

INTERNAL REVENUE BULLETIN



HIGHLIGHTS OF THIS ISSUE

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

ADMINISTRATIVE

Rev. Proc. 2020-49, page 1122.

This revenue procedure provides temporary guidance regarding the public approval requirement under § 147(f) of the Internal Revenue Code for tax-exempt qualified private activity bonds. Specifically, in light of the continuing Coronavirus Disease 2019 pandemic, this revenue procedure extends until September 30, 2021, the time period described in section 4.02 of Rev. Proc. 2020-21, 2020-22 I.R.B. 872, during which certain telephonic hearings are permitted.

EMPLOYEE PLANS

REG.-122462-20, page 1137.

The IRS is issuing temporary regulations regarding coverage of preventive health services to implement section 3203 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which shortens the timeframe under which non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage must cover without cost sharing qualifying coronavirus preventive services, including recommended COVID-19 immunizations. The IRS is issuing the temporary regulations at the same time that the Employee Benefits Security Administration of the Department of Labor and the Office of Consumer Information and Insurance Oversight of the Department of Health and Human Services (HHS) are issuing substantially similar interim final rules with request for comments. The text of those temporary regulations also serves as the text of these proposed regulations.

EMPLOYEE TAX

Rev. Proc. 2020-47, page 1121.

This revenue procedure modifies the general procedures used by the IRS to implement the Gaming Industry Tip Com-

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pliance Agreement (GITCA) program. The GITCA program allows gaming industry employers to enter into voluntary agreements with the IRS to establish minimum tip rates for tipped employees in specified occupational categories. The GITCA program was established by Rev. Proc. 2003-35, and updated by Rev. Proc. 2007-32 with a new model GITCA. This revenue procedure modifies Rev. Proc. 2007-32 by extending the expiration and renewal term of a GITCA from three to five years.

INCOME TAX

Rev. Rul. 2020-25, page 1109.

2020 Base Period T-Bill Rate. The “base period T-bill rate” for the period ending September 30, 2020, is published as required by section 995(f) of the Internal Revenue Code.

Rev. Proc. 2020-50, page 1122.

This revenue procedure provides guidance for taxpayers wishing to apply §§ 1.168(k)-2 and 1.1502-68 of the Income Tax Regulations, or to rely on the proposed regulations under § 168(k) (REG-106808-19) published in 2019 for: (1) certain depreciable property acquired and placed in service by the taxpayer after September 27, 2017; (2) certain plants planted or grafted by the taxpayer, as applicable, after September 27, 2017; and (3) components acquired or self-constructed by the taxpayer after September 27, 2017, of certain larger self-constructed property. If the taxpayer retroactively applies §§ 1.168(k)-2 and 1.1502-68, or relies on the 2019 proposed regulations, this revenue procedure also allows the taxpayer to make a late election under § 168(k)(5), (k)(7), or (k)(10), § 1.168(k)-2(c) of the 2020 final regulations or the 2019 proposed regulations, or § 1.1502-68(c)(4), or to revoke an election under § 168(k)(5), (k)(7), or (k)(10), or § 1.168(k)-2(c) of the 2019 proposed regulations.

T.D. 9919, page 1073.

Nonresident aliens and foreign corporations are taxable in the United States on taxable income that is effectively connected with the conduct of a trade or business in the United States. These final regulations provide rules for determining the amount of effectively connected gain or loss recognized by a nonresident alien individual or foreign corporation from the sale or exchange of an interest in a partnership that is engaged in a trade or business within the United States. TD 9919. Published November 6, 2020.

TEMPORARY REGULATION**T.D. 9931, page 1087.**

The IRS is issuing temporary regulations regarding coverage of preventive health services to implement section 3203 of the

Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which shortens the timeframe under which non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage must cover without cost sharing qualifying coronavirus preventive services, including recommended COVID-19 immunizations. The IRS is issuing the temporary regulations at the same time that the Employee Benefits Security Administration of the Department of Labor and the Office of Consumer Information and Insurance Oversight of the Department of Health and Human Services (HHS) are issuing substantially similar interim final rules with request for comments.

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.

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Part I

26 CFR 1.864(c)(8)-1 Gain or Loss of Foreign Persons from Sale or Exchange of Certain Partnership Interests

T.D. 9919

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

Gain or Loss of Foreign Persons from Sale or Exchange of Certain Partnership Interests

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and temporary regulations.

SUMMARY: This document contains regulations that provide guidance for certain foreign persons that recognize gain or loss from the sale or exchange of an interest in a partnership that is engaged in a trade or business within the United States. The regulations also affect partnerships that, directly or indirectly, have foreign persons as partners.

DATES: *Effective date:* These regulations are effective on November 6, 2020.

Applicability dates: For dates of applicability, see §§1.864(c)(8)-1(j) and 1.897-7(c).

FOR FURTHER INFORMATION CONTACT: Chadwick Rowland or Ronald M. Gootzeit, (202) 317-6937 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

On December 27, 2018, the Department of the Treasury (the “Treasury Department”) and the IRS published proposed regulations (REG-113604-18)

under section 864(c)(8) in the **Federal Register** (83 FR 66647) (the “proposed regulations”). Section 864(c)(8) was added to the Internal Revenue Code (the “Code”) by the Tax Cuts and Jobs Act, Public Law 115-97 (2017) (the “Act”), which was enacted on December 22, 2017. The proposed regulations provide rules for determining the amount of gain or loss treated as effectively connected with the conduct of a trade or business within the United States (“effectively connected gain” or “effectively connected loss”) under section 864(c)(8), including certain rules that coordinate section 864(c)(8) with other relevant sections of the Code.

The Treasury Department and the IRS received written comments with respect to the proposed regulations. All written comments received in response to the proposed regulations are available at www.regulations.gov or upon request. No public hearing on the proposed regulations was requested or held.

The Treasury Department and the IRS have also published proposed regulations (REG-105476-18) in the **Federal Register** relating to the withholding of tax and information reporting with respect to certain dispositions by a foreign person of an interest in a partnership that is engaged in the conduct of a trade or business within the United States (the “proposed withholding regulations”). See 84 FR 21198 (May 13, 2019). The Treasury Department and the IRS plan to publish final withholding and information reporting regulations in a later issue of the **Federal Register**.

Summary of Comments and Explanation of Revisions

I. Overview

The final regulations retain the basic approach and structure of the proposed regulations with certain revisions. This Summary of Comments and Explanation of Revisions section discusses the comments received in response to the solicitation of comments in the proposed regulations and explains the revisions made in response to those comments.

II. Comments and Revisions to Proposed §1.864(c)(8)-1

A. Determining deemed sale EC gain or deemed sale EC loss

Section 864(c)(8)(A) provides that gain or loss of a nonresident alien individual or foreign corporation (a “foreign transferor”) from the sale, exchange, or other disposition (“transfer”) of an interest in a partnership that is engaged in any trade or business within the United States is treated as effectively connected gain or loss to the extent such gain or loss does not exceed the amount determined under section 864(c)(8)(B). In general, section 864(c)(8)(B) limits the amount of effectively connected gain or loss to the portion of the foreign transferor’s distributive share of gain or loss that would have been effectively connected if the partnership had sold all of its assets at fair market value (the deemed sale limitation). The proposed regulations illustrate how to determine the deemed sale limitation described in section 864(c)(8)(B), which the proposed regulations refer to as the aggregate deemed sale EC (“ADSEC”) amount. Once the ADSEC amount has been determined for each applicable category of gain or loss, the foreign transferor’s outside gain or loss in each category is compared to the relevant ADSEC gain or ADSEC loss amount for that category to determine the amount of effectively connected gain or effectively connected loss under section 864(c)(8). In general, this amount is determined through a three-step process. Step one determines the amount of gain or loss from each partnership asset as if the partnership conducted a deemed sale of all of its assets on the date of transfer (these amounts, deemed sale gain or deemed sale loss). Step two determines the amount of the deemed sale gain or loss that would be treated as effectively connected gain or loss with respect to each asset (these amounts are referred to as deemed sale EC gain or deemed sale EC loss). Finally, step three determines the foreign transferor’s distributive share of the deemed sale EC gain or deemed sale EC loss amounts determined in step two.

As noted in the preceding paragraph, step two requires the gain or loss from the deemed sale of each partnership asset to be analyzed to determine if the gain or loss is properly characterized as effectively connected gain or effectively connected loss. Sourcing determinations are often material in determining whether gain or loss is effectively connected with the conduct of a trade or business within the United States. See, for example, sections 864(c)(2) and (3). Because the sourcing rules in the Code and regulations are generally fact-specific, the application of these rules in the context of the deemed sale required by section 864(c)(8)(B) is unclear. For example, it is unclear how to apply the sourcing rules and principles contained in sections 865(e)(2)(A) and (e)(3) (and the regulations implementing those sections) (the U.S. office rule) to the deemed sale of partnership property required by section 864(c)(8)(B). Specifically, the application of the U.S. office rule depends upon factual determinations made regarding the underlying sale; that is, whether it is attributable to an office or other fixed place of business in the United States, and, with respect to inventory property, whether it is sold for use, disposition, or consumption outside the United States and whether an office or other fixed place of business maintained by the taxpayer in the foreign country materially participated in the sale. In a deemed sale, however, the required facts are generally not determinable because a sale has not actually occurred. Therefore, to address this lack of required facts and provide guidance on how to apply the sourcing provisions to deemed sales, the proposed regulations provide rules that serve as a proxy for the factual determinations that apply for purposes of sourcing deemed sale gain and loss and, in turn, for determining deemed sale EC gain and loss.

In general, proposed §1.864(c)(8)-1(c)(2)(i) treats all deemed sale gain and loss as attributable to an office or other fixed place of business maintained by the partnership in the United States, and does not treat inventory property as sold for use, disposition, or consumption outside the United States in a sale in which an office or other fixed place of business maintained by the partnership in a foreign country materially participates.

Thus, the rule in proposed §1.864(c)(8)-1(c)(2)(i) provides simplifying factual assumptions that generally treat deemed sale gain and loss as U.S. source. An exception to this rule is provided in the proposed regulations if, during the ten-year period ending on the date of transfer, the asset in question produced no income or gain that was taxable as income that was effectively connected with the conduct of a trade or business within the United States by the partnership (or a predecessor), and the asset has not been used, or held for use, in the conduct of a trade or business within the United States by the partnership (or a predecessor) (the “ten-year exception”). Proposed §1.864(c)(8)-1(c)(2)(ii).

A comment on the interaction between section 864(c)(8) and the sourcing rules suggested that the simplifying factual assumptions supplied by the rule in proposed §1.864(c)(8)-1(c)(2)(i) may overstate the amount of effectively connected gain or loss on a deemed sale of the partnership’s assets, as compared to an actual asset sale, by treating all gain or loss from the deemed sale as attributable to a U.S. office of the partnership, subject only to the ten-year exception. As a result, the proposed regulations would similarly overstate the amount of the deemed sale limitation. To address this concern, the comment suggested that in determining deemed sale EC gain and loss, the final regulations should aim to provide a result that is no better or worse than the result that would occur upon an actual asset sale by the partnership, but the comment acknowledged the difficulty in achieving this objective because the underlying source rules largely rely on fact-specific determinations.

The Treasury Department and the IRS generally agree with the broad principles described in the comment regarding proposed §1.864(c)(8)-1(c)(2). While these final regulations retain the basic framework of the proposed regulations, including the factual determinations regarding office attribution provided in proposed §1.864(c)(8)-1(c)(2)(i), these final regulations adjust their effects by adding rules for sourcing gain or loss from specific assets that may be particularly difficult to source in a deemed sale. §1.864(c)(8)-1(c)(2)(ii)(B) through (E).

1. Ten-year exception

The final regulations provide that deemed sale EC gain and loss is determined by applying section 864 and the regulations thereunder. §1.864(c)(8)-1(c)(2)(i)(A). These final regulations retain the ten-year exception as an exception to the determination of deemed sale EC gain and loss under §1.864(c)(8)-1(c)(2)(i)(A). The ten-year exception is intended to remove assets that have no nexus to the United States from the deemed sale EC gain and loss determination; therefore, for these assets, a foreign transferor does not need to apply the rules described in §1.864(c)(8)-1(c)(2)(ii) to determine deemed sale EC gain and loss. One comment requested that the final regulations clarify that the ten-year exception applies to assets that were not held by the partnership for the full ten-year period. As requested by the comment, these final regulations modify the relevant testing period for the ten-year exception to account for a partnership (including a predecessor of the partnership) that has not existed for at least ten years, or that has not held an asset for at least ten years, by shortening the relevant testing period to the lesser of the ten-year period ending on the date of the transfer or the period during which the partnership (and a predecessor of the partnership) held the asset. §1.864(c)(8)-1(c)(2)(i)(B). In addition, to ensure that the ten-year exception is properly applied, these final regulations also modify the relevant testing period to include any period during which the foreign transferor (and a predecessor of the foreign transferor) held the asset. Id. Accordingly, an asset will not qualify for the ten-year exception if it generated effectively connected income or effectively connected gain for the foreign transferor (or a predecessor of the foreign transferor), or if the asset was used in the conduct of a trade or business within the United States by the foreign transferor (or a predecessor of the foreign transferor), within the relevant testing period. Id.

2. Rules for Sourcing Deemed Sale Gain and Loss for Purposes of Determining Deemed Sale EC Gain and Loss

Proposed §1.864(c)(8)-1(c)(2)(i) treats all gain or loss from the deemed sale of an asset as attributable to an office or oth-

er fixed place of business maintained by the partnership in the United States, and does not treat inventory property as sold for use, disposition, or consumption outside the United States in a sale in which an office or other fixed place of business maintained by the partnership in a foreign country materially participated. These final regulations make several changes to the general rule provided in proposed §1.864(c)(8)-1(c)(2)(i) in response to the comment described in section II.A of this Summary of Comments and Explanation of Revisions; these final regulations also clarify the scope of this rule. First, these final regulations clarify that the general rule applies only for purposes of applying section 865(e)(2)(A) to personal property held by the partnership on the date of the deemed sale. §1.864(c)(8)-1(c)(2)(ii)(A). Second, these final regulations provide additional sourcing rules for determining the foreign source portion of deemed sale gain and loss attributable to specific assets included in the deemed sale. §1.864(c)(8)-1(c)(2)(ii)(B) through (E). The specific assets are inventory, intangibles, and depreciable personal property. Additional sourcing rules are needed because gain or loss from actual sales of each of these assets would be subject to specific sourcing rules under the Code, but sourcing deemed sale gain or loss under those rules would generally require facts that are not determinable in a deemed sale. These final regulations also clarify that if the partnership does not maintain an office or other fixed place of business in the United States (within the meaning of section 864(c)(5)(A) and §1.864-7), neither the U.S. office attribution described in §1.864(c)(8)-1(c)(2)(ii)(A), nor the additional sourcing rules described in §1.864(c)(8)-1(c)(2)(ii)(B) through (E), will apply. §1.864(c)(8)-1(c)(2)(ii)(A). Finally, the final regulations reorganize the proposed regulations to account for the changes described in this section II.A.2 of this Summary of Comments and Explanation of Revisions, and the phrase in proposed §1.864(c)(8)-1(c)(2)(i) regarding use, disposition, or consumption outside the United States is removed to conform with changes made to the general rule and the addition of a specific inventory sourcing rule.

The asset-specific rules provided in §1.864(c)(8)-1(c)(2)(ii)(B) through (E)

utilize available facts as a proxy for the sourcing results, and the attendant effectively connected determinations, that would occur in an actual sale by the partnership of inventory, intangibles, or depreciable personal property. These asset-specific rules use existing sourcing rules and principles to provide fair, administrable rules that can be applied consistently. Specifically, the foreign source portion of deemed sale gain or loss attributable to inventory property (as defined in section 865(i)(1)) is determined using a proxy method that is based on historical data (as suggested by the comment); the foreign source portion of deemed sale gain and loss attributable to intangibles (as defined in section 865(d)(2)) is determined using a proxy method that is based on the partnership's historic income; and the foreign source portion for certain deemed sale gain or loss attributable to depreciable personal property (as defined in section 865(c)(4)(A)) is determined under a recapture principle and, to the extent applicable, a proxy method that is also based on historical data. Additionally, these final regulations add a material change in circumstances rule in §1.864(c)(8)-1(c)(2)(ii)(E) that applies if, based on a material change in circumstances, the asset-specific rules for inventory property or intangibles do not reach an appropriate sourcing result.

Thus, to the extent that deemed sale gain or loss is attributable to inventory, intangibles, or depreciable personal property, the sourcing result for these assets is determined by first applying §1.864(c)(8)-1(c)(2)(ii)(A) and then, to the extent applicable, the asset-specific rules provided in §1.864(c)(8)-1(c)(2)(ii)(B) through (D), or the material change in circumstances rule provided in §1.864(c)(8)-1(c)(2)(ii)(E). Accordingly, the U.S. office attribution rule described in §1.864(c)(8)-1(c)(2)(ii)(A) applies to these assets only to the extent that the deemed sale gain or loss exceeds the relevant foreign source portion determined under the relevant rule provided in §1.864(c)(8)-1(c)(2)(ii)(B) through (E).

i. Look-back rule for inventory property

The comment on the interaction between section 864(c)(8) and the sourcing

rules recommended that the Treasury Department and IRS consider a separate rule for sourcing deemed sales of inventory based on historical data showing how inventory sales were sourced by the partnership over a specified period. The Treasury Department and the IRS agree with the suggestion.

Section 1.864(c)(8)-1(c)(2)(ii)(B) provides a look-back rule for determining the foreign source portion of deemed sale gain or loss attributable to inventory property (as defined in section 865(i)(1), but not including gain sourced by reference to section 865(c)(2)) that is held by the partnership on the date of the deemed sale. Specifically, the general rule provided in §1.864(c)(8)-1(c)(2)(ii)(A) will not apply, and the deemed sale of inventory property will not be treated as attributable to an office or other fixed place of business maintained by the partnership in the United States, to the extent of foreign source inventory gain or loss. This amount is determined by multiplying deemed sale gain and loss attributable to inventory by a fraction that determines the foreign source inventory ratio. The numerator of the fraction includes the gross income of the partnership that is attributable to foreign source gain or loss from inventory property (as determined under the rules of sections 865(b) and 865(e)) sold within the shorter of the period comprised of the partnership's three taxable years immediately preceding the date of the deemed sale, or the existence of the partnership (measured by partnership taxable years); the denominator of the fraction is the total gross income of the partnership that is attributable to inventory over that period.

This approach addresses the concerns raised in the comment by looking to the partnership's past operations to determine the relevant sourcing result for inventory property, instead of assuming that all of the gain or loss from the deemed sale of inventory property is attributable to a U.S. office (unless the ten-year exception is met). That is, because sourcing the deemed sale gain or loss attributable to inventory property will require facts that are not available in a deemed sale, this approach sources the deemed sale gain or loss by reference to the actual sourcing results from prior sales of inventory property during the look-back period, as

evidenced by the foreign source inventory ratio. This rule can be applied by taxpayers and administered by the government with certainty.

ii. Look-back rule for intangibles

The comment on the interaction between section 864(c)(8) and the sourcing rules also discussed how the simplifying factual assumptions supplied by the rule in proposed §1.864(c)(8)-1(c)(2)(i) may overstate the amount of effectively connected gain or loss with respect to a deemed sale of intangibles held by the partnership. While acknowledging the difficulty of determining the source of deemed sale gain and loss attributable to intangibles, the comment described an approach that would apply a separate rule to determine the source of deemed sale gain and loss attributable to intangibles in lieu of the simplifying factual assumptions supplied by the rule in proposed §1.864(c)(8)-1(c)(2)(i) as it applies to intangibles. The Treasury Department and the IRS agree that it is difficult to source deemed sale gain or loss attributable to intangibles and that a single, administrable rule to address this issue is preferable. To minimize the difficulty of applying the sourcing rules to intangible property and to provide more certainty, the final regulations provide a separate rule for intangibles (including going concern value) that determines the foreign source portion of deemed sale gain or loss attributable to intangibles by using a proxy method that is based on the source of the partnership's historic gross ordinary income.

Section 1.864(c)(8)-1(c)(2)(ii)(C) provides a look-back rule for determining the foreign source portion of deemed sale gain or loss attributable to an intangible (as defined in section 865(d)(2)) held by the partnership on the date of the deemed sale. This rule is similar to the look-back rule for inventory property because it provides that the deemed sale of an intangible will not be treated as attributable to an office or other fixed place of business maintained by the partnership in the United States to the extent of a foreign source amount. This amount is determined by multiplying deemed sale gain or loss attributable to an intangible by the foreign source intangible ratio.

Thus, the approach for determining the foreign source amount with respect to intangibles employs the same general approach provided for inventory property, with certain modifications. Deemed sale gain or loss attributable to intangibles, like that attributable to inventory property, cannot be reliably sourced in a deemed sale because an actual sale has not occurred. However, unlike inventory property, intangibles may not have relevant historical data indicating how deemed sale gain and loss would be sourced in an actual sale (for example, some intangibles do not generate an identifiable income stream on which a sourcing proxy could be based). To address this issue, the numerator of the foreign source intangible ratio includes the foreign source gross ordinary income of the partnership (other than from dispositions of depreciable or amortizable property) during the shorter of the period comprised of the partnership's three taxable years preceding the date of the deemed sale or the existence of the partnership (measured by partnership taxable years), to the extent that such income was not effectively connected with the conduct of a trade or business within the United States; the denominator includes the total gross ordinary income of the partnership (other than from dispositions of depreciable or amortizable property) during that period. §1.864(c)(8)-1(c)(2)(ii)(C)(1) and (2). This foreign source intangible ratio looks specifically to the historic gross ordinary income of the partnership (as opposed to all the historic gross income of the partnership) in order to more accurately reflect the partnership's income derived from the use of the intangibles in the ordinary course of its trade or business. This rule does not apply to the extent of any depreciation adjustments (as defined in section 865(c)(4)(B)) with respect to an amortizable intangible; instead, the rules regarding depreciable personal property will apply to such adjustments.

iii. Special rules for foreign source inventory ratio and foreign source intangible ratio

The foreign source inventory ratio and foreign source intangible ratio may in certain circumstances cause mathematically impossible results or unclear

application if cost of goods sold exceed gross receipts. Additional rules were added to address these concerns. First, the foreign source inventory ratio and the foreign source intangible ratio cannot exceed one. §1.864(c)(8)-1(c)(2)(B) and (C). Second, if the foreign source gross income attributable to inventory or the foreign gross ordinary income is not positive, then respectively the foreign source inventory ratio or the foreign source intangible ratio is zero. Id. Third, if the foreign source gross income attributable to inventory is positive, but the total gross income attributable to inventory is not positive, or if the foreign gross ordinary income is positive, but the total gross ordinary income is not positive, then respectively the foreign source inventory ratio or the foreign source intangible ratio is one. Id.

iv. Depreciable personal property

Section 1.864(c)(8)-1(c)(2)(ii)(D) provides a two-part approach for determining the foreign source portion of deemed sale gain and loss attributable to depreciable personal property: the first part applies a recapture principle to the extent of depreciation adjustments taken with respect to the property, and the second part focuses on where the property is located to the extent the property has deemed sale gain in excess of its depreciation adjustments or if the property has deemed sale loss.

Section 1.864(c)(8)-1(c)(2)(ii)(D)(1) applies a recapture principle by providing that the deemed sale of depreciable personal property (as defined in section 865(c)(4)(A)), or the deemed sale of an amortizable intangible (as defined in section 865(d)(2)), will not be treated as attributable to an office or other fixed place of business maintained by the partnership in the United States to the extent the deemed sale gain is treated as sourced outside the United States after applying section 865(c)(1) at the time of the deemed sale. In contrast to the other sourcing rules that could apply to assets held by the partnership on the date of the deemed sale, the recapture rule provided in section 865(c)(1) can be applied with certainty at the time of the deemed sale because it is based on data that is available at the time of the deemed sale.

For deemed sale gain in excess of the depreciation adjustments with respect to depreciable personal property (other than an amortizable intangible), or for deemed sale loss from depreciable personal property (other than an amortizable intangible), §1.864(c)(8)-1(c)(2)(ii)(D)(2) provides that the relevant sourcing determination is made based on where the property is located. See §1.864(c)(8)-1(c)(2)(ii)(C) and section II.A.2.ii of this Summary of Comments and Explanation of Revisions for the rule that applies to gain in excess of depreciation adjustments with respect to an amortizable intangible. Although section 865(c)(2) sources the excess gain as if it were attributable to inventory property, such treatment would require further clarification for purposes of these final regulations. Specifically, in contrast to inventory property, depreciable personal property may not have historical data readily available that evidences the location of the economic activity associated with the property or that otherwise indicates how the excess gain or loss would be sourced in an actual sale. To address this issue, while also providing a clear and administrable rule, §1.864(c)(8)-1(c)(2)(ii)(D)(2) sources the excess gain or loss attributable to depreciable personal property based on the location of the property.

v. Material change in circumstances rule

Section 1.864(c)(8)-1(c)(2)(ii)(E) provides a material change in circumstances rule for inventory and intangibles. If this rule applies, the foreign source portion of deemed sale gain or loss attributable to inventory property or intangibles may be determined by applying the relevant rule of §1.864(c)(8)-1(c)(2)(ii)(B) or (C) by reference to a modified look-back period.

The Treasury Department and the IRS have determined that the general rule provided in §1.864(c)(8)-1(c)(2)(ii)(A) and the asset-specific determinations provided in §1.864(c)(8)-1(c)(2)(ii)(B) and (C) will reach an appropriate sourcing result in most cases; that is, an actual sale of the partnership's assets has not occurred, so relevant sourcing information with respect to an actual sale of the assets on the date of

the deemed sale will not be readily determinable in most cases, and the look-back rules use the partnership's past operations as a proxy for reaching a sourcing determination with respect to certain assets included in the deemed sale. See sections II.A.2.i and II.A.2.ii of this Summary of Comments and Explanation of Revisions.

The Treasury Department and the IRS realize, however, that the look-back rules provided in §1.864(c)(8)-1(c)(2)(ii)(B) and (C) for inventory property and intangibles could reach incorrect sourcing results in certain cases; specifically, if a material change in circumstances occurred during the relevant look-back period described in paragraph §1.864(c)(8)-1(c)(2)(ii)(B)(1) or §1.864(c)(8)-1(c)(2)(ii)(C)(1), the partnership's historical data for the entire look-back period may not be an accurate proxy for reaching a sourcing determination with respect to deemed sale gain or loss attributable to such property. In these cases, the final regulations allow taxpayers to use this material change in circumstances rule to remedy an incorrect sourcing result with respect to inventory property and intangibles.

The application of §1.864(c)(8)-1(c)(2)(ii)(E), therefore, is limited to situations in which a material change in circumstances causes the look-back rule provided in §1.864(c)(8)-1(c)(2)(ii)(B), or the look-back rule provided in §1.864(c)(8)-1(c)(2)(ii)(C), to reach an inappropriate sourcing result; that is, a sourcing result that is materially different from the sourcing result that would occur if the applicable look-back period began on the date on which the material change in circumstance occurred and ended on the last day of the partnership's taxable year immediately preceding the year in which the deemed sale occurs (the modified look-back period).¹ If the material change in circumstances rule applies, the applicable sourcing rule for inventory or intangibles may be applied by reference to the modified look-back period. §1.864(c)(8)-1(c)(2)(ii)(E). The determination of whether a sourcing result is materially different is determined by comparing the foreign source inventory ratio or foreign source intangible ratio provided in §1.864(c)(8)-1(c)(2)(ii)(B) or

(C) (as applicable) with the foreign source inventory ratio or foreign source intangible ratio if that ratio were determined by reference to the modified look-back period. The sourcing result is not materially different unless the percentage point difference between the two ratios described in the preceding sentence is at least 30 percentage points. Id. See *Example 2* in §1.864(c)(8)-1(c)(2)(iii).

B. Treaty coordination

A comment questioned whether the rules provided in proposed §1.864(c)(8)-1(c) for determining a foreign transferor's deemed sale EC gain or deemed sale EC loss were intended to apply in the treaty context without regard to whether the partnership in fact had a permanent establishment in the United States under the terms of an income tax treaty at the time of the transfer.

These final regulations clarify that the U.S. office attribution rule described in §1.864(c)(8)-1(c)(2)(ii)(A) does not apply unless the partnership maintains an office or other fixed place of business in the United States. A partnership without a U.S. office or other fixed place of business will also generally not have a permanent establishment in the United States. In addition, the treaty coordination rule in §1.864(c)(8)-1(f) takes into account an applicable treaty when computing the amount of a foreign transferor's distributive share of deemed sale EC gain and deemed sale EC loss. As a result, for purposes of §1.864(c)(8)-1(c)(3) (that is, the third step in the three-step process to determine the foreign transferor's aggregate deemed sale EC items), gain or loss derived by the foreign transferor attributable to assets deemed sold that would be exempt from tax under an applicable U.S. income tax treaty if disposed of by the partnership are not taken into account.

The final regulations retain the general rule that prevents taxation of gain on assets that do not form part of a permanent establishment, but also address certain gains that may be taxed without regard to whether there is a permanent establishment (for example, gains from the dispo-

¹The material change in circumstances rule cannot apply to a change in circumstances that occurs in the year of the deemed sale because such a change does not occur during the relevant look-back period and, in that case, there is no modified look-back period against which to measure the results that otherwise occur under §1.864(c)(8)-1(c)(2)(ii)(B) or (C).

sition of certain U.S. real property interests). The final regulations also modify the structure of proposed §1.864(c)(8)-1(f) by consolidating proposed §1.864(c)(8)-1(f)(1) through (3) into a single paragraph and make three additional changes.

First, §1.864(c)(8)-1(f) clarifies that a foreign transferor is eligible for benefits under an income tax treaty only if the transferor meets the requirements of a limitation on benefits article, if any, in the treaty between the jurisdiction in which the foreign transferor is resident and the United States.

Second, §1.864(c)(8)-1(f) modifies proposed §1.864(c)(8)-1(f)(2), which stated that “[t]reaty provisions applicable to gains from the alienation of property forming part of a permanent establishment, including gains from the alienation of a permanent establishment in the United States, apply to the transfer by a foreign transferor of an interest in a partnership with a permanent establishment in the United States.” The final regulations clarify that a gains article that permits the taxation of gain from the alienation of property forming part of a permanent establishment or fixed place of business in the United States also permits the taxation of gain from the alienation of a partnership interest, to the extent the partnership’s assets deemed sold under section 864(c)(8) form a part of the U.S. permanent establishment or fixed place of business of the partnership. Thus, the final regulations remove from the description of an applicable gains provision the phrase “including gains from the alienation of a permanent establishment,” as that phrase, as used in certain treaties, merely illustrates one application of the underlying words and is not a separate rule. This approach also is consistent with the statutory framework under section 864(c)(8), which determines the amount of effectively connected gain or loss of a foreign transferor based on the amount of the transferor’s distributive share of gain or loss that would have been effectively connected if the partnership had sold all of its assets at fair market value.

Finally, §1.864(c)(8)-1(f) adds a rule coordinating these regulations with treaty provisions governing the disposition of United States real property interests, which allow the United States to tax gain

derived from the disposition of the United States real property interest without regard to whether the U.S. real property interest forms a part of a partnership’s permanent establishment or fixed place of business in the United States. Under this coordination rule, if, after applying treaty benefits in paragraph (c)(3) of this section, the only gains or losses that would be taken into account are gains or losses attributable to United States real property interests, the foreign transferor determines its effectively connected gain and effectively connected loss pursuant to section 897 and not under section 864(c)(8). This addition is consistent with the approach taken in the proposed regulations that the gain would be computed under section 897 rather than section 864(c)(8). See section IV of the Explanation of Provisions section of the preamble to the proposed regulations.

C. Partner-specific exclusions and exceptions

A comment requested that the final regulations more clearly address the interaction of section 864(c)(8) and §1.864(c)(8)-1 with provisions of the Code providing for an exemption from U.S. federal income tax. The Treasury Department and the IRS agree with this suggestion; accordingly, the final regulations provide that a foreign transferor’s distributive share of deemed sale EC gain or loss does not include any amount that is excluded from the foreign transferor’s gross income or otherwise exempt from U.S. Federal income tax by reason of an applicable provision of the Code. Section 1.864(c)(8)-1(c)(3)(i). For this purpose, the final regulations refer to sections 864(b)(2), 872(b), and 883 as examples. *Id.*

Similarly, §1.864(c)(8)-1(c)(3) is modified to provide that a foreign transferor’s distributive share of deemed sale EC gain or deemed sale EC loss does not include any amount to which an exception under section 897 applies, such as section 897(k) or section 897(l), provided that amount is not otherwise treated as effectively connected income under a provision of the Code. This rule, which was provided in proposed §1.864(c)(8)-1(c)(2) as part of the determination of a foreign transferor’s deemed sale EC gain and deemed sale EC loss, is moved to §1.864(c)(8)-1(c)(3) in

these final regulations because the exceptions under section 897(k) and section 897(l) are specific to the foreign transferor. This modification is intended to make the three step-process for determining the foreign transferor’s aggregate deemed sale EC amounts more cohesive by placing all partner-specific adjustments in step 3.

D. Section 731 distributions

Under the proposed regulations, a foreign transferor determines the amount of outside gain and loss recognized on the transfer of a partnership interest under all relevant provisions of the Code and regulations, including any applicable nonrecognition provision. Proposed §1.864(c)(8)-1(b)(2). Although section 864(c)(8)(E) authorizes regulations or other guidance with respect to the application of section 864(c)(8) to nonrecognition transactions, the proposed regulations generally do not provide special rules that apply to nonrecognition transactions. But see proposed §1.864(c)(8)-1(h) (the anti-stuffing rule). However, the Treasury Department and the IRS recognized that certain nonrecognition transactions, for example certain section 731 distributions, may have the effect of reducing gain or loss that would be taken into account under the rules provided in the proposed regulations. The preamble to the proposed regulations, therefore, requested comments regarding whether sections of the Code other than section 864(c)(8) adequately address transactions that rely on section 731 distributions to reduce the scope of assets subject to U.S. federal income taxation as a result of section 864(c)(8) and proposed §1.864(c)(8)-1. A comment identified several relevant Code sections and analyzed the application of these sections to transactions involving section 731 distributions. The Treasury Department and the IRS continue to study this issue and will, if necessary, address it through future rulemaking.

E. Information exchange between a partnership and non-controlling partners

A comment requested that foreign partners that do not own a controlling interest in a partnership be permitted to estimate their effectively connected gain or loss for purposes of section 864(c)(8) because

non-controlling partners may not be able to obtain from the partnership the information required to perform the computations under these rules. The Treasury Department and the IRS have determined that such a rule is not needed under section 864(c)(8) because the proposed withholding regulations address this issue. Specifically, the proposed withholding regulations provide rules in proposed §1.864(c)(8)-2 that facilitate and encourage the transfer of information between a foreign partner and a partnership for purposes of section 864(c)(8). The information reporting requirements of the proposed withholding regulations require the partnership to provide the foreign partner with the information necessary to perform the computations under these rules, even if the foreign partner does not hold a controlling interest in the partnership. However, this comment will be considered as part of the proposed withholding regulations, which will be finalized separately in a later issue of the **Federal Register**.

F. Section 754 elections

A comment requested a special rule for any foreign transferor that has a difference between its basis in the partnership interest and its share of the partnership's inside basis that occurs because no section 754 election is in effect at the time of transfer; this special rule would, in effect, deem a section 754 election. Specifically, the comment indicated that a foreign transferor may not have negotiated for the partnership to make a section 754 election upon acquisition of an interest in a partnership engaged in a trade or business within the United States because the transferor considered Rev. Rul. 91-32, 1991-1 C.B. 107, to be incorrect. As a result, upon a later transfer of the acquired partnership interest, the foreign transferor would have received a different result under the rules in the section 864(c)(8) proposed regulations than if the partnership had instead sold all of its assets and then liquidated. Because this result occurs due to the failure to make a section 754 election and the mismatches that follow from that failure, the Treasury Department and the IRS have determined that it would be inappropriate to adopt a special rule in these circumstances.

G. Clarification of section 897 coordination rule with respect to nonrecognition provisions

Proposed §1.864(c)(8)-1(d) coordinates the taxation of United States real property interests under section 897(g) with section 864(c)(8) by providing that when a partnership holds United States real property interests and a transfer of an interest in that partnership is subject to section 864(c)(8) because the partnership is engaged in the conduct of a trade or business within the United States without regard to section 897, the amount of the foreign transferor's effectively connected gain or loss will be determined under section 864(c)(8) and not under section 897(g). However, the proposed regulations did not provide explicit guidance on the application of the section 897 coordination rule when a foreign transferor transfers its partnership interest in a nonrecognition transaction. The final regulations clarify the interaction between the section 897 coordination rule and the nonrecognition provision described in §1.864(c)(8)-1(b)(2)(ii). Specifically, §1.864(c)(8)-1(d) provides that any transfer of an interest in a partnership as part of a nonrecognition transaction will not be subject to section 864(c)(8) to the extent that the gain or loss on the transfer is not recognized; instead, if the partnership owns one or more United States real property interests, section 897(g) and the regulations thereunder will apply with respect to the unrecognized gain or loss.

III. Applicability Dates

The proposed regulations were proposed to apply to transfers occurring on or after November 27, 2017. Because the provisions contained in this rulemaking are finalized after June 22, 2019, these regulations generally apply to transfers occurring on or after December 26, 2018 (that is, the date on which the proposed regulations were filed with the **Federal Register**). See sections 7805(b)(1)(B) and (b)(2) and §§1.864(c)(8)-1(j) and 1.897-7(c); see also the Applicability Dates section of the Preamble to the proposed regulations. While not subject to these final regulations, transfers occurring on or after November 27, 2017, but before

December 26, 2018, are subject to section 864(c)(8). In addition, these final regulations apply to amounts taken into account on or after December 26, 2018, pursuant to an installment sale (as defined in section 453(b)) occurring on or after November 27, 2017, and before December 26, 2018. §§1.864(c)(8)-1(j) and 1.897-7(c). This rule is consistent with the manner in which installment sales are treated under existing law. See, e.g., *Snell v. Commissioner*, 97 F.2d 891 (5th Cir. 1938) (the tax laws in effect for the year the installment gain is recognized apply to the gain); see also *Estate of Kearns v. Commissioner*, 73 T.C. 1223 (1980); *Klein v. Commissioner*, 42 T.C. 1000 (1964); Rev. Rul. 79-22, 1979-1 C.B. 275.

Special Analyses

These final regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

The Treasury Department and the IRS have assessed that the final regulations do not establish a new collection of information nor modify an existing collection that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

Section 864(c)(8) and the final regulations generally apply to nonresident alien individuals and foreign corporations on the transfer of an interest in a partnership that is engaged in a trade or business within the United States, and not directly to the trade or business the partnership conducts in the United States. Under section 605 of the Regulatory Flexibility Act (5 U.S.C. chapter 6), the Treasury Department and the IRS certify that the final regulations will not have a significant economic impact on a substantial number of small business entities. The reason is that the final regulations generally apply to nonresident alien individuals and foreign corporations on the transfer of an interest in a partnership and not directly to domestic small business entities. Pursuant to section 7805(f), the notice of proposed rulemaking preceding these 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 regulations are Chadwick Rowland and Ronald M. Gootzeit, Office of the Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

Statement of Availability

Revenue rulings and other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and record-keeping requirements.

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 is amended by adding entries in numerical order to read in part as follows:

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

Section 1.864(c)(8)-1 also issued under 26 U.S.C. 864(c)(8) and 897(g).

* * * * *

Section 1.897-7 also issued under 26 U.S.C. 897(g).

* * * * *

Par. 2. Section 1.864(c)(8)-1 is added to read as follows:

§1.864(c)(8)-1 Gain or loss by foreign persons on the disposition of certain partnership interests.

(a) *Overview.* This section provides rules and definitions under section 864(c)(8). Paragraph (b) of this section provides the general rule treating gain or loss rec-

ognized by a nonresident alien individual or foreign corporation from the sale or exchange of a partnership interest as effectively connected gain or effectively connected loss. Paragraph (c) of this section provides rules for determining the limitations on the amount of effectively connected gain or effectively connected loss under section 864(c)(8) and paragraph (b) of this section. Paragraph (d) of this section provides rules regarding coordination with section 897. Paragraph (e) of this section provides rules regarding certain tiered partnerships. Paragraph (f) of this section provides rules regarding U.S. income tax treaties. Paragraph (g) of this section provides definitions. Paragraph (h) of this section provides a rule regarding certain contributions of property to a partnership. Paragraph (i) of this section contains examples illustrating the rules set forth in this section. Paragraph (j) of this section provides the applicability date.

(b) *Gain or loss treated as effectively connected gain or loss—(1) In general.* Notwithstanding any other provision of subtitle A of the Internal Revenue Code, if a foreign transferor owns, directly or indirectly, an interest in a partnership that is engaged in the conduct of a trade or business within the United States, outside capital gain, outside capital loss, outside ordinary gain, or outside ordinary loss (each as defined in paragraph (b)(2) of this section) recognized by the foreign transferor on the transfer of all (or any portion) of the interest is treated as effectively connected gain or effectively connected loss, subject to the limitations described in paragraph (b)(3) of this section. Except as provided in paragraph (d) of this section, this section does not apply to prevent any portion of the gain or loss that is otherwise treated as effectively connected gain or effectively connected loss under provisions of the Internal Revenue Code other than section 864(c)(8) from being so treated.

(2) *Determination of outside gain and loss—(i) In general.* The amount of gain or loss recognized by the foreign transferor in connection with the transfer of its partnership interest is determined under all relevant provisions of the Internal Revenue Code and the regulations thereunder. See, e.g., §§1.741-1(a) and 1.751-1(a)(2). For purposes of this section, the amount of gain or loss that is treated as capital gain or

capital loss under sections 741 and 751 is referred to as *outside capital gain* or *outside capital loss*, respectively. The amount of gain or loss that is treated as ordinary gain or ordinary loss under sections 741 and 751 is referred to as *outside ordinary gain* or *outside ordinary loss*, respectively.

(ii) *Nonrecognition provisions.* A foreign transferor's gain or loss recognized in connection with the transfer of its partnership interest does not include gain or loss to the extent that the gain or loss is not recognized by reason of one or more nonrecognition provisions of the Internal Revenue Code.

(3) *Limitations.* For purposes of applying this section, this paragraph (b)(3) limits the amount of gain or loss recognized by a foreign transferor that may be treated as effectively connected gain or effectively connected loss.

(i) *Capital gain limitation.* Outside capital gain recognized by a foreign transferor is treated as effectively connected gain to the extent it does not exceed aggregate deemed sale EC capital gain determined under paragraph (c)(3)(ii)(B) of this section.

(ii) *Capital loss limitation.* Outside capital loss recognized by a foreign transferor is treated as effectively connected loss to the extent it does not exceed aggregate deemed sale EC capital loss determined under paragraph (c)(3)(ii)(B) of this section.

(iii) *Ordinary gain limitation.* Outside ordinary gain recognized by a foreign transferor is treated as effectively connected gain to the extent it does not exceed aggregate deemed sale EC ordinary gain determined under paragraph (c)(3)(ii)(A) of this section.

(iv) *Ordinary loss limitation.* Outside ordinary loss recognized by a foreign transferor is treated as effectively connected loss to the extent it does not exceed aggregate deemed sale EC ordinary loss determined under paragraph (c)(3)(ii)(A) of this section.

(c) *Amount treated as effectively connected with the conduct of a trade or business within the United States.* This paragraph (c) describes the steps to be followed in computing the limitations described in paragraph (b)(3) of this section.

(1) *Step 1: Determine deemed sale gain and loss.* Determine the amount of gain or

loss that the partnership would recognize with respect to each of its assets (other than interests in partnerships described in paragraph (e) of this section) upon a deemed sale of all of the partnership's assets on the date of the transfer of the partnership interest described in paragraph (b)(1) of this section (deemed sale). For this purpose, a deemed sale is treated as a sale by the partnership to an unrelated person of each of its assets (tangible and intangible) in a fully taxable transaction for cash in an amount equal to the fair market value of each asset (taking into account section 7701(g)) immediately before the partner's transfer of the interest in the partnership. For rules concerning the deemed sale of certain partnership interests, see paragraph (e) of this section.

(2) *Step 2: Determine deemed sale EC gain and loss*—(i) *In general*—(A) *Effectively connected determination*. With respect to each asset deemed sold in paragraph (c)(1) of this section, determine the amount of gain or loss from the deemed sale that would be treated as effectively connected gain or effectively connected loss (including by reason of section 897). Gain described in this paragraph (c)(2) is referred to as *deemed sale EC gain*, and loss described in this paragraph (c)(2) is referred to as *deemed sale EC loss*. Section 864 and the regulations thereunder apply for purposes of determining whether deemed sale gain or loss would be treated as effectively connected gain or loss. See paragraph (c)(2)(ii) of this section for sourcing rules that apply for purposes of determining deemed sale EC gain and deemed sale EC loss.

(B) *10-year exception*. For purposes of applying paragraph (c)(2)(i)(A) of this section, gain or loss from the deemed sale of an asset (other than a United States real property interest within the meaning of section 897(c)) will not be treated as deemed sale EC gain or deemed sale EC loss if—

(I) No income or gain produced by the asset was taxable as income that was effectively connected with the conduct of a trade or business within the United States by the partnership (or the foreign transferor, a predecessor of the foreign transferor, or a predecessor of the partnership) during the lesser of the ten-year period ending on the date of the transfer or the period for

which the partnership (and, if applicable, the foreign transferor, a predecessor of the foreign transferor, and a predecessor of the partnership) held the asset; and

(2) The asset has not been used, or held for use, in the conduct of a trade or business within the United States by the partnership (or the foreign transferor, a predecessor of the foreign transferor, or a predecessor of the partnership) during that same period.

(ii) *Sourcing rules for determining deemed sale EC gain and deemed sale EC loss*—(A) *In general*. For purposes of applying section 865(e)(2)(A) in connection with the determination of deemed sale EC gain and deemed sale EC loss under this paragraph (c)(2)(ii)(A), except to the extent provided in paragraphs (c)(2)(ii)(B) through (E) of this section, the deemed sale of an asset will be treated as attributable to an office or other fixed place of business maintained by the partnership in the United States. However, if the partnership does not maintain an office or other fixed place of business in the United States (within the meaning of section 864(c)(5)(A) and §1.864-7), neither the office attribution described in this paragraph (c)(2)(ii)(A), nor the rules of paragraphs (c)(2)(ii)(B) through (E) of this section, will apply.

(B) *Look-back rule for sale of inventory property*. The deemed sale of inventory property (as defined in section 865(i)(1)) will not be treated as attributable to an office or other fixed place of business maintained by the partnership in the United States to the extent of *foreign source inventory gain or loss*. Foreign source inventory gain or loss is determined by multiplying the deemed sale gain or deemed sale loss attributable to inventory property by the foreign source inventory ratio. The foreign source inventory ratio cannot exceed one. If the amount in paragraph (c)(2)(ii)(B)(1) of this section is not positive, the foreign source inventory ratio is zero. If the amount in paragraph (c)(2)(ii)(B)(1) of this section is positive, but the amount in paragraph (c)(2)(ii)(B)(2) of this section is not positive, the foreign source inventory ratio is one. The foreign source inventory ratio is—

(1) The gross income of the partnership from sources without the United States (as determined under sections 865(b) and

865(e)(2)) that was attributable to inventory property sold during the lesser of—

(i) The period comprised of the partnership's three taxable years immediately preceding the date of the deemed sale, or

(ii) The period beginning on the date the partnership (or any of its predecessors) was formed and ending on the last day of the partnership's taxable year immediately preceding the date of the deemed sale; over

(2) The total gross income of the partnership that was attributable to inventory property sold during that same period.

(C) *Look-back rule for intangibles*. The deemed sale of an intangible (as defined in section 865(d)(2), including going concern value) will not be treated as attributable to an office or other fixed place of business maintained by the partnership in the United States to the extent of *foreign source intangible gain or loss*. Foreign source intangible gain or loss is determined by multiplying the deemed sale gain or deemed sale loss from an intangible, without regard to any gain described in section 865(d)(4)(A), by the foreign source intangible ratio. The foreign source intangible ratio cannot exceed one. If the amount in paragraph (c)(2)(ii)(C)(1) of this section is not positive, the foreign source intangible ratio is zero. If the amount in paragraph (c)(2)(ii)(C)(1) of this section is positive, but the amount in paragraph (c)(2)(ii)(C)(2) of this section is not positive, the foreign source inventory ratio is one. The foreign source intangible ratio is—

(I) The gross ordinary income (other than from dispositions of depreciable or amortizable property) of the partnership from sources without the United States that was not effectively connected with the conduct of a trade or business within the United States, during the lesser of—

(i) The period comprised of the partnership's three taxable years immediately preceding the date of the deemed sale, or

(ii) The period beginning on the date the partnership (or any of its predecessors) is formed and ending on the last day of the partnership's taxable year immediately preceding the year in which the deemed sale occurs; over

(2) The total gross ordinary income (other than from dispositions of depreciable or amortizable property) of the partnership during that period.

(D) *Depreciable personal property*—
(I) *Depreciation recapture*. The deemed sale of depreciable personal property (as defined in section 865(c)(4)(A)), including from the sale of an amortizable intangible (as defined in section 865(d)(2)), will not be treated as attributable to an office or other fixed place of business maintained by the partnership in the United States to the extent the deemed sale gain would be treated as from sources outside the United States after applying section 865(c)(1) at the time of the deemed sale.

(2) *Gain in excess of depreciation or loss with respect to depreciable personal property*. For purposes of this section, if the deemed sale of depreciable personal property (other than an amortizable intangible) results in deemed sale gain in excess of the property's depreciation adjustments (as defined in section 865(c)(4)(B)), or results in deemed sale loss, attribution to an office or other fixed place of business maintained by the partnership in the United States with respect to the excess deemed sale gain, or deemed sale loss, will be determined based on where the property is located: if the property is located outside the United States, the excess deemed sale gain, or the deemed sale loss, will not be treated as attributable to an office or other fixed place of business maintained by the partnership in the United States; if the property is located within the United States, the excess deemed sale gain, or the deemed sale loss, will be treated as attributable to an office or other fixed place of business maintained by the partnership in the United States.

(E) *Material change in circumstances rule*. If a material change in circumstances occurred that causes the applicable rule provided in paragraph (c)(2)(ii)(B) or (C) of this section to provide a sourcing result that is materially different from the sourcing result that would occur if the applicable period described in paragraph (c)(2)(ii)(B)(I) or (c)(2)(ii)(C)(I) of this section began on the date on which the material change in circumstance occurred and ended on the last day of the partnership's taxable year immediately preceding the year in which the deemed sale occurs (the *modified look-back period*), the applicable rule provided in paragraph (c)(2)(ii)(B) or (C) of this section may be applied by reference to the modified look-back period.

The difference between the sourcing results is determined by comparing the foreign source inventory ratio (as described in paragraph (c)(2)(ii)(B) of this section) or the foreign source intangible ratio (as described in paragraph (c)(2)(ii)(C) of this section), as applicable, with the foreign source inventory ratio or foreign source intangible ratio, as applicable, if that ratio were determined by reference to the modified look-back period. For purposes of this paragraph (c)(2)(ii)(E), the sourcing results will not be materially different unless the percentage point difference between the ratios described in the preceding sentence is at least 30 percentage points.

(iii) *Examples*. This paragraph (c)(2)(iii) provides examples that illustrate the rules of paragraph (c)(2)(ii) of this section. Except as otherwise provided, the following facts apply for purposes of this paragraph (c)(2)(iii). FP is a foreign corporation and a partner in PRS, a partnership that is engaged in the conduct of a trade or business within the United States (the U.S. Business) and a business in Country A (the Country A Business). Both businesses purchase inventory property and sell the purchased inventory property to unrelated customers; this is the only income-generating activity carried on by the businesses. PRS maintains an office or fixed place of business within the U.S. (within the meaning of section 864(c)(5)(A) and §1.864-7) and, for its U.S. business, PRS sells its inventory property through its U.S. office. For the Country A business, PRS sells its inventory property through its Country A office for consumption in Country A; PRS's Country A office materially participates in each sale. The gain or loss from the inventory sold through PRS's Country A office is treated as from sources without the United States and is not effectively connected with PRS's U.S. Business. In year 4, FP sells its entire interest in PRS, thereby triggering the deemed sale described in paragraph (c)(1) of this section. In the deemed sale, PRS recognizes \$10x of gain on the sale of its inventory property (the only asset PRS holds other than goodwill and going concern value). The 10-year exception provided in paragraph (c)(2)(i)(B) of this section does not apply.

(A) *Example 1: Determining foreign source inventory gain*—(I) *Facts*. Based on PRS's sales records for the three taxable years immediately preceding the date of the deemed sale, PRS's gross income from

sources without the United States that is attributable to sales of inventory property is \$12x and PRS's total gross income attributable to sales of inventory property during that period is \$30x.

(2) *Analysis*. To determine foreign source inventory gain or loss described in paragraph (c)(2)(ii)(B) of this section, the \$10x deemed sale gain attributable to inventory property is multiplied by PRS's foreign source inventory ratio. PRS's foreign source inventory ratio is PRS's gross income from sources without the United States that are attributable to sales of inventory property within PRS's three taxable years preceding the date of the deemed sale, over PRS's total gross income attributable to sales of inventory property during the same period. Thus, based on PRS's sales records from the three taxable years preceding the date of the deemed sale, the foreign source inventory gain for PRS's inventory is \$4x (the \$10x deemed sale gain attributable to inventory multiplied by the foreign source inventory ratio of \$12x over \$30x).

(B) *Example 2: Determining deemed sale EC gain attributable to inventory property under the material change in circumstances rule*—(I) *Facts*. The facts are the same as in paragraph (c)(2)(iii)(A)(I) of this section (the facts of *Example 1* in this paragraph (c)(2)(iii)), except that at the beginning of year 3 (PRS's taxable year immediately preceding the date of the deemed sale), PRS started a new business in Country B (the Country B Business) to take advantage of favorable market prospects for its products in Country B. For the Country B Business, PRS sells its inventory property through its Country B office for consumption in Country B; PRS's Country B office materially participates in each such sale. The gain or loss from the inventory sold through PRS's Country B office is foreign source gain or loss. Also, at the beginning of year 3, PRS substantially reduced its U.S. Business as a result of market factors. As a result of these changes in year 3, 95% of PRS's inventory property is sold in its Country A Business and Country B Business (collectively, the Foreign Businesses) beginning on the date in which these changes occurred; accordingly, 5% of PRS's inventory property is sold in its U.S. Business after these changes. Based on PRS's sales records for the three taxable years preceding the date of the deemed sale, PRS's gross income from sources without the United States that are attributable to sales of inventory property is \$15x and PRS's total gross income attributable to sales of inventory property during that period is \$30x; for year 3, PRS's gross income from sources without the United States that are attributable to sales of inventory property is \$9.5x, and PRS's total gross income attributable to sales of inventory property in Year 3 is \$10x.

(2) *Analysis*. The material change in circumstances rule described in paragraph (c)(2)(ii)(E) of this section applies if due to a material change in circumstances, the sourcing rule provided in paragraph (c)(2)(ii)(B) of this section provides a sourcing result that is materially different from the sourcing result that would occur if that sourcing rule was applied by reference to the modified look-back period; that is, the period beginning on the date in which a material change in circumstances occurred and ending on the last day of the PRS's taxable year immediately preceding the date of the deemed sale. For this pur-

pose, the reduction in PRS's U.S. business in year 3, coupled with the creation of the Country B Business in the same year, qualifies as a material change in circumstances. Thus, the modified look-back period consists of year 3; that is, the period starting at the beginning of year 3, the date in which the material change in circumstances occurred, and ending of the last day of year 3, the last day of PRS's taxable year immediately preceding the date of the deemed sale. Based on PRS's sales records for the three taxable years preceding the deemed sale, the foreign source inventory ratio, expressed as a percentage, is 50% (\$15x attributable to PRS's gross income from sources without the United States with respect to sales of its inventory property, over \$30x attributable to PRS's total gross income with respect to sales of its inventory property). Due to the material change in circumstances, however, 95% of PRS's inventory property is sold in its Foreign Businesses. (\$9.5x attributable to PRS's gross income from sources without the United States with respect to sales of its inventory property, over \$10x attributable to PRS's total gross income with respect to sales of its inventory property.) Accordingly, if PRS applied the sourcing rule provided in paragraph (c)(2)(ii)(B) of this section by reference to the modified look-back period, 95% (\$9.5x/\$10x), or \$9.5x, of the gain would be attributable to sales for PRS's Foreign Businesses (gain from sources without the United States), and only 5% (\$.5x/\$10x), or \$0.5x, of the gain would be attributable to sales for PRS's U.S. Business (gain from United States sources). The excess of the foreign source inventory ratio determined by reference to the modified look-back period (expressed as a percentage), over the foreign source inventory ratio (also expressed as a percentage) is 45%; that is 95% (as determined under the modified look-back period) minus 50% (as determined under the foreign source inventory ratio). Accordingly, the sourcing results are materially different because the 45 percentage point difference is greater than the 30 percentage point threshold provided in paragraph (c)(2)(ii)(E) of this section. Thus, the material change in circumstances rule of paragraph (c)(2)(ii)(E) of this section applies and the foreign source inventory gain determined under paragraph (c)(2)(ii)(B) of this section, determined by reference to the modified look-back period, is \$9.5x; that is, the deemed sale gain attributable to inventory property (\$10x), multiplied by the foreign source inventory ratio determined by reference to the modified look-back period (\$9.5x/\$10x).

(3) *Step 3: Determine the foreign transferor's distributive share of deemed sale EC gain or deemed sale EC loss—*
(i) *In general.* A foreign transferor's distributive share of deemed sale EC gain or deemed sale EC loss with respect to each asset is the amount of the deemed sale EC gain and deemed sale EC loss determined under paragraph (c)(2) of this section that would have been allocated to the foreign transferor by the partnership under all applicable Internal Revenue Code sections (including section 704) upon the deemed sale described in paragraph (c)(1) of this

section, taking into account allocations of tax items applying the principles of section 704(c), including any remedial allocations (see §1.704-3(d)), and any section 743(b) basis adjustments (see §1.743-1(j)(3)). For this purpose, a foreign transferor's distributive share of deemed sale EC gain or deemed sale EC loss does not include any amount that is excluded from the foreign transferor's gross income or otherwise exempt from U.S. Federal income tax by reason of an applicable provision of the Internal Revenue Code (including, for example, by reason of section 864(b)(2), 872(b), or 883). Similarly, a foreign transferor's distributive share of deemed sale EC gain or deemed sale EC loss does not include any amount to which an exception under section 897 applies, such as section 897(k) or section 897(l), if that amount is not otherwise treated as effectively connected under a provision of the Code. For rules regarding the determination of a foreign transferor's distributive share of deemed sale EC gain and deemed sale EC loss under an applicable U.S. income tax treaty, see paragraph (f) of this section.

(ii) *Aggregate deemed sale EC items—*
(A) *Ordinary gain or loss.* A foreign transferor's *aggregate deemed sale EC ordinary gain* (if the net aggregate of the foreign transferor's distributive share of the deemed sale EC ordinary gain and loss is a gain) or *aggregate deemed sale EC ordinary loss* (if the net aggregate of the foreign transferor's distributive share of the deemed sale EC ordinary gain and loss is a loss) is determined by taking into account—

(I) The portion of the foreign transferor's distributive share of deemed sale EC gain and deemed sale EC loss that is attributable to the deemed sale of the partnership's assets that are section 751(a) property; and

(2) Deemed sale EC gain and deemed sale EC loss from the deemed sale of assets that are section 751(a) property that would be allocated to the foreign transferor with respect to interests in partnerships that are engaged in the conduct of a trade or business within the United States under paragraph (e)(1)(ii) of this section upon the deemed asset sales described in paragraph (e)(1)(i) of this section.

(B) *Capital gain or loss.* A foreign transferor's *aggregate deemed sale EC*

capital gain (if the net aggregate of the foreign transferor's distributive share of the deemed sale EC capital gain and loss is a gain) or *aggregate deemed sale EC capital loss* (if the net aggregate of the foreign transferor's distributive share of the deemed sale EC capital gain and loss is a loss) is determined by taking into account—

(1) The portion of the foreign transferor's distributive share of deemed sale EC gain and deemed sale EC loss that is attributable to the deemed sale of assets that are not section 751(a) property; and

(2) Deemed sale EC gain and deemed sale EC loss from the sale of assets that are not section 751(a) property and that would be allocated to the foreign transferor with respect to all interests in partnerships that are engaged in the conduct of a trade or business within the United States under paragraph (e)(1)(ii) of this section upon the deemed asset sales described in paragraph (e)(1)(i) of this section.

(iii) *Partial transfers.* If a foreign transferor transfers less than all of its interest in a partnership, then for purposes of paragraph (c)(3)(i) of this section, the foreign transferor's distributive share of deemed sale EC gain and deemed sale EC loss is determined by reference to the amount of deemed sale EC gain or deemed sale EC loss determined under paragraph (c)(3)(i) of this section that is attributable to the portion of the foreign transferor's partnership interest that was transferred.

(d) *Coordination with section 897.* If a foreign transferor transfers an interest in a partnership in a transfer that is subject to section 864(c)(8) and the partnership owns one or more United States real property interests (as defined in section 897(c)), then the foreign transferor determines its effectively connected gain and effectively connected loss under this section, and not pursuant to section 897(g). Accordingly, with respect to a transfer that is subject to section 864(c)(8), section 864(c)(8)(C) does not reduce the amount of gain or loss treated as effectively connected gain or loss under this section. For rules regarding a transfer not subject to section 864(c)(8) of an interest in a partnership that owns one or more United States real property interests, see section 897(g) and the regulations thereunder. If a foreign transferor transfers an interest in a partnership in the

manner described in paragraph (b)(2)(ii) of this section, the transfer is treated as not subject to section 864(c)(8) to the extent of the gain or loss that is not recognized; instead, if the partnership owns one or more United States real property interests at the time of transfer, the rules of section 897(g) and the regulations thereunder apply to the unrecognized gain or loss.

(e) *Tiered partnerships*—(1) *Transfers of upper-tier partnerships*. Assets sold in a deemed sale described in paragraph (c)(1) of this section do not include interests in partnerships that are engaged in the conduct of a trade or business within the United States or interests in partnerships that hold, directly or indirectly, partnerships that are engaged in the conduct of a trade or business within the United States. Rather, if a foreign transferor transfers an interest in a partnership (upper-tier partnership) that owns, directly or indirectly, an interest in one or more partnerships that are engaged in the conduct of a trade or business within the United States, then—

(i) Beginning with the lowest-tier partnership that is engaged in the conduct of a trade or business within the United States in a chain of partnerships and going up the chain, each partnership that is engaged in the conduct of a trade or business within the United States is treated as selling its assets in a deemed sale in accordance with the principles of paragraph (c)(1) of this section; and

(ii) Each partnership must determine its deemed sale EC gain and deemed sale EC loss in accordance with the principles of paragraph (c)(2) of this section, and determine the distributive share of deemed sale EC gain and deemed sale EC loss for each partner that is either a partnership (in which the foreign transferor is a direct or indirect partner) or a foreign transferor, in accordance with the principles of paragraph (c)(3)(i) of this section.

(2) *Transfers by upper-tier partnerships*. If a foreign transferor is a direct or indirect partner in an upper-tier partnership and the upper-tier partnership transfers an interest in a partnership that is engaged in the conduct of a trade or business within the United States (including a partnership held indirectly through one or more partnerships), then the principles of this section (including paragraph (e)(1) of this section) apply with respect to the gain or loss on

the transfer that is allocated to the foreign transferor by the upper-tier partnership.

(3) *Coordination with section 897*. For purposes of this paragraph (e), a lower-tier partnership that holds one or more United States real property interests is treated as engaged in the conduct of a trade or business within the United States.

(f) *Treaty coordination*. This paragraph (f) describes how paragraph (c)(3) of this section applies in the case of a transfer of an interest in a partnership by a foreign transferor that is eligible for benefits under an applicable U.S. income tax treaty. As a general matter, a foreign transferor must satisfy the requirements of the limitation on benefits article, if any, in the treaty between the jurisdiction in which the transferor is resident and the United States to be eligible for treaty benefits. In the case of a foreign transferor that is entitled to treaty benefits, in determining the foreign transferor's distributive share of deemed sale EC gain and deemed sale EC loss, gain or loss derived by the foreign transferor attributable to assets deemed sold that would be exempt from tax under an applicable U.S. income tax treaty if disposed of by the partnership are not taken into account under paragraph (c)(3) of this section. In general, gain or loss on the alienation of a partnership interest will be treated as effectively connected gain or loss under section 864(c)(8) to the extent that the gain or loss is either attributable to assets forming part of a U.S. permanent establishment or fixed place of business, or taxable under a provision governing the disposition of United States real property interests. Gain or loss from the alienation of a partnership interest will be considered gain or loss attributable to the alienation of assets forming part of a permanent establishment or fixed place of business in the United States to the extent the assets deemed sold under section 864(c)(8) form a part of the U.S. permanent establishment or fixed place of business of the partnership. If, however, after applying treaty benefits in paragraph (c)(3) of this section, the only gains or losses that would be taken into account are gains or losses attributable to United States real property interests, the foreign transferor determines its effectively connected gain and effectively connected

loss pursuant to section 897 and not under this section.

(g) *Definitions*. The following definitions apply for purposes of this section.

(1) *Effectively connected gain*. The term *effectively connected gain* means gain that is treated as effectively connected with the conduct of a trade or business within the United States.

(2) *Effectively connected loss*. The term *effectively connected loss* means loss treated as effectively connected with the conduct of a trade or business within the United States.

(3) *Foreign transferor*. The term *foreign transferor* means a nonresident alien individual or foreign corporation.

(4) *Section 751(a) property*. The term *section 751(a) property* means unrealized receivables described in section 751(c) and inventory items described in section 751(d).

(5) *Transfer*. The term *transfer* means a sale, exchange, or other disposition, and includes a distribution from a partnership to a partner to the extent that gain or loss is recognized on the distribution, as well as a transfer treated as a sale or exchange under section 707(a)(2)(B).

(h) *Anti-stuffing rule*. If a foreign transferor (or a person that is related to a foreign transferor within the meaning of section 267(b) or 707(b)) transfers property (including another partnership interest) to a partnership in a transaction with a principal purpose of reducing the amount of gain treated as effectively connected gain, or increasing the amount of loss treated as effectively connected loss, under section 864(c)(8) or section 897, the transfer is disregarded for purposes of section 864(c)(8) or section 897, as appropriate.

(i) *Examples*. This paragraph (i) provides examples that illustrate the rules of this section. Except as otherwise provided, the following facts are presumed for purposes of this paragraph (i). FP is a foreign corporation. USP is a domestic corporation. PRS is a partnership that was formed on January 1, 2018, when FP and USP each contributed \$100x in cash. PRS has made no distributions and received no contributions other than those described in the preceding sentence. FP's adjusted basis in its interest in PRS is \$100x. X is a foreign corporation that is unrelated to FP, USP, or PRS. Upon the formation of PRS,

FP and USP entered into an agreement providing that all income, gain, loss, and deduction of PRS will be allocated equally between FP and USP. PRS is engaged in the conduct of a trade or business within the United States (the U.S. Business) and an unrelated business in Country A (the

Country A Business). In a deemed sale described in paragraph (c)(1) of this section, gain or loss on assets of the U.S. Business would be treated as effectively connected gain or effectively connected loss, and gain or loss on assets of the Country A Business would not be so treated (includ-

ing by reason of paragraph (c)(2)(i)(B) of this section). PRS has no liabilities.

(1) *Example 1. Deemed sale limitation—(i)*
Facts. On January 1, 2019, FP sells its entire interest in PRS to X for \$105x. FP does not qualify for the benefits of an income tax treaty between the United States and another country. Immediately before the sale, PRS's balance sheet appears as follows:

	<i>Adjusted Basis</i>	<i>Fair Market Value</i>
U.S. Business section 1231 asset	\$100x	\$104x
Country A Business capital asset	100x	106x
Total	<hr/> \$200x	<hr/> \$210x

(ii) *Analysis—(A) Outside gain or loss.* FP is a foreign transferor (within the meaning of paragraph (g)(3) of this section) and transfers (within the meaning of paragraph (g)(5) of this section) its interest in PRS to X. For purposes of this example, for simplicity, PRS is assumed to hold no section 751(a) property and depreciation recapture is assumed to be zero. FP recognizes a \$5x capital gain under section 741, which is an outside capital gain within the meaning of paragraph (b)(2)(i) of this section. Under paragraph (b)(1) of this section, FP's \$5x capital gain is treated as effectively connected gain to the extent that it does not exceed the limitation described in paragraph (b)(3)(i) of this section, which is FP's aggregate deemed sale EC capital gain.

(B) *Deemed sale.* FP's aggregate deemed sale EC capital gain is determined according to the three-step process set forth in paragraph (c) of this section. First, the amount of gain or loss that PRS would recognize with respect to each of its assets upon a deemed sale described in paragraph (c)(1) of this section is a \$4x gain with respect to the U.S. Business section 1231 asset and a \$6x gain with respect to the Country A Business capital asset. Second, under paragraph (c)(2) of this section, PRS's deemed sale EC gain is \$4x. Third, under paragraph (c)(3)(ii)(B) of this section, FP's aggregate deemed sale EC capital gain is \$2x (that is, the aggregate of its distributive share of deemed sale EC gain attributable to the deemed sale of assets that are not section 751(a) property, which is 50% of \$4x).

that are not section 751(a) property, which is 50% of \$4x).

(C) *Limitation.* Under paragraph (b)(3)(i) of this section, the \$5x outside capital gain recognized by FP is treated as effectively connected gain to the extent that it does not exceed FP's \$2x aggregate deemed sale EC capital gain. Accordingly, FP recognizes \$2x of capital gain that is treated as effectively connected gain.

(2) *Example 2. Outside gain limitation—(i)*
Facts. On January 1, 2019, FP sells its entire interest in PRS to X for \$110x. FP does not qualify for the benefits of an income tax treaty between the United States and another country. Immediately before the sale, PRS's balance sheet appears as follows:

	<i>Adjusted Basis</i>	<i>Fair Market Value</i>
U.S. Business section 1231 asset	\$100x	\$150x
Country A Business capital asset	100x	70x
Total	<hr/> \$200x	<hr/> \$220x

(ii) *Analysis—(A) Outside gain or loss.* FP is a foreign transferor (within the meaning of paragraph (g)(3) of this section) and transfers (within the meaning of paragraph (g)(5) of this section) its interest in PRS to X. For purposes of this example, for simplicity, PRS is assumed to hold no section 751(a) property and depreciation recapture is assumed to be zero. FP recognizes a \$10x capital gain under section 741, which is an outside capital gain within the meaning of paragraph (b)(2)(i) of this section. Under paragraph (b)(1) of this section, FP's \$10x capital gain is treated as effectively connected gain to the extent that it does not exceed the limitation described in paragraph (b)(3)(i) of this section, which is FP's aggregate deemed sale EC capital gain.

(B) *Deemed sale.* FP's aggregate deemed sale EC capital gain is determined according to the three-step process set forth in paragraph (c) of this section. First, the amount of gain or loss that PRS would recognize with respect to each of its assets upon a deemed sale described in paragraph (c)(1) of this section is a \$50x gain with respect to the U.S. Business section 1231 asset and a \$30x loss with respect to the Country A Business capital asset. Second, under paragraph (c)(2) of this section, PRS's deemed sale EC gain is \$50x. Third, under paragraph (c)(3)(ii)(B) of this section, FP's aggregate deemed sale EC capital gain is \$25x (that is, the aggregate of its distributive share of deemed sale EC gain attributable to the deemed sale of assets that are not section 751(a) property, which is 50% of \$50x).

(C) *Limitation.* Under paragraph (b)(3)(i) of this section, the \$10x outside capital gain recognized by FP is treated as effectively connected gain to the extent that it does not exceed FP's \$25x aggregate deemed sale EC capital gain. Accordingly, FP recognizes \$10x of capital gain that is treated as effectively connected gain.

(3) *Example 3. Interaction with section 751(a)—(i)*
Facts. On January 1, 2019, FP sells its entire interest in PRS to X for \$95x. FP does not qualify for the benefits of an income tax treaty between the United States and another country. Through both its U.S. Business and its Country A Business, PRS holds inventory items and receivables that are section 751 property (as defined in §1.751-1(a)). Immediately before the sale, PRS's balance sheet appears as follows:

	<i>Adjusted Basis</i>	<i>Fair Market Value</i>
U.S. Business section 1231 asset	\$20x	\$50x
U.S. Business inventory and receivables	30x	50x
Country A Business capital asset	100x	80x
Country A Business inventory	50x	10x
Total	<hr/> \$200x	<hr/> \$190x

(ii) *Analysis*—(A) *Outside gain or loss*. FP is a foreign transferor (within the meaning of paragraph (g)(3) of this section) and transfers (within the meaning of paragraph (g)(5) of this section) its interest in PRS to X. Under sections 741 and 751, FP recognizes a \$10x ordinary loss and a \$5x capital gain. See §1.751-1(a). Under paragraph (b)(2)(i) of this section, FP has outside ordinary loss equal to \$10x and outside capital gain equal to \$5x. Under paragraph (b)(1) of this section, FP's outside ordinary

loss and outside capital gain are treated as effectively connected loss and effectively connected gain to the extent that each does not exceed the applicable limitation described in paragraph (b)(3) of this section. In the case of FP's outside ordinary loss, the applicable limitation is FP's aggregate deemed sale EC ordinary loss. In the case of FP's outside capital gain, the applicable limitation is FP's aggregate deemed sale EC capital gain.

(B) *Deemed sale*. FP's aggregate deemed sale EC ordinary loss and aggregate deemed sale EC capital gain are determined according to the three-step process set forth in paragraph (c) of this section.

(1) *Step 1*. The amount of gain or loss that PRS would recognize with respect to each of its assets upon a deemed sale described in paragraph (c)(1) of this section is as follows:

Asset	<i>Gain/(Loss)</i>
U.S. Business section 1231 asset	\$30x
U.S. Business inventory and receivables	20x
Country A Business capital asset	(20x)
Country A Business inventory	(40x)

(2) *Step 2*. Under paragraph (c)(2) of this section, PRS's deemed sale EC gain and deemed sale EC loss

must be determined with respect to each asset. The

amounts determined under paragraph (c)(2) of this section are as follows:

Asset	<i>Deemed Sale EC Gain/(Loss)</i>
U.S. Business section 1231 asset	\$30x
U.S. Business inventory and receivables	20x
Country A Business capital asset	0
Country A Business inventory	0

(3) *Step 3*. Under paragraph (c)(3)(ii)(B) of this section, FP's aggregate deemed sale EC capital gain is \$15x (that is, the aggregate of its distributive share of deemed sale EC gain that is attributable to the deemed sale of assets that are not section 751(a) property, which is 50% of \$30x) and FP's aggregate deemed sale EC ordinary loss is \$0 (that is, the aggregate of its distributive share of deemed sale EC loss that is attributable to the deemed sale of assets that are section 751(a) property).

(C) *Limitation*—(i) *Capital gain*. Under paragraph (b)(3)(i) of this section, the \$5x outside capital gain recognized by FP is treated as effectively connected gain to the extent that it does not exceed FP's \$15x aggregate deemed sale EC capital gain. Accordingly, the amount of FP's capital gain that is treated as effectively connected gain is \$5x.

(ii) *Ordinary loss*. Under paragraph (b)(3)(iv) of this section, the \$10x outside ordinary loss recognized by FP is treated as effectively connected loss

to the extent that it does not exceed FP's \$0 aggregate deemed sale EC ordinary loss. Accordingly, the amount of FP's ordinary loss that is treated as effectively connected loss is \$0.

(4) *Example 4. Coordination with income tax treaties*—(i) *Facts*—(A) *Sale of interest*. On January 1, 2019, FP sells its entire interest in PRS to X for \$105x. Immediately before the sale, PRS's balance sheet appears as follows:

	<i>Adjusted Basis</i>	<i>Fair Market Value</i>
U.S. Business section 1231 asset	\$100x	\$104x
Country A Business capital asset	100x	106x
Total	\$200x	\$210x

(B) *Treaty benefits*. FP is a qualified resident of Country A under a U.S. income tax treaty between the United States and Country A that is similar or identical in all material respects to the 2006 U.S. Model Income Tax Convention (the Treaty). PRS is treated as fiscally transparent for purposes of Country A tax law. PRS does not carry on its U.S. business through a U.S. permanent establishment (PE).

(ii) *Analysis*—(A) *Outside gain or loss*. FP is a foreign transferor (within the meaning of paragraph (g)(3) of this section) and transfers (within the mean-

ing of paragraph (g)(5) of this section) its interest in PRS to X. For purposes of this example, for simplicity, PRS is assumed to hold no section 751(a) property and depreciation recapture is assumed to be zero. FP recognizes a \$5x capital gain under section 741, which is an outside capital gain within the meaning of paragraph (b)(2)(i) of this section. Under paragraph (b)(1) of this section, FP's \$5x capital gain is treated as effectively connected gain to the extent that it does not exceed the limitation described

in paragraph (b)(3)(i) of this section, which is FP's aggregate deemed sale EC capital gain.

(B) *Deemed sale*. FP's aggregate deemed sale EC capital gain is determined according to the three-step process set forth in paragraph (c) of this section by taking into account the treaty coordination rule under paragraph (f) of this section.

(1) *Step 1*. The amount of gain or loss that PRS would recognize with respect to each of its assets upon a deemed sale described in paragraph (c)(1) of this section is as follows:

Asset	<i>Gain/(Loss)</i>
U.S. Business section 1231 asset	\$4x
Country A Business capital asset	6x

(2) Step 2. Under paragraph (c)(2) of this section, PRS's deemed sale EC gain is as follows:

Asset	Gain/(Loss)
U.S. Business section 1231 asset	\$4x
Country A Business capital asset	0x

(3) Step 3. FP is eligible for benefits under the Treaty and derives the gain on the deemed sale of U.S. Business section 1231 asset. Under paragraph (c)(3)(i) and paragraph (f) of this section, because gain from the disposition of the U.S. Business section 1231 asset does not form part of a U.S. PE, the gain is exempt from U.S. tax under the Treaty, and is not taken into account in determining FP's distributive share of deemed sale EC gain under paragraphs (c)(3)(i) and paragraph (f) of this section. Therefore, FP's aggregate deemed sale EC capital gain is \$0x under paragraph (c)(3)(ii)(B) of this section.

(C) *Limitation.* Under paragraph (b)(3)(i) of this section, the \$5x outside capital gain recognized by FP is not treated as effectively connected gain since all of it would exceed FP's \$0x aggregate deemed sale EC capital gain.

(j) *Applicability date.* This section applies to transfers occurring on or after December 26, 2018, and to amounts received on or after December 26, 2018, pursuant to an installment sale (as defined in section 453(b)) occurring on or after November 27, 2017.

Par. 3. Section 1.897-7 is added to read as follows:

§1.897-7 Treatment of certain partnership interests, trusts and estates under section 897(g).

(a) through (b) [Reserved]. For further guidance, see § 1.897-7T(a) through (b).

(c) *Coordination with section 864(c)(8).* Except as provided in § 1.864(c)(8)-1, the amount of any money, and the fair market value of any property, received by a nonresident alien individual or foreign corporation in exchange for all or part of its interest in a partnership, trust, or estate will, to the extent attributable to United States real property interests, be considered as an amount received from the sale or exchange in the United States of such property. See also § 1.864(c)(8)-1(h) for an anti-stuffing rule that may apply to transactions subject to section 897. This paragraph applies to transfers occurring on or after December 26, 2018, and to amounts received on or after December 26, 2018, pursuant to an installment sale (as defined in section

453(b)) occurring on or after November 27, 2017.

Par. 4. Section 1.897-7T is amended by adding paragraph (c) to read as follows:

§1.897-7T Treatment of certain partnership interests as entirely U.S. real property interests under sections 897(g) and 1445(e) (temporary).

* * * * *

(c) *Coordination with section 864(c)(8).* [Reserved]. For further guidance, see § 1.897-7(c).

Sunita Lough,
Deputy Commissioner for Services
and Enforcement.

Approved: September 10, 2020.

David J. Kautter,
Assistant Secretary of the Treasury
(Tax Policy).

(Filed by the Office of the Federal Register on November 05, 2020, 8:45 a.m., and published in the issue of the Federal Register for November 06, 2020, 85 F.R. 70958)

26 CFR § 54.9815-2713

T.D. 9931

**DEPARTMENT OF THE
TREASURY
Internal Revenue Service
26 CFR Part 54**

**DEPARTMENT OF THE
TREASURY
Office of the Secretary
31 CFR Part 33**

**DEPARTMENT OF HEALTH
AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services
42 CFR Parts 410, 411, 414, 417, 433, and 510**

**Office of the Secretary
45 CFR Parts 147, 155 and 182
[CMS-9912-IFC]**

Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS); Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor.

ACTION: Interim final rule with request for comments.

SUMMARY: * * *

This rule also amends regulations regarding coverage of preventive health services to implement section 3203 of the CARES Act, which shortens the timeframe within which non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage must begin to cover without cost sharing qualifying coronavirus preventive services, including recommended COVID-19 immunizations. This IFC also revises regulations to set forth flexibilities in the public notice requirements and post award public participation requirements for State Innovation Waivers under section 1332 of the Patient Protection and Affordable Care Act (PPACA) during the public health emergency for COVID-19.

DATES: *Effective date:* These regulations are effective on [Insert the date of display for public inspection at the Office of the **Federal Register**], except for amendatory instructions 36 and 37, which are effective on January 1, 2021.

Applicability date: Except as otherwise specified in this paragraph, these regulations are applicable from [Insert the date of display for public inspection at the Office of the **Federal Register**] until the end of the public health emergency for COVID-19 as determined by the HHS Secretary. The regulations at 42 CFR 410.57, 410.152, 410.160, 411.15, 414.701, 414.707, 414.900, and 414.904 and at 42 CFR part 510 (other than 42 CFR 510.300(a)(1)(i) and (iii)) are applicable [Insert the date of display for public inspection at the Office of the **Federal Register**]. Because the requirement at section 6008(b)(3) of the Families First Coronavirus Response Act (FFCRA) is not limited to the duration of the public health emergency for COVID-19, regulations at 42 CFR part 433, subpart G, apply from [Insert the date of display for public inspection at the Office of the **Federal Register**] through the end of the last month of the public health emergency for COVID-19 in accordance with section 6008(b)(3) of the Families First Coronavirus Response Act. Regulations at 42 CFR 510.300(a)(1)(i) and (a)(1)(iii) are applicable October 1, 2020.

Comment date: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on [Insert date 60 days after date of display in the **Federal Register**].

ADDRESSES: In commenting, please refer to file code CMS-9912-IFC.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY:

Centers for Medicare & Medicaid Services,

Department of Health and Human Services,

Attention: CMS-9912-IFC,
P.O. Box 8016,
Baltimore, MD 21244-8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY:

Centers for Medicare & Medicaid Services,

Department of Health and Human Services,

Attention: CMS-9912-IFC,
Mail Stop C4-26-05,
7500 Security Boulevard,
Baltimore, MD 21244-1850

For information on viewing public comments, see the beginning of the "SUPPLEMENTARY INFORMATION" section.

FOR FURTHER INFORMATION CONTACT: * * *

Lina Rashid, (443) 902-2823, or Michelle Koltov, (301) 492-4225, Centers for Medicare & Medicaid Services, Department of Health and Human Services, Kimberly Koch, (202) 622-0854, Department of the Treasury, for issues related to State Innovation Waivers Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency

* * *

David Mlawsky, (410) 786-1565, Centers for Medicare & Medicaid Services, Department of Health and Human Services, Elizabeth Schumacher, (202) 693-8335, Employee Benefits Security Administration, Department of Labor, Dara Alderman, (202) 317-5500, Internal Revenue Service, Department of the Treasury, for issues related to Rapid Coverage of Preventive Services for Coronavirus.

* * *

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the

close of the comment period on the following website as soon as possible after they have been received: <http://regulations.gov>. Follow the search instructions on that website to view public comments.

Background

The United States is responding to an outbreak of respiratory disease caused by a novel coronavirus that was first detected in China and has now been detected in more than 190 countries internationally, and all 50 States, the District of Columbia, and U.S. territories. The virus has been named "severe acute respiratory syndrome coronavirus 2" ("SARS-CoV-2") and the disease it causes has been named "coronavirus disease 2019" ("COVID-19").

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization (WHO) declared the outbreak a "Public Health Emergency of International Concern." On January 31, 2020, pursuant to section 319 of the Public Health Service (PHS) Act (42 U.S.C. 247d), the Health and Human Services Secretary (the Secretary) determined that a public health emergency (PHE) exists for the United States to aid the nation's health care community in responding to COVID-19 (hereafter referred to as the PHE for COVID-19). On March 11, 2020, the WHO publicly declared COVID-19 a pandemic. On March 13, 2020, President Donald J. Trump (the President) declared the COVID-19 pandemic a national emergency. Effective October 23, 2020, the Secretary renewed the January 31, 2020 determination that was previously renewed on April 21, 2020 and July 23, 2020 that a PHE exists and has existed since January 27, 2020.

The Administration is committed to ensuring that Americans have access to a COVID-19 vaccine through Operation Warp Speed, a partnership among components of the HHS, including the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), the National Institutes of Health (NIH), and the Biomedical Advanced Research and Development Authority (BARDA). Operation Warp Speed engages with private firms and other Federal agencies, including the Department of Defense (DoD), Department of Agricul-

ture, the Department of Energy, and the Department of Veterans Affairs. Through the work of the Federal Government and the private sector, Operation Warp Speed seeks to accelerate the development, manufacture, and distribution of a COVID-19 vaccine to the American people.

The CDC has reported that some people are at higher risk of severe illness from COVID-19.¹ These higher-risk categories include:

- Older adults, with risk increasing by age.
- People who have serious chronic medical conditions such as:
 - ++ Obesity.
 - ++ Cardiovascular disease.
 - ++ Diabetes mellitus.
 - ++ Hypertension.
 - ++ Chronic lung disease.
 - ++ Neurologic/Neurodevelopmental disability.²
 - ++ Immunocompromised individuals.
- Residents of Long Term Care (LTC) facilities, including nursing homes, Intermediate Care Facilities for Individuals with Intellectual and Developmental Disabilities (ICF/IIDs), inpatient psychiatric and substance abuse treatment facilities including Institutions for Mental Disease (IMDs) & Psychiatric Residential Treatment Facilities (PRTFs), assisted living facilities, group homes for individuals with developmental disabilities and board-and-care facilities.³

As the health care community implements and updates recommended prevention and control practices, regulatory agencies operating under appropriate waiver authority granted by the PHE for COVID-19 are also working to revise and implement regulations that support these health care community infection prevention and treatment practices. Based on the current and projected increases in the incidence rate of COVID-19 in the US, observed fatalities in the older adult population, and the impact on health care workers at increased risk due to treating special populations, CMS⁴ is reviewing and revising regulations, as appropriate, to offer states, providers, suppliers, and

group health plans and health insurance issuers additional flexibilities in furnishing and providing services to combat the PHE for COVID-19 and to address and minimize the unique impact of the PHE for COVID-19 on other regulatory provisions.

CMS addressed additional policies in three previous interim final rules with comment period (IFCs). The “Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency” IFC appeared in the April 6, 2020 **Federal Register** (85 FR 19230) with an effective date of March 31, 2020, and the “Medicare and Medicaid Programs, Basic Health Program, and Exchanges; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency and Delay of Certain Reporting Requirements for the Skilled Nursing Facility Quality Reporting Program” IFC appeared in the May 8, 2020 **Federal Register** (85 FR 27550) with an effective date of May 8, 2020. The “Medicare and Medicaid Programs, Clinical Laboratory Improvement Amendments, and Patient Protection and Affordable Care Act: Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency” IFC appeared in the September 2, 2020 **Federal Register** (85 FR 54820) with an effective date of September 2, 2020.

This IFC implements a number of measures intended to further the Administration’s commitment to ensure every American has timely access to a COVID-19 vaccine without any out-of-pocket expenses, no matter their source of coverage, or whether they are covered at all.

* * *

In this IFC, HHS and the Departments of Labor and the Treasury (referred to collectively as “the Departments”) clarify certain aspects of coverage of preventive services without cost sharing under the current regulations implementing section 2713 of the Public Health Service (PHS) Act, as added by PPACA and incorporated into the Employee Retirement Income

Security Act of 1974 (ERISA) by section 715 of ERISA and into the Internal Revenue Code (the Code) by section 9815 of the Code. The Departments also amend those regulations to implement the unique requirements related to rapid coverage of qualifying coronavirus preventive services under section 3203 of the CARES Act. Specifically, this IFC clarifies that plans and issuers subject to section 2713 of the PHS Act must cover without cost sharing recommended immunizations as well as the administration of such immunizations, regardless of how the administration is billed. This IFC also defines qualifying coronavirus preventive services consistent with the definition provided in section 3203 of the CARES Act and clarifies that plans and issuers subject to section 2713 of the PHS Act must cover recommended immunizations for COVID-19 that are qualifying coronavirus preventive services, even if not listed for routine use on the Immunization Schedules of the CDC. Due to the urgent need to ensure coverage of and access to qualifying coronavirus preventive services, and to ensure that participants, beneficiaries, and enrollees can access qualifying coronavirus preventive services on the expedited basis specified by statute, this IFC also provides that during the PHE for COVID-19, plans and issuers must cover, without cost sharing, qualifying coronavirus preventive services, regardless of whether such services are delivered by an in-network or out-of-network provider. This coverage is required to be provided within 15 business days after the date the United States Preventive Services Task Force (USPSTF) or the Advisory Committee on Immunization Practices of the CDC (ACIP) makes an applicable recommendation relating to a qualifying coronavirus preventive service.

* * *

This IFC provides for flexibilities in the public notice requirements for a State Innovation Waiver (also referred to as a section 1332 waiver) described in section 1332 of PPACA that apply during the PHE for COVID-19. Specifically, this IFC gives the Secretary of HHS and the

¹ <https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e3.htm>.

² https://www.cdc.gov/mmwr/volumes/69/wr/mm6924e2.htm?s_cid=mm6924e2_w.

³ <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html>.

⁴ Throughout this IFC, unless otherwise specified, “we” and “our” refer to CMS only.

Secretary of the Treasury the authority to modify, in part, the public notice procedures to expedite a decision on a proposed waiver request that is submitted or would otherwise become due during the PHE for COVID-19. This IFC also gives these Secretaries the authority to modify, in part, the post-award public notice requirements for an approved waiver request that would otherwise take place or become due during the PHE for COVID-19.

II. Provisions of the Interim Final Rule – Department of Health and Human Services

* * *

III. Provisions of the Interim Final Rule – Departments of the Treasury, Labor and Health and Human Services

A. Rapid Coverage of Preventive Services for Coronavirus

1. Background

In addition to the steps Congress took to ensure coverage of COVID-19 diagnostic testing, in section 3203 of the CARES Act, Congress required group health plans and health insurance issuers offering group or individual health insurance coverage to cover, without cost sharing, qualifying coronavirus preventive services. This coverage is required to be provided “pursuant to section 2713(a) of the [PHS] Act,” including its implementing regulations or any successor regulations.

Section 2713 of the PHS Act was added by section 1001 of PPACA and incorporated by reference into ERISA by section 715 of ERISA and into the Code by section 9815 of the Code. Section 2713 of the PHS Act and the regulations implementing section 2713 of the PHS Act require non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to provide coverage of certain specified preventive items and services without cost sharing. These services include:

- Evidence-based items or services that have in effect a rating of “A” or “B” in the current recommendations of the USPSTF with respect to the individual involved.

- Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from ACIP with respect to the individual involved. A recommendation of ACIP is considered to be “in effect” after it has been adopted by the Director of the CDC. A recommendation is considered to be for “routine use” if it appears on the Immunization Schedules of the CDC.

- With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA).

- With respect to women, preventive care and screenings provided for in comprehensive guidelines supported by HRSA (not otherwise addressed by the recommendations of the USPSTF), subject to certain exemptions and accommodations (see 45 CFR 147.131 through 147.133).

The Departments’ current regulations (herein referred to as the 2015 Final Regulations) under section 2713 of the PHS Act at 26 CFR 54.9815-2713; 29 CFR 2590.715-2713; and 45 CFR 147.130 require that plans and issuers provide coverage of recommended preventive services for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

Under the 2015 Final Regulations, if a recommended preventive service is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit. However, if a preventive service is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

The 2015 Final Regulations generally do not require a plan and issuer that has a network of providers to provide benefits for applicable preventive items or services that are delivered by an out-of-network provider. Moreover, the 2015 Final Regulations generally do not preclude a plan or issuer that has a network of providers

from imposing cost-sharing requirements for preventive services that are delivered by an out-of-network provider. However, if a plan or issuer does not have in its network a provider who can provide a preventive service, then the plan or issuer must cover the recommended preventive service when performed by an out-of-network provider and may not impose cost sharing with respect to the recommended preventive service.

Many items and services required to be covered under section 2713 of the PHS Act typically are provided as part of the usual course of preventive care, often according to regularly scheduled intervals. Examples include immunizations provided according to schedules established by the CDC and other annual screenings or counseling. Therefore, the 2015 Final Regulations require coverage without cost sharing for applicable immunizations that are recommended by ACIP for routine use, and state that a recommendation is considered to be for “routine use” if it appears on the Immunization Schedules of the CDC.

Section 3203 of the CARES Act establishes a more accelerated timeline for required coverage of qualifying coronavirus preventive services than other recommended preventive services under PHS Act section 2713. As stated above, coverage of qualifying coronavirus preventive services must be provided no later than 15 business days following an applicable recommendation. In addition, it is possible that items, services, and immunizations used to prevent or mitigate COVID-19 will not, in the immediate future, be recommended as part of a usual course of preventive care, but rather for more urgent use. As reflected by the expedited timeline for coverage Congress established in section 3203 of the CARES Act, the need to provide coverage of qualifying coronavirus preventive services is urgent. Therefore, as discussed below, this IFC requires coverage of COVID-19 immunizations within 15 business days after the immunization has been recommended by ACIP and adopted by the CDC, regardless of whether it appears on the Immunization Schedules of the CDC for routine use.

Additionally, in light of the current PHE for COVID-19, it is imperative that group health plans and health insurance

issuers provide full coverage for these items and services, including costs for the administration of vaccines, and ensure timely access to coverage as Congress intended. Accordingly, in this IFC, the Departments provide certain clarifications previously made with respect to the 2015 Final Regulations and amend those regulations to implement unique requirements related to covering qualifying coronavirus preventive services.⁵

2. Scope of Requirement to Cover Certain Recommended Preventive Services under Section 2713 of the Public Health Service Act

a. Related Items and Services

In implementing section 2713 of the PHS Act, the 2015 Final Regulations addressed whether office visit charges associated with certain recommended preventive services must be covered without cost sharing. Specifically, *Example 1* in the 2015 Final Regulations illustrates how the requirements apply in situations where a provider bills a plan for an office visit where a preventive screening for cholesterol abnormalities (which has in effect a rating of A or B from the USPSTF) is conducted and for the laboratory work of the cholesterol screening test. In that example, the plan may not impose any cost-sharing requirements with respect to the separately billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the 2015 Final Regulations provide that the plan may impose cost-sharing requirements for the office visit.

Prior to the publication of the 2015 Final Regulations, the Departments received questions from stakeholders regarding discrete coverage issues related to certain recommended preventive services. In particular, with respect to colonoscopies,

stakeholders asked whether certain related services (such as the cost of polyp removal or anesthesia) must also be covered without cost sharing. The Departments clarified in subregulatory guidance that a plan or issuer may not impose cost sharing for polyp removal during a preventive screening colonoscopy, as such service is an integral part of a colonoscopy, and also stated that anesthesia provided in connection with a preventive colonoscopy must be covered without cost sharing.⁶

Consistent with the examples provided in the 2015 Final Regulations and subregulatory guidance cited in the preamble to the rulemaking promulgating the 2015 Final Regulations, the Departments further clarify that under the 2015 Final Regulations and this IFC, plans and issuers subject to section 2713 of the PHS Act must cover, without cost sharing, items and services that are integral to the furnishing of the recommended preventive service, regardless of whether the item or service is billed separately. For example, several of the recommended preventive services involve screenings for the presence of certain health conditions, such as diabetes, or a variety of sexually transmitted infections. These recommended screenings, typically performed by laboratories, cannot be conducted without first collecting a specimen. Accordingly, plans and issuers subject to section 2713 of the PHS Act must cover without cost sharing both the specimen collection and the recommended preventive service, regardless of how the specimen collection is billed. Similarly, a recommended immunization generally cannot be furnished without being administered by a medical professional. As qualifying coronavirus preventive services are expected to include immunizations, plans and issuers subject to section 2713 of the PHS Act must cover without cost sharing such an immunization and its administration, regardless of how the administration is billed, and regardless of

whether a COVID-19 vaccine or any other immunization requires the administration of multiple doses in order to be considered a complete vaccination. This includes coverage without cost sharing of the administration of a required preventive immunization in instances where a third party, such as the Federal Government, pays for the preventive immunization. Further, if a COVID-19 immunization is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the visit is the delivery of the recommended COVID-19 immunization, then consistent with the 2015 Final Regulations, the plan or issuer may not impose cost-sharing requirements with respect to the office visit. The Departments seek comment on this clarification.

b. Out-of-Network Coverage During the PHE for COVID-19

The 2015 Final Regulations permit a group health plan or issuer that has a network of providers to omit coverage or to impose cost-sharing requirements for recommended preventive services when such services are provided by an out-of-network provider, unless the plan or issuer does not have in its network a provider who can provide the service.⁷ This approach reflects that, as noted earlier in this section of the preamble, recommended preventive services generally are obtained as part of a regular course of preventive care, so participants, beneficiaries, and enrollees typically have the opportunity to seek such care from an in-network provider. By contrast, in the immediate term, newly developed qualifying coronavirus preventive services might be available from a narrower range of providers than other, more established recommended preventive services. To help ensure full access to and the widespread use of qualifying coronavirus preventive services to mitigate the effect

⁵The 2015 Final Regulations address the obligation to continue to provide coverage for recommended preventive services that are in effect on the first day of a plan or policy year when there are changes in recommendations or guidelines. See 26 CFR 54.9815–2713(b)(2)(i) and (ii); 29 CFR 2590.715–2713(b)(2)(i) and (ii); 45 CFR 147.130(b)(2)(i) and (ii). Given the expedited timeline for coverage under section 3203 of the CARES Act, this IFC amends the 2015 Final Regulations to make clear that these paragraphs apply to recommended preventive services that are covered on the first day of the plan or policy year or, with respect to qualifying coronavirus preventive services, “as otherwise specified in paragraph (b)(3) of this section.”

⁶See FAQs About Affordable Care Act Implementation Part 12, Q5 (Feb. 20, 2013), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-xii.pdf> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs12 and FAQs About Affordable Care Act Implementation Part XXVI, Q7 (May 11, 2015), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-xxvi.pdf> and https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/acaImplementation_faqs26.pdf.

⁷26 CFR 54.9815–2713(a)(3); 29 CFR 2590.715–2713(a)(3); 45 CFR 147.130(a)(3).

of the PHE for COVID-19 and slow transmission of the virus, it is critical that individuals be able to receive such services from any provider authorized to provide the service. Therefore, this IFC amends the 2015 Final Regulations to require that plans and issuers subject to section 2713 of the PHS Act must cover without cost sharing a qualifying coronavirus preventive service, regardless of whether such service is delivered by an in-network or out-of-network provider. This is based on the Departments' view that participants, beneficiaries, and enrollees may not be able to locate in-network providers consistently during the emergency period.

To satisfy this requirement, the Departments are of the view that plans and issuers must administer this out-of-network coverage requirement in such a way that makes receiving out-of-network services for qualifying coronavirus preventive services a meaningful benefit for participants, beneficiaries, and enrollees. To be a meaningful benefit, the Departments are of the view that plans and issuers must administer this out-of-network coverage requirement in a way that ensures that participants, beneficiaries, and enrollees have access to a variety of out-of-network providers for such services. To the extent plans and issuers reimburse out-of-network providers an unreasonably low amount for qualifying coronavirus preventive services, including for administration of a COVID-19 vaccine, this approach could severely limit the number of such providers that are willing to provide the service, which would contravene the purpose of the requirement to provide out-of-network coverage without cost sharing of qualifying coronavirus preventive services. Therefore, this IFC provides that with respect to a qualifying coronavirus preventive service and a provider with whom the plan or issuer does not have a negotiated rate for such service (such as an out-of-network provider), the plan or issuer must reimburse the provider for such service in an amount that is reasonable,

as determined in comparison to prevailing market rates for such service. The Departments will consider the amount of payment to be reasonable, for example, if the plan or issuer pays the provider the amount that would be paid under Medicare for the item or service. In the Departments' view, these minimum payment standards are necessary and appropriate because providers that participate in the CDC COVID-19 Vaccination Program contractually agree to administer a COVID-19 vaccine regardless of an individual's ability to pay and regardless of their coverage status, and also may not seek any reimbursement, including through balance billing, from a vaccine recipient.

The Departments request comment on all aspects of this approach. The Departments request comment on the issue of network adequacy and whether and, if so, how long provider networks are expected to be inadequate. The Departments also request comment on the safeguards in this IFC to ensure that out-of-network reimbursement rates are reasonable and that providers administering a publicly funded COVID-19 vaccine are reimbursed by group health plans and issuers prevailing market rates in the absence of a negotiated rate, and whether other examples of reasonable reimbursement rates, in addition to Medicare rates, would be useful.

3. Definition of Qualifying Coronavirus Preventive Services

Section 3203(b)(1) of the CARES Act defines "qualifying coronavirus preventive service" as an item, service, or immunization that is intended to prevent or mitigate COVID-19 and that is—(A) an evidence-based item or service that has in effect a rating of 'A' or 'B' in the current recommendations of the USPSTF; or (B) an immunization that has in effect a recommendation from ACIP with respect to the individual involved. The statutory provisions describing USPSTF and ACIP recommendations in this definition are sub-

stantively identical to the ones at section 2713(a)(1) and (2) of the PHS Act. However, as stated above, under the 2015 Final Regulations, only "immunizations for routine use in children, adolescents, and adults" that are recommended by ACIP must be covered without cost sharing.⁸ A recommendation is considered to be for routine use if it is listed on the CDC's Immunization Schedules.⁹

This IFC provides a definition of qualifying coronavirus preventive services that is consistent with the statutory definition in section 3203 of the CARES Act. However, the Departments note that unlike the other preventive service immunizations required to be covered without cost sharing under section 2713 of the PHS Act and the 2015 Final Regulations, this definition and related coverage requirement are not limited to COVID-19 immunizations recommended by ACIP for "routine use." While other preventive items and services may be recommended for routine use, for reasons described elsewhere in this section of the preamble, the PHE for COVID-19 presents unique circumstances and qualifying coronavirus preventive services might not, in the immediate term, be recommended for routine use, according to specified schedules. Rather, the Departments generally expect consumers should receive an immunization for COVID-19 as soon as it becomes available to the general public, or as soon as it becomes available to them based on their status as part of a high-risk or high-priority population, as recommended by ACIP. Plans and issuers subject to section 2713 of the PHS Act must cover, without cost sharing, COVID-19 immunizations that are recommended by ACIP and adopted by the Director of CDC, even if not listed for routine use on the CDC Immunization Schedules, pursuant to 26 CFR 54.9815-2713T(a); 29 CFR 2590.715-2713(a); and 45 CFR 147.130(a), and subject to the additional changes described later in this section of the preamble.¹⁰

⁸ See 75 FR 41726, 41728 (July 19, 2010), codified at 26 CFR 54.9815-2713(a)(1)(ii); 29 CFR 2590.715-2713(a)(1)(ii); 45 CFR 147.130(a)(1)(ii).

⁹ *Id.*

¹⁰ HHS reminds states that the HHS Office for Civil Rights enforces applicable Federal civil rights laws as described above, as well as laws protecting the exercise of conscience and religious freedom, including the Religious Freedom Restoration Act (42 U.S.C. 2000bb through 2000bb-4). HHS's requirements are subject to these laws, and states may have obligations under these laws to protect conscience, prohibit coercion, and to ensure the free exercise of religion. U.S. Department of Health & Human Services, Office for Civil Rights, Conscience and Religious Freedom, <https://www.hhs.gov/conscience/index.html> (last visited Aug. 20, 2020).

4. Qualifying Coronavirus Preventive Services – Timing Requirement

Section 2713 of the PHS Act and the 2015 Final Regulations require plans and issuers to cover recommended preventive items and services beginning with the first plan year (or in the individual market, policy year) that is one year after the date the recommendation or guideline is issued. Section 3203 of the CARES Act accelerates the timeline for coverage of qualifying coronavirus preventive services without cost sharing, requiring coverage to be provided within 15 business days after the date on which a recommendation is made relating to such service. This IFC codifies these timing requirements at 26 CFR 54.9815-2713T(b)(3); 29 CFR 2590.715-2713(b)(3); and 45 CFR 147.130(b)(3).

In addition, the IFC adds a sunset provision at 26 CFR 54.9815-2713T(e); 29 CFR 2590.715-2713(e); and 45 CFR 147.130(e), under which the amendments made to the regulations will not apply with respect to qualifying coronavirus preventive services furnished on or after the expiration of the PHE for COVID-19. The Departments note, however, that coverage under section 3203 of the CARES Act is not limited to the duration of the PHE for COVID-19 and therefore the statutory provisions will continue to apply.

B. Diagnostic Testing for COVID-19

Section 6001 of the FFCRA generally requires group health plans and health insurance issuers offering group or individual health insurance coverage to provide benefits for COVID-19 diagnostic tests and certain items and services related to diagnostic testing for COVID-19 when those items or services are furnished on or after March 18, 2020, and during the duration of the PHE for COVID-19. Under the FFCRA, plans and issuers must provide this coverage without imposing any cost-sharing requirements (including deductibles, copayments, and coinsurance) or prior authorization or other medical management requirements. Section 3201

of the CARES Act, enacted on March 27, 2020, amended section 6001 of the FFCRA to include a broader range of diagnostic tests that plans and issuers must cover without any cost-sharing requirements or prior authorization or other medical management requirements.

Section 3202(a) of the CARES Act provides that a plan or issuer providing coverage of items or services described in section 6001(a) of the FFCRA shall reimburse the provider of the diagnostic testing at a rate negotiated with the provider, or if there is no negotiated rate, at an amount that equals the cash price for such service as listed by the provider on a public internet website. As previously articulated in guidance, the Departments interpret the requirement to provide coverage without cost sharing in section 6001 of the FFCRA, together with section 3202(a) of the CARES Act, as establishing a process for setting reimbursement rates and protecting participants, beneficiaries, and enrollees from being balance billed for an applicable COVID-19 test.¹¹ These provisions help ensure consumers can be tested for COVID-19 without barriers related to cost, and are critical to the ability to detect the virus and stop its spread. However, testing efforts have continued to be hampered by challenges, such as delays in obtaining results, issues with test accuracy, and supply shortages.¹²

The Departments encourage group health plans and issuers of group or individual health insurance coverage to consider market-driven approaches to addressing these continued challenges surrounding COVID-19 diagnostic testing. The Departments encourage plans and issuers to explore using payment arrangements that create incentives for providers to reduce the time it takes to provide results for diagnostic testing for COVID-19, while maintaining the accuracy rates of their test results in instances where it is within the ability of providers to address a delay.

At certain points in this PHE, there have been wide variations in the time it takes providers to make test results avail-

able to consumers. These delays in obtaining test results increase the risk that infected individuals may unknowingly infect others. These delays could be caused by large volumes of tests to process and/or inadequate resources. Pay-for-performance arrangements, where reimbursement rates are based on the time it takes to make test results available, could encourage innovative approaches by providers to reduce the turnaround time. The Departments encourage group health plans and issuers of group or individual health insurance coverage to consider developing such arrangements with providers, and strongly encourage plans and issuers that do so to incorporate safeguards to ensure that the payment arrangements are not structured in a way that prioritizes speed over accuracy or that result in unintended consequences, such as reduction in access to COVID-19 diagnostic testing or non-compliance with balance billing restrictions.

IV. Provisions of the Interim Final Rule Regarding State Innovation Waivers – Department of the Treasury and Health and Human Services

A. State Innovation Waivers Policy and Regulatory Revisions in Response to the PHE for COVID-19 Public Health Emergency

1. Background

Section 1332 of the PPACA permits states to apply for a State Innovation Waiver (also referred to as “section 1332 waivers” or “State Relief and Empowerment Waivers”) to pursue innovative strategies for providing their residents with access to higher value, more affordable health coverage. The overarching goal of section 1332 waivers is to give all Americans the opportunity to obtain high value and affordable health coverage regardless of income, geography, age, sex, or health status, while simultaneously empowering states to develop health coverage strategies that best meet

¹¹ FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 43 (June 23, 2020), available at <https://www.cms.gov/files/document/FFCRA-Part-43-FAQs.pdf> and <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-43.pdf>.

¹² American Society for Microbiology, “Supply Shortages Impacting COVID-19 and Non-COVID Testing” (Oct. 15, 2020), available at <https://asm.org/Articles/2020/September/Clinical-Microbiology-Supply-Shortage-Collect-1>.

the needs of their residents. Section 1332 waivers provide states an opportunity to promote a stable health insurance market that offers more choice and affordability to their residents. Under section 1332 of the PPACA, a State Innovation Waiver can be approved by HHS and the Department of the Treasury if it provides access to quality health coverage that is at least as comprehensive and affordable as would be provided absent the waiver, provides coverage to a comparable number of residents of the state as would be provided coverage absent a waiver, and does not increase the Federal deficit. To date, HHS and the Department of the Treasury have approved 15 state waiver requests, 14 of which implement state-based reinsurance programs.¹³ As noted in a recent data brief issued by CMS, section 1332 state-based reinsurance waivers have resulted in a statewide average premium reduction ranging from four to 37 percent in calendar year 2020 for residents in states with approved waivers.¹⁴ Reinsurance provides a direct benefit to consumers by paying a portion of provider claims that would otherwise be paid by consumers through higher premiums and lowering premiums for people in the individual health insurance market. HHS and the Department of the Treasury continue to encourage states to take advantage of the flexibilities available through section 1332 waivers in order to pursue solutions to help lower costs and increase coverage choices for Americans faced with unaffordable premiums and reduced competition in the insurance market both during and after the PHE for COVID-19.

Section 1332(a)(4)(B) of the PPACA requires the Secretary of HHS and the Secretary of the Treasury (the Secretaries) to issue regulations regarding procedures for State Innovation Waivers. On March 14, 2011, HHS and the Department of the Treasury published the “Application, Review, and Reporting Process for Waivers for State Innovation” proposed

rule (76 FR 13553) to implement section 1332(a)(4)(B) of the PPACA.¹⁵ On February 27, 2012, HHS and the Department of the Treasury published the “Application, Review, and Reporting Process for Waivers for State Innovation” final rule (77 FR 11700) (hereinafter referred to as the “2012 Final Rule”).¹⁶ On October 24, 2018, HHS and the Department of the Treasury issued the “State Relief and Empowerment Waivers” guidance (83 FR 53575) (hereinafter referred to as the “2018 Guidance”), which superseded the previous guidance published on December 16, 2015 (80 FR 78131), and provided additional information about the requirements that states must meet regarding section 1332 waiver proposals, the Secretaries’ application review procedures, pass-through funding determinations, certain analytical requirements, and operational considerations.^{17, 18}

Section 1332(a)(4)(B) of the PPACA also directs HHS and the Department of the Treasury to issue regulations that provide for state and Federal public notice and comment sufficient to ensure a meaningful level of public input regarding a state’s section 1332 waiver plan, both during the application process and after a waiver is implemented. Current regulations and guidance address how states may apply for a waiver, information states must include in an application, public notice and comment requirements, and HHS’ and the Department of the Treasury’s monitoring and compliance activities, including state reporting requirements (collectively referred to as public notice procedures).

The Secretaries are setting forth a process for states to request modifications to the public notice procedures during the PHE for COVID-19 prior to and after approval of a section 1332 waiver that continue to meet the statutory and regulatory requirements that the public has an opportunity to provide meaningful input. Further the Secretaries are promulgating this rule so that HHS and the Department

of the Treasury do not impose requirements that are unreasonable or unnecessarily burdensome regarding state compliance consistent with section 1332(a)(4)(B)(iii) of the PPACA during the PHE for COVID-19. This IFC promulgates rules to establish a framework for the Secretaries to modify some of the existing regulatory public notice procedures to expedite a decision on a proposed waiver request during the PHE for COVID-19 when a delay would undermine or compromise the purpose of the proposed waiver request and be contrary to the interests of consumers. The Secretaries will also make available such flexibility regarding public notice procedures should any state with an approved section 1332 waiver request an extension or amendment of an approved section 1332 waiver during the PHE for COVID-19.

Similarly, this IFC also establishes a framework for the Secretaries to modify, in part, post award public notice procedures for an approved waiver request that would otherwise take place or become due during the PHE for COVID-19. The Secretaries will also make available such flexibility for post award public notice procedures for approved waiver extensions, amendments, or phase-out for a waiver should those otherwise take place or become due during the PHE for COVID-19. HHS and the Department of the Treasury are of the view that section 1332 waivers are a critical tool for states to ensure patients have stable access to health care coverage, including during the PHE for COVID-19. These interim final provisions are effective immediately for the duration of the PHE for COVID-19. HHS and the Department of the Treasury note that existing threats to consumers’ access to health coverage or care—such as in geographic areas in which issuer participation has been low for some time—would not be considered emergency situations for purposes of applying the flexibilities adopted in this rulemaking.

¹³ More information on section 1332 waivers that are approved is available online: https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.

¹⁴ CCIIO Data Brief Series: State Relief and Empowerment Waives: State-based Reinsurance Programs. June 2020. Available online: <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/1332-Data-Brief-June2020.pdf>.

¹⁵ <https://www.govinfo.gov/content/pkg/FR-2011-03-14/pdf/2011-5583.pdf>.

¹⁶ <https://www.govinfo.gov/content/pkg/FR-2012-02-27/pdf/2012-4395.pdf>.

¹⁷ <https://www.govinfo.gov/content/pkg/FR-2018-10-24/pdf/2018-23182.pdf>.

¹⁸ <https://www.govinfo.gov/content/pkg/FR-2015-12-16/pdf/2015-31563.pdf>.

2. Public Notice Procedures and Approval Processes During the PHE (31 CFR 33.118 and 45 CFR 155.1318)

Section 1332(a)(4)(B) of the PPACA provides that the Secretary of HHS and the Secretary of the Treasury shall issue regulations providing a process for public notice and comment at the state level, including public hearings, and a process for providing public notice and comment after the application is received by the Secretaries, that are both sufficient to ensure a meaningful level of public input. Current regulations at §§ 33.112 and 155.1312 specify state public notice and participation requirements for proposed waiver requests, and §§ 33.116(b) and 155.1316(b) specify the accompanying public notice and comment period requirements under the Federal public notice and approval process.

Under the current regulations at §§ 33.112 and 155.1312, states are required to provide a public notice and comment period prior to submitting an application for a new section 1332 waiver. The notice must include a comprehensive description of the section 1332 waiver application; information about where the application is available for public review; where the written comments may be submitted; and the location, date, and time of public hearings that will be convened by the state to seek public input on the application for a section 1332 waiver.¹⁹ After issuing the public notice and prior to submitting an application for a section 1332 waiver, the state must hold public hearings to allow the public to learn about and comment on the state's application, and must publish the date, time, and location

of the hearings in a prominent location on the state's public website.²⁰ As set forth in §§ 33.112(a)(2) and 155.1312(a)(2), as part of the public notice and comment period, a state with one or more federally recognized tribes must conduct a separate process for meaningful consultation with such tribes, if applicable. As HHS and the Department of the Treasury explained in the 2012 Final Rule preamble, this tribal consultation must be conducted in accordance with Executive Order (E.O.) 13175, and, as E.O. 13175 also applies to Medicaid, a state may use a Medicaid consultation process to satisfy the consultation needed for a section 1332 waiver (77 FR 11700, 11706). Furthermore, the state should include in its section 1332 waiver application a description of issues raised and comments received.

In addition, under section 1332(a)(4)(B)(iii) of the PPACA and the existing implementing regulations at §§ 33.116(b) and 155.1316(b), the Secretary of HHS and the Secretary of the Treasury are required to provide a Federal public notice and comment period following their preliminary determination that a state's section 1332 waiver application is complete.

Section 1332 waivers may vary significantly in their complexity and breadth. The existing regulations generally provide states and the Federal Government flexibility in determining and/or extending the length of the comment periods. Both the state and the Federal public notice and comment periods must be sufficient to ensure a meaningful level of public input. The 2018 Guidance²¹ further specifies that the state comment period should be no less than 30 days, and explains that consistent with HHS regulations, waiver

applications must be posted online in a manner that meets technical standards for website accessibility similar to applicable national standards²² to ensure access for individuals with disabilities.

HHS and the Department of the Treasury recognize that the current section 1332 regulations regarding state and Federal public notice procedures and comment period requirements may impose barriers for states pursuing a proposed waiver request during the PHE for COVID-19.²³ It is the mission of HHS to enhance and protect the health and well-being of all Americans. As such, HHS and the Department of the Treasury are issuing this guidance to protect public health and to prevent the spread of COVID-19 by limiting the need for in-person gatherings related to section 1332 waivers during the PHE. Additionally, states may face uncertainty as to whether their waiver request will be approved in time, given the state and Federal public notice procedures or other public participation requirement associated with state procedures that would otherwise require an in-person gathering, to expeditiously reform their health insurance markets and to protect consumers from the effects of the PHE for COVID-19. Some states may not consider more robust changes because they are concerned that the current section 1332 waiver application requirements are too time-consuming or burdensome to pursue during the PHE for COVID-19. Therefore, HHS and the Department of the Treasury are of the view that having the flexibility to modify certain public notice procedures and participation requirements during the PHE for COVID-19 will protect public health and health insurance markets, and will increase flexibility and

¹⁹ 31 CFR 33.112(b); 45 CFR 155.1312(b).

²⁰ In response to a question from a commenter, the 2012 Final Rule states that "hearings," as used in 31 CFR 33.112(c)(1) and 45 CFR 155.1312(c)(1), means no less than two hearings. (77 FR 11700, 11706). The HHS and the Department of Treasury continue to interpret the regulatory requirement that a State shall hold "hearings" to refer to at least two hearings, except as otherwise provided by the amendments made in this IFC. The existing regulation does not expressly rely on the statutory requirement that the Secretaries of HHS and Treasury establish "a process for public notice and comment at the State level, including public hearings..." and HHS and the Department of the Treasury are of the view that language, by itself, does not require a particular state to hold more than one hearing. Rather, the statutory language describes a process applicable across multiple states, which will, in the aggregate, necessarily involve multiple hearings.

²¹ 83 FR 53575 (<https://www.govinfo.gov/content/pkg/FR-2018-10-24/pdf/2018-23182.pdf>).

²² "National standards" refers to standards issued by the Architectural and Transportation Barriers Compliance Board (often referred to as "section 508" standards), or alternatively, the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG) 2.0 Level AA standards. See 83 FR 53575, 53583 (Oct. 24, 2018).

²³ During the PHE for COVID-19, under the Secretaries' discretion, HHS and the Department of the Treasury have allowed states to conduct their public forums virtually, both prior to application submission and post award. For example, following the scheduling and notice of the hearings, and in consultation with CMS, the New Hampshire Insurance Department rescheduled planned in-person public hearings to an online webinar format in response to social distancing guidance provided by New Hampshire Governor Chris Sununu and the Federal government. (<https://www.nh.gov/insurance/lah/documents/nh-section-1332-waiver-draft.pdf>). Georgia also offered public hearings virtually because of public health concerns regarding large, in-person gatherings during the COVID-19 pandemic. In addition, as of July 13, 2020, several states with approved waivers conducted their post award forum virtually due to COVID-19, including Alaska, Colorado, Delaware, Maine, Maryland, Minnesota, Montana, Oregon, North Dakota, Rhode Island, and Wisconsin. In this IFC, the Secretaries expand and build upon this approach by providing more flexibility to allow HHS and the Department of the Treasury to expedite a decision on a proposed waiver request. (<https://medicaid.georgia.gov/document/document/georgia1332waiverapplicationfinal07312020vfpdf/download>)

reduce burdens for states seeking to use section 1332 waivers as a means of innovation for providing coverage, lowering premiums, and improving their health care markets.

Section 1332 waivers are a critical tool for states to ensure patients across the country have access to health care coverage. About 10.7 million individuals on average rely on the Exchanges to purchase individual health insurance coverage throughout the year.^{24,25} Although recently there have been positive premium stabilization and insurer participation trends, the COVID-19 pandemic has introduced new uncertainties in the individual and small group markets such that past trends resulting in limited access and affordability may return in some areas. For example, in response to the uncertainty created by the PHE for COVID-19 regarding health care utilization rates and claims costs, such as those associated with testing and treatment for COVID-19, premiums may increase and issuers may reduce their presence or coverage options in the individual and small group markets. Additionally, due to the PHE for COVID-19, some issuers may have difficulty predicting the composition of their risk pools given uncertainty about the risk profiles of many new enrollees coming from employer-sponsored coverage and the potential transition of other enrollees to Medicaid due to income loss. Therefore, HHS and the Department of the Treasury are concerned that past trends that threaten the stability of the individual market risk pool may return, leading some issuers to cease offering coverage on the Exchanges in some states and counties and leading other issuers to increase their rates, leaving some geographic areas with limited or no affordable Exchange coverage options. Permitting the Secretary of HHS and the Secretary of the Treasury to modify the public notice procedures, in part, will help states seeking section 1332 waivers to address such circumstances more quickly and develop innovative ways to ensure consumers have access to affordable health care coverage. As such,

HHS and the Department of the Treasury are of the view that, if certain safeguards are met, it is in the best interest of the public to provide states applying for section 1332 waivers with the option to request to modify public notice procedures during the PHE for COVID-19.

This IFC adds the new §§ 33.118 and 155.1318 and provides that the Secretary of HHS and the Secretary of the Treasury may modify, in part, the state public notice requirements specified in §§ 33.112 and 155.1312 and the Federal public notice requirements specified at §§ 33.116(b) and 155.1316(b) to expedite a decision on a proposed waiver request during the PHE for COVID-19 when a delay would undermine or compromise the purpose of the proposed waiver request and be contrary to the interests of consumers. Examples of the public notice procedures that currently apply under the aforementioned regulations that a state may seek to have waived or modified include the requirement that states notify the public and hold hearings prior to submitting an application, that the state hold more than one public hearing in more than one location and that HHS and the Department of the Treasury provide for public notice and comment after an application is determined to be complete. States may also seek to modify the state and/or Federal comment periods to be less than 30 days and to host public hearings virtually rather than in-person.

For a state to qualify for modification of the state or Federal public notice requirements to expedite a decision on a proposed waiver request during the PHE for COVID-19, a delay must undermine or compromise the purpose of the proposed waiver request and be contrary to the interests of consumers. During the PHE for COVID-19, the Secretary of HHS and the Secretary of the Treasury (the Secretaries) may modify the Federal and/or state public notice procedures, in part, if the state meets all of the following:

- The state requests a modification in the form and manner specified by the Secretaries.

- The state acted in good faith, and in a diligent, timely, and prudent manner in the preparation of the request for the modification for the waiver, and the waiver application request.

- The state details in its request for a modification, as applicable, the reason(s) the state seeks a modification from the state public notice procedures, describes how the state meets the modification criteria, and describes the alternative public notice procedures it proposes to implement at the state level, including public hearings, that are designed to provide the greatest opportunity and level of meaningful public input from impacted stakeholders that is practicable given the emergency circumstances underlying the state's request for a modification.

- The state details in its request for a modification, as applicable, the justification for the request and the alternative public notice procedures it requests to be implemented at the Federal level.

- The state must, as applicable, implement the alternative public notice procedures at the state level if the state's modification request is approved and, if required, amend the waiver application to specify that it is the state's intent to comply with those alternative public notice procedures in the state's modification request.

Any state submitting a proposed waiver request during the PHE for COVID-19 can submit a request to the Secretary of HHS and the Secretary of the Treasury for this modification from the state and/or Federal public notice procedures or include such a request in its section 1332 waiver application request.

The Secretary of HHS and the Secretary of the Treasury's review and consideration of a modification request will vary based on the state's circumstances, its modification request, and the complexity and breadth of the state's proposed section 1332 waiver request. For example, during the PHE for COVID-19, many states are prohibiting in-person public gatherings or establishing stay-at-home orders due to the public health threat.²⁶ States seeking new

²⁴ American Health Benefit Exchanges, or “Exchanges,” are entities established under PPACA through which qualified individuals and qualified employers can purchase health insurance coverage in qualified health plans (QHPs).

²⁵ First Half of 2020 Average Effectuated Enrollment Data, available at <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/Early-2020-2019-Effectuated-Enrollment-Report.pdf>.

²⁶ <https://khn.org/morning-breakout/states-declare-emergencies-ban-large-gatherings-as-coronavirus-sweeps-the-nation/>. <https://wwwaxios.com/states-shelter-in-place-coronavirus-66e9987a-a674-42bc-8d3f-070a1c0ee1a9.html>.

section 1332 waiver(s) that have such prohibitions in effect at the time they would have otherwise have to conduct public notice would most likely be unable to comply with the public notice requirements to hold two in-person public hearings prior to submission of their section 1332 waiver applications in accordance with the 2018 Guidance addressing requirements under §§ 33.112(b) and 155.1312(b). In such cases, this IFC will allow the Secretaries to grant the state's request to hold the two public hearings virtually, rather than in-person, or to hold one public hearing at the state level, rather than two public hearings at the state level. As another example, the Secretaries may agree with a state that, due to emergency circumstances that have arisen related to the PHE for COVID-19, there is insufficient time for the state to provide public notice and hold any public hearings at the state level prior to submitting its section 1332 waiver application as required by §§ 33.112(a) and 155.1312(a), and grant the state's request to provide public notice and hold public hearings at the state level after the state submits its section 1332 waiver application.²⁷

In situations where HHS and the Department of the Treasury determine that public notice and hearings are warranted on a different timeframe and may occur after the submission of a state's waiver application request, the state will be required to amend the application request as necessary to reflect public comments or other relevant feedback received during the alternative public notice procedures. HHS and the Department of the Treasury will evaluate a state's request for a modification and issue their modification determination within approximately 15 calendar days after the request is received. In assessing whether a state acted in good faith, and in a diligent, timely, and prudent manner in the preparation of the modification request for the waiver, and for the waiver application, HHS and the Department of the Treasury will evaluate whether the relevant circumstances constitute an emergency.

HHS and the Department of the Treasury remind states that any public partici-

pation processes must continue to comply with applicable Federal civil rights laws, including taking reasonable steps to provide meaningful access for individuals with limited English proficiency and taking appropriate steps to ensure effective communication with individuals with disabilities, including accessibility of information and communication technology. Please note that virtual meetings may present additional accessibility challenges for people with communications and mobility disabilities, as well as to those who lack broadband access. Ensuring effective communication may include providing American Sign Language interpretation and real-time captioning, and ensuring that the platform is interoperable with assistive technology for those with mobility difficulties. HHS and the Department of the Treasury especially encourage states to strive to obtain meaningful input from potentially affected populations, including low-income residents, residents with high expected health care costs, persons less likely to have access to care, and members of federally-recognized tribes, if applicable, as part of any alternative public participation process.²⁷

The Secretary of HHS will publish on the CMS website any modification determinations within 15 calendar days of the Secretary of HHS and the Secretary of the Treasury making such a determination, as well as the approved revised timeline for public comment at the state and Federal level, as applicable. In addition, under the new §§ 33.118 and 155.1318, the state will be required to publish on its website any modification requests and determinations within 15 calendar days of receipt of the determination, as well as the approved revised timeline for public comment at the state and Federal level, as applicable.

3. Monitoring and Compliance (31 CFR 33.120 and 45 CFR 155.1320)

As section 1332 waivers are likely to have a significant impact on individuals, states, and the Federal Government, the 2012 Final Rule established processes and methodologies to ensure that the Secretary

of HHS and the Secretary of the Treasury receive adequate and appropriate information regarding section 1332 waivers (consistent with section 1332(a)(4)(B)(iv) of the PPACA). Under §§ 33.120(c) and 155.1320(c), to ensure continued public input within at least 6 months after the implementation date, and annually thereafter, states are required to hold a public forum at which members of the public have an opportunity to provide comments on the progress of the program authorized by the section 1332 waiver and to provide a summary of this forum to the Secretary of HHS as part of the quarterly and annual reports required under §§ 33.124 and 155.1324. Under §§ 33.120(c)(1) and 155.1320(c)(1), states are required to publish the date, time, and location of the public forum in a prominent location on the state's public website at least 30 days prior to the date of the planned public forum.

This IFC adds new §§ 33.120(c)(2) and 155.1320(c)(2), which provide that the Secretary of HHS and the Secretary of the Treasury (the Secretaries) may waive, in part, post award public notice requirements for an approved waiver outlined in §§ 33.120(c) and 155.1320(c) during the PHE for COVID-19 when the application of the post award public notice procedures would be contrary to the interests of consumers during the PHE for COVID-19.

The Secretaries may modify the post award public notice procedures, in part, when the state meets all of the following:

- The state requests a modification in the form and manner specified by the Secretaries.
- The state acts in good faith, and in a diligent, timely, and prudent manner to comply with the monitoring and compliance requirements under the regulations and specific terms and conditions of the waiver and to submit and prepare the request for a modification.
- The state details in its request for a modification the reason(s) the state seeks a modification from the state post award public notice procedures, describes how the state meets the modification criteria, and describes the alternative post award public notice procedures it proposes to

²⁷ As noted above, the HHS Office for Civil Rights enforces applicable Federal civil rights laws as described above, as well as laws protecting the exercise of conscience and religious freedom, including the Religious Freedom Restoration Act (42 U.S.C. 2000bb through 2000bb-4). HHS's requirements are subject to these laws, and states may have obligations under these laws to protect conscience, prohibit coercion, and to ensure the free exercise of religion. U.S. Department of Health & Human Services, Office for Civil Rights, Conscience and Religious Freedom, <https://www.hhs.gov/conscience/index.html> (last visited Aug. 20, 2020).

implement at the state level, including public hearings, that are designed to provide the greatest opportunity and level of meaningful public input from impacted stakeholders that is practicable given the emergency circumstances underlying the state's request for a modification.

As part of HHS and the Department of the Treasury's monitoring and oversight of approved section 1332 waivers, the Secretary of HHS and the Secretary of the Treasury, at their discretion, monitor the state's compliance with the specific terms and conditions of the waiver including, but not limited to, compliance with the guardrails, reporting requirements, and the post award forum requirements. Under the flexibilities provided in this IFC, the Secretaries may, for example, allow the public forum for an approved waiver that would take place or become due during the PHE for COVID-19 to be held virtually rather than as an in person gathering. HHS and the Department of the Treasury will work closely with states that have these approved flexibilities through oversight and monitoring activities to ensure open communication with states during the PHE for COVID-19. HHS and the Department of the Treasury also will remain focused on ensuring the public is informed about the implementation of programs authorized by section 1332 waivers and have a meaningful opportunity to comment on the implementation.

The Secretary of HHS and the Secretary of the Treasury will evaluate a state's request for a modification and issue their modification determination within approximately 15 calendar days after the request is received. The state is required to publish on its website any modification requests and determinations by HHS and the Department of the Treasury within 15 calendar days of receipt of the determination, as well as information on the approved revised timeline for the state's post award public notice procedures, as applicable. Since the state is already required to post materials as part of post award annual reporting requirements, such as the notice for the public forum and annual report, states will be responsible for ensuring that the public is aware of the

determination to modify the public notice procedures and must include this information along with the information required under §§ 33.120(c)(1) and 155.1320(c)(1) in a prominent location on the state's public website.

HHS and the Department of the Treasury are of the view that post award forums are critical to ensure that the public has a regular opportunity to learn about and comment on the progress of section 1332 waivers. States that receive approval, to modify, in part, these post award public notice procedures would still need to meet all other requirements specified in §§ 33.112(b) and 155.1312(b). For example, should the state receive a modification approval that permits it to hold the post award public forum virtually instead of in person, the state must still publish the notice of its post award public notice on the state's public website and use other effective means to communicate the required information to the public. The public notice must include the website, date, and time of the public forum that will be convened by the state, information related to the timeframe for comments, and how comments from the public on the section 1332 waiver must be submitted. HHS and the Department of the Treasury remind states that they still must also comply with Federal civil rights requirements, including laws pertaining to accessibility, if the Secretary of HHS and the Secretary of the Treasury approve a modification from all or a portion of the post award public notice procedures. In such a circumstance, the state would need to ensure these virtual public hearings are as accessible as possible during the PHE for COVID-19 so members of the public can participate and submit comments. The state should also track how many people are attending these forums, if possible.

V. Waiver of Proposed Rulemaking

Section 553(b) of the APA requires the agency to publish a notice of the proposed rule in the **Federal Register** that includes a reference to the legal authority under which the rule is proposed, and the terms and substance of the proposed rule or a description of the subjects and issues

involved. Section 553(c) further requires the agency to give interested parties the opportunity to participate in the rulemaking through public comment before the provisions of the rule take effect. Section 553(b)(B) authorizes the agency to waive these procedures, however, if the agency finds good cause that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

Section 553(d) ordinarily requires a 30-day delay in the effective date of a final rule from the date of its publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds good cause to support an earlier effective date. Finally, the Congressional Review Act (CRA) requires a delay in the effective date for major rules unless an agency finds good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, in which case the rule shall take effect at such time as the agency determines. 5 U.S.C. 801(a)(3), 808(2).

As noted earlier in this preamble, on January 30, 2020, the International Health Regulations Emergency Committee of the WHO declared the outbreak a "Public Health Emergency of international concern." On January 31, 2020, pursuant to section 319 of the PHS, the HHS Secretary determined that a PHE exists for the United States to aid the nation's health care community in responding to COVID-19. On March 11, 2020, the WHO publicly declared COVID-19 a pandemic. On March 13, 2020, the President declared the COVID-19 pandemic a national emergency. Effective October 23, 2020, the HHS Secretary renewed the January 31, 2020 determination, which was previously renewed on April 21, 2020 and July 25, 2020, that a PHE exists and has existed since January 27, 2020. This declaration, along with the HHS Secretary's January 30, 2020 declaration of a PHE, conferred on the HHS Secretary certain waiver authorities under section 1135 of the Act. On March 13, 2020, the HHS Secretary authorized waivers under section 1135 of the Act, effective March 1, 2020.²⁸

²⁸<https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx>.

It is critically important that the Departments implement the policies in this IFC as quickly as possible. As the United States is in the midst of the PHE for COVID-19, the Departments find good cause to waive notice of proposed rulemaking under the APA, 5 U.S.C. 553(b)(B). For those same reasons, as authorized by section 808(2) of the CRA, the Departments find it is impracticable and contrary to the public interest not to waive the delay in effective date of this IFC under section 801 of the CRA. Therefore, the Departments find there is good cause to waive the CRA's delay in effective date pursuant to section 808(2) of the CRA. Thus, the Departments find good cause to waive the applicable delays in the effective date and, moreover, to establish these policies in this IFC applicable as of the date of display at the Office of the Federal Register.

In this IFC, consistent with section 1902(a)(4) and (a)(19) of the Act, the Department adds a new subpart G to 42 CFR part 433 to provide states with more flexibility, subject to certain safeguards, in implementing the requirement in section 6008(b)(3) of the FFCRA that states maintain Medicaid beneficiary enrollment in order to receive the temporary increase in Federal funding in the FFCRA. This temporary funding increase is effective beginning January 1, 2020 and could extend through the last day of the calendar quarter in which the PHE for COVID-19, including any extensions, terminates, if the state claims the temporary funding increase in that quarter. This provision of the IFC is immediately necessary to ensure that states can determine eligibility and provide care and services during the PHE in a manner that is consistent with simplicity of administration and the best interests of beneficiaries and also claim the temporary funding increase.

In this IFC, HHS and the Department of the Treasury are setting forth flexibilities in the public notice and post award public participation requirements for a State Innovation Waiver described in section 1332 of PPACA during the PHE for COVID-19. HHS and the Department of the Treasury recognize that following the normal state and Federal public notice procedures and the state post award requirements for section 1332 waivers may impose barriers for states pursuing a

proposed waiver request during the PHE for COVID-19. This guidance is intended to protect public health and prevent the spread of COVID-19 by limiting the need for in-person gatherings related to a section 1332 waiver. Additionally, states may face uncertainty as to whether their waiver requests will be approved in time to expeditiously reform their health insurance markets and to protect consumers from the effects of the PHE for COVID-19. Some states may not consider more robust changes because they were concerned that the current section 1332 waiver application requirements are too time-consuming or burdensome to be helpful during the PHE for COVID-19. HHS and the Department of the Treasury are of the view that the flexibility to modify certain public notice procedures and participation requirements will increase flexibility and reduce burden for states seeking to use section 1332 waivers as a means of innovation for providing coverage, lowering premiums, and improving their health care markets during the PHE for COVID-19. As such, these flexibilities are immediately necessary to provide states applying for a section 1332 waiver or during the post award period with the option to request a modification from the state and/or Federal public notice requirements when a delay would undermine or compromise the purpose of the waiver and be contrary to the interests of consumers. HHS and the Department of the Treasury are of the view that it could be contrary to the public interest to require full notice and comment during the current PHE for COVID-19 because following the normal timeframes and requirements could result in waiver approvals for innovative waivers taking effect after issuers have already made their decisions regarding issuer participation in the individual market and after rates for the upcoming plan year have been submitted. A modification from the public participation requirements would be beneficial to the public interest by providing states and the Federal Government the flexibilities necessary to review and approve, as appropriate, section 1332 waivers that expand access to coverage on a faster timeframe.

In this IFC, the Departments amend the regulations under section 2713 of the PHS Act to implement the requirement in section 3203 of the CARES Act that

non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage provide coverage without cost sharing for qualifying coronavirus preventive services. This coverage must be provided within 15 business days after the date on which a recommendation is made by the USPSTF or ACIP. The Departments also establish in this IFC that this coverage must be provided regardless of whether the service is delivered by an in-network or out-of-network provider.

The Departments are issuing these amendments under the authority of section 9833 of the Code, section 734 of ERISA, and section 2792 of the PHS Act. These sections authorize the Secretaries of the Treasury, Labor, and HHS to promulgate any interim final rules that the Secretaries determine are appropriate to carry out the provisions of chapter 100 of the Code, part 7 of subtitle B of title I of ERISA, and part A of title XXVII of the PHS Act, which include PHS Act sections 2701 through 2728 and the incorporation of those sections into ERISA section 715 and Code section 9815. In addition, section 7805(e) of the Code restricts any temporary regulation issued by Treasury and the IRS under the Code, such as interim final regulations, to a duration of 3 years.

Several COVID-19 vaccine candidates are currently in late-stage development. Once a vaccine is authorized or approved by FDA, the Departments expect that ACIP may move expeditiously to recommend the immunization. In addition, unlike other preventive items and services typically provided according to regularly scheduled intervals, items and services intended to prevent or mitigate COVID-19 will not, in the immediate future, be provided as part of a usual course of preventive care. Instead, the Departments expect consumers to receive these services once they are recommended for the general public or specific high-risk or high-priority populations. To help ensure full access to and the widespread use of qualifying coronavirus preventive services to mitigate the PHE for COVID-19, it is critical that individuals be able to receive such services from any provider authorized to provide the service. This is consistent with the objectives of Operation Warp Speed,

which, as mentioned above, is a partnership among components of the Federal Government that engages with private firms to accelerate the development, manufacture, and distribution of a COVID-19 vaccine to the American people.

The provisions of this IFC therefore are immediately necessary to ensure group health plan and group and individual health insurance coverage of these items and services is prompt and broad, to ensure timely access to combat the pandemic. In this IFC, the Department adds a requirement at § 417.454 to require section 1876 cost plans to cover without cost sharing the COVID 19 vaccine and its administration described in section 1861(s)(10)(A) of the Act without cost sharing for the duration of the PHE for the COVID-19 pandemic, specifically the end of the emergency period defined in paragraph (1)(B) of section 1135(g) of the Act, which is the PHE declared by the Secretary on January 31, 2020 and any renewals thereof. While section 1876(c)(2) of the Act ensures that enrollees in Medicare cost plans will have coverage of a COVID-19 vaccine and its administration, section 3713 of the CARES Act did not amend section 1876 of the Act to provide similar cost-sharing protections for enrollees in cost plans who receive the vaccine from an in-network provider. Currently, there is no requirement for cost plans to cover the COVID-19 vaccine and its administration without cost sharing (that is, with cost sharing that is the same as original Medicare) when the vaccine is furnished by an in-network health care provider. This provision of the IFC is immediately necessary to ensure that cost plan enrollees, like other Medicare beneficiaries, are provided access to the COVID-19 vaccine and its administration without cost sharing. This immediate action will ensure that cost is not a barrier for beneficiaries to get the vaccine, particularly during the public health emergency when ensuring access is paramount importance. The delay necessary for notice and comment rulemaking is both contrary to the public interest and impractical here as it would delay access to a COVID-19 vaccine without cost sharing and be contrary to the need to ensure access to a COVID-19 vaccine for enrollees in cost plans on the same basis as is ensured for other Medicare beneficiaries.

Further, as underscored by the timeline for coverage Congress established in section 3203 of the CARES Act, the need to provide coverage of qualifying coronavirus preventive services is urgent. Following a recommendation of the USPTF or ACIP, the requirement to provide coverage without cost sharing of qualifying coronavirus preventive services, which are expected to include immunizations, takes effect within 15 business days. Plans and issuers need immediate guidance to understand their obligations under section 3203 of the CARES Act and to take steps that will enable them to comply with those requirements as soon as the coverage requirement goes into effect. Delaying these provisions would likewise delay plans' and issuers' ability to prepare for the availability of a COVID-19 vaccine, resulting in barriers in access to coverage of these critical services during the PHE for COVID-19. As of the date of display of this regulation, there are not any coronavirus preventive services including vaccines for coronavirus that are required to be covered. However, because emergency use authorization or approval of a COVID-19 vaccine may be imminent, the Departments are of the view it is critical that these regulations under section 2713 of the PHS Act be issued and effective prior to such authorization or approval. The Departments are of the view that it would be impracticable and contrary to the public interest to undertake normal notice and comment rulemaking procedures in light of the urgent need to ensure coverage of and access to qualifying coronavirus preventive services to protect the public health as well as the health and safety of individuals and communities to prevent the spread of COVID-19. For these same reasons, the Departments are of the view a delayed effective date would also be contrary to the public interest. Ensuring individuals have access to a COVID-19 vaccine as soon as it becomes available is critical to ending the PHE for COVID-19, and therefore it is imperative that these regulations are in effect on the date such a vaccine becomes available and recommended by ACIP. Undertaking the standard rulemaking process of publishing a proposed rule, seeking public comment, carefully analyzing those public

comments, and subsequently publishing a final rule would possibly and perhaps likely jeopardize such an effective date.

The Departments are of the view that it would be impracticable and contrary to the public interest to undertake normal notice and comment procedures and to thereby delay the effective date of this IFC. The Departments find good cause to waive notice of proposed rulemaking under the APA, 5 U.S.C. 553(b)(B). For those same reasons, as authorized by section 808(2) of the CRA, the Departments find it is impracticable and contrary to the public interest not to waive the delay in effective date of this IFC under section 801 of the CRA. Therefore, the Departments find there is good cause to waive the CRA's delay in effective date pursuant to section 808(2) of the CRA. The provisions in this IFC will go into effect on the date of display.

* * *

VI. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, the Departments are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to OMB for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (PRA) requires that the Departments solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of the agency.
- The accuracy of the estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

The Departments are soliciting public comment on each of the section 3506(c)(2)(A)-required issues for the following information collection requirements (ICRs). The requirements and burden will be submitted to under OMB Control Number 0938-NEW.

A. ICRs for Price Transparency for COVID-19 Diagnostic Tests

* * *

B. ICRs for State Innovation Waivers Policy and Regulatory Revision in Response to COVID-19 Public Health Emergency

This IFC provides that states are required to submit modification requests to the Secretary of HHS and the Secretary of the Treasury in order to obtain approval for the modifications made available by this IFC. Any state can submit a request to the Secretaries for a modification from the state and/or Federal public notice procedures or include such a request in their section 1332 waiver application if the waiver application is submitted during the PHE for COVID-19. The request must describe the reason the state seeks a modification from the state public notice procedures, describe how the state meets the modification criteria, describe the alternative public notice procedures it proposes to implement at the state level, including public hearings, that are designed to provide the greatest opportunity and level of meaningful public input from impacted stakeholders that is practicable given the emergency circumstances underlying the state's request for a modification. The re-

quest must describe the reason the state seeks a modification from the Federal public notice procedures and the alternative public notice procedures it requests to be implemented at the Federal level, as applicable.

A state with an approved section 1332 waiver can submit a request to HHS and the Department of Treasury for a modification from post award public notice procedures. The request must specify the reason the state seeks a modification from the post award public notice procedures, describe how the state meets the modification criteria, and describe the alternative procedures it proposes to implement at the state level, including public hearings, that are designed to provide the greatest opportunity and level of meaningful public input from impacted stakeholders that is practicable given the emergency circumstances underlying the state's request for a modification.

While HHS and the Department of Treasury do not have data available to predict the number of states that will likely request a modification of either the waiver application or the post award public notice procedures, HHS and the Department of Treasury estimate it will take a senior manager 1 hour to prepare a state's request, with an equivalent cost of approximately \$118.²⁹ In addition, if HHS and the Department of Treasury approve a

state's modification request, the state will have to post the determination on their Web site within 15 days of the approval. HHS and the Department of Treasury estimate that for each state, it will take a network and computer systems administrator 15 minutes to post the approval with an equivalent cost of approximately \$21.³⁰ Assuming that approximately 15 states will submit a modification request, the total burden hours for all states will be 15 hours, with an equivalent cost of approximately \$1,775. HHS and the Department of Treasury have assumed that 15 states will submit a request because, as of display of this IFC, 15 states have an approved 1332 waiver. This is an upper bound, since some states may not need to request the available modification for their waivers, and therefore, will incur no burden. Furthermore, assuming that approximately 15 states receive approval of the modification request and then must post the approval, the total burden hours for all states will be approximately 3.75 hours, with an equivalent cost of approximately \$319. This is an upper bound, since some states may not receive approval, and therefore, will incur a lower (or no) burden. The total estimated burden hours assuming approximately 15 states apply for and receive approval of the modification request is 18.75 hours, with an equivalent cost of approximately \$2,094.

TABLE 3: Estimated Cost and Burden Hours per respondent.

BLS Occupation	Average Burden Hour per Respondent (in hours)	Hourly Wage Rates	Total Cost per Respondent
Senior Manager	1	\$118.30	\$118.30
Network and Computer Systems Administrator	0.25	\$85.02	\$21.26
Total	1.25		\$139.56

TABLE 4: Estimated Total Cost and Burden for all Respondents.

	Number of Respondents	Number of Responses	Burden Hours Per Respondent	Total Burden Hours	Total Cost
Modification Request	15	15	1	15	\$1,775
Posting modification approval	15	15	0.25	3.75	\$319
Total	15		1.25	18.75	\$2,094

²⁹ Using data from the Bureau of Labor Statistics (BLS) for General and Operations Managers (Code 11-1020), we estimate that the average hourly labor cost will be \$118.30, including 100 percent increase for overhead and fringe benefits. https://www.bls.gov/oes/current/oes_stru.htm.

³⁰ Using data from the BLS for Network and Computer Systems Administrators (Code 15-1244), we estimate that the average hourly labor cost will be \$85.02, including 100 percent increase for overhead and fringe benefits. https://www.bls.gov/oes/current/oes_stru.htm.

Response to Comments

Because of the large number of public comments normally received on **Federal Register** documents, the Departments are not able to acknowledge or respond to them individually. All comments received by the date and time specified in the “DATES” section of this preamble will be considered, and, when the Departments proceed with a subsequent document, the Departments will respond to the comments in the preamble to that document.

Regulatory Impact Analysis

A. Statement of Need

The flexibilities and changes contained within this IFC are responsive to the PHE for COVID-19. The policies implemented in this IFC will provide flexibilities, during the PHE for COVID-19, to states pursuing waivers under section 1332 of the PPACA and to states with approved section 1332 waivers. Additionally, the policies and regulatory updates implemented in this IFC will increase the affordability with regards to section 1332 waiver applications and support continuity of health insurance coverage for consumers in the individual and small group (or merged) market during the PHE for COVID-19.

In section 3203 of the CARES Act, Congress required group health plans and issuers of group or individual health insurance coverage to cover without cost sharing qualifying coronavirus preventive services, and required such coverage to be provided within 15 business days after the date on which an applicable recommendation is made relating to such service. The Departments codify these requirements in this IFC, and finalize amendments to the regulations implementing section 2713 of the PHS Act at 26 CFR 54.9815-2713; 29 CFR 2590.715-2713; and 45 CFR 147.130 that are intended to help ensure full access to and the widespread use of qualifying coronavirus preventive services to mitigate the public health emergency.

B. Overall Impact

The Departments have examined the potential impacts of this rule as required

by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104-4), Executive Order 13132 on Federalism (August 4, 1999), the Congressional Review Act (5 U.S.C. 804(2)), and Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs (January 30, 2017).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule: (1) having an annual effect on the economy of \$100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as “economically significant”); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$100 million or more in any one year), and a “significant” regulatory action is subject to review by the OMB. The Departments have determined that these rules are likely to have economic impacts of \$100 million or more in at least one year, and thus, meet the definition of “economically significant” under Executive Order 12866 and a major rule under the Congressional Review Act. Therefore, the Departments

have provided an assessment of the potential costs, benefits, and transfers associated with this rule. In accordance with the provisions of Executive Order 12866, this regulation was reviewed by OMB.

C. Detailed Economic Analysis

1. Effects of Rapid Coverage of Preventative Services for Coronavirus

This IFC requires that non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage provide coverage for qualifying coronavirus preventive services, including recommended COVID-19 immunizations and their administration, without any cost sharing. It also requires plans and issuers to provide coverage within 15 business days after the date on which an applicable recommendation is made by USPSTF or ACIP relating to such a service. In addition, it requires that during the PHE for COVID-19 a group health plan or issuer that has a network of providers to provide coverage without cost sharing regardless of whether the service is delivered by an in-network or out-of-network provider. Making these qualifying coronavirus preventive services, including COVID-19 immunizations, available without any delay is in the interest of public health, as making these services available as quickly as possible may encourage individuals to take advantage of these services and therefore may slow the transmission of COVID-19. Access to qualifying coronavirus preventive services without cost sharing will encourage more individuals to obtain them. Increased use of qualifying coronavirus preventive services may reduce the transmission and spread of the disease and thus potentially result in better overall health outcomes. In the immediate term, newly developed qualifying coronavirus preventive services might be available from a narrower range of providers than other, more established recommended preventive items and services. If COVID-19 immunizations require specialized storage and administration services, only a limited number of providers may be able to offer them at first. If consumers have to incur additional burdens, long wait times, and increased travel times

to find an in-network provider that can provide such services, it will limit access and discourage them from obtaining such services. Therefore, the Departments are of the view that requiring out-of-network coverage without cost sharing for qualifying coronavirus preventive services will help ensure that consumers are able to obtain the preventive services without cost sharing as soon as possible.

Plans and issuers will incur the cost of the qualifying coronavirus preventive services and administration of such services. Providing coverage within 15 business days after a recommendation is made relating to such services is likely to impose significant administrative costs on issuers, group health plans, and other service providers to update systems to include billing codes for the preventive services, negotiate prices with network providers, determine reimbursements for out-of-network providers, and conduct outreach to providers, participants, beneficiaries, and enrollees in a very short time period. Depending on the magnitude of the costs of qualifying coronavirus preventive services and administration of such services relative to the potential cost of treatment for the disease, this may have an impact on premiums. There are uncertainties regarding the price of potential qualifying coronavirus preventive services, including COVID-19 immunizations. If the prices are high and there is widespread use of such services, premiums may increase. If the timing of availability of the preventive services is such that plans and issuers are unable to take them into account when setting premiums, it may result in lower profits or losses for plans and issuers. The costs to plans and issuers will be lower if a third party, such as the Federal Government, covers the cost of the immunizations. In addition, the costs associated with providing coverage for qualifying coronavirus preventive services may be offset by savings from avoidance of treatment for COVID-19.

During the PHE for COVID-19, costs to group health plans or issuers that have networks of providers will be higher if a significant number of participants, beneficiaries, or enrollees go to out-of-net-

work providers, and the issuers and plans reimburse those out-of-network providers at higher levels than their negotiated rate with in-network providers. However, if consumers can obtain the qualifying coronavirus preventive services where they usually obtain health care services, consumers are likely to receive the services from an in-network provider. Plans and issuers may also wish to educate participants, beneficiaries, or enrollees about the availability of the services from in-network providers and encourage them to obtain these services from their usual providers. This approach could limit the number of participants, beneficiaries, or enrollees going to out-of-network providers instead of staying in network, but there will be associated administrative burdens and costs.

The total cost to plans and issuers related to qualifying coronavirus preventive services that are immunizations will depend on the cost and number of required immunization doses to be administered, the number of people who will choose to get immunized against COVID-19 and which providers will be able to provide the preventive services. For the 2018–19 influenza season, 62.6 percent of children 6 months through 17 years and 45.3 percent of adults 18 years and older obtained the influenza vaccine.³¹ Given the severity of COVID-19, the Departments anticipate the immunization rates for COVID-19 are likely to ultimately be higher than for influenza, although initial rates may be lower until an adequate supply is available. Total costs to plans and issuers will depend on the cost of covering qualifying coronavirus preventive services, the number of people choosing to obtain such services, and whether a third party such as the Federal Government covers the costs of any immunizations.

The Departments seek comment on any potential costs and burdens that may be incurred by plans and issuers due to the requirements to cover the costs and administration of such qualifying coronavirus preventive services without any cost sharing regardless of whether the service is delivered by an in-network or out-of-network provider. The Departments also

seek comment on the potential effects and costs consumers may face as a result of this provision.

2. Effects of Changes to State Innovation Waivers Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency

This IFC establishes a framework for states to request the Secretary of HHS and the Secretary of the Treasury to modify, in part, the public notice procedures outlined in 31 CFR 33.112 and 33.116 and 45 CFR 155.1312 and 155.1316 to expedite a decision on a proposed section 1332 waiver request during the PHE for COVID-19. Regulations at §§ 33.112 and 155.1312 require a state to provide a public notice and comment period at the state level prior to submitting an application for a section 1332 waiver. The regulations at §§ 33.116 and 155.1316 establish Federal public notice requirements for state section 1332 waiver applications. This IFC also establishes a framework at the new 31 CFR 33.120(c) (2) and 45 CFR 155.1320(c)(2) for states to request the Secretaries to modify, in part, the post award public notice procedures outlined in §§ 33.120(c) and 155.1320(c) for an approved waiver that would otherwise take place or become due during the PHE for COVID-19. As stated above, HHS and the Department of the Treasury are of the view that requiring states that meet the criteria outlined in this IFC to comply with the full public notice procedures during the PHE for COVID-19 could cause undue harm to the public. Allowing the Secretaries to modify, in part, these requirements will enable states to request and receive approval for waiver requests more quickly and also implement changes that will provide consumers with access to affordable health insurance coverage during the current PHE for COVID-19. States that request modifications from the public notice procedures will incur some burden, as discussed in the Collection of Information Requirements section. For a state that requests and receives a modification of the public notice proce-

³¹ See Flu Vaccination Coverage, United States, 2018–19 Influenza Season. Center for Disease Control and Prevention, available at <https://www.cdc.gov/flu/fluview/coverage-1819estimates.htm>.

dures, we acknowledge that consumers may receive less prior notice than would occur without the modification. Through this IFC, the HHS and the Department of Treasury intend to provide an appropriate balance and permit flexibility where a state can ensure a sufficient opportunity for meaningful public input given the circumstances in the PHE for COVID-19 while also ensuring the safety of the public. If a state's modification request is approved there may be a shorter comment period at the state or Federal level, or the comment periods may be the same number of days (for example 30 days) but perhaps on a different timeframe. For example, a state may conduct the state public comment period concurrently with the Federal public comment period instead of before. States with approved modification requests may experience a reduction in costs related to post award public notice procedures. However, if the state's modification request is approved, the state must also implement alternative public notice procedures and, if required, amend the waiver application to specify that it is the state's intent to comply with those alternative public notice requirements in the state's modification request. States may also need to employ additional technologies to host virtual hearings instead of in person gatherings. In this case, there may be no reduction in costs related to public notice procedures.

HHS and the Department of the Treasury seek comment on any potential costs and burdens that may be incurred by states due to the flexibilities afforded in this IFC. HHS and the Department of the Treasury also seek comment on the potential effects and costs consumers may face as a result of a state's action taken as a result of the flexibilities in this IFC.

D. Regulatory Alternatives Considered

The Departments considered not requiring plans and issuers to provide coverage for qualifying coronavirus preventive services without cost sharing from out-of-network providers. However, in the near term, newly developed qualifying coronavirus preventive services might be available from a narrower range of providers than other, more established

recommended preventive services because of specialized storage and administration requirements. If there are only a limited number of in-network providers that can administer these services, consumers may incur additional burden related to travel and long wait times to obtain these services, which can result in lower utilization. The Departments are concerned that allowing plans and issuers to impose cost sharing for COVID-19 immunizations provided by out-of-network providers would discourage individuals from seeking immunization, potentially leading to reduced administration of any COVID-19 vaccine and prolonging the PHE for COVID-19, contrary to the intent of the CARES Act. In order to ensure that the immunization services will be available to all consumers enrolled in non-grandfathered group health plans and non-grandfathered group and individual health insurance coverage, the Departments are therefore requiring such plans and issuers to cover without cost sharing a qualifying coronavirus preventive service, regardless of whether such service is delivered by an in-network or out-of-network provider. The Departments anticipate that as such services become more widely available over time, consumers will be able to obtain them more easily from in-network providers.

HHS and the Department of the Treasury considered providing states with the flexibility to waive all of the public notice procedures outlined in 31 CFR 33.112 and 33.116 and 45 CFR 155.1312 and 155.1316 to expedite a decision on a proposed section 1332 waiver request during the PHE for COVID-19. This approach would have allowed a state to request to completely eliminate a public notice or reporting requirement pre- or post-award. However, HHS and the Department of the Treasury were concerned that that this would violate the statutory requirements regarding a meaningful level of input from the public. In addition, HHS and the Department of Treasury are committed to transparency and value public input on waiver proposals and value public feedback to ensure consumers are aware of waiver proposals that may affect them. HHS and the Department of the Treasury anticipate working with states on their modification

request to ensure the public is provided the opportunity to provide feedback on waiver proposals and the progress of the program authorized by the section 1332 waiver.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act, (5 U.S.C. 601, *et seq.*), requires agencies to analyze options for regulatory relief of small entities to prepare an initial regulatory flexibility analysis to describe the impact of the proposed rule on small entities, unless the head of the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities. The RFA generally defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a not-for-profit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000. States and individuals are not included in the definition of "small entity." HHS uses a change in revenues of more than 3 to 5 percent as its measure of significant economic impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Individuals and states are not included in the definition of a small entity. This IFC is not preceded by a general notice of proposed rulemaking, and thus the requirements of RFA do not apply.

In addition, section 1102(b)(2) of the Act provides that whenever the Secretaries promulgate a final version of a rule or regulation with respect to which an initial regulatory impact analysis is required, the Secretaries shall prepare a final regulatory impact analysis with respect to the final version of such rule or regulation. Such analysis is required to set forth, with respect to small rural hospitals, the matters required under section 604 of title 5, United States Code, to be set forth with respect to small entities. The Departments are not required to prepare a final regulatory impact analysis, because this regulatory action is being issued as an interim final rule without being preceded by a general notice of proposed rulemaking.

F. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing any proposed rule or any final rule for which a general notice of proposed rulemaking was published that includes any Federal mandate that may result in expenditures in any 1 year by a state, local, or Tribal governments, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. In 2020, that threshold is approximately \$156 million. This IFC was not preceded by a general notice of proposed rulemaking, and thus the requirements of UMRA do not apply.

G. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this rule aims to alleviate burden on State and local governments, the requirements of Executive Order 13132 are not applicable.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the states, the Departments have engaged in efforts to consult with and work cooperatively with

affected states, including participating in conference calls with and attending conferences of the NAIC, and consulting with state insurance officials on an individual basis.

While developing this rule, the Departments attempted to balance the states' interests in regulating health insurance issuers with the need to ensure market stability. By doing so, the Departments complied with the requirements of Executive Order 13132.

H. Reducing Regulation and Controlling Regulatory Costs

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017 and requires that the costs associated with significant new regulations "shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations." This IFC's designation under Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs (82 FR 9339), which was issued on January 30, 2017, will be informed by public comments received.

List of Subjects

26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

* * *

31 CFR Part 33

Health care, Health insurance, Reporting and recordkeeping requirements.

Dated: October 21, 2020.

Seema Verma,
Administrator,
Centers for Medicare & Medicaid
Services.

Dated: October 26, 2020.

Alex M. Azar II,
Secretary,
Department of Health and Human
Services.

Sunita Lough,
Deputy Commissioner for Services
and Enforcement
Internal Revenue Service

Approved: October 28, 2020.

David J. Kautter
Assistant Secretary of the Treasury
(Tax Policy).

Signed at Washington DC, this 29th day of October, 2020

Jeanne Klinefelter Wilson,
Acting Assistant Secretary,
Employee Benefits Security
Administration,
Department of Labor.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Amendments to the Regulations

For the reasons set forth in the preamble, the Department of the Treasury amends 26 CFR part 54 as set forth below:

PART 54—PENSION EXCISE TAXES

Par. 1. The authority citation for part 54 continues to read in part as follows:

Authority: 26 U.S.C. 7805, unless otherwise noted.

* * * *

Section 54.9815-2713T also issued under 26 U.S.C. 9833.

* * * *

2. Section 54.9815-2713T is added to read as follows:

§ 54.9815-2713T Coverage of preventive health services (temporary).

(a) *Services*—(1) *In general*. Beginning at the time described in paragraph (b) of this section and subject to § 54.9815-2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for and must not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) for—

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for purposes of this paragraph (a)(1)(ii), a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect

after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration;

(iv) With respect to women, such additional preventive care and screenings not described in paragraph (a)(1)(i) of this section as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of section 2713(a)(4) of the Public Health Service Act, subject to 45 CFR 147.131, 147.132, and 147.133; and

(v) Any qualifying coronavirus preventive service, which means an item, service, or immunization that is intended to prevent or mitigate coronavirus disease 2019 (COVID-19) and that is, with respect to the individual involved—

(A) An evidence-based item or service that has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force; or

(B) An immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention (regardless of whether the immunization is recommended for routine use). For purposes of this paragraph (a)(1)(v)(B), a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention.

(2) *Office visits*. (i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item

or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

(A) *Example 1*—(1) *Facts*. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(2) *Conclusion*. In paragraph (a)(2)(iv)(A)(1) of this section, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

(B) *Example 2*—(1) *Facts*. Same facts as in paragraph (a)(2)(iv)(A)(1) of this section (*Example 1*). As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(2) *Conclusion*. In paragraph (a)(2)(iv)(B)(1) of this section, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

(C) *Example 3*—(1) *Facts*. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations

of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(2) *Conclusion.* In paragraph (a)(2)(iv) (C)(1) of this section, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

(D) *Example 4—(1) Facts.* A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(2) *Conclusion.* In paragraph (a)(2)(iv) (D)(1) of this section, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) *Out-of-network providers.* (i) Subject to paragraphs (a)(3)(ii) and (iii) of this section, nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider, or precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(ii) If a plan or issuer does not have in its network a provider who can provide an item or service described in paragraph (a)(1) of this section, the plan or issuer must cover the item or service when performed by an out-of-network provider, and may

not impose cost-sharing with respect to the item or service.

(iii) A plan or issuer must provide coverage for and must not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) for any qualifying coronavirus preventive service described in paragraph (a)(1)(v) of this section, regardless of whether such service is delivered by an in-network or out-of-network provider. For purposes of this paragraph (a)(3)(iii), with respect to a qualifying coronavirus preventive service and a provider with whom the plan or issuer does not have a negotiated rate for such service (such as an out-of-network provider), the plan or issuer must reimburse the provider for such service in an amount that is reasonable, as determined in comparison to prevailing market rates for such service.

(4) *Reasonable medical management.* Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the relevant recommendation or guideline. To the extent not specified in a recommendation or guideline, a plan or issuer may rely on the relevant clinical evidence base and established reasonable medical management techniques to determine the frequency, method, treatment, or setting for coverage of a recommended preventive health service.

(5) *Services not described.* Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) *Timing—(1) In general.* A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued, except as provided in paragraph (b)(3) of this section.

(2) *Changes in recommendations or guidelines.* (i) A plan or issuer that is required to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section on the first day of a plan year, or as otherwise provided in paragraph (b)(3) of this section, must provide coverage through the last day of the plan or policy year, even if the recommendation or guideline changes or is no longer described in paragraph (a)(1) of this section, during the applicable plan or policy year.

(ii) Notwithstanding paragraph (b)(2)(i) of this section, to the extent a recommendation or guideline described in paragraph (a)(1)(i) of this section that was in effect on the first day of a plan year, or as otherwise provided in paragraph (b)(3) of this section, is downgraded to a “D” rating, or any item or service associated with any recommendation or guideline specified in paragraph (a)(1) of this section is subject to a safety recall or is otherwise determined to pose a significant safety concern by a Federal agency authorized to regulate the item or service during a plan or policy year, there is no requirement under this section to cover these items and services through the last day of the applicable plan or policy year.

(3) *Rapid coverage of preventive services for coronavirus.* In the case of a qualifying coronavirus preventive service described in paragraph (a)(1)(v) of this section, a plan or issuer must provide coverage for such item, service, or immunization in accordance with this section by the date that is 15 business days after the date on which a recommendation specified in paragraph (a)(1)(v)(A) or (B) of this section is made relating to such item, service, or immunization.

(c) *Recommendations not current.* For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other

provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) *Applicability date.* The provisions of paragraphs (a)(1)(i) through (iv), (a)(2), (a)(3)(i) and (ii), (a)(4) through (5), (b)(1) and (2), and (c) of this section are applicable as of April 16, 2012.

(e) *Sunset date.* The provisions of paragraphs (a)(1)(v), (a)(3)(iii), and (b)(3) of this section will not apply with respect to a qualifying coronavirus preventive service furnished on or after the expiration of the public health emergency determined on January 31, 2020, to exist nationwide as of January 27, 2020, by the Secretary of Health and Human Services pursuant to section 319 of the Public Health Service Act, as a result of COVID-19, including any subsequent renewals of that determination.

DEPARTMENT OF THE TREASURY

Office of the Secretary

Amendments to the Regulations

For the reasons set forth in the preamble, the Department of Treasury amends 31 CFR part 33 as set forth below:

PART 33—WAIVERS FOR STATE INNOVATION

5. The authority citation for part 33 continues to read as follows:

Authority: Sec. 1332, Pub. L. 111-148, 124 Stat. 119.

6. Section 33.118 is added to read as follows:

§ 33.118 Modification from the normal public notice requirements during the public health emergency.

(a) The Secretary and the Secretary of Health and Human Services may modify, in part, the State public notice requirements under § 33.112 and the Federal public notice procedures under § 33.116 to expedite a decision on a proposed

waiver request during the public health emergency for COVID-19, as defined in 42 CFR 400.200, when a delay would undermine or compromise the purpose of the proposed waiver request and be contrary to the interests of consumers. These flexibilities are limited to event-triggered, emergent situations, and the flexibilities outlined in this section will not be available for States seeking to address a threat to consumers' access to health coverage or care that existed prior to the public health emergency for COVID-19.

(b) A State must meet all of the following criteria to request a modification under paragraph (a) of this section:

(1) The State must request a modification under paragraph (a) of this section, in the form and manner specified by the Secretaries.

(2) The State must have acted in good faith, and in a diligent, timely, and prudent manner in the preparation of the request for a modification under paragraph (a) of this section, and the waiver application request, as applicable.

(3) The State must, as applicable, detail in its request for a modification from State-level notice procedures under paragraph (a) of this section the justification for the request and the alternative public notice procedures it proposes to implement at the State level, including public hearings, that are designed to provide the greatest opportunity and level of meaningful public input from impacted stakeholders that is practicable given the emergency circumstances underlying the State's request for a modification. As a condition of receiving a modification approval, a State must implement public notice procedures, including public hearings, at the State level and, if required, amend the waiver application request.

(4) The State must, as applicable, detail in its request for a modification from Federal-level notice procedures under paragraph (a) of this section the justification for the request as it relates to the public health emergency and the alternative public notice procedures it requests to be implemented at the Federal level.

(c) The Secretary and the Secretary of Health and Human Services will evaluate a State's request for a modification under paragraph (a) of this section and issue

their exemption determination within approximately 15 calendar days after the request is received.

(d) The Secretary of Health and Human Services will publish on the Centers for Medicare and Medicaid Services (CMS) website any modification determinations within 15 calendar days of the Secretary and the Secretary of Health and Human Services making such a determination, as well as the approved revised timeline for public comment under the approved alternative State or Federal public notice procedures, as applicable.

(e) The State must publish on its website any modification requests and determinations within 15 calendar days of receipt of the determination, as well as the approved revised timeline for public comment under the alternative State or Federal public notice procedures, as applicable.

(f) The State must, as applicable, implement the alternative public notice procedures at the State level if the State's exemption request is approved and, if required, amend the waiver application request.

7. Section 33.120 is amended—

- a. In paragraph (c)(1) by adding a paragraph heading; and
 - b. By adding paragraph (c)(2).
- The additions read as follows:

§ 33.120 Monitoring and compliance.

(c) ***

(1) *Notification requirements for public forum.* ***

(2) *Modification from the normal post-award requirements during the public health emergency.* (i) The Secretary and the Secretary of Health and Human Services may modify, in part, State post-award requirements under this paragraph (c)(2) for an approved waiver request during the public health emergency for COVID-19, as defined in 42 CFR 400.200, when the application of the post award public notice requirements would be contrary to the interests of consumers during the public health emergency. These flexibilities are limited to event-triggered, emergent situations, and the flexibilities outlined in this section will not be available for States seeking to address a threat

to consumers' access to health coverage or care that existed prior to the public health emergency for COVID-19.

(ii) A State must meet all of the following criteria to request a modification under paragraph (c) of this section:

(A) The State must request a modification under this paragraph (c)(2), in the form and manner specified by the Secretaries.

(B) The State must have acted in good faith, and in a diligent, timely, and prudent manner to comply with the monitoring and compliance requirement under the waiver and the terms and conditions of the agreement between the Secretary and the Secretary of Health and Human Services, as applicable, and the State to implement a section 1332 waiver and to submit and prepare the request for a modification under this paragraph (c)(2).

(C) The State must detail in its request for a modification under this paragraph (c)(2) the alternative post award public notice procedures it proposes to implement at the State level, including public hearings, that are designed to provide the greatest opportunity and level of meaningful public input from impacted stakeholders that is practicable given the emergency circumstances underlying the State's request for a modification.

(D) The Secretary and the Secretary of Health and Human Services will evaluate a State's request for a modification under this paragraph (c)(2) and issue their modification determination within approximately 15 calendar days after the request is received.

(E) The State must publish on its Web site any modification requests and determinations within 15 calendar days of the receipt of the determination as well as information on the approved revised timeline for the state's post award public notice procedures, as applicable.

* * * * *

(Filed by the Office of the Federal Register on November 2, 2020, 4:15 p.m., and published in the issue of the Federal Register for November 06, 2020, 85 F.R. 71142)

Section 995.—Taxation of DISC Income to Shareholders

2020 Base Period T-Bill Rate. The "base period T-bill rate" for the period ending September 30, 2020, is published as required by section 995(f) of the Internal Revenue Code

Rev. Rul. 2020-25

Section 995(f)(1) of the Internal Revenue Code provides that a shareholder of a domestic international sales corporation ("DISC") shall pay interest each taxable year in an amount equal to the product of the "shareholder's DISC-related deferred tax liability" for the year (as defined in section 995(f)(2)) and the "base period T-bill rate." Under section 995(f)(4), the base period T-bill rate is "the annual rate of interest determined by the Secretary to be equivalent to the average of the 1-year constant maturity Treasury yields, as published by the Board of Governors of the Federal Reserve System, for the 1-year period ending on September 30 of the calendar year ending with (or of the most recent calendar year ending before)

the close of the taxable year of the shareholder."

The base period T-bill rate for the period ending September 30, 2020, is 0.73 percent.

Pursuant to section 6622 of the Internal Revenue Code, interest must be compounded daily. The table below provides factors for compounding the 2020 base period T-bill rate daily for any number of days in the shareholder's taxable year (including for a 52-53 week taxable year). To compute the amount of the interest charge for the shareholder's taxable year, multiply the amount of the shareholder's DISC-related deferred tax liability for that year by the base period T-bill rate factor corresponding to the number of days in the shareholder's taxable year for which the interest charge is being computed. Generally, one would use the factor for 365 days. One would use a different factor only if the shareholder's taxable year for which the interest charge is being determined is a short taxable year, if the shareholder uses a 52-53 week taxable year, or if the shareholder's taxable year is a leap year.

For the base period T-bill rates for periods ending in prior years, see Rev. Rul. 2019-27, 2019-51 I.R.B. 1378; Rev. Rul. 2018-31, 2018-50 I.R.B. 848; Rev. Rul. 2017-23, 2017-49 I.R.B. 546; Rev. Rul. 2017-01, 2017-03 I.R.B. 377; and Rev. Rul. 2015-26, 2015-49 I.R.B. 696.

DRAFTING INFORMATION

The principal author of this revenue ruling is Kathleen C. Arsenault of the Office of Associate Chief Counsel (International). For further information regarding the revenue ruling, contact Ms. Arsenault at (202) 317-3800 (not a toll-free number).

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
1	0.000019945
2	0.000039891
3	0.000059837
4	0.000079784
5	0.000099731
6	0.000119678
7	0.000139626
8	0.000159574
9	0.000179523
10	0.000199471
11	0.000219421
12	0.000239371
13	0.000259321
14	0.000279271
15	0.000299222
16	0.000319173
17	0.000339125
18	0.000359077
19	0.000379030
20	0.000398983
21	0.000418936
22	0.000438890
23	0.000458844
24	0.000478798
25	0.000498753
26	0.000518709
27	0.000538664
28	0.000558620
29	0.000578577
30	0.000598534
31	0.000618491
32	0.000638449
33	0.000658407
34	0.000678365
35	0.000698324

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
36	0.000718283
37	0.000738243
38	0.000758203
39	0.000778164
40	0.000798125
41	0.000818086
42	0.000838048
43	0.000858010
44	0.000877972
45	0.000897935
46	0.000917898
47	0.000937862
48	0.000957826
49	0.000977790
50	0.000997755
51	0.001017720
52	0.001037686
53	0.001057652
54	0.001077619
55	0.001097586
56	0.001117553
57	0.001137520
58	0.001157488
59	0.001177457
60	0.001197426
61	0.001217395
62	0.001237365
63	0.001257335
64	0.001277305
65	0.001297276
66	0.001317247
67	0.001337219
68	0.001357191
69	0.001377163
70	0.001397136

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
71	0.001417109
72	0.001437083
73	0.001457057
74	0.001477031
75	0.001497006
76	0.001516981
77	0.001536957
78	0.001556933
79	0.001576909
80	0.001596886
81	0.001616863
82	0.001636841
83	0.001656819
84	0.001676797
85	0.001696776
86	0.001716755
87	0.001736735
88	0.001756715
89	0.001776695
90	0.001796676
91	0.001816657
92	0.001836639
93	0.001856621
94	0.001876603
95	0.001896586
96	0.001916569
97	0.001936553
98	0.001956537
99	0.001976521
100	0.001996506
101	0.002016491
102	0.002036477
103	0.002056463
104	0.002076449
105	0.002096436

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
106	0.002116423
107	0.002136411
108	0.002156399
109	0.002176387
110	0.002196376
111	0.002216365
112	0.002236354
113	0.002256344
114	0.002276335
115	0.002296325
116	0.002316317
117	0.002336308
118	0.002356300
119	0.002376293
120	0.002396285
121	0.002416278
122	0.002436272
123	0.002456266
124	0.002476260
125	0.002496255
126	0.002516250
127	0.002536246
128	0.002556242
129	0.002576238
130	0.002596235
131	0.002616232
132	0.002636229
133	0.002656227
134	0.002676226
135	0.002696224
136	0.002716224
137	0.002736223
138	0.002756223
139	0.002776223
140	0.002796224

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
141	0.002816225
142	0.002836227
143	0.002856229
144	0.002876231
145	0.002896234
146	0.002916237
147	0.002936240
148	0.002956244
149	0.002976249
150	0.002996253
151	0.003016258
152	0.003036264
153	0.003056270
154	0.003076276
155	0.003096283
156	0.003116290
157	0.003136297
158	0.003156305
159	0.003176314
160	0.003196322
161	0.003216331
162	0.003236341
163	0.003256351
164	0.003276361
165	0.003296372
166	0.003316383
167	0.003336395
168	0.003356406
169	0.003376419
170	0.003396431
171	0.003416445
172	0.003436458
173	0.003456472
174	0.003476486
175	0.003496501

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
176	0.003516516
177	0.003536531
178	0.003556547
179	0.003576564
180	0.003596580
181	0.003616597
182	0.003636615
183	0.003656633
184	0.003676651
185	0.003696670
186	0.003716689
187	0.003736708
188	0.003756728
189	0.003776749
190	0.003796769
191	0.003816790
192	0.003836812
193	0.003856834
194	0.003876856
195	0.003896879
196	0.003916902
197	0.003936925
198	0.003956949
199	0.003976973
200	0.003996998
201	0.004017023
202	0.004037049
203	0.004057074
204	0.004077101
205	0.004097127
206	0.004117154
207	0.004137182
208	0.004157210
209	0.004177238
210	0.004197267

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
211	0.004217296
212	0.004237325
213	0.004257355
214	0.004277385
215	0.004297416
216	0.004317447
217	0.004337479
218	0.004357511
219	0.004377543
220	0.004397575
221	0.004417609
222	0.004437642
223	0.004457676
224	0.004477710
225	0.004497745
226	0.004517780
227	0.004537815
228	0.004557851
229	0.004577887
230	0.004597924
231	0.004617961
232	0.004637999
233	0.004658036
234	0.004678075
235	0.004698113
236	0.004718152
237	0.004738192
238	0.004758232
239	0.004778272
240	0.004798313
241	0.004818354
242	0.004838395
243	0.004858437
244	0.004878479
245	0.004898522

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
246	0.004918565
247	0.004938609
248	0.004958652
249	0.004978697
250	0.004998741
251	0.005018786
252	0.005038832
253	0.005058878
254	0.005078924
255	0.005098971
256	0.005119018
257	0.005139065
258	0.005159113
259	0.005179161
260	0.005199210
261	0.005219259
262	0.005239308
263	0.005259358
264	0.005279408
265	0.005299459
266	0.005319510
267	0.005339562
268	0.005359613
269	0.005379666
270	0.005399718
271	0.005419771
272	0.005439825
273	0.005459879
274	0.005479933
275	0.005499988
276	0.005520043
277	0.005540098
278	0.005560154
279	0.005580210
280	0.005600267

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
281	0.005620324
282	0.005640381
283	0.005660439
284	0.005680498
285	0.005700556
286	0.005720615
287	0.005740675
288	0.005760735
289	0.005780795
290	0.005800856
291	0.005820917
292	0.005840978
293	0.005861040
294	0.005881102
295	0.005901165
296	0.005921228
297	0.005941291
298	0.005961355
299	0.005981419
300	0.006001484
301	0.006021549
302	0.006041615
303	0.006061680
304	0.006081747
305	0.006101813
306	0.006121880
307	0.006141948
308	0.006162016
309	0.006182084
310	0.006202153
311	0.006222222
312	0.006242291
313	0.006262361
314	0.006282431
315	0.006302502

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
316	0.006322573
317	0.006342644
318	0.006362716
319	0.006382789
320	0.006402861
321	0.006422934
322	0.006443008
323	0.006463082
324	0.006483156
325	0.006503231
326	0.006523306
327	0.006543381
328	0.006563457
329	0.006583533
330	0.006603610
331	0.006623687
332	0.006643764
333	0.006663842
334	0.006683921
335	0.006703999
336	0.006724078
337	0.006744158
338	0.006764238
339	0.006784318
340	0.006804399
341	0.006824480
342	0.006844561
343	0.006864643
344	0.006884725
345	0.006904808
346	0.006924891
347	0.006944974
348	0.006965058
349	0.006985143
350	0.007005227

ANNUAL RATE, COMPOUNDED DAILY
0.73 PERCENT

DAYS	FACTOR
351	0.007025312
352	0.007045398
353	0.007065484
354	0.007085570
355	0.007105657
356	0.007125744
357	0.007145831
358	0.007165919
359	0.007186007
360	0.007206096
361	0.007226185
362	0.007246275
363	0.007266365
364	0.007286455
365	0.007306546
366	0.007326637
367	0.007346728
368	0.007366820
369	0.007386912
370	0.007407005
371	0.007427098

Part III

3121(q)

Gaming Industry Tip Compliance Agreement Program

Rev. Proc. 2020-47

SECTION 1. PURPOSE

This revenue procedure modifies Revenue Procedure 2007-32, 2007-22 I.R.B.1322, to extend the term of a Gaming Industry Tip Compliance Agreement (GITCA). Revenue Procedure 2007-32 provides that the term of a GITCA is generally three years. This revenue procedure modifies Revenue Procedure 2007-32 to provide that the term of a GITCA is generally five years and to extend the renewal term of a GITCA from three years to a term of up to five years.

SECTION 2. BACKGROUND

The Gaming Industry Tip Compliance Agreement Program (GITCA Program) is designed to promote compliance by gaming industry employers and employees with the provisions of the Internal Revenue Code relating to tip income and to reduce disputes under section 3121(q). Under section 3121(q), tips received by an employee in the course of the employee's employment are considered remuneration for that employment and are deemed to have been paid by the employer for purposes of the employer share of social security and Medicare tax imposed by sections 3111(a) and (b). The remuneration is deemed to be paid when a written statement including the tips is furnished to the employer by the employee pursuant to section 6053(a). The GITCA Program was established by Revenue Procedure 2003-35, 2003-20 I.R.B. 919, and was updated by Revenue Procedure 2007-32 with a new model GITCA. The model GITCA in Revenue Procedure 2007-32 was intended to enhance administration of the GITCA Program by facilitating and promoting the use of financial information technology in the tip reporting process.

Under the GITCA Program, a gaming industry employer and the Internal Revenue Service (Service) work together to reach a GITCA that establishes minimum tip rates for participating tipped employees in specified occupational categories, prescribes a threshold level of participation by the employer's employees, and reduces compliance burdens for the employer and enforcement burdens for the Service.

Revenue Procedure 2003-35 and Revenue Procedure 2007-32 will remain in effect until the expiration date set forth in that agreement, unless modified by the renewal of a GITCA under section 4.04 of Revenue Procedure 2007-32 (as modified by section 3 of this revenue procedure).

SECTION 6. DRAFTING AND CONTACT INFORMATION

The principal author of this revenue procedure is Stephanie Caden of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information about this revenue procedure, contact Ms. Caden at (202) 317-4774 (not a toll-free number). For inquiries into participating in the GITCA Program or for questions about the program, contact the National Tip Reporting Compliance Program office in SB/SE, Employment Tax Examination, at (616) 365-4603 (not a toll-free number).

*26 CFR 601.601: Rules and Regulations.
(Also: §§ 147, 1.147(f)-1)*

Rev. Proc. 2020-49

SECTION 1. PURPOSE

This revenue procedure provides temporary guidance regarding the public approval requirement under § 147(f) of the Internal Revenue Code for tax-exempt qualified private activity bonds. Specifically, in light of the continuing Coronavirus Disease 2019 (COVID-19) pandemic, this revenue procedure extends until September 30, 2021, the time period described in section 4.02 of Rev. Proc. 2020-21, 2020-22 I.R.B. 872, during which certain telephonic hearings are permitted.

SECTION 2. BACKGROUND

.01 Pursuant to § 147(f), tax-exempt qualified private activity bonds are subject to a public approval requirement. Except for refunding bonds described in § 147(f)(2)(D), a bond issue must be approved by the governmental unit issuing the bonds

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective November 23, 2020.

SECTION 5. EFFECT ON OTHER DOCUMENTS

Revenue Procedure 2007-32 is modified. A GITCA executed pursuant to Reve-

(or on behalf of which such bonds are issued) and by the governmental unit having jurisdiction over the area in which any facility to be financed by the issue is located. Under § 147(f)(2)(B), an issue will be treated as having been approved by any governmental unit if the issue is approved by the applicable elective representative of the governmental unit after a public hearing following reasonable public notice, or by voter referendum of the governmental unit.

.02 Section 1.147(f)-1(d)(1) of the Income Tax Regulations provides that public hearing means a forum providing a reasonable opportunity for interested individuals to express their views, orally or in writing, on the proposed issue of bonds and the location and nature of the proposed project to be financed. Section 1.147(f)-1(d)(2) provides that the public hearing must be held in a location that, based on the facts and circumstances, is convenient for residents of the approving governmental unit. The location is presumed convenient for residents of the governmental unit if it is located in the approving governmental unit's capital or seat of government. Further, if more than one governmental unit is required to hold a public hearing, the hearings may be combined as long as the combined hearing affords the residents of all of the participating governmental units a reasonable opportunity to be heard. The location of any combined hearing is presumed convenient for residents of each participating governmental unit if it is no farther than 100 miles from the seat of government of each participating governmental unit beyond whose geographic jurisdiction the hearing is conducted.

.03 In light of the COVID-19 pandemic, state and local governmental units sought alternatives to in-person hearings held to meet the public approval requirement. In response to these concerns, Rev. Proc. 2020-21, effective May 4, 2020, provides temporary guidance regarding the public approval requirement under § 147(f). Rev. Proc. 2020-21 provides that for the period ending on December 31, 2020, hearings held by teleconference that are accessible to the residents of the approving governmental unit by calling a toll-free telephone number will be treated as held in a location that, based on the facts and circumstances, is convenient for

residents of the approving governmental unit for purposes of § 1.147(f)-1(d)(2). The Department of the Treasury and the Internal Revenue Service have received several requests for extension of the time period set forth in section 4.02 of Rev. Proc. 2020-21. This revenue procedure extends that time period until September 30, 2021.

SECTION 3. EXTENSION OF TIME PERIOD

The period described in section 4.02 of Rev. Proc. 2020-21 is extended. Accordingly, section 4.02 of Rev. Proc. 2020-21 is modified as follows:

.02 *Time period.* The period described in this section 4.02 is the period beginning on May 4, 2020, and ending on September 30, 2021.

SECTION 4. EFFECT ON OTHER DOCUMENTS

This revenue procedure modifies section 4.02 of Rev. Proc. 2020-21.

SECTION 5. DRAFTING INFORMATION

The principal authors of this revenue procedure are Johanna Som de Cerff and David White of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Ms. Som de Cerff or Mr. White on (202) 317-6980 (not a toll-free number).

*26 CFR 1.168(k)-2: Additional first year depreciation deduction for property acquired and placed in service after September 27, 2017.
(Also Part I, §§ 168, 446; 1.446-1, 1.1502-68)*

Rev. Proc. 2020-50

SECTION 1. PURPOSE

This revenue procedure provides guidance for taxpayers wishing to apply §§ 1.168(k)-2 and 1.1502-68 of the Income Tax Regulations, or to rely on the proposed regulations under § 168(k) of the Internal Revenue Code (Code) (REG-106808-19) that were published in the

Federal Register on September 24, 2019 (84 FR 50152; 2019-41 I.R.B. 912) (2019 proposed regulations), for: (1) certain depreciable property acquired and placed in service after September 27, 2017, by the taxpayer during its taxable years ending on or after September 28, 2017, and before the taxpayer's first taxable year that begins on or after January 1, 2021; (2) certain plants planted or grafted, as applicable, after September 27, 2017, by the taxpayer during its taxable years ending on or after September 28, 2017, and before the taxpayer's first taxable year that begins on or after January 1, 2021; and (3) components acquired or self-constructed after September 27, 2017, of certain larger self-constructed property and placed in service by the taxpayer during its taxable years ending on or after September 28, 2017, and before the taxpayer's first taxable year that begins on or after January 1, 2021. If the taxpayer retroactively applies §§ 1.168(k)-2 and 1.1502-68, or relies on the 2019 proposed regulations, this revenue procedure also allows the taxpayer to make a late election under § 168(k)(5), (k)(7), or (k)(10), § 1.168(k)-2(c) of the 2020 final regulations (as defined in section 2.02(4) of this revenue procedure) or the 2019 proposed regulations, or § 1.1502-68(c) (4) of the 2020 final regulations, or to revoke an election under § 168(k)(5), (k)(7), or (k)(10), or § 1.168(k)-2(c) of the 2019 proposed regulations, for the taxpayer's taxable years ending on or after September 28, 2017, and before the taxpayer's first taxable year that begins on or after January 1, 2021.

SECTION 2. BACKGROUND

.01 Amendments to § 168(k).

(1) Prior to amendment by § 13201 of Public Law 115-97 (131 Stat. 2054), commonly referred to as the Tax Cuts and Jobs Act (TCJA), § 168(k)(1) allowed a 50-percent additional first year depreciation deduction for qualified property for the taxable year in which the qualified property is placed in service by the taxpayer. Qualified property was defined in part as property the original use of which begins with the taxpayer.

(2) Section 13201 of the TCJA made several amendments to § 168(k). For ex-

ample, the additional first year depreciation deduction percentage was increased from 50 to 100 percent; the property eligible for the additional first year depreciation deduction was expanded to include certain used depreciable property and certain film, television, or live theatrical productions; the placed-in-service date was extended from before January 1, 2020, to before January 1, 2027 (from before January 1, 2021, to before January 1, 2028, for property described in § 168(k)(2)(B) or (C)); and the date on which a specified plant is planted or grafted by the taxpayer was extended from before January 1, 2020, to before January 1, 2027.

(3) Section 13201(d) of the TCJA also amended § 168(k) by adding § 168(k)(9) to the Code. It excludes from the definition of qualified property the following property: any property that is primarily used in a trade or business described in § 163(j)(7)(A)(iv), or any property used in a trade or business that has had floor plan financing indebtedness, as defined in § 163(j)(9), if the floor plan financing interest related to such indebtedness was taken into account under § 163(j)(1)(C).

(4) Section 13201(h) of the TCJA provides the effective dates of the amendments to § 168(k) made by § 13201 of the TCJA. Except as provided in § 13201(h)(2) of the TCJA, these amendments apply to property acquired and placed in service after September 27, 2017. However, property is not treated as acquired after the date on which a written binding contract is entered into for such acquisition. Section 13201(h)(2) of the TCJA provides that these amendments apply to specified plants planted or grafted after September 27, 2017.

(5) Unless otherwise provided, all references hereinafter in this revenue procedure to § 168(k) are references to § 168(k) as amended by the TCJA.

.02 Regulations under § 168(k).

(1) On August 8, 2018, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published a notice of proposed rulemaking (REG-104397-18) in the Federal Register (83 FR 39292; 2018-41 I.R.B. 558) containing proposed regulations under § 168(k) (2018 proposed regulations). Because of the amendments to § 168(k) by the TCJA, the 2018 proposed regu-

lations updated existing regulations in § 1.168(k)-1 by providing a new section at § 1.168(k)-2 for property acquired and placed in service after September 27, 2017. The 2018 proposed regulations clarified statutory requirements that must be met for depreciable property to qualify for the additional first year depreciation deduction under § 168(k).

(2) On September 24, 2019, the Treasury Department and the IRS published final regulations adopting the 2018 proposed regulations with modifications in response to comments and testimony as T.D. 9874 (84 FR 50108; 2019-41 I.R.B. 809) (the 2019 final regulations). The 2019 final regulations made several modifications to the 2018 proposed regulations. For example, the 2019 final regulations provide: (a) a 5-year safe harbor for determining if the taxpayer or a predecessor previously had a depreciable interest in used property; (b) a rule for determining whether substantially renovated property was used by the taxpayer or a predecessor before its acquisition; (c) that the acquisition date of property that the taxpayer acquired pursuant to a written binding contract is the later of (i) the date on which the contract was entered into, (ii) the date on which the contract is enforceable under State law, (iii) if the contract has one or more cancellation periods, the date on which all cancellation periods end, or (iv) if the contract has one or more contingency clauses, the date on which all conditions subject to such clauses are satisfied; and (d) that property manufactured, constructed, or produced for a taxpayer by another person under a written binding contract entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business or production of income, is self-constructed property for purposes of determining the acquisition date of such property.

(3) Along with the publication of the 2019 final regulations, the Treasury Department and the IRS published the 2019 proposed regulations, which propose amendments to the 2019 final regulations to provide additional guidance beyond that provided in the 2019 final regulations. For example, the 2019 proposed regulations provide rules regarding: (a) property described in § 168(k)(9), as described in section 2.01(3) of this revenue procedure;

(b) whether the taxpayer or a predecessor previously had a depreciable interest in (i) used property where the prior use was de minimis, (ii) property acquired in a series of related transactions, and (iii) property acquired by a consolidated group; (c) a partner's prior depreciable interest in property held by a partnership; (d) when a contract to acquire a trade or business or an entity is binding; (e) the acquisition date for property not acquired pursuant to a written binding contract; and (f) components acquired or self-constructed after September 27, 2017, for larger self-constructed property for which manufacture, construction, or production began before September 28, 2017.

(4) On November 10, 2020, the Treasury Department and the IRS published final regulations adopting the 2019 proposed regulations with modifications in response to comments and testimony as T.D. 9916 (85 FR 71734) (2020 final regulations). The 2020 final regulations made several modifications to the 2019 proposed regulations. For example, the 2020 final regulations modified the rules regarding: (a) whether the taxpayer or a predecessor previously had a depreciable interest in (i) used property where the prior use was de minimis, (ii) property acquired in a series of related transactions, and (iii) property acquired by a consolidated group; and (b) components acquired or self-constructed after September 27, 2017, for larger self-constructed property for which manufacture, construction, or production began before September 28, 2017. The 2020 final regulations also did not retain the rules regarding a partner's prior depreciable interest in property held by a partnership. These rules will be withdrawn effective January 11, 2021 (85 FR 71587). The rules regarding whether the taxpayer or a predecessor previously had a depreciable interest in property acquired by a consolidated group were moved from § 1.168(k)-2 to § 1.1502-68.

(5) The 2020 final regulations also made a few modifications to the 2019 final regulations. For example, the 2020 final regulations: (a) clarified the application of the 5-year safe harbor for determining if the taxpayer or a predecessor previously had a depreciable interest in used property; (b) clarified the definitions of predecessor and class of property for basis adjustments

under § 743; and (c) modified the definition of qualified improvement property to reflect the amendments made to § 168(e)(6) by § 2307 of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 281 (March 27, 2020) (CARES Act).

(6) Hereinafter, the 2019 final regulations and the 2020 final regulations together are referred in this revenue procedure as the Final Regulations.

(7) Section 1.168(k)-2(h) provides the applicability dates of § 1.168(k)-2 in the Final Regulations. Section 1.1502-68(e) provides the applicability dates of § 1.1502-68 in the Final Regulations.

(8) In general, § 1.168(k)-2(h)(1) and § 1.1502-68(e)(1) of the 2020 final regulations provide that § 1.168(k)-2 and § 1.1502-68 in the Final Regulations, respectively, apply to: (a) depreciable property acquired after September 27, 2017, by the taxpayer and placed in service by the taxpayer during or after the taxpayer's taxable year that begins on or after January 1, 2021; (b) a specified plant for which the taxpayer properly made an election to apply § 168(k)(5) and that is planted, or grafted to a plant that was previously planted, by the taxpayer during or after the taxpayer's taxable year that begins on or after January 1, 2021; and (c) components acquired or self-constructed after September 27, 2017, of larger self-constructed property described in § 1.168(k)-2(c)(2) of the 2020 final regulations and placed in service by the taxpayer during or after the taxpayer's taxable year that begins on or after January 1, 2021.

(9) Section 1.168(k)-2(h)(2) of the 2020 final regulations directs taxpayers to § 1.168(k)-2 of the 2019 final regulations for the applicability of those regulations to taxable years beginning before January 1, 2021.

(10) Sections 1.168(k)-2(h)(3) and 1.1502-68(e)(2) of the 2020 final regulations allow a taxpayer to choose to apply the Final Regulations to periods before their specified applicability dates. In general, § 1.168(k)-2(h)(3)(i) and § 1.1502-68(e)(2)(i) allow a taxpayer to apply both the rules in § 1.168(k)-2 and, to the extent relevant, in § 1.1502-68, of the Final Regulations, in their entirety and in a consistent manner, to: (a) depreciable property acquired and placed in service after Sep-

tember 27, 2017, by the taxpayer during the taxpayer's taxable years ending on or after September 28, 2017; (b) a specified plant for which the taxpayer properly made an election to apply § 168(k)(5) and that is planted, or grafted to a plant that was previously planted, after September 27, 2017, by the taxpayer during the taxpayer's taxable years ending on or after September 28, 2017; and (c) components acquired or self-constructed after September 27, 2017, of larger self-constructed property described in § 1.168(k)-2(c)(2) of the 2020 final regulations and placed in service by the taxpayer during the taxpayer's taxable years ending on or after September 28, 2017. In the case of property described in § 1.1502-68(e)(2)(i) of the Final Regulations that is acquired in a transaction that satisfies the requirements of § 1.1502-68(c)(1)(ii) or (c)(2)(ii) of the Final Regulations, §§ 1.168(k)-2(h)(3)(ii) and 1.1502-68(e)(2)(ii) of the Final Regulations provide that the taxpayer may apply §§ 1.168(k)-2 and 1.1502-68 of the Final Regulations, in their entirety and in a consistent manner, to such property only if those rules are applied, in their entirety and in a consistent manner, by all parties to the transaction, including the transferor member, the transferee member, and the target, as applicable, and the consolidated groups of which they are members, for the taxable year(s) in which the transaction occurs and the taxable year(s) that includes the day after the Deconsolidation Date. For this purpose, the terms transferor member, transferee member, and target have the meanings provided in § 1.168(k)-2(b)(3)(v)(C) and (D) in the 2019 proposed regulations, and the term Deconsolidation Date has the meaning provided in § 1.168(k)-2(b)(3)(v)(C)(1) in the 2019 proposed regulations.

.03 *Elections*.

(1) Section 168(k)(5)(A) allows a taxpayer to make an election to apply the special rules of § 168(k)(5) to one or more specified plants that are planted, or grafted to a plant that has already been planted, by the taxpayer in the ordinary course of its farming business, as defined in § 263A(e)(4) (§ 168(k)(5) election). The rules and procedures for making the § 168(k)(5) election are set forth in § 1.168(k)-2(f)(2) of the Final Regulations. Pursuant to § 1.168(k)-2(f)(2)(ii) of the Final Regulations, the § 168(k)(5) election must be made by the due date, including extensions, of the Federal income tax return or Form 1065, *U.S. Return of Partnership Income*, for the taxable year in which the taxpayer planted or grafted the specified plant to which the § 168(k)(5) election applies, and is made in the manner prescribed on Form 4562, *Depreciation and Amortization*, and its instructions. For specified plants planted, or grafted to a plant that was previously planted, by the taxpayer

(11) The preamble to the 2020 final regulations provides that a taxpayer also may rely on § 1.168(k)-2 in the 2019 proposed regulations with respect to depreciable property, including certain components, acquired and placed in service after September 27, 2017, or certain plants planted or grafted after September 27, 2017, as applicable, by the taxpayer during taxable

before the applicability date set forth in § 1.168(k)-2(h)(1) of the 2019 final regulations, section 4.05 of Rev. Proc. 2017-33, 2017-19 I.R.B. 1236, provides the time and manner for making the § 168(k)(5) election, and such procedures are the same as in § 1.168(k)-2(f)(2)(ii) of the Final Regulations. Further, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year beginning in 2017 and ending on or after September 28, 2017, sections 4.01(2) and 4.02 of Rev. Proc. 2019-33, 2019-34 I.R.B. 662, provide special procedures to allow the taxpayer to make a deemed § 168(k)(5) election or a late § 168(k)(5) election for a specified plant planted, or grafted to a plant that was previously planted, by the taxpayer after September 27, 2017. Also, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year ending in 2018, 2019, or 2020, and such return was filed on or before April 17, 2020, section 4 of Rev. Proc. 2020-25, 2020-19 I.R.B. 785, as modified by section 8 of this revenue procedure, provides special procedures to allow the taxpayer to make a late § 168(k)(5) election for a specified plant planted, or grafted to a plant that was previously planted, by the taxpayer after September 27, 2017, during such taxable year. Finally, pursuant to § 1.168(k)-2(f)(7) of the 2020 final regulations, the IRS may issue guidance published in the Internal Revenue Bulletin (IRB) that provides alternative procedures for making the § 168(k)(5) election.

(2) Section 168(k)(7) allows a taxpayer to make an election not to deduct the additional first year depreciation for any class of property that is qualified property placed in service during the taxable year (§ 168(k)(7) election). The rules and procedures for making the § 168(k)(7) election are set forth in § 1.168(k)-2(f)(1) of the Final Regulations. Section 1.168(k)-2(f)(1)(ii) of the Final Regulations defines "class of property" for purposes of the § 168(k)(7) election. Pursuant to § 1.168(k)-2(f)(1)(iii) of the Final Regulations, the § 168(k)(7) election must be made by the due date, including extensions, of the Federal income tax return or Form 1065 for the taxable year in which the qualified property is placed in service by the taxpayer, and is made in the man-

ner prescribed on Form 4562, *Depreciation and Amortization*, and its instructions. For qualified property placed in service by the taxpayer before the applicability date set forth in § 1.168(k)-2(h)(1) of the 2019 final regulations, section 4.04 of Rev. Proc. 2017-33 provides the time and manner for making the § 168(k)(7) election, and such procedures are the same as in § 1.168(k)-2(f)(1)(iii) of the Final Regulations. Further, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year beginning in 2017 and ending on or after September 28, 2017, sections 5.02(2) and 5.03 of Rev. Proc. 2019-33 provide special procedures to allow the taxpayer to make a deemed § 168(k)(7) election or a late § 168(k)(7) election for a class of property that is qualified property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer during such taxable year. Also, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year ending in 2018, 2019, or 2020, and such return was filed on or before April 17, 2020, section 4 of Rev. Proc. 2020-25, as modified by section 8 of this revenue procedure, provides special procedures to allow a taxpayer to make a late § 168(k)(7) election for a class of property that is qualified property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer during such taxable year. Finally, pursuant to § 1.168(k)-2(f)(7) of the 2020 final regulations, the IRS may issue guidance published in the IRB that provides alternative procedures for making the § 168(k)(7) election.

(3) Section 168(k)(10) allows a taxpayer to make an election to deduct 50 percent, instead of 100 percent, additional first year depreciation for: (a) all qualified property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer during its taxable year that includes September 28, 2017; and (b) all specified plants that are planted, or grafted to a plant that has already been planted, after September 27, 2017, by the taxpayer in the ordinary course of the taxpayer's farming business during its taxable year that includes September 28, 2017, if the taxpayer makes the § 168(k)(5) election for that taxable year (§ 168(k)(10) elec-

tion). The rules and procedures for making the § 168(k)(10) election are set forth in § 1.168(k)-2(f)(3) of the Final Regulations. Pursuant to § 1.168(k)-2(f)(3)(ii) of the Final Regulations, the § 168(k)(10) election must be made by the due date, including extensions, of the Federal income tax return or Form 1065 for the taxpayer's taxable year that includes September 28, 2017, and is made in the manner prescribed on the 2017 Form 4562, *Depreciation and Amortization*, and its instructions. For qualified property placed in service, and specified plants planted, or grafted to a plant that was previously planted, by the taxpayer before the applicability date set forth in § 1.168(k)-2(h)(1) of the 2019 final regulations, section 6.02 of Rev. Proc. 2019-33 provides the time and manner for making the § 168(k)(10) election, and such procedures are the same as in § 1.168(k)-2(f)(3)(ii) of the Final Regulations. Further, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year beginning in 2017 and ending on or after September 28, 2017, sections 6.03(2) and 6.04 of Rev. Proc. 2019-33 provide special procedures to allow the taxpayer to make a deemed § 168(k)(10) election or a late § 168(k)(10) election for all qualified property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer during such taxable year, or for all specified plants planted, or grafted to a plant that was previously planted, by the taxpayer after September 27, 2017. Also, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year that includes September 27, 2017, section 4 of Rev. Proc. 2020-25, as modified by section 8 of this revenue procedure, provides special procedures to allow a taxpayer to make a late § 168(k)(10) election for all qualified property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer during such taxable year, or for all specified plants planted, or grafted to a plant that was previously planted, by the taxpayer after September 27, 2017, during such taxable year. Finally, pursuant to § 1.168(k)-2(f)(7) of the 2020 final regulations, the IRS may issue guidance published in the IRB that provides alternative procedures for making the § 168(k)(10) election.

(4) Section 1.168(k)-2(f)(5) of the Final Regulations provides that, in general, the § 168(k)(5) election, § 168(k)(7) election, and § 168(k)(10) election, once made, may be revoked only by filing a request for a private letter ruling and obtaining the written consent of the Commissioner of Internal Revenue (Commissioner) to revoke the election. Further, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year beginning in 2017 and ending on or after September 28, 2017, sections 4.03, 5.04, and 6.05 of Rev. Proc. 2019-33 provide special procedures to allow the taxpayer to revoke its § 168(k)(5) election, § 168(k)(7) election, and § 168(k)(10) election, respectively, made for such taxable year. Also, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year ending in 2018, 2019, or 2020, and such return was filed on or before April 17, 2020, section 5 of Rev. Proc. 2020-25 provides special procedures to allow a taxpayer to revoke its § 168(k)(5) election or § 168(k)(7) election made for such taxable year. And, if a taxpayer timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year that includes September 28, 2017, and such return was filed on or before April 17, 2020, section 5 of Rev. Proc. 2020-25 provides special procedures to allow a taxpayer to revoke its § 168(k)(10) election made for such taxable year. Finally, pursuant to § 1.168(k)-2(f)(7) of the 2020 final regulations, the IRS may issue guidance published in the IRB that provides alternative procedures for revoking the § 168(k)(5) election, § 168(k)(7) election, or § 168(k)(10) election.

(5) Section 1.168(k)-2(c)(1) of the 2020 final regulations allows a taxpayer to make an election to treat any acquired or self-constructed component, as described in § 1.168(k)-2(c)(3) of the 2020 final regulations, of the larger self-constructed property, as described in § 1.168(k)-2(c)(2) of the 2020 final regulations, as being eligible for the additional first year depreciation deduction under § 1.168(k)-2, assuming all requirements of § 168(k) and § 1.168(k)-2 are met (component election). The rules and procedures for making the component election are set forth in § 1.168(k)-2(c) of the 2020 final

regulations. Pursuant to § 1.168(k)-2(c)(6) of the 2020 final regulations, the component election must be made by the due date, including extensions, of the Federal income tax return or Form 1065 for the taxable year in which the taxpayer placed in service the larger self-constructed property, and is made by attaching a statement to such return or Form 1065 indicating that the taxpayer is making the component election and whether the taxpayer is making the component election for all or some of the components described in § 1.168(k)-2(c)(3) of the 2020 final regulations. Section 1.168(k)-2(c)(7) of the 2020 final regulations provides that, in general, the component election, once made, may be revoked only by filing a request for a private letter ruling and obtaining the written consent of the Commissioner to revoke the component election. Pursuant to § 1.168(k)-2(c)(8) of the 2020 final regulations, the IRS may issue guidance published in the IRB that provides alternative procedures for making, or revoking, the component election.

(6) Pursuant to § 1.168(k)-2(c)(1) of the 2019 proposed regulations, a taxpayer may elect to treat any component acquired or self-constructed after September 27, 2017, of certain larger self-constructed property, as being eligible for the additional first year depreciation deduction under § 1.168(k)-2, assuming all requirements of § 168(k) and § 1.168(k)-2 are met (proposed component election). Specifically, the larger self-constructed property must be manufactured, constructed, or produced beginning before September 28, 2017, qualified property under § 168(k)(2) as in effect before the enactment of the TCJA, and placed in service by the taxpayer after September 27, 2017, during its taxable years ending on or after September 28, 2017, and ending before the taxpayer's first taxable year that begins on or after January 1, 2021. The time and manner for making the proposed component election are set forth in § 1.168(k)-2(c)(6) of the 2019 proposed regulations, and such procedures are the same as in § 1.168(k)-2(c)(6) of the 2020 final regulations.

(7) Section 1.1502-68(c)(4) of the 2020 final regulations allows a transferee member, as defined in § 1.1502-68(a)(2)(xii), or the target, as defined in § 1.1502-68(a)

(2)(xi), to make an election not to apply the Consolidated Asset Acquisition Rule in § 1.1502-68(c)(1)(i) or the Consolidated Deemed Acquisition Rule in § 1.1502-68(c)(2)(i), respectively, to all eligible property, as defined in § 1.1502-68(a)(2)(vii), that is acquired or deemed acquired in a transaction that otherwise satisfies the requirements of the Consolidated Asset Acquisition Rule or the Consolidated Deemed Acquisition Rule (designated transaction election). The rules and procedures for making the designated transaction election are set forth in § 1.1502-68(c)(4) of the 2020 final regulations. Pursuant to § 1.1502-68(c)(4)(ii)(A) and (B) of the 2020 final regulations, the designated transaction election must be made by the due date, including extensions, of the Federal income tax return for the taxable year of the transferee member or target that begins on the day after the deconsolidation date, as defined in § 1.1502-68(a)(2)(iii), and is made by attaching a statement to such return describing the transaction(s) to which the Consolidated Asset Acquisition Rule or the Consolidated Deemed Acquisition Rule otherwise would apply and stating that the transferee member or the target, as applicable, is not claiming the additional first year depreciation deduction for any eligible property transferred in such transaction(s). Pursuant to § 1.1502-68(c)(4)(ii)(C) of the 2020 final regulations, the IRS may issue guidance published in the IRB that provides alternative procedures for making the designated transaction election. Section 1.1502-68(c)(4)(iii) provides that the designated transaction election, once made, may be revoked only by filing a request for a private letter ruling and obtaining the written consent of the Commissioner to revoke the election.

.04 Method of accounting.

(1) Section 446(e) and § 1.446-1(e)(2) require a taxpayer to secure the consent of the Commissioner before changing a method of accounting for Federal income tax purposes. Section 1.446-1(e)(3)(ii) authorizes the Commissioner to prescribe administrative procedures setting forth the limitations, terms, and conditions necessary to permit a taxpayer to obtain consent to change a method of accounting.

(2) Section 2.05 of Rev. Proc. 2015-13, 2015-5 I.R.B 419, 425, provides that

a taxpayer may not request, or otherwise make, a retroactive change in method of accounting, unless specifically authorized by the Commissioner or by statute.

(3) Section 1.446-1(e)(2)(ii)(d)(3)(iii) provides that the making of a late depreciation election or the revocation of a timely valid depreciation election is not a change in method of accounting, except as otherwise expressly provided by the Code, the regulations under the Code, or other guidance published in the Internal Revenue Bulletin.

(4) Section 1.446-1(e)(2)(ii)(d)(5)(iii) provides that, except as otherwise expressly provided by the Code, the regulations under the Code, or other guidance published in the Internal Revenue Bulletin, no § 481 adjustment is required or permitted for a change from one permissible method of computing depreciation to another permissible method of computing depreciation for an asset because this change is implemented by either a cut-off method, as described in section 2.07 of Rev. Proc. 2015-13, or a modified cut-off method under which the adjusted depreciable basis of the asset as of the beginning of the year of change is recovered using the new permissible method of accounting, as appropriate. However, a change from an impermissible method of computing depreciation to a permissible method of computing depreciation for an asset results in a § 481(a) adjustment.

(5) With the publication of the 2020 final regulations, guidance is needed under § 168 for taxpayers that want to apply the 2020 final regulations, the 2019 final regulations, and/or the 2019 proposed regulations retroactively. Accordingly, this revenue procedure permits certain taxpayers to file an amended return, administrative adjustment request under § 6227 (AAR), or a Form 3115, *Application for Change in Accounting Method*, to change their method of accounting for depreciation of certain depreciable property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer after September 27, 2017, and during the taxpayer's taxable years ending on or after September 28, 2017, and ending before the taxpayer's first taxable year that begins on or after January 1, 2021, and certain plants that are planted or grafted, as

applicable, after September 27, 2017, by the taxpayer during its taxable years ending on or after September 28, 2017, and ending before the taxpayer's first taxable year that begins on or after January 1, 2021. See section 4 of this revenue procedure for the procedures for changing the depreciation of such property or plants. Further, this revenue procedure permits certain taxpayers to make a late § 168(k)(5) election, a late § 168(k)(7) election, a late § 168(k)(10) election, a late component election, a late designated transaction election, or a late proposed component election, or to revoke a § 168(k)(5) election, a § 168(k)(7) election, a § 168(k)(10) election, or a proposed component election, for certain property or plants for a limited period of time. Because of the administrative burden of filing amended returns and AARs, the Treasury Department and the IRS also have determined that it is appropriate to treat the making of these late elections or the revocation of these elections as a change in method of accounting with a § 481(a) adjustment for a limited period of time. See sections 5 and 6 of this revenue procedure for the procedures to make these late elections or to revoke these elections.

SECTION 3. SCOPE

This revenue procedure applies to a taxpayer that chooses to:

.01 Apply both § 1.168(k)-2 and, to the extent relevant, § 1.1502-68, of the Final Regulations, in their entirety and in a consistent manner, to:

(1) All depreciable property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer after September 27, 2017, and during the taxpayer's taxable year: (a) beginning in 2016 or 2017 (2017 taxable year); (b) beginning in 2018 (2018 taxable year); (c) beginning in 2019 (2019 taxable year); or (d) beginning in 2020, and ending before the taxpayer's first taxable year that begins on or after January 1, 2021 (2020 taxable year);

(2) All specified plants for which the taxpayer properly made or makes a § 168(k)(5) election and that are planted, or grafted to a plant that was previously planted, after September 27, 2017, by the taxpayer during the taxpayer's 2017 tax-

able year, 2018 taxable year, 2019 taxable year, or 2020 taxable year; and

(3) Components acquired or self-constructed by the taxpayer after September 27, 2017, of larger self-constructed property described in § 1.168(k)-2(c)(2) of the 2020 final regulations and placed in service by the taxpayer during the taxpayer's 2017 taxable year, 2018 taxable year, 2019 taxable year, or 2020 taxable year;

.02 Apply § 1.168(k)-2 of the 2019 final regulations, in its entirety, to:

(1) All depreciable property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer after September 27, 2017, and during the taxpayer's 2017 taxable year, 2018 taxable year, 2019 taxable year, or 2020 taxable year; and

(2) All specified plants for which the taxpayer properly made or makes a § 168(k)(5) election and that are planted, or grafted to a plant that was previously planted, after September 27, 2017, by the taxpayer during the taxpayer's 2017 taxable year, 2018 taxable year, 2019 taxable year, or 2020 taxable year; or

.03 Apply both § 1.168(k)-2 of the 2019 final regulations and the 2019 proposed regulations, in their entirety, except for § 1.168(k)-2(b)(3)(iii)(B)(5) in the 2019 proposed regulations, and in a consistent manner, to:

(1) All depreciable property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer after September 27, 2017, and during the taxpayer's 2017 taxable year, 2018 taxable year, 2019 taxable year, or 2020 taxable year;

(2) All specified plants for which the taxpayer properly made or makes a § 168(k)(5) election and that are planted, or grafted to a plant that was previously planted, after September 27, 2017, by the taxpayer during the taxpayer's 2017 taxable year, 2018 taxable year, 2019 taxable year, or 2020 taxable year; and

(3) Components acquired or self-constructed by the taxpayer after September 27, 2017, of larger self-constructed property for which manufacture, construction, or production begins before September 28, 2017, and that is qualified property under § 168(k)(2) as in effect before the enactment of the TCJA and placed in service by the taxpayer after September 27,

2017, and during the taxpayer's 2017 taxable year, 2018 taxable year, 2019 taxable year, or 2020 taxable year.

SECTION 4. METHOD CHANGE PROCEDURES TO APPLY ADDITIONAL FIRST YEAR DEPRECIATION REGULATIONS

.01 *Scope.* This section 4 applies to a taxpayer within the scope of section 3 of this revenue procedure that is changing its method of accounting for depreciation under § 168 for depreciable property, including components described in § 1.168(k)-2(c) of the 2020 final regulations or the 2019 proposed regulations for which the taxpayer has already made the component election or proposed component election, as applicable, and specified plants, within the scope of section 3 of this revenue procedure to comply with the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations, as applicable. However, this section 4:

(1) Does not apply to property that is affected by a late election, or withdrawn election, made/withdrawn by the taxpayer under § 163(j)(7)(B) (electing real property trade or business) or § 163(j)(7)(C) (electing farming business) after November 16, 2020, in accordance with Rev. Proc. 2020-22, 2020-18 I.R.B. 745. Any changes to depreciation for such property that result from such a late election, or withdrawn election, are made in accordance with sections 4.02 and 4.03, or 5.02 of Rev. Proc. 2020-22, as applicable;

(2) Does not apply to property or a specified plant for which the taxpayer is changing from deducting the cost or other basis of such property as an expense to capitalizing and depreciating the cost or other basis, or *vice versa*;

(3) Does not apply to property or a specified plant that the taxpayer does not own at the beginning of the year of change. However, and solely for purposes of this section 4:

(a) In the case of property described in § 1.1502-68(e)(2)(i) of the 2020 final regulations that is acquired in a transaction that satisfies the requirements of § 1.1502-68(c)(1)(ii) or (c)(2)(ii) of the 2020 final regulations, such property is treated as owned by the taxpayer at the beginning

of the year of change if any party to the transaction owned such property at that time; and

(b) In the case of property that is acquired in a transaction described in § 1.168(k)-2(b)(3)(v)(C) or (D) in the 2019 proposed regulations, such property is treated as owned by the taxpayer at the beginning of the year of change if any party to the transaction owned such property at that time; and

(4) Cannot be used to make a late election, or revoke an election, under § 168, § 179, or § 1.1502-68. However, see sections 5 and 6 of this revenue procedure for procedures for making or revoking certain elections.

.02 *Changing to the depreciation allowable under the additional first year depreciation regulations.*

(1) *In general.* A taxpayer within the scope of this section 4 has a choice to apply the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations for (a) depreciable property within the scope of this section 4 that is placed in service by the taxpayer during the same taxable year, and (b) specified plants within the scope of this section 4 that are planted or grafted by the taxpayer during the same taxable year in which the taxpayer planted or grafted the specified plant to which the § 168(k)(5) election applies (the planting year). However, once a taxpayer applies § 1.168(k)-2 and, to the extent relevant, § 1.1502-68, of the Final Regulations, in their entirety, for a taxable year, the taxpayer must continue to apply § 1.168(k)-2 and, to the extent relevant, § 1.1502-68, of the Final Regulations, in their entirety, for the taxpayer's subsequent taxable years. For example, if Partnership ABC applies § 1.168(k)-2 of the Final Regulations, in its entirety, for its 2018 taxable year and if § 1.1502-68 of the Final Regulations does not apply to Partnership ABC, Partnership ABC must apply § 1.168(k)-2 of the Final Regulations for its 2019 taxable year, 2020 taxable year, and subsequent taxable years.

(2) *Change from impermissible or permissible method of accounting.* The first time the taxpayer changes its method of accounting for depreciation under this revenue procedure for depreciable property and specified plants described in

section 4.02(1) of this revenue procedure to comply with the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations, as applicable, is deemed to be a change from an impermissible method of accounting to a permissible method of accounting that is made with a § 481(a) adjustment. See section 4.03 of this revenue procedure for the procedures to make this change in method of accounting. Any subsequent time the taxpayer changes its method of accounting for depreciation for such depreciable property and such specified plants to comply with the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations, is a change from a permissible method of accounting to another permissible method of accounting that is made on a cut-off basis. See section 4.04 of this revenue procedure for the procedures to make this change in method of accounting.

(3) For example, for its taxable year beginning on January 1, 2020, and ending on December 31, 2020, Taxpayer X changes its method of accounting for depreciation for qualified property acquired by Taxpayer X after September 27, 2017, and placed in service by Taxpayer X after September 27, 2017, and during its 2017 and 2018 taxable years to comply with § 1.168(k)-2 of the 2019 final regulations. This change is a change from an impermissible method of accounting to a permissible method of accounting that is made with a § 481(a) adjustment. Subsequently, for its taxable year beginning on January 1, 2021, Taxpayer X changes its method of accounting for depreciation for qualified property acquired by Taxpayer X after September 27, 2017, and placed in service by Taxpayer X after September 27, 2017, and during its 2017, 2018, and 2019 taxable years to comply with § 1.168(k)-2 and, to the extent relevant, § 1.1502-68 of the Final Regulations. This change is (a) a change from a permissible method of accounting to another permissible method of accounting that is made on a cut-off basis for qualified property acquired after September 27, 2017, and placed in service by Taxpayer X after September 27, 2017, and during its 2017 and 2018 taxable years, and (b) a change from an impermissible method of accounting to

a permissible method of accounting that is made with a § 481(a) adjustment for qualified property acquired after September 27, 2017, and placed in service by Taxpayer X after September 27, 2017, and during its 2019 taxable year.

(4) *Ordering rules.* If, for the same taxable year, a taxpayer within the scope of this section 4 makes a late election under section 5 of this revenue procedure and/or revokes an election under section 6 of this revenue procedure and also makes a change in method of accounting for the same depreciable property or same specified plant, the taxpayer applies the late election or the revocation, as applicable, first.

(5) *Special rules for applying consolidated group rules.* In the case of property described in § 1.1502-68(e)(2)(i) of the 2020 final regulations that is acquired in a transaction that satisfies the requirements of § 1.1502-68(c)(1)(ii) or (c)(2)(ii) of the 2020 final regulations, all parties to the transaction, including the transferor member, the transferee member, and the target, as applicable, and the consolidated groups of which they are members for the taxable year(s) in which the transaction occurs and the taxable year(s) that includes the day after the deconsolidation date, as defined in § 1.1502-68(a)(2)(iii) of the 2020 final regulations, must change their methods of accounting for depreciation for the property and specified plants in the same manner under this section 4. For example, if the transferor member changes its method of accounting for depreciation for property by filing an amended return in accordance with section 4.03 of this revenue procedure, all other parties to the transaction must do the same. Similarly, in the case of property to which § 1.168(k)-2 of the 2019 proposed regulations applies and that is acquired in a transaction described in § 1.168(k)-2(b)(3)(v)(C) or (D) in the 2019 proposed regulations, all parties to the transaction, including the transferor member, the transferee member, and the target, as applicable, as defined in § 1.168(k)-2(b)(3)(v)(C) or (D) in the 2019 proposed regulations, and the consolidated groups of which they are members for the taxable year(s) in which the transaction occurs and the taxable year(s) that includes the day after the Deconsolidation Date, as defined in § 1.168(k)-2(b)

(3)(v)(C)(I) in the 2019 proposed regulations, must change their methods of accounting for depreciation for the property and specified plants in the same manner under this section 4. If a party to a transaction described in this section 4.02(5) was a member of a consolidated group for the taxable year(s) in which the transaction occurs and/or the taxable year(s) that includes the day after the deconsolidation date, then the change in the method of accounting for depreciation is made by the agent for the group, within the meaning of § 1.1502-77(a) and (c), in accordance with this section 4.

.03 *Change from an impermissible to permissible method of accounting for depreciation.*

(1) *Applicability.* This section 4.03 applies to the first time that the taxpayer changes its method of accounting for depreciation under this revenue procedure to comply with the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations for (a) depreciable property within the scope of this section 4 that is placed in service during the same taxable year, and (b) specified plants within the scope of this section 4 that are planted or grafted during the same planting year. This initial change in determining depreciation is a change from an impermissible to a permissible method of accounting.

(2) *One-year property.* For depreciable property that is within the scope of this section 4.03 and is placed in service by the taxpayer in the taxable year immediately preceding the year of change, as defined in section 3.19 of Rev. Proc. 2015-13 (1-year Property), the taxpayer may change from the impermissible method of determining depreciation to the permissible method of determining depreciation for the 1-year Property by filing a Form 3115 for this change in accordance with section 4.03(4)(b) of this revenue procedure, provided the § 481(a) adjustment reported on the Form 3115 includes the amount of any adjustment attributable to all property, including the 1-year Property, subject to the Form 3115. Similarly, for a specified plant that is within the scope of this section 4.03 and is planted or grafted by the taxpayer in the taxable year immediately preceding the year of change, as defined in section 3.19 of Rev. Proc. 2015-13 (1-year Plant),

the taxpayer may change from the impermissible method of determining depreciation to the permissible method of determining depreciation for the 1-year Plant by filing a Form 3115 for this change in accordance with section 4.03(4)(b) of this revenue procedure, provided the § 481(a) adjustment reported on the Form 3115 includes the amount of any adjustment attributable to all property, including the 1-year Plant, subject to the Form 3115. Alternatively, the taxpayer may change from the impermissible method of determining depreciation to the permissible method of determining depreciation for the 1-year Property or 1-year Plant by filing an amended return or AAR, as applicable.

(3) *Retroactive change in method of accounting.* The Commissioner allows a taxpayer within the scope of this section 4.03 to make a retroactive change in method of accounting under this section 4.03 for a limited period of time, provided the taxpayer files the amended return(s) or AAR(s) within the time and manner provided in section 4.03(4)(a) of this revenue procedure and satisfies, to the extent relevant, section 4.02 of this revenue procedure. A Form 3115 is not required to be filed with such amended return(s) or AAR(s).

(4) *Changing from the impermissible to the permissible method of determining depreciation.* The taxpayer may change from the impermissible method of determining depreciation to a permissible method of determining depreciation under this section 4.03 by filing either:

(a) A Federal amended income tax return or amended Form 1065 for the placed-in-service year of the depreciable property and for the planting year of the specified plant on or before December 31, 2021, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is being filed. A partnership subject to the centralized partnership audit regime enacted as part of the Bipartisan Budget Act of 2015 (BBA partnership) may file an AAR for the placed-in-service year of the depreciable property or the planting year of the specified plant, as applicable, on or before December 31, 2021, but in no event later than the applicable period of limitations on making adjustments under § 6235 for the reviewed year as defined

in § 301.6241-1(a)(8) of the Procedure and Administration Regulations. This amended return or AAR must include the adjustment to taxable income for the change in determining depreciation of the depreciable property or specified plant and any collateral adjustments to taxable income or to tax liability (for example, proper amount allowed as a deduction for interest expense, taking into account the business interest limitation under § 163(j) and the regulations thereunder, for a trade or business with floor plan financing indebtedness that is applying § 1.168(k)-2(b)(2)(ii)(G) of the Final Regulations, § 1.168(k)-2(b)(2)(ii)(G) of the 2019 final regulations, or both § 1.168(k)-2(b)(2)(ii)(G) of the 2019 final regulations and § 1.168(k)-2(b)(2)(ii)(G) of the 2019 proposed regulations). Such collateral adjustments also must be made on original or amended Federal returns or AARs for any affected succeeding taxable years. If the taxpayer satisfies this section 4.03(4)(a) for all depreciable property placed in service during the same taxable year and all specified plants planted or grafted during the same planting year, the Commissioner grants consent to the taxpayer to make this retroactive method change for such property and plant; or

(b) A Form 3115 with the taxpayer's timely filed original Federal income tax return or Form 1065 under the automatic change procedures in Rev. Proc. 2015-13. This change in method of accounting is made with a § 481(a) adjustment. However, consent to make a change in method of accounting under this section 4.03(4)(b) will be granted by the Commissioner only if the taxpayer satisfies, to the extent relevant, section 4.02 of this revenue procedure. Further, if a taxpayer that has a trade or business with floor plan financing indebtedness is applying § 1.168(k)-2(b)(2)(ii)(G) of the Final Regulations, § 1.168(k)-2(b)(2)(ii)(G) of the 2019 final regulations, or both § 1.168(k)-2(b)(2)(ii)(G) of the 2019 final regulations and § 1.168(k)-2(b)(2)(ii)(G) of the 2019 proposed regulations for depreciable property placed in service by the taxpayer in its 2018, 2019, or 2020 taxable year, consent to make a change in method of accounting under this section 4.03(4)(b) will be granted by the Commissioner only if the amount

of the § 481(a) adjustment is adjusted to account for the proper amount of interest expense, taking into account the business interest limitation under § 163(j) and the regulations thereunder, as of the beginning of the year of change. See section 7.03 of this revenue procedure for the procedures for making this change in method of accounting.

.04 Change from a permissible to another permissible method of accounting for the depreciation.

(1) *Applicability.* This section 4.04 applies to the taxpayer that previously changed its method of accounting for depreciation under this revenue procedure to comply with the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations, as applicable, for depreciable property within the scope of this section 4 that is placed in service during the same taxable year and specified plants within the scope of this section 4 that are planted or grafted during the same planting year, and now wants to make another change in method of accounting for depreciation to comply with the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations for the same depreciable property or specified plant. This subsequent change in determining depreciation is a change from one permissible method of accounting to another permissible method of accounting.

(2) *Changing from a permissible to another permissible method of determining depreciation allowable.* The taxpayer may change from a permissible method of accounting for depreciation to another permissible method of accounting for depreciation under this section 4.04 by filing a Form 3115 with the taxpayer's timely filed original Federal income tax return or Form 1065 under the automatic change procedures in Rev. Proc. 2015-13. Consent to make a change in method of accounting under this section 4.04 will be granted by the Commissioner only if the taxpayer satisfies section 4.02 of this revenue procedure, to the extent relevant. Further, this change in method of accounting is made on a cut-off basis. See section 7.03 of this revenue procedure for the procedures for making this change in method of accounting.

SECTION 5. AUTOMATIC EXTENSION OF TIME TO FILE CERTAIN ELECTIONS UNDER SECTIONS 1.168(k)-2 AND 1.1502-68

.01 Scope.

(1) This section 5 applies to a taxpayer within the scope of section 3 of this revenue procedure that:

(a) placed in service depreciable property during its 2017, 2018, 2019, or 2020 taxable year, or planted or grafted the specified plant during its 2017, 2018, 2019, or 2020 taxable year to which the late § 168(k)(5) election applies, as applicable;

(b) timely filed its Federal income tax return or Form 1065 for the placed-in-service year of such depreciable property or the planting year of such specified plant, and such return was filed before November 17, 2020;

(c) applies the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations for the placed-in-service year of such depreciable property or the planting year of such specified plant;

(d) wants to (i) make a § 168(k)(5) election for the planting year of such specified plant or make a § 168(k)(7) election for the placed-in-service year of the class of such depreciable property, or (ii) make a component election, designated transaction election, or proposed component election for the placed-in-service year of such depreciable property or the planting year of such specified plant and such election(s) is permitted for the placed-in-service year of such depreciable property or the planting year of such specified plant under the specific regulation in section 5.01(1)(c) of this revenue procedure that is applied by the taxpayer for that placed-in-service year or planting year; and

(e) did not (i) previously revoke such election(s) in accordance with section 6.02 of this revenue procedure, (ii) previously revoke such election(s) after November 16, 2020, in accordance with section 5 of Rev. Proc. 2020-25, or (iii) previously revoke such election(s) after November 16, 2020, in accordance with section 4.03 or 5.04 of Rev. Proc. 2019-33, as applicable.

(2) This section 5 also applies to a taxpayer within the scope of section 3 of this revenue procedure that:

(a) placed in service depreciable property during its taxable year that includes September 28, 2017, or planted or grafted specified plants during its taxable year that includes September 28, 2017, as applicable;

(b) timely filed its Federal income tax return or Form 1065 for the taxpayer's taxable year that includes September 28, 2017;

(c) applies the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations for its taxable year that includes September 28, 2017;

(d) wants to make a § 168(k)(10) election for such taxable year; and

(e) did not (i) previously revoke a § 168(k)(10) election for such taxable year in accordance with section 6.02 of this revenue procedure, (ii) previously revoke a § 168(k)(10) election for such taxable year after November 16, 2020, in accordance with section 5 of Rev. Proc. 2020-25, or (iii) previously revoke a § 168(k)(10) election after November 16, 2020, in accordance with section 6.05 of Rev. Proc. 2019-33.

(3) Solely for purposes of section 5.01 of this revenue procedure, a taxpayer applies the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations under section 5.01(1)(c) of this revenue procedure for the placed-in-service year of the depreciable property described in section 5.01(1)(a) of this revenue procedure or for the planting year of the specified plant described in section 5.01(1)(a) of this revenue procedure, or applies the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations under section 5.01(2)(c) of this revenue procedure for the placed-in-service year of the depreciable property described in section 5.01(2)(a) of this revenue procedure or for the planting year of the specified plant described in section 5.01(2)(a) of this revenue procedure, either by (a) making a change in method of accounting under section 4.03 of this revenue procedure to apply that specific regulation for the placed-in-service year of such depreciable property or for the planting year of such specified plant, or (b) complying with that specific regulation on its timely filed orig-

inal Federal income tax return or Form 1065 for the placed-in-service year of such depreciable property or for the planting year of such specified plant.

(4) A taxpayer within the scope of section 5.01(1) of this revenue procedure makes the § 168(k)(5) election, § 168(k)(7) election, component election, proposed component election, or designated transaction election in accordance with section 2.03(1), (2), (5), (6), or (7), respectively, of this revenue procedure or under section 5.02 of this revenue procedure. A taxpayer within the scope of section 5.01(2) of this revenue procedure makes the § 168(k)(10) election in accordance with section 2.03(3) of this revenue procedure or under section 5.02 of this revenue procedure.

.02 Time and manner of making a late § 168(k)(5) election, a late § 168(k)(7) election, a late § 168(k)(10) election, a late component election, a late designated transaction election, or a late proposed component election. A taxpayer within the scope of this section 5 may make the late § 168(k)(5) election, the late § 168(k)(7) election, the late § 168(k)(10) election, the late component election, the late designated transaction election, or the late proposed component election by filing either:

(1) A Federal amended income tax return or amended Form 1065 for the placed-in-service year of the property, or for the planting year of the specified plant, as applicable, on or before December 31, 2021, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is being filed. A BBA partnership may file an AAR for the placed-in-service year of the property or the planting year of the specified plant, as applicable, on or before December 31, 2021, but in no event later than the applicable period of limitations on making adjustments under § 6235 for the reviewed year as defined in § 301.6241-1(a)(8). This amended return or AAR must include the adjustment to taxable income for the late election and any collateral adjustments to taxable income or to tax liability. Such collateral adjustments also must be made on original or amended Federal returns or AARs for any affected succeeding taxable years; or

(2) A Form 3115 (a) with the taxpayer's timely filed original Federal income

tax return or Form 1065 for the taxpayer's first or second taxable year succeeding the taxable year in which the taxpayer placed in service the property or the planting year of the specified plant, as applicable, or (b) if later, with the taxpayer's timely filed original Federal income tax return or Form 1065 that is filed on or after November 6, 2020, and on or before December 31, 2021. The late § 168(k)(5) election, late § 168(k)(7) election, late § 168(k)(10) election, late component election, late designated transaction election, or late proposed component election under this section 5.02(2) will be treated as a change in method of accounting with a § 481(a) adjustment only during this limited period of time. The time and manner of making this late election are described in section 7.02(2) of this revenue procedure, which modifies section 6.20 of Rev. Proc. 2019-43 to include this late election.

.03 Examples. The application of this section 5 is illustrated by the following examples.

Example 1. Taxpayer A, a calendar year taxpayer, placed in service several depreciable assets during its 2018 taxable year that are eligible for the additional first year depreciation under § 168(k) as in effect before the enactment of the TCJA. On its timely filed Federal income tax return for the 2018 taxable year, Taxpayer A deducted 40-percent additional first year depreciation for such assets. After the issuance of the 2020 final regulations, Taxpayer A determined that one such asset is larger self-constructed property under § 1.168(k)-2(c)(2) of the 2020 final regulations and some components of that property are eligible for the component election under § 1.168(k)-2(c) of the 2020 final regulations. Pursuant to section 4.03(4)(a) of this revenue procedure, Taxpayer A (a) makes a retroactive change in method of accounting by filing in February 2021 amended Federal income tax returns for its 2018 and 2019 taxable years to apply the Final Regulations, and (b) timely files its original Federal income tax return for the 2020 taxable year applying the Final Regulations. Because Taxpayer A retroactively applied the Final Regulations to the 2018 taxable year in accordance with section 4 of this revenue procedure, Taxpayer A is eligible to make the late component election under this section 5 for eligible components placed in service by Taxpayer A during its 2018 taxable year. The result would be the same if, pursuant to section 4.03(4)(b) of this revenue procedure, Taxpayer A filed a Form 3115 with its timely filed original Federal income tax return for the 2020 taxable year under the automatic change procedures in Rev. Proc. 2015-13 and section 6.21 of Rev. Proc. 2019-43, as added by section 7.03 of this revenue procedure, to apply the Final Regulations for property placed in service by Taxpayer A during its 2018 and 2019 taxable years.

Example 2. The facts are the same as in *Example 1*, except Taxpayer A files the amended Federal in-

come tax returns for its 2018 and 2019 taxable years to apply the 2019 final regulations and timely files its original Federal income tax return for the 2020 taxable year applying the 2019 final regulations. Because the component election under § 1.168(k)-2(c) of the 2020 final regulations is not permitted under the 2019 final regulations, Taxpayer A is not eligible to make the late component election under this section 5 for components that are eligible for the component election under § 1.168(k)-2(c) of the 2020 final regulations and placed in service by Taxpayer A during its 2018 taxable year.

Example 3. Taxpayer B, a calendar year taxpayer, placed in service several depreciable assets during its 2018 taxable year. On its timely filed Federal income tax return for the 2018 taxable year, Taxpayer B deducted 100-percent additional first year depreciation for such assets. Now, Taxpayer B wants to make a late § 168(k)(7) election for all qualified property placed in service during its 2018 taxable year. Taxpayer B did not apply, and is not applying, the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations for the 2018 taxable year. As a result, Taxpayer B is not eligible to make a late § 168(k)(7) election under this revenue procedure for the 2018 taxable year. Instead, Taxpayer B must submit a private letter ruling request under § 301.9100-3 of the Procedure and Administration Regulations to obtain the Commissioner's consent to make such late election.

SECTION 6. CONSENT TO REVOKE CERTAIN ELECTIONS UNDER SECTION 168

.01 Scope.

(1) This section 6 applies to a taxpayer within the scope of section 3 of this revenue procedure that:

(a) placed in service depreciable property during its 2017, 2018, 2019, or 2020 taxable year, or planted or grafted the specified plant during its 2017, 2018, 2019, or 2020 taxable year to which the § 168(k)(5) election applies, as applicable;

(b) applies the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations for the placed-in-service year of such depreciable property or the planting year of such specified plant;

(c) made a § 168(k)(5) election, § 168(k)(7) election, or proposed component election on its timely filed original Federal income tax return or Form 1065 for the placed-in-service year of such depreciable property or class of such depreciable property, as applicable, or for the planting year of the specified plant, and such return was filed before November 17, 2020, or made a § 168(k)(5) election or § 168(k)(7) election in accordance with

section 4 or 5 of Rev. Proc. 2019-33, respectively, or in accordance with section 4 of Rev. Proc. 2020-25, as modified by section 8 of this revenue procedure, before November 17, 2020; and

(d) wants to revoke such election.

(2) This section 6 also applies to a taxpayer within the scope of section 3 of this revenue procedure that:

(a) applies the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations for the taxpayer's taxable year that includes September 28, 2017;

(b) made a § 168(k)(10) election on its timely filed original Federal income tax return or Form 1065 for the taxpayer's taxable year that includes September 28, 2017, or made a § 168(k)(10) election in accordance with section 6 of Rev. Proc. 2019-33 or section 4 of Rev. Proc. 2020-25, as modified by section 8 of this revenue procedure, for the taxpayer's taxable year that includes September 28, 2017, before November 17, 2020; and

(c) wants to revoke the § 168(k)(10) election.

(3) Solely for purposes of section 6.01 of this revenue procedure, a taxpayer applies the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations under section 6.01(1)(b) of this revenue procedure for the placed-in-service year of the depreciable property described in section 6.01(1)(a) of this revenue procedure or for the planting year of the specified plant described in section 6.01(1)(a) of this revenue procedure, or applies the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations under section 6.01(2)(a) of this revenue procedure for the taxpayer's taxable year that includes September 28, 2017, either by (a) making a change in method of accounting under section 4.03 of this revenue procedure to apply that specific regulation for the placed-in-service year of such depreciable property or for the planting year of such specified plant, or (b) complying with that specific regulation on its timely filed original Federal income tax return or Form 1065 for the placed-in-service year of such depreciable property or for the planting year of such specified plant.

(4) If a taxpayer within the scope of section 6.01(1) of this revenue procedure revokes the § 168(k)(7) election in accordance with section 6.02(2) of this revenue procedure, the revocation applies to all property included in the class of property and placed in service during the same taxable year. If a taxpayer within the scope of section 6.01(2) of this revenue procedure revokes the § 168(k)(10) election in accordance with section 6.02(2) of this revenue procedure, the revocation applies to (a) all qualified property acquired by the taxpayer after September 27, 2017, and placed in service by the taxpayer during its taxable year that includes September 28, 2017, and (b) all specified plants that are planted, or grafted to a plant that has already been planted, after September 27, 2017, by the taxpayer in the ordinary course of the taxpayer's farming business during its taxable year that includes September 28, 2017, if the taxpayer made the § 168(k)(5) election for that taxable year.

.02 Consent granted to revoke election.

(1) *In general.* The Commissioner grants a taxpayer within the scope of this section 6 consent to revoke its § 168(k)(5) election, § 168(k)(7) election, § 168(k)(10) election, or proposed component election provided the taxpayer makes this revocation in the time and manner described in this section 6.02.

(2) Revocation of § 168(k)(5) election, § 168(k)(7) election, or § 168(k)(10) election, or proposed component election. A taxpayer within the scope of this section 6 may revoke its § 168(k)(5) election, § 168(k)(7) election, § 168(k)(10) election, or proposed component election by filing either:

(a) A Federal amended income tax return or amended Form 1065 for the placed-in-service year of the property or the planting year of the specified plant, as applicable, on or before December 31, 2021, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is being filed. A BBA partnership may file an AAR for the placed-in-service year of the property or the planting year of the specified plant, as applicable, on or before December 31, 2021, but in no event later than the applicable period of limitations on making adjustments under § 6235 for the reviewed year as defined in

§ 301.6241-1(a)(8). This amended return or AAR must include the adjustment to taxable income for the revocation of the § 168(k)(5) election, § 168(k)(7) election, § 168(k)(10) election, or proposed component election and any collateral adjustments to taxable income or to tax liability. Such collateral adjustments also must be made on original or amended Federal returns or AARs for any affected succeeding taxable years; or

(b) A Form 3115 (a) with the taxpayer's timely filed original Federal income tax return or Form 1065 for the taxpayer's first or second taxable year succeeding the taxable year in which the taxpayer placed in service the property or the planting year of the specified plant, as applicable, or (b) if later, with the taxpayer's timely filed original Federal income tax return or Form 1065 that is filed on or after November 6, 2020, and on or before December 31, 2021. The revocation of the § 168(k)(5) election, the § 168(k)(7) election, the § 168(k)(10) election, or the proposed component election under this section 6.02(2)(b) will be treated as a change in method of accounting with a § 481(a) adjustment only during this limited period of time. The time and manner of making this revocation are described in section 7.02(2) of this revenue procedure, which modifies section 6.20 of Rev. Proc. 2019-43 to include this revocation.

SECTION 7. CHANGES IN METHOD OF ACCOUNTING

.01 *In general.* The making of a late election, or the revocation of an election, under sections 5.02(2) and 6.02(2)(b) of this revenue procedure is treated as a change in method of accounting for a limited period of time to which §§ 446(e) and 481, and the corresponding regulations, apply. A taxpayer that wants to make a late election, or revoke an election, under sections 5.02(2) and 6.02(2)(b) of this revenue procedure must use the automatic change procedures in Rev. Proc. 2015-13 or its successor.

.02 *Modifications to existing automatic changes.*

(1) Section 6.01(1)(c) of Rev. Proc. 2019-43, 2019-48 I.R.B. 1107, is modified by:

(a) Revising section 6.01(1)(c)(xvii) to read as follows:

(xvii) any qualified improvement property, as defined in § 168(e)(6), placed in service by the taxpayer after December 31, 2017, to which section 6.19 of this revenue procedure applies. However, an original Form 3115 for such change in method of accounting may be filed under this section 6.01 instead of section 6.19 of this revenue procedure if the original Form 3115 was filed before November 17, 2020;

(b) At the end of section 6.01(1)(c)(xviii), adding “; or”;

(c) Adding a new section 6.01(1)(c)(xix) to read as follows:

(xix) any change in method of accounting to which section 6.21 of this revenue procedure applies.

(2) Section 6.19 of Rev. Proc. 2019-43 is modified by:

(a) At the end of section 6.19(1)(c)(ii), deleting “or”;

(b) At the end of section 6.19(1)(c)(iii), adding “; or”;

(c) Adding a new section 6.19(1)(c)(iv) to read as follows:

(iv) any change in method of accounting to which section 6.21 of this revenue procedure applies.

(3) Section 6.20 of Rev. Proc. 2019-43 is modified to read as follows:

6.20 Certain late elections under §§ 168 and 1502 or revocation of certain elections under § 168.

(1) *Description of change.*

(a) *Applicability.* This change applies to:

(i) A taxpayer within the scope of section 4 of Rev. Proc. 2020-25, 2020-19 I.R.B. 785, as modified by section 8 of Rev. Proc. 2020-50, 2020-48 I.R.B. 1122, that wants to make a late election provided in section 4.02(2) of Rev. Proc. 2020-25 under § 168(g)(7), (k)(5), (k)(7), or (k)(10). This change also applies to a taxpayer within the scope of section 5 of Rev. Proc. 2020-25 that wants to revoke an election provided in section 5.02(2)(b) of Rev. Proc. 2020-25 under § 168(k)(5), (k)(7), or (k)(10); or

(ii) A taxpayer within the scope of section 5 of Rev. Proc. 2020-50, 2020-48 I.R.B. 1122, that wants to make a late election under § 168(k)(5), (7), or (10), § 1.168(k)-2(c) (component election), § 1.1502-68(c)(4) (designated transaction

election), or proposed § 1.168(k)-2(c) (proposed component election) as provided in section 5.02(2) of Rev. Proc. 2020-50. This change also applies to a taxpayer within the scope of section 6 of Rev. Proc. 2020-50 that wants to revoke an election under § 168(k)(5), (k)(7), or (k)(10), or a proposed component election as provided in section 6.02(2)(b) of Rev. Proc. 2020-50.

(b) *Inapplicability.*

(i) The IRS will treat the making of a late election provided in section 4 of Rev. Proc. 2020-25 under § 168(g)(7), (k)(5), (k)(7), and (k)(10), or the revocation of an election provided in section 5 of Rev. Proc. 2020-25 under § 168(k)(5), (k)(7), and (k)(10), as a change in method of accounting with a § 481(a) adjustment only for the taxable years specified in section 6.20(2)(a) of this revenue procedure. This treatment does not apply to a taxpayer that makes these late elections or revocations before or after the time specified in section 6.20(2)(a) of this revenue procedure, and any such late election or revocation is not a change in method of accounting pursuant to § 1.446-1(e)(2)(ii)(d)(3)(iii).

(ii) The IRS will treat the making of a late election under § 168(k)(5), (7), or (10), a late component election, a late designated transaction election, or a late proposed component election as provided in section 5 of Rev. Proc. 2020-50, or the revocation of an election under § 168(k)(5), (k)(7), or (k)(10), or a proposed component election as provided in section 6 of Rev. Proc. 2020-50, as a change in method of accounting with a § 481(a) adjustment only for the taxable years specified in section 6.20(2)(b) of this revenue procedure. This treatment does not apply to a taxpayer that makes these late elections or revocations before or after the time specified in section 6.20(2)(b) of this revenue procedure, and any such late election or revocation is not a change in method of accounting pursuant to § 1.446-1(e)(2)(ii)(d)(3)(iii).

(2) *Time for making the change.*

(a) The change under section 6.20(1)(a)(i) and (b)(i) of this revenue procedure must be made for (i) the taxpayer's first or second taxable year succeeding the taxable year in which the taxpayer placed in service the property affected by the late election under § 168(g)(7), (k)(5), (k)(7), or (k)(10),

as applicable, or revocation of the election under § 168(k)(5), (k)(7), or (k)(10), as applicable, or, if later, (ii) any taxable year for which the taxpayer timely files an original Federal income tax return or Form 1065, as applicable, on or after April 17, 2020, and on or before October 15, 2021.

(b) The change under section 6.20(1)(a)(ii) and (b)(ii) of this revenue procedure must be made for:

(i) The taxpayer's first or second taxable year succeeding the taxable year in which the taxpayer (A) placed in service the property affected by the late election under § 168(k)(7) or (10), the late component election, the late designated transaction election, or the late proposed component election, as applicable, or by the revocation of the election under § 168(k)(7) or (k)(10), or the proposed component election, as applicable, or (B) planted or grafted the specified plant to which the late § 168(k)(5) election applies or to which the revocation of the election under § 168(k)(5) applies; or, if later

(ii) Any taxable year for which the taxpayer timely files an original Federal income tax return or Form 1065, as applicable, on or after November 6, 2020, and on or before December 31, 2021.

(3) *Certain eligibility rules inapplicable.*

(a) The eligibility rules in section 5.01(1)(d) and (f) of Rev. Proc. 2015-13, 2015-5 I.R.B. 419, do not apply to the change under section 6.20(1)(a)(i) and (b)(i) of this revenue procedure for the taxpayer's first or second taxable year succeeding the taxable year in which the taxpayer placed in service the property affected by the late election under § 168(g)(7), (k)(5), (k)(7), or (k)(10), as applicable, or revocation of the election under § 168(k)(5), (k)(7), or (k)(10), as applicable, or if later, for any taxable year for which the taxpayer timely files an original Federal income tax return or Form 1065, as applicable, on or after April 17, 2020, and on or before October 15, 2021.

(b) The eligibility rules in section 5.01(1)(d) and (f) of Rev. Proc. 2015-13, 2015-5 I.R.B. 419, do not apply to the change under section 6.20(1)(a)(ii) and (b)(ii) of this revenue procedure for:

(i) The taxpayer's first or second taxable year succeeding the taxable year in which the taxpayer (A) placed in service

the property affected by the late election under § 168(k)(7) or (10), the late component election, the late designated transaction election, or the late proposed component election, as applicable, or by the revocation of the election under § 168(k)(7) or (k)(10), or the proposed component election, as applicable, or (B) planted or grafted the specified plant to which the late § 168(k)(5) election applies or to which the revocation of the election under § 168(k)(5) applies; or, if later

(ii) Any taxable year for which the taxpayer timely files an original Federal income tax return or Form 1065, as applicable, on or after November 6, 2020, and on or before December 31, 2021.

(4) *Reduced filing requirement.* A taxpayer making a change under this section 6.20 is required to complete only the following information on Form 3115 (Rev. December 2018):

- (a) The identification section of page 1 (above Part I);
- (b) The signature section at the bottom of page 1;
- (c) Part I;
- (d) Part II, all lines except lines 11, 12, 13, 15, 16, 17, and 19;
- (e) Part IV, all lines; and
- (f) Schedule E, all lines except lines 1, 4b, 5, and 6.

(5) *Concurrent automatic change.*

(a) A taxpayer making one or more late elections, and/or revoking one or more elections, under sections 4 and 5 of Rev. Proc. 2020-25, or under sections 5 and 6 of Rev. Proc. 2020-50, for the same year of change must file a single Form 3115 for all such changes. The single Form 3115 must provide a single net § 481(a) adjustment for all such changes for all assets placed in service, and all specified plants planted or grafted, by the taxpayer during the same taxable year. See section 6.03(1)(b) of Rev. Proc. 2015-13 for information on making concurrent changes.

(b) A taxpayer making one or more changes under this section 6.20 and the change in section 6.01, 6.19, or 6.21 of this revenue procedure for the same year of change must file a single Form 3115 for all such changes and must enter the designated automatic accounting method change numbers on the appropriate line on the Form 3115. The single Form 3115 must provide a single net § 481(a) adjust-

ment for all such changes for all assets placed in service, and all specified plants planted or grafted, by the taxpayer during the same taxable year. See section 6.03(1)(b) of Rev. Proc. 2015-13 for information on making concurrent changes.

(6) *Designated automatic accounting method change number.* The designated automatic accounting method change number for a change to the method of accounting under this section 6.20 is "245."

(7) *Contact information.* For further information regarding a change under this section 6.20, contact Elizabeth R. Binder at (202) 317-7005 (not a toll-free number).

.03 *New automatic change.* Rev. Proc. 2019-43 is modified to add new section 6.21 to read as follows:

6.21 *Change in depreciation as a result of applying the additional first year depreciation regulations.*

(1) *Description of Change.*

(a) *Applicability.* This change applies to a taxpayer within the scope of section 4 of Rev. Proc. 2020-50, 2020-48 I.R.B. 1122, that wants to change its method of accounting for depreciation under § 168 to comply with the Final Regulations, the 2019 final regulations, or both the 2019 final regulations and the 2019 proposed regulations, as applicable, and as defined in section 2.02 of Rev. Proc. 2020-50, for depreciable property and specified plants within the scope of section 4 of Rev. Proc. 2020-50. A change under this section 6.21 applies to (i) a taxpayer that is changing from an impermissible method of accounting to a permissible method of accounting under section 4.03(4)(b) of Rev. Proc. 2020-50, and (ii) a taxpayer that is changing from one permissible method of accounting to another permissible method of accounting under section 4.04 of Rev. Proc. 2020-50.

(b) *Inapplicability.* This change does not apply to any property for which the taxpayer is changing its method of accounting for depreciation to the method of accounting for depreciation provided in § 1.168(i)-4, which applies when there is a change in use of the property (but see section 6.04 or 6.05 of this revenue procedure for making this change).

(2) *Certain eligibility rules inapplicable.*

(a) *In general.* The eligibility rule in section 5.01(1)(d) of Rev. Proc. 2015-13,

2015-5 I.R.B. 419, does not apply to a taxpayer making this change for the property and specified plant within the scope of section 4 of Rev. Proc. 2020-50, as modified by section 6.21(1)(b) of this revenue procedure.

(b) *Special rule.* The eligibility rule in section 5.01(1)(f) of Rev. Proc. 2015-13, 2015-5 I.R.B. 419, does not apply to a taxpayer making this change for the property and specified plant within the scope of section 4 of Rev. Proc. 2020-50, as modified by section 6.21(1)(b) of this revenue procedure, for:

(i) The taxpayer's first or second taxable year succeeding the taxable year in which the taxpayer placed in service such property, or planted or grafted such specified plant, as applicable; or, if later

(ii) Any taxable year for which the taxpayer timely files an original Federal income tax return or Form 1065, as applicable, on or after November 6, 2020, and on or before December 31, 2021.

(3) *Impermissible to permissible method of determining the depreciation deduction allowable.*

(a) A taxpayer may change from an impermissible method of accounting to a permissible method of accounting under section 4.03 of Rev. Proc. 2020-50 for the property and specified plant within the scope of section 4.03 of Rev. Proc. 2020-50, as modified by section 6.21(1)(b) of this revenue procedure, for which the taxpayer used the impermissible method of accounting in at least two taxable years immediately preceding the year of change (but see section 6.21(3)(b) of this revenue procedure for property placed in service or a specified plant planted or grafted in the taxable year immediately preceding the year of change).

(b) If a taxpayer does not satisfy section 6.21(3)(a) of this revenue procedure for depreciable property that is within the scope of section 4.03 of Rev. Proc. 2020-50, as modified by section 6.21(1)(b) of this revenue procedure, because the depreciable property is placed in service by the taxpayer in the taxable year immediately preceding the year of change (1-year Property), the taxpayer may change from the impermissible method of determining depreciation to the permissible method of determining depreciation for the 1-year Property by filing a Form 3115 for this

change in accordance with this section 6.21(3), provided the § 481(a) adjustment reported on the Form 3115 includes the amount of any adjustment attributable to all property, including the 1-year Property, subject to the Form 3115. Similarly, for a specified plant that is within the scope of section 4.03 of Rev. Proc. 2020-50, as modified by section 6.21(1)(b) of this revenue procedure, and is planted or grafted by the taxpayer in the taxable year immediately preceding the year of change (1-year Plant), the taxpayer may change from the impermissible method of determining depreciation to the permissible method of determining depreciation under this section 6.21(3) for the 1-year Plant by filing a Form 3115 for this change in accordance with this section 6.21(3), provided the § 481(a) adjustment reported on the Form 3115 includes the amount of any adjustment attributable to all property, including the 1-year Plant, subject to the Form 3115.

Alternatively, the taxpayer may change from the impermissible method of determining depreciation to the permissible method of determining depreciation for the 1-year Property or 1-year Plant by filing an amended return or AAR, as applicable.

(c) A change under section 4.03(4)(b) of Rev. Proc. 2020-50 and this section 6.21(3) is made with a § 481(a) adjustment. However, consent to make a change in method of accounting under this section 6.21 will be granted by the Commissioner only if the taxpayer satisfies section 4.02 of Rev. Proc. 2020-50, to the extent relevant. Further, if a taxpayer that has a trade or business with floor plan financing indebtedness is applying § 1.168(k)-2(b)(2)(ii)(G) of the Final Regulations, § 1.168(k)-2(b)(2)(ii)(G) of the 2019 final regulations, or both § 1.168(k)-2(b)(2)(ii)(G) of the 2019 final regulations and § 1.168(k)-2(b)(2)(ii)(G) of the 2019 proposed regulations for depreciable property placed in service by the taxpayer in its 2018, 2019, or 2020 taxable year, consent to make a change in method of accounting under this section 6.21 will be granted by the Commissioner only if the amount of the § 481(a) adjustment is adjusted to account for the proper amount of interest expense, taking into account the business interest limitation under § 163(j) and the regulations

thereunder, as of the beginning of the year of change.

(4) *Permissible to another permissible method of determining the depreciation deduction allowable.*

(a) A taxpayer may change from one permissible method of accounting to another permissible method of accounting under section 4.04 of Rev. Proc. 2020-50 for the property and specified plant within the scope of section 4.04 of Rev. Proc. 2020-50, as modified by section 6.21(1)(b) of this revenue procedure.

(b) A change under section 4.04 of Rev. Proc. 2020-50 and this section 6.21(4) is made on a cut-off basis. Accordingly, neither the modified cut-off method, as described in § 1.446-1(e)(2)(ii)(d)(5)(iii), nor a § 481(a) adjustment is permitted or required.

(5) *Additional requirement.* A taxpayer making a change under this section 6.21 also must comply with section 4.02 of Rev. Proc. 2020-50, to the extent relevant. Once a taxpayer applies § 1.168(k)-2 and, to the extent relevant, § 1.1502-68, of the Final Regulations, in their entirety, for a taxable year, the taxpayer must continue to apply § 1.168(k)-2 and, to the extent relevant, § 1.1502-68, of the Final Regulations, in their entirety, for the taxpayer's subsequent taxable years. See §§ 1.168(k)-2(h)(3)(iii) and 1.1502-68(e)(2)(iii) of the Final Regulations and section 4.02(1) of Rev. Proc. 2020-50.

(6) *Reduced filing requirement.* A taxpayer making a change under this section 6.21 is required to complete only the following information on Form 3115 (Rev. December 2018):

(a) The identification section of page 1 (above Part I);

(b) The signature section at the bottom of page 1;

(c) Part I;

(d) Part II, all lines except lines 11, 12, 13, 15, 16, 17, and 19;

(e) Part IV, all lines; and

(f) Schedule E, all lines except lines 1, 4b, 5, and 6.

(7) *Concurrent automatic change.*

(a) A taxpayer making this change must file a single Form 3115 for all assets placed in service, and all specified plants planted or grafted, by the taxpayer during the same taxable year and must provide a

single net § 481(a) adjustment for all the changes included in that Form 3115.

(b) A taxpayer making one or more changes under section 6.21(3) of this revenue procedure and the change in section 6.01, 6.19, or 6.20 of this revenue procedure for the same year of change must file a single Form 3115 for all such changes and must enter the designated automatic accounting method change numbers on the appropriate line on the Form 3115. The single Form 3115 must provide a single net § 481(a) adjustment for all such changes for all assets placed in service, and all specified plants planted or grafted, by the taxpayer during the same taxable year. See section 6.03(1)(b) of Rev. Proc. 2015-13 for information on making concurrent changes.

(8) *Designated automatic accounting method change numbers.* The designated automatic accounting method change number for (a) a change under section 6.21(3) of this revenue procedure is “246”, and (b) a change under section 6.21(4) of this revenue procedure is “247.”

(9) *Contact information.* For further information regarding a change under this section 6.21, contact Elizabeth R. Binder at (202) 317-7005 (not a toll-free number).

SECTION 8. MODIFICATIONS TO REV. PROC. 2020-25

.01 Section 4.01 of Rev. Proc. 2020-25 is modified to read as follows:

.01 *Scope.* This section 4 applies to:

(1) A taxpayer that (a) placed in service depreciable property during its 2018, 2019, or 2020 taxable year, (b) timely filed its Federal income tax return or Form 1065 for the placed-in-service year of such depreciable property and such return was filed on or before April 17, 2020, (c) wants to make a § 168(g)(7) election, § 168(k)(5) election, or § 168(k)(7) election for such depreciable property, and (d)(i) did not previously revoke or withdraw such election(s) in accordance with section 5.02 of this revenue procedure, or (ii) did not previously revoke such § 168(k)(5) election or § 168(k)(7) election in accordance with section 6 of Rev. Proc. 2020-50, 2020-48 I.R.B. 1122. The taxpayer makes the § 168(g)(7) election, § 168(k)(5) election, or § 168(k)(7) election in accordance with section 2.02(1), (2), or (3), respectively, of this revenue procedure or under section 4.02 of this revenue procedure; or

(2) A taxpayer that (a) timely filed its Federal income tax return or Form 1065 for the taxpayer’s taxable year that includes September 28, 2017, (b) wants to make a § 168(k)(10) election for such taxable year, and (c) did not previously revoke a § 168(k)(10) election for such taxable year in accordance with section 5.02 of this revenue procedure or with section 6 of Rev. Proc. 2020-50. The taxpayer makes the § 168(k)(10) election in accordance with section 2.02(1), (2), or (3), respectively, of this revenue procedure or under section 4.02 of this revenue procedure.

dance with section 2.02(4) of this revenue procedure or under section 4.02 of this revenue procedure.

SECTION 9. EFFECT ON OTHER DOCUMENTS

.01 Section 6 of Rev. Proc. 2019-43 is modified to include the modifications provided in section 7.02 of this revenue procedure and the accounting method change provided in section 7.03 of this revenue procedure.

.02 Section 4.01 of Rev. Proc. 2020-25 is modified.

SECTION 10. EFFECTIVE DATE

This revenue procedure is effective November 6, 2020.

SECTION 11. DRAFTING INFORMATION

The principal author of this revenue procedure is Kathleen Reed of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, contact Elizabeth Binder at (202) 317-4869 (not a toll-free number) or Ms. Reed at (202) 317-4660 (not a toll-free number).

Part IV

26 CFR Part 54

Notice of Proposed Rulemaking

Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency

REG-122462-20

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: Elsewhere in this issue of the Federal Register, the IRS is issuing temporary regulations regarding coverage of preventive health services to implement section 3203 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which shortens the time-frame under which non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage must cover without cost sharing qualifying coronavirus preventive services, including recommended COVID-19 immunizations. The IRS is issuing the temporary regulations at the same time that the Employee Benefits Security Administration of the Department of Labor and the Office of Consumer Information and Insurance Oversight of the Department of Health and Human Services (HHS) are issuing substantially similar interim final rules with request for comments. The text of those temporary regulations also serves as the text of these proposed regulations.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on January 5, 2021.

ADDRESSES: In commenting, please refer to file code CMS-9912-IFC.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the "Submit a comment" instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY:

Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9912-IFC,
P.O. Box 8016,
Baltimore, MD 21244-8016.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY:

Centers for Medicare & Medicaid Services,
Department of Health and Human Services,
Attention: CMS-9912-IFC,
Mail Stop C4-26-05,
7500 Security Boulevard,
Baltimore, MD 21244-1850

FOR FURTHER INFORMATION

CONTACT: Dara Alderman, (202) 317-5500, Internal Revenue Service, Department of the Treasury, for issues related to Rapid Coverage of Preventive Services for Coronavirus.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: <http://regulations.gov>. Follow the search instructions on that website to view public comments.

Background and Regulatory Impact Analysis

The temporary regulations published elsewhere in this issue of the Federal Register add §54.9815-2713T to the Miscellaneous Excise Tax Regulations. The proposed and temporary regulations are being published as part of a joint rulemaking with the Department of Labor and HHS. The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and provides a regulatory impact analysis.

Drafting Information

The principal author of this notice of proposed rulemaking is Dara Alderman, Office of the Chief Counsel (Employee Benefits, Exempt Organizations and Employment Taxes). The proposed regulations, as well as the temporary regulations, have been developed in coordination with personnel from the Department of Labor and HHS.

List of Subjects in 26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 54 is proposed to be amended as follows:

PART 54—PENSION EXCISE TAXES

Par. 1. The authority citation for part 54 continues to read in part as follows:

Authority: 26 U.S.C. 7805, unless otherwise noted.

* * * * *

Section 54.9815-2713 also issued under 26 U.S.C. 9833;

* * * * *

2. Section 54.9815-2713 is revised to read as follows:

§ 54.9815-2713 Coverage of preventive health services.

[The text of proposed § 54.9815–2713 is the same as the text of § 54.9815–2713T

published elsewhere in this issue of the Federal Register].

Sunita Lough,
Deputy Commissioner for Services and Enforcement,

Internal Revenue Service.

(Filed by the Office of the Federal Register on November 2, 2020, 4:15 pm., and published in the issue of the Federal Register for November 06, 2020, 85 F.R. 71142)

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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¹A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

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¹ A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

Internal Revenue Service

Washington, DC 20224

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INTERNAL REVENUE BULLETIN

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at www.irs.gov/irb/.

We Welcome Comments About the Internal Revenue Bulletin

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page (www.irs.gov) or write to the Internal Revenue Service, Publishing Division, IRB Publishing Program Desk, 1111 Constitution Ave. NW, IR-6230 Washington, DC 20224.