provisions of section 19 of Rev. Proc. 2000–20. Section 19.04 of Rev. Proc. 2000–20 requires plans eligible for the extension to request a determination letter by the end of the

extended period if a determination letter is required for reliance. Thus, current procedures would require adopting employers of nonstandardized M&P plans and volume submitter plans to request determination letters within the extended period.

An employer eligible for reliance without a determination letter, as described in this section, is not required to request a determination letter to be entitled to the extension of the remedial amendment period under section 19 of Rev. Proc. 2000–20, provided that the employer adopts the GUST-approved M&P or specimen plan within the extended remedial amendment period.

SECTION III. CHANGES TO APPLICATION PROCEDURES FOR EMPLOYERS THAT MAINTAIN MULTIPLE EMPLOYER PLANS

A. Current Application Procedures

Under current procedures, an application for a determination letter for a multiple employer plan must include separate Form 5300 applications for each employer maintaining the plan. In addition, demonstrations to be included with Schedule Q must separately demonstrate compliance with the relevant coverage or nondiscrimination requirement by each employer.

B. New Application Procedures

A determination letter applicant can request either (1) a letter for the plan or (2) a letter for the plan and a letter for each employer maintaining the plan with respect to whom a separate Form 5300 is filed.

1. An applicant requesting a letter for the plan submits one Form 5300 application for the plan, filed on behalf of one employer, omitting the optional minimum coverage questions and Schedule Q and either including or omitting the design-based safe harbor questions. The user fee for a single employer plan will apply. An employer maintaining a multiple employer plan can rely on a favorable determination letter issued for the plan except with respect to the requirements of §§ 401(a)(4), 401(a)(26), 401(l), 410(b) and 414(s), and, if the employer maintains or has ever maintained another plan, §§ 415 and 416.

2. An applicant requesting a letter for the plan and an employer must submit the filing required in (1) above and a separate Form 5300 application, completed through line 8, for each employer requesting a separate letter. Each employer may elect to respond to the Form 5300 questions regarding minimum coverage and design-based safe harbors and to file Schedule Q to request a determination on the average benefit test, the general test, or any other nondiscrimination requirement addressed by the Schedule Q. The user fee for the application will be determined under the user fee schedules for multiple employer plans in section 6.06 of Rev. Proc. 2001–8, 2001–1 I.R.B. 239, substituting the number of Forms 5300 filed for the number of employers maintaining the plan and treating the entire application as a general test or average benefit test application if any employer requests a determination on either of these tests.

C. Other Limitations and Conditions

Rules similar to the rules in Section II.C and D above also apply in the case of an employer maintaining a multiple employer plan.

SECTION IV. HIGHLIGHTING DOCUMENT CHANGES

The Service encourages practitioners to highlight changes to plan documents that have previously received determination letters in such a way as makes the nature and purpose of the changes apparent and assists Service personnel in reviewing the plan. This practice may speed the review of plan documents; however, the Service retains the discretion to review the entire document.

SECTION V. LISTS OF M&P AND VOLUME SUBMITTER PLANS

The period of extension of the GUST remedial amendment period under section 19 of Rev. Proc. 2000–20 is 12 months. The 12-month period begins on the date of approval of the last M&P or specimen plan of the employer's M&P sponsor or volume submitter practitioner to receive a favorable GUST opinion or advisory letter. In Notice 2001–42, page 70, this bulletin, the Service has provided that the 12-month period shall be treated as not ending before December 31, 2002.

The Service has been asked to make available lists of M&P and volume submitter plans to assist employers in determining the expiration of their GUST remedial amendment period. Therefore, the Service plans to make available on the Internet a list of all the M&P and volume submitter plans that were submitted to the Service for GUST opinion or advisory letters by December 31, 2000, the deadline for filing under Rev. Proc. 2000–20. This list will include the name of the M&P sponsor or volume submitter practitioner, the name of each plan submitted by the sponsor or practitioner, and the file folder or other number assigned to each plan. This list will be posted as early as possible in the second half of 2001.

As soon as practical after publication of the list, and periodically thereafter, the Service will amend the list to include the date on which each plan is approved or the application is otherwise closed.

SECTION VI. FINAL CROSS-TESTING REGULATIONS

A. Publication of Final Regulations

Final regulations under § 401(a)(4), published in the Federal Register on June 29, 2001 (the "final cross-testing regulations") amend §§ 1.401(a)(4)–8, 1.401(a)(4)–9 and 1.401(a)(4)–12 of the Income Tax Regulations. The final cross-testing regulations describe the conditions under which defined contribution plans, and defined contribution and defined benefit plans that are tested together, are permitted to demonstrate compliance with nondiscrimination requirements on a benefits basis. The regulations are effective for plan years beginning on or after January 1, 2002.

B. Permitted Amendment of Pending Specimen Plans in Conjunction with GUST

Practitioners that sponsor volume submitter plans with "cross-testing formulas" or provisions may wish to amend their specimen plans for the regulations to help adopting employers ensure that their plans will be eligible to cross-test. In order to facilitate the amendment of specimen plans for the final cross-testing regulations during the GUST plan restatement process, the Service will allow practitioners to submit final regulation amendments to their specimen defined contribution plans to be reviewed in conjunction with the re-

view of the plan for compliance with GUST, provided the amendments are submitted by October 22, 2001. When submitting such amendments, practitioners should include a cover letter that identifies the specimen plan to which the amendments relate and the status of the application (if known) and that describes the nature of the amendments. The Service will not issue an advisory letter for a defined contribution specimen plan before October 22, 2001, without first obtaining the concurrence of the practitioner.

C. Permitted Amendment of Previously Approved Specimen Plans

Practitioners that have already received a GUST advisory letter for a defined contribution specimen plan may resubmit the plan by October 22, 2001, to include final regulation amendments. The submission should include the plan and any amendments, a copy of the GUST advisory letter, and a cover letter which describes the nature of the changes to the specimen plan and indicates that the application is being submitted pursuant to Announcement 2001–77. In this case, a favorable advisory letter issued with respect to the amendments will be treated as the initial GUST advisory letter for the specimen plan for purposes of determining the 12-month period under Rev. Proc. 2000–20.

D. Determination Letter Applications

For determination letter applications filed on or after August 22, 2001, employers may request a determination that takes the final cross-testing regulations into account. If a demonstration involving cross-testing relates to the 2002 or later plan year, the demonstration must address the requirements of the regulations. Estimated data for the 2002 plan year may be used for purposes of this demonstration.

SECTION VII. RELIANCE PRIOR TO PUBLICATION OF MODIFIED REVENUE PROCEDURES

The changes described in this announcement will be published as modifications to Rev. Procs. 2000–20, 2001–6 and 2001–8. Until the modifications to the revenue procedures are published, plan sponsors may rely on this announcement regarding the changes.

DRAFTING INFORMATION

The principal drafter of this announcement is James Flannery of Employee Plans. For further information regarding this announcement, please contact Employee Plans' taxpayer assistance telephone service at (202) 283-9516 or (202) 283-9517, between the hours of 1:30 p.m. and 3:30 p.m. Eastern Time, Monday through Thursday. Mr. Flannery may be reached at (202) 283-9613. These telephone numbers are not toll-free.

Foundations Status of Certain Organizations

Announcement 2001–78

The following organizations have failed to establish or have been unable to maintain their status as public charities or as operating foundations. Accordingly, grantors and contributors may not, after this date, rely on previous rulings or designations in the Cumulative List of Organizations (Publication 78), or on the presumption arising from the filing of notices under section 508(b) of the Code. This listing does *not* indicate that the organizations have lost their status as organizations described in section 501(c)(3), eligible to receive deductible contributions.

Former Public Charities. The following organizations (which have been treated as organizations that are not private foundations described in section 509(a) of the Code) are now classified as private foundations:

African American Cultural Center, Inc., Lumberton, NC
Algerian Relief Foundation, Inc., Cary, NC
Alliance Educational Fund, Alexandria, VA
American Friends of English National Opera, New York, NY
Andrews Youth Football Association, Andrews, NC
Apollon Art Research Foundation, Inc., Claverack, NY
Arc of Mecklenburg County Condominiums, Inc., Charlotte, NC
Asian-American Cultural Society, Philadelphia, PA
Assistance in Dialysis Expenses, Inc., Charlotte, NC
Assisted Living Legal Defense & Education Fund, Inc., Herndon, VA
Association of Virginia Artisans, Inc., Waynesboro, VA
Badin-Harristown in Home Enrichment in Reading Program, Badin, NC
Belyi Foundation, Brevard, NC
Benco, Corvallis, OR
Bethany Bible Institute, Inc., Plainfield, NJ
Bone and Muscle Cancer Research and Awareness Foundation, Bala Cynwyd, PA
Brownlee Non-Profit Housing Corporation, Durham, NC
Build, Inc., Sanford, NC
Cape Fear Community Development Corporation, Fayetteville, NC
Carolina Stage Company, Fayettville, NC
Cary First Planned Partners Ministry, Inc., Cary, NC
Center for Academic Excellence, Naples, NC
Center for Children of Separation and Divorce, Charlotte, NC
Chaparral Rails to Trails, Inc., Roxton, TX
Charlotte Wine & Food Weekend, Inc., Charlotte, NC
Chatham Citizens for Responsible Development, Siler City, NC
Cherubs the Assoc. of Congenital Diaphragmatic Hernia Research, Creedmor, NC
Childcare Advocates for Response & Empowerment, Inc., Smithfield, NC
Christian Relief Ministries, Incorporated, Advance, NC
Community Networking Association, Virginia Beach, VA
Concerned Citizens Coalition for Equal Opportunity and Equality, Naperville, IL
Constitutional Tradition and Education Corporation, Durham NC
Craven Community Chorus, New Bern, NC
Cross Ministries, Garner, NC
Cub Scout Pack 52 Endowment Fund, Inc., Morgantown, WV
Danny McLean Memorial Scholarship, St. Paul, NC
Disability Express, Raleigh, NC
Eagles Wings Ministries International, Burke, VA
Ease, Inc., Durham, NC

East Coast State Community Development Corporation, Virginia Beach, VA
East Mecklenburg Exceptional Childrens Booster Club, Charlotte, NC
Ebenezer Baptist Church Child Care Center, Rocky Mount, NC
Ebony-Ivory International, Inc., Baltimore, MD
Egregor, Inc., Faith, NC
Elizabeth City Neighborhood Corporation, Elizabeth City, NC
Fat Guy Charities, Inc., Charlotte, NC
Filipino-American Senior Citizens of Los Angeles, Los Angeles, CA
First Baptist Housing Development, Inc. II, Lumberton, NC
First in Families, Inc., Charlotte, NC
Foundation for Sustainable Development, Carrboro, NC
Foundation for the Historical and Cultural Preservation of Inigenou, Elkins, WV
Friends for Animals of Green County, Snow Hill, NC
Friends of the Belle Haven Marina, Alexandria, VA
Fund for Investigative Reporting, Inc., Asheville, NC
Garlyn, Inc., Shelby, NC
G.E.M. Community Services, Inc., Edison, NJ
Gilbert Theater, Fayetteville, NC
Global Institute of Environmental Scientists, Alexandria, VA
Global Response Service Corporation, Herndon, VA
Golf Shop-Headquarters for Jr. Golf, Inc., Norfolk, VA
Greater Manassas Tournament Softball Foundation, Manassas, VA
Guardians of Wildlife, Dale City, Va
Guilford County Association of Scuba Personnel, Oak Ridge, NC
Hampton Roads Early Music Society, Norfolk, VA
Hand to Eye Workshop & Studio, Incorporated, Durham, NC
Harold C. Enloe Lodge No. 1 of the Fraternal Order of Police Foundation, Inc., Asheville, NC
Heritage Square Apartments, Inc., Siloam Springs, AR
High Point Youth Sports Council, Inc., High Point, NC
Highlands-Cashiers National Public Radio Assoc., Inc., Cashiers, NC
HR Housing, Inc., Milwaukee, WI
Hyline Rescue Team, Inc., Harrisonburg, VA
In Step Ministries, Inc., Greensboro, NC
Institute for Training and Development, Herndon, Va
International Coalition for Aids Research and Education, Sterling, VA
International Federation of Conservation & Wildlife, Cleveland, OH
Isle of Wight Educational Foundation, Smithfield, VA
J.D. Grant Ministries, Inc., Sylva, NC
Joint Committee for Persons with Disabilities, Elizabeth City, NC
Joyland Foundation, Durham, NC
Justice for Children Corporation, Durham, NC
Kehilah Kashrus, Inc., Brooklyn, NY
Kelly M. Alexander Sr. Leadership Institute, Charlotte, NC
Kennesaw Non-Profit Housing Corporation, Santa Monica, CA
Knights of Windmaster, Inc., Lillington, NC
Laurel Springs Educational Foundation, Ojai, CA
Limits, Washington, DC
Living Free Program, Inc., Roanoke, VA
Living in the Word International, Midlothian, VA
Love Foundation, Winston Salem, NC
Lumbee Tribe of Cheraw Indians Dept. of Programs & Administration, Inc., Pembroke, NC
Lyric Theatre, Inc., Poquoson, VA
Mackall Foundation for the Arts, Inc., Arlington, VA
Mary's Learning Center, Inc., Thomasville, NC
Mecklenburg Youth Council, Inc., Charlotte, NC
Metropolitan Washington Council for Homeless Veteran, Inc., Washington, DC
Montgomery County Young Mens Christian Association, Troy, NC
Music Mothers of Meagher County, Incorporated, White Sulphur Springs, MT
Neighborhood Community Builders, Inc., Greensboro, NC
New Bern Volunteer Firefighters Ladies' Auxiliary, New Bern, NC
New Covenant Christian Center, Philadelphia, PA
New Tomorrow World Ministries, Inc., Kearneysville, WV
New Vinland Foundation, Rockport, ME
NFL Alumni Charities of Arizona, Tucson, AZ
Noble Quest, Ltd., Hillsborough, NC
Northern Wizards Wrestling Club, Cambridge, MN
Nutrition for Children, Inc., Demopolis, AL
Ohio Valley Multiple Sclerosis Society, Inc., Weirton, WV
Panhandle Humane Society, Inc., Kearneysville, WV
Park II Non-Profit Housing Corporation, Santa Monica, CA
Pastoral Biblical Counseling Center, Inc., Scotts, MI
Peacehaven, Inc., Warrensville, NC
Peter Gammons Ministries International, Altamonte, VA
Pets are Worth Saving, Inc., Sanford, NC
Pitt County Historical Reenactors, Greenville, NC
Plaza II Non-Profit Housing Corporation, Redono Beach, CA
Project Motivation Education, Inc., Charlotte, NC
Racers Reward, Inc., Concord, NC
Radical Changes Ministry, Raleigh, NC
Reach Teach and Touch Ministries, Bryson City, NC
Real Theatre Company, Boone, NC
Rebecca Gray Davis Memorial Fund for Children, Inc., Morgantown, NC
Reclaiming Our Youth, Inc., Centerville, VA
Regional Family Service Enterprise, Inc., High Point, NC
Rough River Area Enhancement, Inc., Leitchfield, KY
Rowan County Youth Soccer Association, Inc., Salisbury, NC
Severt-Holston League of Residents, Marion, VA
Sisters in the Name of Love of the Roanoke Valley, Inc., Roanoke, VA
SMP Retreat Center, Twin Lake, MI
Soar Corp. International, Virginia Beach, VA
Soaring In Education, Dresden, ME
Soldiers Memorial A.M.E. Zion Church Foundation, Inc., Salisbury, NC
Southeastern Case Management Network, Greensboro, NC
Southwest Area Network, Inc., Birmingham, AL
Spruce Pine Housing Authority, Inc., Spruce Pine, NC
St. Paul's Family Resources, St. Paul, MN

Statesmen, Inc., Charlotte, NC
Sunset Ministries, Ft. Worth, TX
Third World Outreach (TWO), Inc., Bronx, NY
Timberlake Restoration Fund, Inc., Lynchburg, VA
Tithe Luv, Inc., Norfolk, VA
Triad Community Artspace, Inc., Greensboro, NC
Triad Radio Project, Greensboro, NC
Tularcitos Parent Club, Carmel Valley, CA
Twin Rivers Quilters, New Bern, NC
Ujamma, Incorporated, Charlotte, NC
United Burial Fund, Inc., Chesapeake, VA
United Ralph Bell Crusade for Christ Ministry of Billy Graham, Clarksburg, WV
Voter Education and Equal Representation, Inc., Charlotte, NC
VQHA Ray Melton Youth Scholarship Fund, Montpelier, VA
Wake Electric Care, Inc., Wake Forest, NC
Walking by Faith Prophetic Ministry, Inc., North Chicago, IL
Westview Bible College, Inc., Rocky Point, NC
Westview Summer Baseball Softball Association Norton, CT
Willow Care, Raleigh, NC
Woodbridge Foundation, Inc., Woodbridge, VA
World Engineering Partnership for Sustainable Development, Inc., Alexandria, VA
York Non-Profit Housing Corporation, Santa Monica, CA
Youth Taking Charge, Arlington, VA

If an organization listed above submits information that warrants the renewal of its classification as a public charity or as a private operating foundation, the Internal Revenue Service will issue a ruling or determination letter with the revised classification as to foundation status. Grantors and contributors may thereafter rely upon such ruling or determination letter as provided in section 1.509(a)–7 of the Income Tax Regulations. It is not the practice of the Service to announce such revised classification of foundation status in the Internal Revenue Bulletin.

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 law 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 the 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.—Statements 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 2001–1 through 2001–26 is in Internal Revenue Bulletin 2001–27, dated July 2, 2001.

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[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2001–1 through 2001–26 is in Internal Revenue Bulletin 2001–27, dated July 2, 2001.

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