INTERNAL REVENUE
BULLETIN

IRS

HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2017–33
August 14, 2017

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

INCOME TAX

Action On Decision 2017–06, page 194.

Nonacquiescence relating to the holding that a taxpayer's sale and acquisition of business property qualifies as a like-kind exchange under I.R.C. § 1031 even though 17 months before the purported exchange, an accommodating party facilitating the transaction acquired title to the replacement property and the taxpayer acquired the benefits and burdens of ownership of the property.

T.D. 9822, page 195.

These final regulations provide relief to victims of domestic abuse and spousal abandonment from the requirement that married taxpayers file joint returns to obtain a premium tax credit (PTC). The regulations also address the allocation of certain amounts for computing the PTC and reconciling advance payments of the PTC with the allowable PTC, and rules for self-employed taxpayers claiming both a PTC and a § 162(l) deduction for health insurance expenses.

Notice 2017–36, page 208.

This notice announces that the Department of the Treasury and the Internal Revenue Service intend to amend Treas. Reg. § 1.385–2 (the "Documentation Regulations") to apply only to interests issued or deemed issued on or after January 1, 2019. This amendment has the effect of delaying the application of the Documentation Regulations by 12 months. The notice also requests comments concerning whether the proposed amendment and delay of the application of the Documentation Regulations affords adequate time for taxpayers to develop any necessary systems or processes to comply with the Documentation Regulations.

EXCISE TAX

T.D. 9823, page 206.

These final regulations define the term "controlled group" for purposes of the Affordable Care Act section 9008 Prescription Drug Fee.

ADMINISTRATIVE

Announcement 2017–10, page 210.

Announcement 2017–10 amends Revenue Procedure 2017–39, 2017–26 I.R.B. 1286 to make the following corrections.
–Section 4.2.2. The correct title is Composite Substitute Statements to Recipients for Forms Specified in Sections 4.1.2 and 4.1.3.
–Section 4.2.2. The first paragraph is replaced with the following: A composite recipient statement for the forms specified in Sections 4.1.2 or 4.1.3 is permitted when one filer is reporting more than one type of payment during a calendar year to the same form recipient. A composite statement is not allowed for a combination of forms listed in Sections 4.1.2 and 4.1.3.

Finding Lists begin on page ii.

The IRS Mission

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

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

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

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

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

The Bulletin is divided into four parts as follows:

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

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

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

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

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

Actions Relating to Court Decisions

It is the policy of the Internal Revenue Service to announce at an early date whether it will follow the holdings in certain cases. An Action on Decision is the document making such an announcement. An Action on Decision will be issued at the discretion of the Service only on unappealed issues decided adverse to the government. Generally, an Action on Decision is issued where its guidance would be helpful to Service personnel working with the same or similar issues. Unlike a Treasury Regulation or a Revenue Ruling, an Action on Decision is not an affirmative statement of Service position. It is not intended to serve as public guidance and may not be cited as precedent.

Actions on Decisions shall be relied upon within the Service only as conclusions applying the law to the facts in the particular case at the time the Action on Decision was issued. Caution should be exercised in extending the recommendation of the Action on Decision to similar cases where the facts are different. Moreover, the recommendation in the Action on Decision may be superseded by new legislation, regulations, rulings, cases, or Actions on Decisions. Prior to 1991, the Service published acquiescence or nonacquiescence only in certain regular Tax Court opinions. The Service has expanded its acquiescence program to include other civil tax cases where guidance is determined to be helpful. Accordingly, the Service now may acquiesce or nonacquiesce in the holdings of memorandum Tax Court opinions, as well as those of the United States District Courts, Claims Court, and Circuit Courts of Appeal. Regardless of the court deciding the case, the recommendation of any Action on Decision will be published in the **Internal Revenue Bulletin**.

The recommendation in every Action on Decision will be summarized as acquiescence, acquiescence in result only, or nonacquiescence. Both "acquiescence" and "acquiescence in result only" mean that the Service accepts the holding of the court in a case and that the Service will follow it in disposing of cases with the same controlling facts. However, "acquiescence" indicates neither approval nor disapproval of the reasons assigned by the court for its conclusions; whereas, "acquiescence in result only" indicates disagreement or concern with some or all of those reasons. "Nonacquiescence" signifies that, although no further review was sought, the Service does not agree with the holding of the court and, generally, will not follow the decision in disposing of cases involving other taxpayers. In reference to an opinion of a circuit court of appeals, a "nonacquiescence" indicates that the Service will not follow the holding on a nationwide basis. However, the Service will recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit.

The Commissioner does NOT ACQUIESCE in the following decision:

Estate of George H. Bartell, Jr. v. Commissioner, 147 T.C. 140 (2016).[1]

[1]Nonacquiescence relating to the holding that a taxpayer's sale and acquisition of business property qualifies as a like-kind exchange under I.R.C. § 1031 even though 17 months before the purported exchange, an accommodating party facilitating the transaction acquired title to the replacement property and the taxpayer acquired the benefits and burdens of ownership of the property.

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

26 CFR 1.36B–2

T.D. 9822

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Health Insurance Premium Tax Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to the health insurance premium tax credit. These regulations affect individuals who enroll in qualified health plans through Affordable Insurance Exchanges (Exchanges, also called Marketplaces) and claim the premium tax credit and Exchanges that make qualified health plans available to individuals.

DATES: *Effective Date*: These regulations are effective on July 24, 2017.

Applicability Date: For applicability dates, see §§ 1.36B–2(d), 1.36B–3(m), 1.36B–4(c), and 1.162(l)–1(c).

FOR FURTHER INFORMATION CONTACT: Suzanne R. Sinno and Stephen J. Toomey at (202) 317-4718 and Shareen S. Pflanz at (202) 317-7006 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations that amend the Income Tax Regulations (26 CFR part 1) under section 36B of the Internal Revenue Code (Code) relating to the health insurance premium tax credit and under section 162(l) of the Code relating to the deduction for health insurance costs for self-employed individuals. The Treasury Department and the IRS published final regulations under section 36B (TD 9590) on May 23, 2012 (77 FR 30385). These regulations were amended in 2014 by TD 9663, published on May 7, 2014 (79 FR 26117); in 2015 by TD 9745, published on December 18, 2015 (80 FR 78974); and in 2016 by TD 9804, published on December 19, 2016 (81 FR 91755).

On July 24, 2014, the Treasury Department and the IRS published final and temporary regulations under section 36B and section 162(l) (TD 9683) in the **Federal Register** (79 FR 43622), providing relief from the joint filing requirement for married victims of domestic abuse or spousal abandonment, the methodology for indexing certain percentages used in determining the amount of and eligibility for the premium tax credit, certain allocation rules for reconciliation of advance credit payments and the premium tax credit, and guidance on the deduction for health insurance costs of self-employed individuals. On the same date, a notice of proposed rulemaking (REG–104579–13) cross-referencing the temporary regulations was published in the **Federal Register** (79 FR 43693). Written comments responding to the proposed regulations were received. The comments have been considered in connection with these final regulations and are available for public inspection at www.regulations.gov or on request. No public hearing was requested or held. After consideration of all the comments, the proposed regulations are adopted by this Treasury decision, with one technical correction that was not identified in the comments.

Summary of Comments and Explanation of Provisions

1. *Relief for Married Victims of Domestic Abuse or Spousal Abandonment*

Section 36B provides a refundable premium tax credit to help individuals and families afford health insurance purchased through an Exchange. To be eligible for a premium tax credit under section 36B, section 36B(a) provides that an individual must be an applicable taxpayer. Section 36B(c)(1) defines an applicable taxpayer to mean a taxpayer (1) with household income for the taxable year that equals or exceeds 100 percent but does not exceed 400 percent of the federal poverty line for the taxpayer's family size, (2) who may not be claimed as a dependent by another taxpayer, and (3) who files a joint return if married (within the meaning of section 7703).

Section 1.36B–2T(b)(2)(i) provides that except as provided in § 1.36B–2T(b)(2)(ii), a married taxpayer is an applicable taxpayer allowed a premium tax credit only if the taxpayer files a joint return with his or her spouse. Under § 1.36B–2T(b)(2)(ii), a married taxpayer satisfies the joint filing requirement if the taxpayer files a tax return using a filing status of married filing separately and the taxpayer (i) is living apart from his or her spouse at the time the taxpayer files his or her tax return, (ii) is unable to file a joint return because the taxpayer is a victim of domestic abuse or spousal abandonment, and (iii) certifies on his or her income tax return in accordance with the relevant forms and instructions that the taxpayer meets these criteria for claiming a premium tax credit using a filing status of married filing separately. Taxpayers may not qualify for relief from the joint filing requirement for a period that exceeds three consecutive years. See § 1.36B–2T(b)(2)(v). The preamble to the temporary regulations included a specific request for comments on these rules.

A. Eligibility criteria

Comments were generally favorable with respect to the criteria for eligibility for relief from the married filing jointly requirement under the temporary regulations. For example, commenters agreed with the rule in the temporary regulations that victims of domestic violence are not required to contact their spouse as a condition for qualifying for relief from the married filing jointly requirement. Commenters also agreed that relief from the married filing jointly requirement should be available even if the abuse or abandonment occurs in a taxable year other than the taxable year for which a taxpayer seeks relief. A number of commenters requested clarification regarding when a taxpayer is considered a victim of spousal abandonment. The rule in § 1.36B–2T(b)(2)(iv) of the temporary regulations provides that a taxpayer is a victim of spousal abandonment for a taxable year if, taking into account all of the facts and circumstances, the taxpayer is unable to locate his or her spouse after reasonable diligence. A number of commenters requested that the final regulations include a definition for the term "reasonable diligence" for spousal abandonment. Other commenters suggested that the regulations broaden the "unable to locate" requirement for spousal abandonment to situations in which the spouse can be located but is uncooperative, poses a threat to the filing taxpayer, or refuses to grant a divorce to the filing taxpayer.

The final regulations do not provide a definition of reasonable diligence. The IRS will take into account all the facts and circumstances in determining whether a taxpayer exercised reasonable diligence in trying to locate his or spouse. A "one size fits all" definition is not appropriate for situations involving spousal abandonment because the facts of each situation are unique. Providing a definition for reasonable diligence could have the unintended consequence of preventing a taxpayer who merits relief from the married filing jointly requirement from meeting the reasonable diligence standard solely because the definition did not contemplate the taxpayer's particular circumstances.

In addition, the final regulations do not broaden the "unable to locate" rule to include situations in which a spouse poses a threat to the taxpayer claiming relief because the definition of domestic abuse in § 1.36B–2T(a)(2)(iii), which includes psychological or emotional abuse and efforts to intimidate the victim, already addresses these circumstances. Finally, relief from the married filing jointly requirement is not suitable for all situations in which the spouse can be located but is uncooperative.

B. Additional exceptions

Several commenters requested that the IRS expand circumstances warranting relief from the married filing jointly requirement beyond domestic abuse and spousal abandonment. For instance, some commenters suggested that same-sex spouses who live in states that do not permit divorce for same-sex marriages, spouses living abroad, incarcerated spouses, and individuals who face challenges in filing a joint return because of their spouse's immigration status should also be eligible for relief from the married filing jointly requirement. Other commenters suggested that those eligible for relief because they are victims of domestic abuse or spousal abandonment should be able to file as single or head of household, rather than be limited to filing as married filing separately, citing the rules under section 6015 for innocent spouses as support for this position. Commenters also requested a one-year exception from the married filing jointly requirement for individuals who are separated but have not initiated a legal separation or divorce or who are in a long-term separation even if they are not victims of domestic abuse or spousal abandonment.

The final regulations do not expand relief from the married filing jointly requirement beyond domestic abuse and spousal abandonment. The relief finalized in these regulations is specifically tailored to address the limited and unique situations when the taxpayer is unable to file a joint return either because the taxpayer fears for his or her safety or, through no fault of the victim, can neither file a joint return because the non-filing spouse cannot be located nor obtain a divorce or legal separation because sufficient time has not lapsed under state law. In contrast, the circumstances described by the commenters do not warrant relief because the taxpayer is able to file a joint return.

Moreover, because the purposes of the innocent spouse rules and the rule in § 1.36B–2T(a)(2) for victims of domestic abuse and spousal abandonment are different, using the innocent spouse rules for domestic abuse or spousal abandonment victims is not appropriate. The innocent spouse rules provide relief from joint and several liability when a joint return is filed. In contrast, the relief provided in § 1.36B–2T(a)(2) allows a married victim of domestic abuse or spousal abandonment to claim a premium tax credit without filing a joint return. Therefore, because relief under § 1.36B–2T(a)(2) is available only for taxpayers who do not file a joint return, there is no need for the relief from joint and several liability provided by the innocent spouse rules.

Commenters also asked that the final regulations include a rule that would allow individuals who are (1) informally separated and (2) unable to locate their spouses, unwilling to contact them, or unaware of how filing separately could impact their eligibility for advance credit payments and the premium tax credit, to take advantage of the relief from the joint filing requirement for one year. The final regulations do not adopt this comment. First, the regulations already include a rule for taxpayers who cannot file jointly because the taxpayer is unable to locate his or her spouse. Further, regarding the comment about taxpayers being unaware of how filing separately could impact their eligibility for advance credit payments and the premium tax credit, the IRS has included information on www.irs.gov and in instructions and publications to alert taxpayers of the requirement to file jointly to claim the premium tax credit and of the available relief for victims of domestic abuse and spousal abandonment.

One commenter asked that the final regulations allow temporary relief from the joint filing requirement for victims of domestic violence who, when enrolling for coverage, plan to leave their spouse but want to have insurance coverage in place before they leave. Another commenter requested that relief from the joint filing requirement apply to a victim of domestic abuse who lives with his or her spouse and whose spouse could, but refuses to, enroll the victim in the spouse's employer's health coverage.

The relief in the temporary regulations applies to victims of spousal abuse who live with their spouse when enrolling in Marketplace health insurance, but who live apart from the spouse at the time of filing their tax return and cannot file a joint return because of the abuse. Thus, no additional relief rules are necessary for victims of domestic violence who are planning to leave their spouse but want to enroll in Marketplace coverage.

In addition, the final regulations do not adopt the suggestion that the relief from the joint filing requirement be extended to victims of domestic abuse who are planning to leave their spouses but have not yet done so at the time of filing their tax return. Only taxpayers who live apart from their spouse at the time the taxpayer files his or her tax return should be eligible to claim relief from the joint return filing requirement. The underlying basis of this relief is that while the taxpayer is technically married, the taxpayer is not able to file a joint return because they either fear contact with the spouse or the spouse cannot be located. In the case of a victim who lives with the spouse, filing a joint return is less challenging than if he or she lives apart from the spouse.

Finally, if a domestic abuse victim qualifies to use the married filing jointly exception, the victim is not precluded from getting a premium tax credit just because the victim's spouse could have, but refused to, enroll the victim in the spouse's employer's health coverage. *See* § 1.36B–2(c)(4)(i), under which a taxpayer, including a domestic abuse victim, who uses the married filing separately filing status is treated as eligible for his or her spouse's employer's health coverage only for months that the taxpayer is enrolled in the coverage.

C. Advance credit payment reconciliation

Under section 1412 of the Affordable Care Act, Public Law 111–148, 124 Stat. 119 (2010), eligible taxpayers may receive the benefit of advance credit payments. Section 36B(f)(1) requires taxpayers who receive the benefit of advance credit payments for a taxable year to file a tax return and reconcile the advance credit payments with the premium tax credit the taxpayer is allowed for the taxable year. Under section 36B(f)(2)(A), the taxpayer's income tax liability is increased by the amount that the advance credit payments for the taxable year exceed the premium tax credit allowed for the taxable year, subject to the repayment limitations in section 36B(f)(2)(B). Section 1.36B–4(b) provides an alternative rule for reconciling the advance credit payments with the premium tax credit for taxpayers who marry during the taxable year (the year of marriage rule). Specifically, under § 1.36B–4(b)(2), taxpayers who marry during a taxable year may compute their excess advance credit payments (the excess of their advance credit payments over the premium tax credit they are allowed) in a manner that is different from the computation used by other taxpayers if, in the taxable year of the marriage, at least one of the spouses received the benefit of advance credit payments for one or more months in the taxable year. This alternative computation may reduce the amount of excess advance credit payments the taxpayers have to repay for the year of marriage.

Several commenters asked that the final regulations allow victims of domestic abuse or spousal abandonment who receive advance credit payments under the assumption that they will file a separate return, but who reconcile with their spouses and file a joint return for the taxable year, to use the year of marriage rule (or a rule similar to the year of marriage rule) to compute their excess advance credit payments. In particular, the commenters noted that these victims of domestic abuse or spousal abandonment risk having excess advance credit payments similar to taxpayers who get married during the taxable year.

The final regulations do not expand the year of marriage rule to cover these taxpayers, nor do they create a similar rule for victims of domestic abuse or spousal abandonment who reconcile, because of the risk of abuse in adding such a rule. Unlike the date of a marriage, which can be substantiated, the date on which a marital reconciliation occurs is often unclear and difficult to establish both for taxpayers and the IRS. This situation could lead to taxpayers not within the parameters of the rule nevertheless using it either because they do not understand when it applies or because they want to lower their excess advance credit repayment and do not believe the IRS will challenge their use of the rule. Moreover, these taxpayers may attempt to use the rule for multiple years. Finally, in many cases, section 36B(f)(2)(B) limits the tax liability that a taxpayer incurs from excess advance credit payments. Thus, the Treasury Department and the IRS think it is appropriate to limit the year of marriage rule to taxpayers who marry during the taxable year.

D. Limiting relief to three consecutive years

Section 1.36B–2T(a)(2)(v) provides that relief from the married filing jointly requirement is not available if the taxpayer satisfied the eligibility requirements of § 1.36B–2T(b)(2)(ii) for each of the three preceding taxable years. Commenters recommended that this limitation be removed from the final regulations. Alternatively, commenters recommended that the final regulations provide a "good cause" exception to the three-year limitation.

Based on IRS data, most taxpayers who claim relief from the joint filing requirement need that relief for only one year. Since 2014, the first tax year that relief from the joint return filing requirement was available to victims of domestic abuse or spousal abandonment, only 0.2 to 0.3 percent of all taxpayers claiming the premium tax credit requested relief. Further, fewer than 3 percent of the individuals who claimed relief in 2014 also claimed relief in 2015. Given that current data indicates that so few taxpayers are claiming relief, and that few of these taxpayers are requesting relief for more than one year, the additional two years provided by the rule in the temporary regulations appears to be sufficient to provide relief for the small number of taxpayers who would benefit from relief for more than one year.

Accordingly, at this time, there does not appear to be a need to extend the availability of this relief beyond three consecutive years. However, the Treasury Department and the IRS will continue to monitor the data. In the meantime, comments are requested regarding how the IRS would administer a process for taxpayers to request relief beyond the three consecutive years permitted under the regulations. Specifically, comments are requested regarding when and how a taxpayer would request a good cause exception and what standards should apply to determine whether a taxpayer has demonstrated good cause.

E. Enforcement issues

Commenters raised concerns related to IRS examinations of taxpayers who obtain relief. Several commenters said the IRS should ensure that taxpayers who use the relief for domestic abuse or spousal abandonment are not subject to audits or penalties solely due to a conflict between their marital status on their Marketplace health insurance application (unmarried) and their filing status on their tax return (married filing separately). Pursuant to the forms and instructions, taxpayers indicate to the IRS that they are filing their tax return married filing separately because they are a victim of domestic abuse or spousal abandonment by checking the appropriate box on the Form 8962, Premium Tax Credit. As noted by the commenters, some Marketplaces, including the Federally-facilitated Marketplace, instruct victims of domestic violence or spousal abandonment who intend to use the married filing separately filing status on their tax return, to indicate on their Marketplace application that they are unmarried if they want to receive the benefit of advance credit payments or cost-sharing reductions. Under HHS guidance dated July 27, 2015, these individuals are not subject to a penalty for reporting their marital status in this manner. See https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Updated-Guidance-on-Victims-of-Domestic-Abuse-and-Spousal-Abandonment_7.pdf. Similarly, if these individuals then use the married filing separately status on their tax return, they have used a permitted filing status and are not subject to Internal Revenue Code penalties as a result of their filing status. Thus, these taxpayers will not be subject to a penalty merely because the marital status on their Marketplace application is not consistent with the marital status on their tax return.

Commenters also recommended that the final regulations describe the supporting documentation of domestic abuse that a taxpayer will need to establish that he or she was a victim of domestic abuse in case of an IRS examination of the taxpayer's return. Publication 974, Premium Tax Credit, provides examples of documentation that victims of domestic abuse may use to substantiate that they qualify for the relief. Publication 974 also includes substantiation information for victims of spousal abandonment. However, these examples are merely illustrative. As stated in the regulations, the IRS will consider all the facts and circumstances in the case of an examination. As a result, a description of specific documentation is not included in the final regulations.

F. Enrollment period

Several commenters urged HHS to provide an open enrollment period if expanded rules for relief are adopted so taxpayers that are eligible for relief due to domestic abuse or spousal abandonment may enroll in a qualified health plan and get advance credit payments. Commenters also recommended that taxpayers be allowed a special enrollment period if the abuse or abandonment occurs during a taxable year for which the victim had not enrolled in a qualified health plan prior to the abuse or abandonment. Other commenters suggested that Marketplaces alert taxpayers on the health insurance application of the availability of relief from the joint filing requirement for victims of domestic abuse or spousal abandonment.

The rules regarding enrollment and Marketplace health insurance applications are administered by HHS, and thus these comments are outside the scope of these final regulations. However, the Treasury Department and the IRS will share these comments with HHS. In addition, taxpayers should refer to HHS guidance that provides victims of domestic abuse and spousal abandonment a special enrollment period to apply for Marketplace coverage. See 45 CFR 155.420. *See also* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Updated-Guidance-on-Victims-of-Domestic-Abuse-and-Spousal-Abandonment_7.pdf.*; https://marketplace.cms.gov/technical-assistance-resources/assisting-victims-of-domestic-violence.PDF*.

Commenters requested that the IRS alert taxpayers regarding the operational limitations in the Federally-Facilitated Marketplace that require victims of domestic abuse or spousal abandonment who intend to file a return separate from their spouse and claim a premium tax credit to indicate that they are unmarried on their health insurance application. HHS, and not the IRS, regulates the Federally-Facilitated Marketplace. Therefore, HHS, and not the IRS, is in the best position to provide taxpayers with information regarding operation of the Marketplace. Moreover, HHS has made available instructions for taxpayers who, because they are victims of domestic abuse or spousal abandonment, intend to use the married filing separately status on their tax returns, but still want to have advance credit payments made for their Marketplace coverage. Thus, no changes to IRS instructions or other items available to taxpayers on www.irs.gov are necessary to address this comment.

G. Forms and instructions

Numerous commenters suggested changes to IRS forms and instructions and the manner in which the forms and instructions should address the married filing jointly exception for victims of domestic abuse and spousal abandonment. Most of these suggestions were incorporated in the forms and instructions after the temporary regulations were published and, consequently, are not specifically discussed in this preamble.

One commenter suggested that taxpayers who are providing a copy of Form 8962 to parties other than the IRS, such as states when filing state tax returns, be allowed to omit or redact the married filing separately exception checkbox when sending the form to these non-IRS parties. IRS rules do not affect whether and in what format taxpayers share their own taxpayer information with third parties. Therefore, no change to the form, instructions, or proposed and temporary regulations is needed to address this comment.

2. *Allocations for Reconciliation of Advance Credit Payments and the Premium Tax Credit*

Section 36B(f)(1) requires taxpayers who receive the benefit of advance credit payments for a taxable year to file a tax return and reconcile the advance credit payments with the premium tax credit the taxpayer is allowed for the taxable year. Section 1.36B–4T(a)(1)(ii) provides that a taxpayer must reconcile the advance credit payments of all members of the taxpayer's family for the taxable year with the premium tax credit the taxpayer is allowed for the taxable year. A taxpayer's family includes the taxpayer, the taxpayer's spouse, and the taxpayer's dependents. See section 1.36B–1(d). Under section 36B(f)(2)(A), the taxpayer's income tax liability is increased by the amount that the advance credit payments for the taxable year exceed the premium tax credit allowed for the taxable year, subject to the repayment limitations in section 36B(f)(2)(B).

In some cases, a qualified health plan covers members of more than one family. To compute the premium tax credit and reconcile the advance credit payments with the premium tax credit allowed in these cases, each family needs to know the enrollment premiums, the premiums for the applicable benchmark plan, and the advance credit payments allocable to each family enrolled in the plan.

Section 1.36B–4T provides allocation rules for situations in which enrollment premiums, the premiums for the applicable benchmark plan, and advance credit payments (policy amounts) for a qualified health plan must be allocated between two or more families. The temporary regulations provide specific allocation rules depending on whether the situation involves married individuals who file separately, formerly married individuals who divorced or separated during the taxable year, or individuals such as children who are enrolled in a qualified health plan with one parent but are claimed as a dependent by the other parent who is not enrolled in the plan (a shifting enrollee). The allocation rules for divorced or separated taxpayers and for shifting enrollee situations allow the affected taxpayers to agree on an allocation percentage. However, if there is no agreement, divorced or separated taxpayers must allocate 50 percent of the enrollment premiums, applicable benchmark plan premiums, and advance credit payments to each of the former spouses. A taxpayer's default allocation percentage for shifting enrollee situations is equal to the number of shifting enrollees claimed as a personal exemption by the taxpayer divided by the total number of individuals enrolled by the enrolling taxpayer in the same qualified health plan as the shifting enrollee (per capita allocation). Married taxpayers who do not file a joint return must allocate 50 percent of the enrollment premiums and advance credit payments to each of the spouses, unless the payments cover a period during which a qualified health plan covered only one of the spouses, only one of the spouses and his or her dependents, or only dependents of one of the spouses. Finally, the temporary regulations provide that the premiums for the applicable benchmark plan must be allocated in situations involving divorced and separated taxpayers and shifting enrollees, but not in situations involving married filing separately taxpayers.

A commenter recommended that the allocation rules should be simplified, and, in particular, not provide different allocation rules for the various allocation situations. In addition, the commenter stated that the applicable benchmark plan premium should never be allocated. Instead, the commenter recommended that taxpayers should determine their monthly applicable benchmark plan premium based on who in their family was, for that month, enrolled in Marketplace coverage and not eligible for other minimum essential coverage. Finally, the commenter recommended that the allocation rules should, in all cases, allow taxpayers with family members enrolled in the same qualified health plan to agree to the allocation percentages for the policy amounts. If there is no agreement, the commenter stated that a per capita allocation should be required in all allocation situations, not just those involving shifting enrollees.

Because the allocation rules have been in effect since 2014, the Treasury Department and the IRS have determined that, in the interest of sound tax administration, it is not appropriate to change the rules in these final regulations. Thus, the final regulations do not change the allocation rules provided in the temporary regulations. However, future guidance is being considered to address allocations of policy amounts, including requiring a per capita allocation in all allocation situations as suggested by the commenter.

Another commenter recommended that because allocating policy amounts is complex, taxpayers should be alerted to the importance of notifying Marketplaces of changes in circumstances, which may reduce the number of months for which allocations are required. Currently, the Form 8962 instructions and Publication 974 include language highlighting the importance of reporting changes in circumstances, as does www.irs.gov. In addition, in various forms of communication, Marketplaces emphasize the importance of reporting changes in circumstances. The Treasury Department and the IRS will continue to look for opportunities to remind taxpayers about the importance of notifying Marketplaces of changes in circumstances and to simplify the allocation rules.

3. *Correction of Computation of the Limitation Amount for Self-Employed Individuals*

Under section 162(l), a taxpayer who is an employee within the meaning of section 401(c)(1) (generally, a self-employed individual) is allowed a deduction for all or a portion of the premiums paid by the taxpayer during the taxable year for health insurance for the taxpayer, the taxpayer's spouse, the taxpayer's dependents, and any child of the taxpayer under the age of 27. Under section 162(l)(2)(A), the section 162(l) deduction is limited to the taxpayer's earned income from the trade or business, within the meaning of section 401(c), with respect to which the health insurance plan is established. In addition, section 280C(g) provides that no deduction is allowed under section 162(l) for the portion of premiums for a qualified health plan equal to the amount of the premium tax credit determined under section 36B(a) with respect to those premiums.

Section 1.36B–4T(a)(3)(iii) provides rules for the limitation on the additional tax under section 36B(f)(2)(B) (the limitation amount) for taxpayers who claim a section 162(l) deduction for premiums paid under a qualified health plan. Under § 1.36B–4T(a)(3)(iii)(B), the limitation amount determined under the rules for taxpayers claiming a section 162(l) deduction replaces the limitation amount that would otherwise be determined under the general rules of § 1.36B–4(a)(3)(ii). Under § 1.36B–4T(a)(3)(iii)(C), for purposes of determining the limitation amount in the case of a taxpayer who claims a section 162(l) deduction, a taxpayer's household income is determined by using a section 162(l) deduction equal to the sum of (1) specified premiums not paid through advance credit payments, (2) the limitation amount, and (3) any deduction allowable under section 162(l) for premiums other than specified premiums. Specified premiums are premiums for which the taxpayer may otherwise claim a deduction under section 162(l) for a qualified health plan covering the taxpayer or another member of the taxpayer's family (enrolled family member) for a month that a premium tax credit is allowed for the enrolled family member's coverage.

The limitation amount computation in § 1.36B–4T(a)(3)(iii)(C), however, inadvertently omitted a rule for situations in which a taxpayer's section 162(l) deduction must, under section 162(l)(2)(A), be limited to his or her earned income from the trade or business with respect to which the health insurance plan is established. The final regulations correct this oversight and clarify that household income for purposes of computing the limitation amount is determined by using a section 162(l) deduction equal to the lesser of (1) the sum of the specified premiums for the plan not paid through advance credit payments, the limitation amount, and any deduction allowable under section 162(l) for premiums other than specified premiums, or (2) the earned income from the trade or business with respect to which the health insurance plan is established.

Effective/Applicability Date

For applicability dates, see §§ 1.36B–2(d), 1.36B–3(m), 1.36B–4(c), and 1.162(l)–1(c).

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. Because the final regulations do not impose a collection of information requirement on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking that preceded the final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received.

Drafting Information

The principal authors of these final regulations are Suzanne R. Sinno, Stephen J. Toomey, and Shareen S. Pflanz of the Office of the Associate Chief Counsel (Income Tax & Accounting).

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.36B–0 is amended by:

1. Adding entries for § 1.36B–2(b)(2)(i), (ii), (iii), (iv), and (v).
2. Adding an entry for § 1.36B–2(d).
3. Adding an entry for § 1.36B–3(m).
4. Revising the entry for § 1.36B–4(a)(1)(ii) and adding entries for § 1.36B–4(a)(1)(ii)(A) and (B), (a)(1)(ii)(B)(*1*), (*2*), (*3*), (*4*), and (*5*), and (a)(1)(ii)(C).
5. Adding entries for § 1.36B–4(a)(3)(iii) and § 1.36B–4(a)(3)(iii)(A), (B), (C), (D), and (E).
6. Removing the entry for § 1.36B–4(b)(4).
7. Redesignating the entry for § 1.36B–4(b)(5) as § 1.36B–4(b)(4), revising the newly redesignated entry for § 1.36B–4(b)(4), and adding entries for § 1.36B–4(b)(4)(i) and (ii).
8. Redesignating the entry for § 1.36B–4(b)(6) as § 1.36B–4(b)(5).
9. Adding an entry for § 1.36B–4(c).

The revisions and additions read as follows:

§ 1.36B–0 Table of contents.

* * * * *

§ 1.36B–2 Eligibility for premium tax credit.

* * * * *

(b) * * *

(2) * * *

(i) *In general*.

(ii) *Victims of domestic abuse and abandonment*.

(iii) *Domestic abuse*.

(iv) *Abandonment*.

(v) *Three-year rule*.

* * * * *

(d) *Applicability date*.

* * * * *

§ 1.36B–3 Computing the premium assistance credit amount.

* * * * *

(m) *Applicability date*.

* * * * *

§ 1.36B–4 Reconciling the premium tax credit with advance credit payments.

(a) * * *

(1) * * *

(ii) *Allocation rules and responsibility for advance credit payments*.

(A) *In general*.

(B) *Individuals enrolled by a taxpayer and claimed as a personal exemption deduction by another taxpayer*.

(*1*) *In general*.

(2) *Allocation percentage*.

(*3*) *Allocating premiums*.

(*4*) *Allocating advance credit payments*.

(*5*) *Premiums for the applicable benchmark plan*.

(C) *Responsibility for advance credit payments for an individual for whom no personal exemption deduction is claimed*.

* * * * *

(3) * * *

(iii) *Limitation on additional tax for taxpayers who claim a section 162(l) deduction for a qualified health plan*.

(A) *In general*.

(B) *Determining the limitation amount*.

(C) *Requirements*.

(D) *Specified premiums not paid through advance credit payments*.

(E) *Examples*.

(4) * * *

(b) * * *

(4) *Taxpayers filing returns as married filing separately or head of household*.

(i) *Allocation of advance credit payments*.

(ii) *Allocation of premiums*.

* * * * *

(c) *Applicability date*.

* * * * *

Par. 3. Section 1.36B–2 is amended by:

1. Revising paragraphs (b)(2) and (c)(3)(v)(C).

2. Adding paragraph (d).

The revisions and additions read as follows:

§ 1.36B–2 Eligibility for premium tax credit.

* * * * *

(b) * * *

(2) *Married taxpayers must file joint return*—(i) *In general*. Except as provided in paragraph (b)(2)(ii) of this section, a taxpayer who is married (within the meaning of section 7703) at the close of the taxable year is an applicable taxpayer only if the taxpayer and the taxpayer's spouse file a joint return for the taxable year.

(ii) *Victims of domestic abuse and abandonment*. Except as provided in paragraph (b)(2)(v) of this section, a married taxpayer satisfies the joint filing requirement of paragraph (b)(2)(i) of this section if the taxpayer files a tax return using a filing status of married filing separately and the taxpayer—

(A) Is living apart from the taxpayer's spouse at the time the taxpayer files the tax return;

(B) Is unable to file a joint return because the taxpayer is a victim of domestic abuse, as described in paragraph (b)(2)(iii) of this section, or spousal abandonment, as described in paragraph (b)(2)(iv) of this section; and

(C) Certifies on the return, in accordance with the relevant instructions, that the taxpayer meets the criteria of this paragraph (b)(2)(ii).

(iii) *Domestic abuse*. For purposes of paragraph (b)(2)(ii) of this section, domestic abuse includes physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate, and intimidate, or to undermine the victim's ability to reason independently. All the facts and circumstances are considered in determining whether an individual is abused, including the effects of alcohol or drug abuse by the victim's spouse. Depending on the facts and circumstances, abuse of the victim's child or another family member living in the household may constitute abuse of the victim.

(iv) *Abandonment*. For purposes of paragraph (b)(2)(ii) of this section, a taxpayer is a victim of spousal abandonment for a taxable year if, taking into account all facts and circumstances, the taxpayer is unable to locate his or her spouse after reasonable diligence.

(v) *Three-year rule*. Paragraph (b)(2)(ii) of this section does not apply if the taxpayer met the requirements of paragraph (b)(2)(ii) of this section for each of the three preceding taxable years.

* * * * *

(c) * * *

(3) * * *

(v) * * *

(C) *Required contribution percentage*. The required contribution percentage is 9.5 percent. For plan years beginning in a calendar year after 2014, the percentage will be adjusted by the ratio of premium growth to income growth for the preceding calendar year and may be further adjusted to reflect changes to the data used to compute the ratio of premium growth to income growth for the 2014 calendar year or the data sources used to compute the ratio of premium growth to income growth. Premium growth and income growth will be determined under published guidance, see § 601.601(d)(2) of this chapter. In addition, the percentage may be adjusted for plan years beginning in a calendar year after 2018 to reflect rates of premium growth relative to growth in the consumer price index.

* * * * *

(d) *Applicability date*. Paragraphs (b)(2) and (c)(3)(v)(C) of this section apply to taxable years beginning after December 31, 2013.

§ 1.36B–2T [Removed]

Par. 4. Section 1.36B–2T is removed.

Par. 5. Section 1.36B–3 is amended by revising paragraphs (g)(1) and (m) to read as follows:

§ 1.36B–3 Computing the premium assistance credit amount.

* * * * *

(g) * * * (1) *In general.* The applicable percentage multiplied by a taxpayer's household income determines the taxpayer's annual required share of premiums for the benchmark plan. The required share is divided by 12 and this monthly amount is subtracted from the adjusted monthly premium for the applicable benchmark plan when computing the premium assistance amount. The applicable percentage is computed by first determining the percentage that the taxpayer's household income bears to the Federal poverty line for the taxpayer's family size. The resulting Federal poverty line percentage is then compared to the income categories described in the table in paragraph (g)(2) of this section. An applicable percentage within an income category increases on a sliding scale in a linear manner and is rounded to the nearest one-hundredth of one percent. For taxable years beginning after December 31, 2014, the applicable percentages in the table will be adjusted by the ratio of premium growth to income growth for the preceding calendar year and may be further adjusted to reflect changes to the data used to compute the ratio of premium growth to income growth for the 2014 calendar year or the data sources used to compute the ratio of premium growth to income growth. Premium growth and income growth will be determined in accordance with published guidance, see § 601.601(d)(2) of this chapter. In addition, the applicable percentages in the table may be adjusted for taxable years beginning after December 31, 2018, to reflect rates of premium growth relative to growth in the consumer price index.

* * * * *

(m) *Applicability date*. Paragraph (g)(1) of this section applies to taxable years beginning after December 31, 2013.

§ 1.36B–3T [Removed]

Par. 6. Section 1.36B–3T is removed.

Par. 7. Section 1.36B–4 is amended by:

1. Revising paragraphs (a)(1)(ii) and (a)(3)(iii).

2. In paragraph (a)(4), revising *Examples 4*, *10*, *11*, *12*, *13*, *14*, and *15*.

3. Revising paragraphs (b)(3) and (4).

4. In paragraph (b)(5), revising *Examples 9* and *10*.

5. Revising paragraph (c).

The revisions read as follows:

§ 1.36B–4 Reconciling the premium tax credit with advance credit payments.

(a) * * *

(1) * * *

(ii) *Allocation rules and responsibility for advance credit payments*—(A) *In general*. A taxpayer must reconcile all advance credit payments for coverage of any member of the taxpayer's family.

(B) *Individuals enrolled by a taxpayer and claimed as a personal exemption deduction by another taxpayer*—(*1*) *In general*. If a taxpayer (the enrolling taxpayer) enrolls an individual in a qualified health plan and another taxpayer (the claiming taxpayer) claims a personal exemption deduction for the individual (the shifting enrollee), then for purposes of computing each taxpayer's premium tax credit and reconciling any advance credit payments, the enrollment premiums and advance credit payments for the plan in which the shifting enrollee was enrolled are allocated under this paragraph (a)(1)(ii)(B) according to the allocation percentage described in paragraph (a)(1)(ii)(B)(*2*) of this section. If advance credit payments are allocated under paragraph (a)(1)(ii)(B)(*4*) of this section, the claiming taxpayer and enrolling taxpayer must use this same allocation percentage to calculate their § 1.36B–3(d)(1)(ii) adjusted monthly premiums for the applicable benchmark plan (benchmark plan premiums). This paragraph (a)(1)(ii)(B) does not apply to amounts allocated under § 1.36B–3(h) (qualified health plan covering more than one family) or if the shifting enrollee or enrollees are the only individuals enrolled in the qualified health plan. For purposes of this paragraph (a)(1)(ii)(B)(*1*), a taxpayer who is expected at enrollment in a qualified health plan to be the taxpayer filing an income tax return for the year of coverage with respect to an individual enrolling in the plan has enrolled that individual.

(*2*) *Allocation percentage*. The enrolling taxpayer and claiming taxpayer may agree on any allocation percentage between zero and one hundred percent. If the enrolling taxpayer and claiming taxpayer do not agree on an allocation percentage, the percentage is equal to the number of shifting enrollees claimed as a personal exemption deduction by the claiming taxpayer divided by the number of individuals enrolled by the enrolling taxpayer in the same qualified health plan as the shifting enrollee.

(*3*) *Allocating premiums*. In computing the premium tax credit, the claiming taxpayer is allocated a portion of the enrollment premiums for the plan in which the shifting enrollee was enrolled equal to the enrollment premiums times the allocation percentage. The enrolling taxpayer is allocated the remainder of the enrollment premiums not allocated to one or more claiming taxpayers.

(*4*) *Allocating advance credit payments*. In reconciling any advance credit payments, the claiming taxpayer is allocated a portion of the advance credit payments for the plan in which the shifting enrollee was enrolled equal to the enrolling taxpayer's advance credit payments for the plan times the allocation percentage. The enrolling taxpayer is allocated the remainder of the advance credit payments not allocated to one or more claiming taxpayers. This paragraph (a)(1)(ii)(B)(*4*) only applies in situations in which advance credit payments are made for coverage of a shifting enrollee.

(*5*) *Premiums for the applicable benchmark plan*. If paragraph (a)(1)(ii)(B)(*4*) of this section applies, the claiming taxpayer's benchmark plan premium is the sum of the benchmark plan premium for the claiming taxpayer's coverage family, excluding the shifting enrollee or enrollees, and the allocable portion. The allocable portion for purposes of this paragraph (a)(1)(ii)(B)(*5*) is the product of the benchmark plan premium for the enrolling taxpayer's coverage family if the shifting enrollee was a member of the enrolling taxpayer's coverage family and the allocation percentage. If the enrolling taxpayer's coverage family is enrolled in more than one qualified health plan, the allocable portion is determined as if the enrolling taxpayer's coverage family includes only the coverage family members who enrolled in the same plan as the shifting enrollee or enrollees. The enrolling taxpayer's benchmark plan premium is the benchmark plan premium for the enrolling taxpayer's coverage family had the shifting enrollee or enrollees remained a part of the enrolling taxpayer's coverage family, minus the allocable portion.

(C) *Responsibility for advance credit payments for an individual for whom no personal exemption deduction is claimed*. If advance credit payments are made for coverage of an individual for whom no taxpayer claims a personal exemption deduction, the taxpayer who attested to the Exchange to the intention to claim a personal exemption deduction for the individual as part of the advance credit payment eligibility determination for coverage of the individual must reconcile the advance credit payments.

* * * * *

(3) * * *

(iii) *Limitation on additional tax for taxpayers who claim a section 162(l) deduction for a qualified health plan*—(A) *In general*. A taxpayer who receives advance credit payments and deducts premiums for a qualified health plan under section 162(l) must use paragraph (a)(3)(iii)(B), and paragraph (a)(3)(iii)(C) or (D), of this section to determine the limitation on additional tax in this paragraph (a)(3) (limitation amount). Taxpayers must make this determination before calculating their section 162(l) deduction and premium tax credit. For additional rules for taxpayers who may claim a deduction under section 162(l) for a qualified health plan for which advance credit payments are made, see § 1.162(l)–1.

(B) *Determining the limitation amount*. A taxpayer described in paragraph (a)(3)(iii)(A) of this section must use the limitation amount for which the taxpayer qualifies under paragraph (a)(3)(iii)(C) or (D) of this section. The limitation amount determined under this paragraph (a)(3)(iii) replaces the limitation amount that would otherwise be determined under the additional tax limitation table in paragraph (a)(3)(ii) of this section. In applying paragraph (a)(3)(iii)(C) of this section, a taxpayer must first determine whether he or she qualifies for the limitation amount applicable to taxpayers with household income of less than 200 percent of the Federal poverty line for the taxpayer's family size. If the taxpayer does not qualify to use the limitation amount applicable to taxpayers with household income of less than 200 percent of the Federal poverty line for the taxpayer's family size, the taxpayer must next determine whether he or she qualifies for the limitation applicable to taxpayers with household income of less than 300 percent of the Federal poverty line for the taxpayer's family size. If the taxpayer does not qualify to use the limitation amount applicable to taxpayers with household income of less than 300 percent of the Federal poverty line for the taxpayer's family size, the taxpayer must next determine whether he or she qualifies for the limitation applicable to taxpayers with household income of less than 400 percent of the Federal poverty line for the taxpayer's family size. If the taxpayer does not qualify to use the limitation amount applicable to taxpayers with household income of less than 200 percent, 300 percent, or 400 percent of the Federal poverty line for the taxpayer's family size, the limitation on additional tax under section 36B(f)(2)(B) does not apply to the taxpayer.

(C) *Requirements*. A taxpayer meets the requirements of this paragraph (a)(3)(iii)(C) for a limitation amount if the taxpayer's household income as a percentage of the Federal poverty line is less than or equal to the maximum household income as a percentage of the Federal poverty line for which that limitation is available. Household income for this purpose is determined by using a section 162(l) deduction equal to the lesser of—

(*1*) The sum of the specified premiums for the plan not paid through advance credit payments, the limitation amount (determined without regard to paragraph (a)(1)(iii)(C)(*2*) of this section), and any deduction allowable under section 162(l) for premiums other than specified premiums, and

(*2*) The earned income from the trade or business with respect to which the health insurance plan is established.

(D) *Specified premiums not paid through advance credit payments*. For purposes of paragraph (a)(3)(iii)(C) of this section, specified premiums not paid through advance credit payments means specified premiums, as defined in § 1.162(l)–1(a)(2), minus advance credit payments made with respect to the specified premiums.

(E) *Examples*. For examples illustrating the rules of this paragraph (a)(3)(iii), see *Examples 13*, *14*, and *15* of paragraph (a)(4) of this section.

(4) * * *

Example 4. Family size decreases. (i) Taxpayers B and C are married and have two children, K and L (ages 17 and 20), whom they claim as dependents in 2013. The Exchange for their rating area projects their 2014 household income to be $63,388 (275 percent of the Federal poverty line for a family of four, applicable percentage 8.78). B and C enroll in a qualified health plan for 2014 that covers the four family members. The annual premium for the applicable benchmark plan is $14,100. B's and C's advance credit payments for 2014 are $8,535, computed as follows: benchmark plan premium of $14,100 less contribution amount of $5,565 (projected household income of $63,388 × .0878) = $8,535.

(ii) In 2014, B and C do not claim L as their dependent (and no taxpayer claims a personal exemption deduction for L). Consequently, B's and C's family size for 2014 is three, their household income of $63,388 is 332 percent of the Federal poverty line for a family of three (applicable percentage 9.5), and the annual premium for their applicable benchmark plan is $12,000. Their premium tax credit for 2014 is $5,978 ($12,000 benchmark plan premium less $6,022 contribution amount (household income of $63,388 x .095)). Because B's and C's advance credit payments for 2014 are $8,535 and their 2014 credit is $5,978, B and C have excess advance payments of $2,557. B's and C's additional tax liability for 2014 under paragraph (a)(1) of this section, however, is limited to $2,500 under paragraph (a)(3) of this section.

* * * * *

Example 10. Allocation percentage, agreement on allocation. (i) Taxpayers G and H are divorced and have two children, J and K. G enrolls herself and J and K in a qualified health plan for 2014. The premium for the plan in which G enrolls is $13,000. The Exchange in G's rating area approves advance credit payments for G based on a family size of three, an annual benchmark plan premium of $12,000, and projected 2014 household income of $58,590 (300 percent of the Federal poverty line for a family of three, applicable percentage 9.5). G's advance credit payments for 2014 are $6,434 ($12,000 benchmark plan premium less $5,566 contribution amount (household income of $58,590 × .095)). G's actual household income for 2014 is $58,900.

(ii) K lives with H for more than half of 2014 and H claims K as a dependent for 2014. G and H agree to an allocation percentage, as described in paragraph (a)(1)(ii)(B)(*2*) of this section, of 20 percent. Under the agreement, H is allocated 20 percent of the items to be allocated, and G is allocated the remainder of those items.

(iii) If H is eligible for a premium tax credit, H takes into account $2,600 of the premiums for the plan in which K was enrolled ($13,000 × .20) and $2,400 of G's benchmark plan premium ($12,000 × .20). In addition, H is responsible for reconciling $1,287 ($6,434 × .20) of the advance credit payments for K's coverage.

(iv) G's family size for 2014 includes only G and J and G's household income of $58,900 is 380 percent of the Federal poverty line for a family of two (applicable percentage 9.5). G's benchmark plan premium for 2014 is $9,600 (the benchmark premium for the plan covering G, J, and K ($12,000), minus the amount allocated to H ($2,400). Consequently, G's premium tax credit is $4,004 (G's benchmark plan premium of $9,600 minus G's contribution amount of $5,596 ($58,900 × .095)). G has an excess advance payment of $1,143 (the excess of the advance credit payments of $5,147 ($6,434 – $1,287 allocated to H) over the premium tax credit of $4,004).

Example 11. Allocation percentage, no agreement on allocation. (i) The facts are the same as in *Example 10* of paragraph (a)(4) of this section, except that G and H do not agree on an allocation percentage. Under paragraph (a)(1)(ii)(B)(*2*) of this section, the allocation percentage is 33 percent, computed as follows: the number of shifting enrollees, 1 (K), divided by the number of individuals enrolled by the enrolling taxpayer on the same qualified health plan as the shifting enrollee, 3 (G, J, and K). Thus, H is allocated 33 percent of the items to be allocated, and G is allocated the remainder of those items.

(ii) If H is eligible for a premium tax credit, H takes into account $4,290 of the premiums for the plan in which K was enrolled ($13,000 × .33). H, in computing H's benchmark plan premium, must include $3,960 of G's benchmark plan premium ($12,000 × .33). In addition, H is responsible for reconciling $2,123 ($6,434 × .33) of the advance credit payments for K's coverage.

(iii) G's benchmark plan premium for 2014 is $8,040 (the benchmark premium for the plan covering G, J, and K ($12,000), minus the amount allocated to H ($3,960). Consequently, G's premium tax credit is $2,444 (G's benchmark plan premium of $8,040 minus G's contribution amount of $5,596 ($58,900 × .095)). G has an excess advance credit payment of $1,867 (the excess of the advance credit payments of $4,311 ($6,434 – $2,123 allocated to H) over the premium tax credit of $2,444).

Example 12. Allocations for an emancipated child. Spouses L and M enroll in a qualified health plan with their child, N. L and M attest that they will claim N as a dependent and advance credit payments are made for the coverage of all three family members. However, N files his own return and claims a personal exemption deduction for himself for the taxable year. Under paragraph (a)(1)(ii)(B)(*1*) of this section, L and M are enrolling taxpayers, N is a claiming taxpayer, and all are subject to the allocation rules in paragraph (a)(1)(ii)(B) of this section.

Example 13. Taxpayer with advance credit payments allowed a section 162(l) deduction but not a limitation on additional tax. (i) In 2014, B, B's spouse, and their two dependents enroll in the applicable second lowest cost silver plan with an annual premium of $14,000. B's advance credit payments attributable to the premiums are $8,000. B is self-employed for all of 2014 and derives $75,000 of earnings from B's trade or business. B's household income without including a deduction under section 162(l) for specified premiums is $103,700. The Federal poverty line for a family the size of B's family is $23,550.

(ii) Because B received the benefit of advance credit payments and deducts premiums for a qualified health plan under section 162(l), B must determine whether B is allowed a limitation on additional tax under paragraph (a)(3)(iii) of this section. B begins by testing eligibility for the $600 limitation amount for taxpayers with household income at less than 200 percent of the Federal poverty line for the taxpayer's family size. B determines household income as a percentage of the Federal poverty line by taking a section 162(l) deduction equal to the lesser of $6,600 (the sum of the amount of premiums not paid through advance credit payments, $6,000 ($14,000 – $8,000), and the limitation amount, $600) and $75,000 (the earned income from the trade or business with respect to which the health insurance plan is established). The result is $97,100 ($103,700–$6,600) or 412 percent of the Federal poverty line for B's family size. Since 412 percent is not less than 200 percent, B may not use a $600 limitation amount.

(iii) B performs the same calculation for the $1,500 ($103,700 – $7,500 = $96,200 or 408 percent of the Federal poverty line) and $2,500 limitation amounts ($103,700 – $8,500 = $95,200 or 404 percent of the Federal poverty line), the amounts for taxpayers with household income of less than 300 percent or 400 percent, respectively, of the Federal poverty line for the taxpayer's family size, and determines that B may not use either of those limitation amounts. Because B does not meet the requirements of paragraph (a)(3)(iii) of this section for any of the limitation amounts in section 36B(f)(2)(B), B is not eligible for the limitation on additional tax for excess advance credit payments.

(iv) Although B may not claim a limitation on additional tax for excess advance credit payments, B may still be eligible for a premium tax credit. B would determine eligibility for the premium tax credit, the amount of the premium tax credit, and the section 162(l) deduction using the rules under section 36B and section 162(l), applying no limitation on additional tax.

Example 14. Taxpayer with advance credit payments allowed a section 162(l) deduction and a limitation on additional tax. (i) The facts are the same as in *Example 13* of paragraph (a)(4) of this section, except that B's household income without including a deduction under section 162(l) for specified premiums is $78,802.

(ii) Because B received the benefit of advance credit payments and deducts premiums for a qualified health plan under section 162(l), B must determine whether B is allowed a limitation on additional tax under paragraph (a)(3)(iii) of this section. B first determines that B does not meet the requirements of paragraph (a)(3)(iii)(C) of this section for using the $600 or $1,500 limitation amounts, the amounts for taxpayers with household income of less than 200 percent or 300 percent, respectively, of the Federal poverty line for the taxpayer's family size. That is because B's household income as a percentage of the Federal poverty line, determined by using a section 162(l) deduction for premiums for the qualified health plan equal to the lesser of the sum of the premiums for the plan not paid through advance credit payments and the limitation amount, and the earned income from the trade or business with respect to which the health insurance plan is established, is more than the maximum household income as a percentage of the Federal poverty line for which that limitation is available (using the $600 limitation, B's household income would be $72,202 ($78,802 – ($6,000 + $600)), which is 307 percent of the Federal poverty line for B's family size; and using the $1,500 limitation, B's household income would be $71,302 ($78,802 – ($6,000 + $1,500)), which is 303 percent of the Federal poverty line for B's family size).

(iii) However, B meets the requirements of paragraph (a)(3)(iii)(C) of this section using the $2,500 limitation amount for taxpayers with household income of less than 400 percent of the Federal poverty line for the taxpayer's family size. That is because B's household income as a percentage of the Federal poverty line by taking a section 162(l) deduction equal to the lesser of $8,500 (the sum of the amount of premiums not paid through advance credit payments, $6,000, and the limitation amount, $2,500) and $75,000 (the earned income from the trade or business with respect to which the health insurance plan is established), is $70,302 (299 percent of the Federal poverty line), which is below 400 percent of the Federal poverty line for B's family size, and is less than the maximum amount for which that limitation is available. Thus, B uses a limitation amount of $2,500 in computing B's additional tax on excess advance credit payments.

(iv) B may determine the amount of the premium tax credit and the section 162(l) deduction using the rules under section 36B and section 162(l), applying the $2,500 limitation amount determined above.

Example 15. Taxpayer with advance credit payments allowed a section 162(l) deduction and a limitation on additional tax limited to earned income from trade or business. (i) In 2017, C, C's spouse, and their two dependents enroll in the applicable second lowest cost silver plan with an annual premium of $14,000. C's advance credit payments attributable to the premiums are $8,000. C is self-employed for all of 2017 and derives $3,000 of earnings from C's trade or business. C's household income, without including a deduction under section 162(l) for specified premiums, is $39,100. The Federal poverty line for a family the size of C's family is $24,600.

(ii) Because C received the benefit of advance credit payments and deducts premiums for a qualified health plan under section 162(l), C must determine whether C is allowed a limitation on additional tax under paragraph (a)(3)(iii) of this section. C begins by testing eligibility for the $600 limitation amount for taxpayers with household income at less than 200 percent of the Federal poverty line for the taxpayer's family size. C determines household income as a percentage of the Federal poverty line by taking a section 162(l) deduction equal to the lesser of $6,600 (the sum of the amount of premiums not paid through advance credit payments, $6,000 ($14,000 – $8,000), and the limitation amount, $600), and $3,000 (C's earned income from the trade or business with respect to which the health insurance plan is established). The result is $36,100 ($39,100 – $3,000) or 147 percent of the Federal poverty line for C's family size. Because 147 percent is less than 200 percent, the limitation amount under paragraph (a)(3)(iii) of this section that C uses in computing C's additional tax on excess advance credit payments is $600.

(iii) C may determine the amount of the premium tax credit and the section 162(l) deduction using the rules under section 36B and section 162(l), applying the $600 limitation amount determined above.

(b) * * *

(3) *Taxpayers not married to each other at the end of the taxable year*. Taxpayers who are married (within the meaning of section 7703) to each other during a taxable year but legally separate under a decree of divorce or of separate maintenance during the taxable year, and who are enrolled in the same qualified health plan at any time during the taxable year must allocate the benchmark plan premiums, the enrollment premiums, and the advance credit payments for the period the taxpayers are married during the taxable year. Taxpayers must also allocate these items if one of the taxpayers has a dependent enrolled in the same plan as the taxpayer's former spouse or enrolled in the same plan as a dependent of the taxpayer's former spouse. The taxpayers may allocate these items to each former spouse in any proportion but must allocate all items in the same proportion. If the taxpayers do not agree on an allocation that is reported to the IRS in accordance with the relevant forms and instructions, 50 percent of: the benchmark plan premiums; the enrollment premiums; and the advance credit payments for the married period, is allocated to each taxpayer. If for a period a plan covers only one of the taxpayers and no dependents, only one of the taxpayers and one or more dependents of that same taxpayer, or only one or more dependents of one of the taxpayers, then the benchmark plan premiums, the enrollment premiums, and the advance credit payments for that period are allocated entirely to that taxpayer.

(4) *Taxpayers filing returns as married filing separately or head of household*—(i) *Allocation of advance credit payments*. Except as provided in § 1.36B–2(b)(2)(ii), the premium tax credit is allowed to married (within the meaning of section 7703) taxpayers only if they file joint returns. *See* § 1.36B–2(b)(2)(i). Taxpayers who receive advance credit payments as married taxpayers and who do not file a joint return must allocate the advance credit payments for coverage under a qualified health plan equally to each taxpayer for any period the plan covers and in which advance credit payments are made for

both taxpayers, only one of the taxpayers and one or more dependents of the other taxpayer, or one or more dependents of both taxpayers. If, for a period a plan covers, advance credit payments are made for only one of the taxpayers and no dependents, only one of the taxpayers and one or more dependents of that same taxpayer, or only one or more dependents of one of the taxpayers, the advance credit payments for that period are allocated entirely to that taxpayer. If one or both of the taxpayers is an applicable taxpayer eligible for a premium tax credit for the taxable year, the premium tax credit is computed by allocating the enrollment premiums under paragraph (b)(4)(ii) of this section. The repayment limitation described in paragraph (a)(3) of this section applies to each taxpayer based on the household income and family size reported on that taxpayer's return. This paragraph (b)(4) also applies to taxpayers who receive advance credit payments as married taxpayers and file a tax return using the head of household filing status.

(ii) *Allocation of premiums*. If taxpayers who are married within the meaning of section 7703, without regard to section 7703(b), do not file a joint return, 50 percent of the enrollment premiums are allocated to each taxpayer. However, all of the enrollment premiums are allocated to only one of the taxpayers for a period in which a qualified health plan covers only that taxpayer and no dependents, only that taxpayer and one or more dependents of that taxpayer, or only one or more dependents of that taxpayer.

(5) * * *

Example 9. (i) The facts are the same as in *Example 8* of paragraph (b)(5) of this section, except that X and Y live apart for over 6 months of the year and X properly files an income tax return as head of household. Under section 7703(b), X is treated as unmarried and therefore is not required to file a joint return. If X otherwise qualifies as an applicable taxpayer, X may claim the premium tax credit based on the household income and family size X reports on the return. Y is not an applicable taxpayer and is not eligible to claim the premium tax credit.

(ii) X must reconcile the amount of credit with advance credit payments under paragraph (a) of this section. The premium for the applicable benchmark plan covering X and his two dependents is $9,800. X's premium tax credit is computed as follows: $9,800 benchmark plan premium minus X's contribution amount of $5,700 ($60,000 × .095) equals $4,100.

(iii) Under paragraph (b)(4) of this section, half of the advance payments ($6,880/2 = $3,440) is allocated to X and half is allocated to Y. Thus, X is entitled to $660 additional premium tax credit ($4,100 – $3,440). Y has $3,440 excess advance payments, which is limited to $600 under paragraph (a)(3) of this section.

Example 10. (i) A is married to B at the close of 2014 and they have no dependents. A and B are enrolled in a qualified health plan for 2014 with an annual premium of $10,000 and advance credit payments of $6,500. A is not eligible for minimum essential coverage (other than coverage described in section 5000A(f)(1)(C)) for any month in 2014. A is a victim of domestic abuse as described in § 1.36B–2(b)(2)(iii). At the time A files her tax return for 2014, A is unable to file a joint return with B for 2014 because of the domestic abuse. A certifies on her 2014 return, in accordance with relevant instructions, that she is living apart from B and is unable to file a joint return because of domestic abuse. Thus, under § 1.36B–2(b)(2)(ii), A satisfies the joint return filing requirement in section 36B(c)(1)(C) for 2014.

(ii) A's family size for 2014 for purposes of computing the premium tax credit is one, and A is the only member of her coverage family. Thus, A's benchmark plan for all months of 2014 is the second lowest cost silver plan offered by the Exchange for A's rating area that covers A. A's household income includes only A's modified adjusted gross income. Under paragraph (b)(4)(ii) of this section, A takes into account $5,000 ($10,000 × .50) of the premiums for the plan in which she was enrolled in determining her premium tax credit. Further, A must reconcile $3,250 ($6,500 × .50) of the advance credit payments for her coverage under paragraph (b)(4)(i) of this section.

(c) *Applicability date*. Paragraphs (a)(1)(ii), (a)(3)(iii), (a)(4), *Examples 4*, *10*, *11*, *12*, *13*, *14*, and *15*, (b)(3), (b)(4), and (b)(5), *Examples 9* and *10* apply to taxable years beginning after December 31, 2013.

§ 1.36B–4T [Removed]

Par. 8. Section 1.36B–4T is removed.

Par. 9. § 1.162(l)–0 is added to read as follows:

§ 1.162(l)–0 Table of Contents.

This section lists the table of contents for § 1.162(l)–1.

Par. 10. Section 1.162(l)–1 is added to read as follows:

§ 1.162(l)–1 Deduction for health insurance costs of self-employed individuals.

(a) *Coordination of section 162(l) deduction for taxpayers subject to section 36B*—(1) *In general*. A taxpayer is allowed a deduction under section 162(l) for specified premiums, as defined in paragraph (a)(2) of this section, not to exceed an amount equal to the lesser of—

(i) The specified premiums less the premium tax credit attributable to the specified premiums; and

(ii) The sum of the specified premiums not paid through advance credit payments, as described in paragraph (a)(3) of this section, and the additional tax (if any) imposed under section 36B(f)(2)(A) and § 1.36B–4(a)(1) with respect to the specified premiums after application of the limitation on additional tax in section 36B(f)(2)(B) and § 1.36B–4(a)(3).

(2) *Specified premiums*. For purposes of paragraph (a)(1) of this section, specified premiums means premiums for a specified qualified health plan or plans for which the taxpayer may otherwise claim a deduction under section 162(l). For purposes of this paragraph (a)(2), a specified qualified health plan is a qualified health plan, as defined in § 1.36B–1(c), covering the taxpayer, the taxpayer's spouse, or a dependent of the taxpayer (enrolled family member) for a month that is a coverage month within the meaning of § 1.36B–3(c) for the enrolled family member. If a specified qualified health plan covers individuals other than enrolled family members, the specified premiums include only the portion of the premiums for the specified qualified health plan that is allocable to the enrolled family members under rules similar to § 1.36B–3(h), which provides rules for determining the amount under § 1.36B–3(d)(1) when two families are enrolled in the same qualified health plan.

(3) *Specified premiums not paid through advance credit payments*. For

purposes of paragraph (a)(1)(ii) of this section, specified premiums not paid through advance credit payments equal the amount of the specified premiums minus the advance credit payments attributable to the specified premiums.

(b) *Additional guidance*. The Secretary may provide by publication in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter) additional guidance on coordinating the deduction allowed under section 162(l) and the credit provided under section 36B.

(c) *Applicability date*. This section applies for taxable years beginning after December 31, 2013.

§ 1.162(l)–1T [Removed]

Par. 11. Section 1.162(l)–1T is removed.

Kirsten B. Wielobob,
Deputy Commissioner for Services and Enforcement.

Approved: July 14, 2017.

Thomas West,
Tax Legislative Counsel.

(Filed by the Office of the Federal Register on July 24, 2017, 4:15 p.m., and published in the issue of the Federal Register for July 26, 2017, 82 F.R. 34601)

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26 CFR 51.2 and 26 CFR 51.11

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 51

T.D. 9823

Branded Prescription Drug Fee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that define the term *controlled group* for purposes of the branded prescription drug fee. The final regulations supersede and adopt the text of temporary regulations that define the term *controlled group.* The final regulations affect persons engaged in the business of manufacturing or importing certain branded prescription drugs.

DATES: *Effective Date*: The final regulations are effective July 24, 2017.

Applicability Date: For dates of applicability, see § 51.11(b) of the final regulations.

FOR FURTHER INFORMATION CONTACT: Rachel S. Smith at (202) 317-6855 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The branded prescription drug fee was enacted by section 9008 of the Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010), as amended by section 1404 of the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029 (2010) (collectively the ACA). Section 9008 did not amend the Internal Revenue Code (Code) but cross-references specific Code sections.

On July 28, 2014, temporary regulations (TD 9684) relating to the fee on branded prescription drugs were published in the **Federal Register** (79 FR 43631) (2014 temporary regulations). A notice of proposed rulemaking (REG–123286–14) cross-referencing the temporary regulations was published in the **Federal Register** on the same day (79 FR 43699). The 2014 temporary regulations provided a definition of the term *controlled group* that was broader than the definition of the term *controlled group* in § 51.2T(e)(3) of the temporary regulations (TD 9544) published in the **Federal Register** (76 FR 51245) on August 18, 2011 (2011 temporary regulations).

Neither the Department of the Treasury (Treasury Department) nor the Internal Revenue Service (IRS) received any written comments with respect to the notice of proposed rulemaking and no public hearing was requested or held. The final regulations adopt the proposed regulations without change and the 2014 temporary regulations are removed.

Explanation of Provisions

The 2011 temporary regulations defined the term *controlled group* to mean a group of at least two covered entities that are treated as a single employer under section 52(a), 52(b), 414(m), or 414(o) of the Code. The 2014 temporary regulations defined the term *controlled group* more broadly to mean a group of two or more persons, including at least one person that is a covered entity, that is treated as a single employer under section 52(a), 52(b), 414(m), or 414(o) of the Code. These final regulations adopt the definition of *controlled group* contained in the 2014 temporary regulations without change.

The broader definition of the term *controlled group* in the 2014 temporary regulations and these final regulations is supported by the statutory language and is consistent with the way in which controlled group rules based on similar statutory language are applied, including how the term *controlled group* is defined in § 57.2(c)(1) for purposes of the health insurance providers fee under section 9010 of the ACA. Consistent with the preamble to the 2014 temporary regulations, the Treasury Department and the IRS continue to expect that the broader definition of the term *controlled group* in the final regulations will primarily affect the scope of joint and several liability for the fee and will not otherwise affect the administration of the fee.

The 2014 temporary regulations applied beginning on January 1, 2015 (i.e., starting with 2015 sales years), and are effective until July 24, 2017**.** These final regulations apply on and after July 24, 2017. Because both the 2014 temporary regulations and these final regulations provide the same definition of *controlled group* for purposes of section 9008 of the ACA, that definition applies continuously beginning with the 2015 sales year and 2017 fee year.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. Because the final regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded the final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received on the proposed regulations.

Drafting Information

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

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 51 is amended as follows:

PART 51 – BRANDED PRESCRIPTION DRUG FEE

Paragraph 1. The authority citation for part 51 is revised to read as follows:

Authority: 26 U.S.C. 7805; sec. 9008, Pub. L. 111–148, 124 Stat. 119.

Section 51.8 also issued under 26 U.S.C. 6302(a).

Section 51.6302–1 also issued under 26 U.S.C. 6302(a).

Par. 2. Section 51.2 is amended by revising paragraph (e)(3) to read as follows:

§ 51.2 Explanation of terms.

* * * * *

(e) * * *

(3) *Controlled group*. The term *controlled group* means a group of two or more persons, including at least one person that is a covered entity, that is treated as a single employer under section 52(a), 52(b), 414(m), or 414(o).

* * * * *

§ 51.2T [Removed]

Par. 3. Section 51.2T is removed.

Par. 4. Section 51.11 is amended by revising the section heading and paragraph (b) and removing paragraph (c) to read as follows:

§ 51.11 Applicability date.

* * * * *

(b) Section 51.2(e)(3) applies on and after July 24, 2017.

§ 51.11T [Removed]

Par. 5. Section 51.11T is removed.

Kirsten Wielobob,
Deputy Commissioner for Services and Enforcement.

Approved: July 17, 2017.

Tom West,
Tax Legislative Counsel.

(Filed by the Office of the Federal Register on July 24, 2017, 4:15 p.m., and published in the issue of the Federal Register for July 24, 2017, 82 F.R. 34611)

Part III. Administrative, Procedural, and Miscellaneous

One-Year Delay in the Application of § 1.385–2

Notice 2017–36

PURPOSE

Final and temporary regulations (T.D. 9790) under section 385 of the Internal Revenue Code (Code) were published in the Federal Register (81 FR 72858) on Friday, October 21, 2016. Notice 2017–38, 2017–30 IRB 1, issued by the Internal Revenue Service (IRS) and the Department of the Treasury (Treasury Department) on July 7, 2017, requested comments on all aspects of the final and temporary regulations under section 385. This notice announces and invites comments on a change to be made to the timing of application of certain portions of the final regulations under section 385. The affected regulations are set forth in 26 CFR § 1.385–2 and relate to the documentation necessary to determine whether an interest in a corporation is treated as stock or indebtedness for all purposes of the Code (Documentation Regulations).

Because taxpayers may be expending resources to develop systems and processes to comply with the Documentation Regulations, there is an urgent need for taxpayers to be aware of this change to the timing of application of the Documentation Regulations in advance of any agency actions in connection with Notice 2017–38.

BACKGROUND

I. In General

Section 385 authorizes the Secretary of the Treasury to prescribe rules to determine whether an interest in a corporation is treated for purposes of the Code as stock or indebtedness (or as in part stock and in part indebtedness) by setting forth factors to be taken into account with respect to particular factual situations.

On April 8, 2016, the Treasury Department and the IRS published proposed regulations (REG–108060–15) under section 385 of the Code (proposed regulations) in the Federal Register (81 FR 20912) concerning the treatment of certain interests in corporations as stock or indebtedness. A public hearing on the proposed regulations was held on July 14, 2016. The Treasury Department and the IRS also received numerous written comments in response to the proposed regulations, all of which are available at *www.regulations.gov* and were carefully considered in developing the final and temporary regulations.

The comments received on the proposed regulations, decisions reached by the Treasury Department and the IRS, and the revisions made to the proposed regulations as a result of the comments are thoroughly described in the preamble to T.D. 9790.

Under the proposed regulations, the Documentation Regulations would apply to interests issued or deemed issued on or after the date the proposed regulations were finalized.

Of particular relevance to this notice is the comment received from numerous sources that the applicability date of the proposed regulations would not give taxpayers adequate time to develop the necessary systems or processes to comply with the Documentation Regulations.

II. Summary of the Documentation Regulations

The Documentation Regulations in § 1.385–2 have two principal purposes. The first is to provide guidance regarding the documentation and other information that must be prepared, maintained, and provided to be used in the determination of whether an instrument subject to the Documentation Regulations will be treated as indebtedness for federal tax purposes. The second is to establish certain operating rules, presumptions, and factors to be taken into account in the making of any such determination. The Documentation Regulations, once applicable, implement these purposes by generally requiring taxpayers to prepare and maintain documentation that evidences specified "indebtedness factors" with respect to purported debt instruments subject to the regulations. Thus, compliance with the Documentation Regulations does not establish that an interest is indebtedness; it serves only to satisfy the minimum documentation for the determination to be made under general federal tax principles.

In response to the concern expressed by taxpayers that the proposed regulations provided inadequate time to begin complying with the Documentation Regulations, the final Documentation Regulations were made applicable only with respect to interests issued or deemed issued on or after January 1, 2018. See §§ 1.385–1(f), 1.385–2(d)(2)(iii), and 1.385–2(i).

Following the issuance of the final Documentation Regulations, the final and temporary regulations under section 385 were identified in Notice 2017–38 as significant tax regulations requiring additional review pursuant to Executive Order 13789.

CHANGE TO DOCUMENTATION REGULATIONS DELAYING THEIR APPLICATION

In response to the concern that taxpayers have continued to raise with the application of the Documentation Regulations to interests issued on or after January 1, 2018, and in light of further actions concerning the final and temporary regulations under section 385 in connection with the review of those regulations, the Treasury Department and the IRS have determined that these concerns warrant a delay in the application of the Documentation Regulations by 12 months. Accordingly, the Treasury Department and the IRS intend to amend the Documentation Regulations to apply only to interests issued or deemed issued on or after January 1, 2019. Pending the issuance of those regulations, taxpayers may rely on the delay in application of the Documentation Regulations set forth in this notice.

REQUEST FOR COMMENTS

Comments are requested concerning whether the proposed amendment and delay of the application of the Documentation Regulations affords adequate time for taxpayers to develop any necessary systems or processes to comply with the Documentation Regulations. Comments, identified by Notice 2017–36, may be submitted using one of the following methods:

- By Mail:

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2017–36)
Room 5203
P.O. Box 7602
Ben Franklin Station
Washington, D.C. 20044

- By Hand or Courier Delivery: Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR
(Notice 2017–36)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

- Electronic: Alternatively, persons may submit comments electronically to *Notice.Comments@irscounsel.treas.gov*. Please include "Notice 2017–36" in the subject line of any electronic communications.

All submissions will be available for public inspection and copying in Room 1621, 1111 Constitution Avenue, N.W., Washington, DC, from 9 a.m. to 4 p.m. Comments should be submitted no later than Friday, September 1, 2017.

DRAFTING INFORMATION

The principal author of this notice is Theresa A. Bell of the Office of Associate Chief Counsel (Corporate). For further information regarding this notice, contact Austin Diamond-Jones at (202) 317-5363 (not a toll-free number).

Part IV. Items of General Interest

Announcement 2017–10

Announcement 2017–10 amends Revenue Procedure 2017–39, 2017–26 I.R.B. 1286 to make the following corrections.

–Section 4.2.2. The correct title is Composite Substitute Statements to Recipients for Forms Specified in Sections 4.1.2 and 4.1.3.

–Section 4.2.2. The first paragraph is replaced with the following: A composite recipient statement for the forms specified in Sections 4.1.2 **or** 4.1.3 is permitted when one filer is reporting more than one type of payment during a calendar year to the same form recipient. A composite statement is **not** allowed for a combination of forms listed in Sections 4.1.2 **and** 4.1.3.

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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[1]A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2017–01 through 2017–26 is in Internal Revenue Bulletin 2017–26, dated June 27, 2017.

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[1]A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2017–01 through 2017–26 is in Internal Revenue Bulletin 2017–26, dated June 27, 2017.

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INTERNAL REVENUE BULLETIN

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