SUBCHAPTER C—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

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AUTHORITY: 26 U.S.C. 7805.

Sections 31.3121(a)–1, 31.3121(a)–3, 31.3231(e)–1, 31.3231(e)–3, 31.3306(b)–1, 31.3306(b)–2, 31.3401(a)–1, and 31.3401(a)–4 also issued under 26 U.S.C. 62.

Section 31.3121(b)(7)–2 also issued under 26 U.S.C. 3121(b)(7)(F).

Section 31.3121(b)(19)–1 also issued under 26 U.S.C. 7701(b)(11).

Section 31.3306(c)(18)–1 also issued under 26 U.S.C. 7701(b)(11).

Section 31.3401(a)(6)–1 also issued under 26 U.S.C. 1441(c)(4) and 26 U.S.C. 3401(a)(6).

Section 31.3402(f)(1)–1 also issued under 26 U.S.C. 3402(m).

Section 31.3402(f)(5)–1 also issued under 26 U.S.C. 3402 (i) and (m).

Section 31.3402(r)–1 also issued under 26 U.S.C. 3402(p) and (r).

Sections 31.3406(a)–1 through 31.3406(i)–1 also issued under 26 U.S.C.3406(i).

Section 31.3406(j)–1 also issued under 26 U.S.C. 3406(i).

Section 31.6011(a)–3A is also issued under the authority of 26 U.S.C. 6011.

Section 31.6011(a)–4 also issued under 26 U.S.C. 6011.

Section 31.6051–1(d) also issued under 26 U.S.C. 6051.

Section 31.6051–2 also issued under 26 U.S.C. 6051.

Sections 31.6053–3 (b)(5), (h) and (j)(9) and 31.6053–4 are also issued under sec. 1072 of Pub. L. 98–369, 98 Stat. 1052; and 26 U.S.C. 6001.

Sections 31.6053–3T and 31.6053–4T are also issued under sec. 1072 of Pub. L. 98–369, 98 Stat. 1052; and 26 U.S.C. 6001.

Section 31.6071–1 also issued under 26 U.S.C. 6071.
Section 31.6071(a)–1A is also issued under the authority of 26 U.S.C. 6071.
Section 31.6081–1 also issued under 26 U.S.C. 6081.
Section 31.6205–2 is also issued under 26 U.S.C. 6205(a)(1).
Sections 31.6302–1 through 31.6302–3 also issued under 26 U.S.C. 6302 (a), (c), and (h).
Section 31.6302–1T also issued under 26 U.S.C. 6302 (a) and (c).
Section 31.6302–4 also issued under 26 U.S.C. 6302 (a) and (c).
Section 31.6302(c)–2A is also issued under 26 U.S.C. 6302 and 6157(d).
Section 31.6302(c)–3 also issued under 26 U.S.C. 6302(h).

SOURCE: T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, unless otherwise noted.

Subpart A—Introduction

§31.0–1 Introduction.

(a) *In general.* The regulations in this part relate to the employment taxes imposed by subtitle C (chapters 21 to 25, inclusive) of the Internal Revenue Code of 1954, as amended. References in the regulations to the ''Internal Revenue Code'' or the ''Code'' are references to the Internal Revenue Code of 1954, as amended, unless otherwise indicated. References to the Federal Insurance Contributions Act, the Railroad Retirement Tax Act, and the Federal Unemployment Tax Act are references to chapters 21, 22, and 23, respectively, of the Code. References to sections of law are references to sections of the Internal Revenue Code unless otherwise indicated. The regulations in this part also provide rules relating to the deposit of other taxes by electronic funds transfer.

(b) *Division of regulations.* The regulations in this part are divided into 7 subparts. Subpart A contains provisions relating to general definitions and use of terms, the division and scope of the regulations in this part, and the extent to which the regulations in this part supersede prior regulations relating to employment taxes. Subpart B relates to the taxes under the Federal Insurance Contributions Act. Subpart C relates to the taxes under the Railroad Retirement Tax Act. Subpart D relates to the tax under the Federal Unemployment Tax Act. Subpart E relates to the collection of income tax at source on wages under chapter 24 of the Code. Subpart F relates to the provisions of chapter 25 of the Code which are applicable in respect of the taxes imposed by chapters 21 to 24, inclusive, of the Code. Subpart G relates to selected provisions of subtitle F of the Code, relating to procedure and administration, which have special application in respect of the taxes imposed by subtitle C of the Code. Inasmuch as these regulations constitute Part 31 of Title 26 of the Code of Federal Regulations, each section of the regulations is preceded by a section symbol and 31 followed by a decimal point (§31.). Sections of law or references thereto are preceded by ''Sec.'' or the word ''section''.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 8723, 62 FR 37492, July 14, 1997]

§31.0–2 General definitions and use of terms.

(a) *In general.* As used in the regulations in this part, unless otherwise expressly indicated—

(1) The terms defined in the provisions of law contained in the regulations in this part shall have the meanings so assigned to them.

(2) The Internal Revenue Code of 1954 means the act approved August 16, 1954 (26 U.S.C.), entitled ''An act to revise the internal revenue laws of the United States'', as amended.

(3) The Internal Revenue Code of 1939 means the act approved February 10, 1939 (53 Stat., Part 1), as amended.

(4) The Social Security Act means the act approved August 14, 1935 (42 U.S.C. c. 7), as amended.

(5) (i) The Social Security Amendments of 1954 means the act approved September 1, 1954 (68 Stat. 1052), as amended.

(ii) The Social Security Amendments of 1956 means the act approved August 1, 1956 (70 Stat. 807), as amended.

(iii) The Social Security Amendments of 1958 means the act approved August 28, 1958 (72 Stat. 1013), as amended.

(iv) The Social Security Amendments of 1960 means the act approved September 13, 1960 (74 Stat. 924).

(v) The Social Security Amendments of 1961 means the act approved June 30, 1961 (75 Stat. 131).

(vi) The Social Security Amendments of 1965 means the act approved July 30, 1965 (79 Stat. 286).

(vii) The Social Security Amendments of 1967 means the act approved January 2, 1968 (81 Stat. 821).

(viii) The Social Security Amendments of 1972 means the act approved October 30, 1972 (86 Stat. 1329).

(6) The Social Security Administration means the Social Security Administration of the Department of Health and Human Services. (See the Statement of Organization and delegations of Authority of the Department of Health and Human Services (20 CFR Part 1996).)

(7) District director means district director of internal revenue. The term also includes the Director of International Operations in all cases where the authority to perform the functions which may be performed by a district director has been delegated to the Director of International Operations.

(8) Person includes an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture or other unincorporated organization or group, through or by means of which any business, financial operation, or venture is carried on. It includes a guardian, committee, trustee, executor, administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, conservator, or any person acting in a fiduciary capacity.

(9) Calendar quarter means a period of 3 calendar months ending on March 31, June 30, September 30, or December 31.

(10) Account number means the identifying number of an employee assigned, as the case may be, under the Internal Revenue Code of 1954, under Subchapter A of Chapter 9 of the Internal Revenue Code of 1939, or under Title VIII of the Social Security Act. See also § 301.7701–11 of this chapter (Regulations on Procedure and Administration).

(11) Identification number means the identifying number of an employer assigned, as the case may be, under the Internal Revenue Code of 1954, under Subchapter A or D of Chapter 9 of the Internal Revenue Code of 1939, or under Title VIII of the Social Security Act. See also § 301.7701–12 of this chapter (Regulations on Procedure and Administration).

(12) Regulations 90 means the regulations approved February 17, 1936 (26 CFR (1939) Part 400), as amended, relating to the excise tax on employers under Title IX of the Social Security Act, and such regulations as made applicable to Subchapter C of Chapter 9 and other provisions of the Internal Revenue Code of 1939 by Treasury Decision 4885, approved February 11, 1939 (26 CFR (1939) 1943 Cum. Supp., p. 5876), together with any amendments to such regulations as so made applicable to the Internal Revenue Code of 1939.

(13) Regulations 91 means the regulations approved November 9, 1936 (26 CFR (1939) Part 401), as amended, relating to the employees' tax and the employers' tax under Title VIII of the Social Security Act, and such regulations as made applicable to Subchapter A of Chapter 9 and other provisions of the Internal Revenue Code of 1939 by Treasury Decision 4885, approved February 11, 1939 (26 CFR (1939) 1943 Cum. Supp., p. 5876), together with any amendments to such regulations as so made applicable to the Internal Revenue Code of 1939.

(14) Regulations 106 means the regulations approved February 24, 1940 (26 CFR (1939) Part 402), as amended, relating to the employees' tax and the employers' tax under the Federal Insurance Contributions Act (Subchapter A of Chapter 9 of the Internal Revenue Code of 1939) with respect to the period after 1939 and before 1951.

(15) Regulations 107 means the regulations approved September 12, 1940 (26 CFR (1939) Part 403), as amended, relating to the excise tax on employers under the Federal Unemployment Tax Act (Subchapter C of Chapter 9 of the Internal Revenue Code of 1939) with respect to the period after 1939 and before 1955.

(16) Regulations 114 means the regulations approved December 30, 1948 (26 CFR (1939) Part 411), as amended, relating to the employers' tax, employees' tax, and employee representatives' tax

under the Railroad Retirement Tax Act (Subchapter B of Chapter 9 of the Internal Revenue Code of 1939) with respect to compensation paid after 1948 for services rendered after 1946 and before 1955.

(17) Regulations 120 means the regulations approved December 22, 1953 (26 CFR (1939) Part 406), as amended, relating to collection of income tax at source on wages under Subchapter D of Chapter 9 of the Internal Revenue Code of 1939 with respect to the period after 1953 and before 1955.

(18) Regulations 128 means the regulations approved December 6, 1951 (26 CFR (1939) Part 408), as amended, relating to the employee tax and the employer tax under the Federal Insurance Contributions Act (Subchapter A of Chapter 9 of the Internal Revenue Code of 1939) with respect to the period after 1950 and before 1955.

(19) The cross references in the regulations in this part to other portions of the regulations, when the word ''see'' is used, are made only for convenience and shall be given no legal effect.

(b) *Subpart B.* As used in Subpart B of this part, unless otherwise expressly indicated—

(1) Act means the Federal Insurance Contributions Act.

(2) Taxes means the employee tax and the employer tax, as respectively defined in this paragraph.

(3) Employee tax means the tax (with respect to wages received by an employee after Dec. 31, 1965, the taxes) imposed by section 3101 of the Code.

(4) Employer tax means the tax (with respect to wages paid by an employer after Dec. 31, 1965, the taxes) imposed by section 3111 of the Code.

(c) *Subpart C.* As used in Subpart C of this part, unless otherwise expressly indicated—

(1) Act means the Railroad Retirement Tax Act.

(2) Railway Labor Act means the act approved May 20, 1926 (45 U.S.C. c. 8), as amended.

(3) Railroad Retirement Act of 1937 means the act approved June 24, 1937 (45 U.S.C. 228a and following), as amended.

(4) Railroad Retirement Board means the board established pursuant to section 10 of the Railroad Retirement Act of 1937 (45 U.S.C. 228j).

(5) Tax means the employee tax, the employee representative tax, or the employer tax, as respectively defined in this paragraph.

(6) Employee tax means the tax imposed by section 3201 of the Code.

(7) Employee representative tax means the tax imposed by section 3211 of the Code.

(8) Employer tax means the tax imposed by section 3221 of the Code.

(d) *Subpart D.* As used in Subpart D of this part, unless otherwise expressly indicated:

(1) Act means the Federal Unemployment Tax Act.

(2) Railroad Unemployment Insurance Act means the act approved June 25, 1938 (45 U.S.C. c. 11), as amended.

(3) Tax means the tax imposed by section 3301 of the Code.

(e) *Subpart E.* As used in Subpart E of this part, unless otherwise expressly indicated, tax means the tax required to be deducted and withheld from wages under section 3402 of the Code.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6606, 27 FR 8516, Aug. 25, 1962; T.D. 6658, 28 FR 6631, June 27, 1963; T.D. 6983, 33 FR 18013, Dec. 4, 1968; T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.0–3 Scope of regulations.

(a) *Subpart B.* The regulations in Subpart B of this part relate to the imposition of the employee tax and the employer tax under the Federal Insurance Contributions Act with respect to wages paid and received after 1954 for employment performed after 1936. In addition to employment in the case of remuneration therefor paid and received after 1954, the regulations in Subpart B of this part relate also to employment performed after 1954 in the case of remuneration therefor paid and received before 1955. The regulations in Subpart B of this part include provisions relating to the definition of terms applicable in the determination of the taxes under the Federal Insurance Contributions Act, such as ''employee'', ''wages'', and ''employment''. The provisions of Subpart B of this part relating to ''employment'' are applicable also, (1) to the extent provided in § 31.3121(b)–2, to services performed before 1955 the remuneration for which is paid after 1954, and (2) to the extent provided in § 31.3121(k)–3, to services performed before 1955 the remuneration for which was paid before 1955. (For prior regulations on similar subject matter, see 26 CFR (1939) Part 408 (Regulations 128).)

(b) *Subpart C.* The regulations in Subpart C of this part relate to the imposition of the employee tax, the employee representative tax, and the employer tax under the Railroad Retirement Tax Act with respect to compensation paid after 1954, for services rendered after such date. The regulations in Subpart C of this part include provisions relating to the definition of terms applicable in the determination of the taxes under the Railroad Retirement Tax Act, such as ''employee'', ''employee representative'', ''employer'', and ''compensation''. (For prior regulations on similar subject matter, see 26 CFR (1939) Part 411 (Regulations 114).)

(c) *Subpart D.* The regulations in Subpart D of this part relate to the imposition on employers of the excise tax under the Federal Unemployment Tax Act for the calendar year 1955 and subsequent calendar years with respect to wages paid after 1954 for employment performed after 1938. In addition to employment in the case of remuneration therefor paid after 1954, the regulations in Subpart D of this part relate also to employment performed after 1954 in the case of remuneration therefor paid before 1955. The regulations in Subpart D of this part include provisions relating to the definition of terms applicable in the determination of the tax under the Federal Unemployment Tax Act, such as ''employee'', ''employer'', ''employment'', and ''wages''. The regulations in Subpart D of this part also include provisions relating to the credits against the Federal tax for State contributions. (For prior regulations on similar subject matter, see 26 CFR (1939) Part 403 (Regulations 107).)

(d) *Subpart E.* The regulations in Subpart E of this part relate to the withholding under chapter 24 of the Code of income tax at source on wages paid after 1954, regardless of when such wages were earned. The regulations in Subpart E of this part include provisions relating to the definition of terms applicable in the determination of the tax under chapter 24 of the Code, such as ''employee'', ''employer'', and ''wages''. (For prior regulations on similar subject matter, see 26 CFR (1939) Part 406 (Regulations 120).)

(e) *Subpart F.* The regulations in Subpart F of this part deal with the general provisions contained in chapter 25 of the Code, which relate to the employment taxes imposed by chapters 21 to 24, inclusive, of the Code. (For prior regulations on the subject matter of section 3503, see 26 CFR (1939) 411.802 and 408.803 (Regulations 114 and 128, respectively). For prior regulations on the subject matter of section 3504, see 26 CFR (1939) 406.807 and 408.906 (Regulations 120 and 128, respectively).)

(f) *Subpart G.* The regulations in Subpart G of this part, which are prescribed under selected provisions of subtitle F of the Code, relate to the procedural and administrative requirements in respect of records, returns, deposits, payments, and related matters applicable to the employment taxes imposed by subtitle C (chapters 21 to 25, inclusive) of the Code. In addition, the provisions of Subpart G of this part relate to adjustments and to claims for refund, credit, or abatement, made after 1954, in connection with the employment taxes imposed by subtitle C of the Internal Revenue Code of 1954, by chapter 9 of the Internal Revenue Code of 1939, or by the corresponding provisions of prior law, but not to any adjustment reported, or credit taken, in whole or in part on any return or supplemental return filed on or before July 31, 1960. The provisions of Subpart G of this part also relate to deposits of taxes imposed by subchapter B of chapter 9 of the 1939 Code or by corresponding provisions of prior law with respect to compensation paid after 1954 for services rendered before 1955. For other administrative provisions which have application to the employment taxes imposed by subtitle C of the Code, see Part 301 of this chapter (Regulations on Procedure and Administration). (The administrative and procedural regulations applicable with respect to a particular employment tax for a prior period were combined with the substantive regulations relating to such tax for such period. For the regulations applicable to the respective taxes for prior periods, see paragraphs (a), (b), (c), and (d) of this section.) Subpart G of this part also provides rules relating to the deposit of other taxes by electronic funds transfer.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8305, July 2, 1964; T.D. 8723, 62 FR 37493, July 14, 1997]

§ 31.0–4 Extent to which the regulations in this part supersede prior regulations.

The regulations in this part, with respect to the subject matter within the scope thereof, supersede 25 CFR (1939) Parts 403, 406, 408, and 411 (Regulations 107, 120, 128, and 114, respectively). The Regulation on Monthly Returns and Payment of Employment Taxes (23 FR 5006) are also superseded.

Subpart B—Federal Insurance Contributions Act (Chapter 21, Internal Revenue Code of 1954)

TAX ON EMPLOYEES

§ 31.3101–1 Measure of employee tax.

The employee tax is measured by the amount of wages received after 1954 with respect to employment after 1936. See § 31.3121(a)–1, relating to wages; and §§ 31.3121(b)–1 to 31.3121(b)–4, inclusive, relating to employment. For provisions relating to the time of receipt of wages, see § 31.3121(a)–2.

[T.D. 6744, 29 FR 8305, July 2, 1964]

§ 31.3101–2 Rates and computation of employee tax.

(a) *Old-age, survivors, and disability insurance.* The rates of employee tax for old-age, survivors, and disability insurance with respect to wages received in calendar years after 1954 are as follows:

Calendar year	Percent
1955 and 1956	2
1957 and 1958	2.25
1959	2.5
1960 and 1961	3
1962	3.125
1963 to 1965, both inclusive	3.625
1966	3.85
1967	3.9
1968	3.8
1969 and 1970	4.2
1971 and 1972	4.6
1973	4.85
1974 to 2010, both inclusive	4.95
2011 and subsequent calendar years	5.95

(b) *Hospital insurance.* The rates of employee tax for hospital insurance with respect to wages received in calendar years after 1965 are as follows:

Calendar year	Percent
1966	0.35
1967	.50
1968 to 1972, both inclusive	.60
1973	1.0
1974 to 1977, both inclusive	0.90
1978 to 1980, both inclusive	1.10
1981 to 1985, both inclusive	1.35
1986 and subsequent calendar years	1.50

(c) *Computation of employee tax.* The employee tax is computed by applying to the wages received by the employee the rate in effect at the time such wages are received.

Example. In 1972, employee A performed for employer X services which constituted employment (see § 31.3121(b)–2). In 1973 A receives from X $1,000 as remuneration for such services. The tax is payable at the 5.85 percent rate (4.85 percent plus 1.0 percent) in effect for the calendar year 1973 (the year in which the wages are received) and not at the 5.2 percent rate which was in effect for the calendar year 1972 (the year in which the services were performed).

[T.D. 7374, 40 FR 30947, July 24, 1975]

§ 31.3101–3 When employee tax attaches.

The employee tax attaches at the time that the wages are received by the employee. For provisions relating to the time of such receipt, see § 31.3121(a)–2.

§ 31.3102–1 Collection of, and liability for, employee tax; in general.

(a) The employer shall collect from each of his employees the employee tax with respect to wages for employment performed for the employer by the employee. The employer shall make the collection by deducting or causing to be deducted the amount of the employee tax from such wages as and when paid. (For provisions relating to the time of such payment, see § 31.3121(a)–2.) The employer is required to collect the tax, notwithstanding the wages are paid in something other than money, and to pay over the tax in money. (As to the exclusion from wages of remuneration paid in any medium other than cash for certain types of services, see § 31.3121(a)(7)–1, relating to such remuneration paid for service not in the course of the employer's trade or business or for domestic service in a private home of the employer; and § 31.3121(a)(8)–1, relating to such remuneration paid for agricultural labor.) For provisions relating to the collection of, and liability for, employee tax in respect of tips, see § 31.3102–3.

(b) The employer is permitted, but not required, to deduct amounts equivalent to employee tax from payments to an employee of cash remuneration to which the sections referred to in this paragraph are applicable prior to the time that the sum of such payments equals:

(1) $50 in the calendar quarter, for service not in the course of the employer's trade or business, to which § 31.3121(a)(7)–1 is applicable; or

(2) $50 in the calendar quarter, for domestic service in a private home of the employer, to which § 31.3121(a)(7)–1 is applicable; or

(3) (i) $100 in the calendar year 1955 or 1956, for agricultural labor, to which § 31.3121(a)(8)–1 is applicable; or

(ii) $150 in any calendar year after 1956, for agricultural labor, to which § 31.3121(a)(8)–1 is applicable, but only to the extent that such payments are made prior to the twentieth day in such calendar year on which the employee has performed such agricultural labor for the employer for cash remuneration computed on a time basis; or

(4) $50 in the calendar quarter, for service performed as a home worker, to which § 31.3121(a)(10)–1 is applicable.

At such time as the sum of the cash payments in the calendar quarter or the calendar year, as the case may be, for a type of service referred to in this paragraph equals or exceeds the amount specified, the employer is required to collect from the employee any amount of employee tax not previously deducted. Further, at such time in any calendar year after 1956 as the employee has performed agricultural labor for the employer on 20 days during such year for cash remuneration computed on a time basis, the employer is required, regardless of the amount of remuneration paid by him to the employee in the calendar year, to collect from the employee any amount of employee tax not previously deducted. If an employer pays cash remuneration to an employee for two or more of the types of service referred to in this paragraph, the provisions of this paragraph are to be applied separately to the amount of remuneration attributable to each type of service. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of employee tax, see § 31.6413(a)–1. The application of this paragraph may be illustrated by the following examples:

Example 1. In the calendar year 1957 employer X makes several payments of cash remuneration to employee A for agricultural labor which constitutes employment. In March employee A works on some part of each of 8 days for which employer X makes his first payment of such cash remuneration to A in the amount of $40. X deducts 90 cents (2¼ percent of $40) as an amount equivalent to employee tax. In June A works 5 days for which X makes his second payment of cash remuneration to A in the amount of $50. X does not deduct from this payment an amount equivalent to employee tax. In October A works 6 days for which X makes his third payment of cash remuneration to A in the amount of $60. This amount brings the sum of such payments in 1957 to $150, and X is now required to collect employee tax from A even though A has performed agricultural labor for X on only 19 days in 1957 and regardless of whether the cash remuneration for A's services is computed on a time basis. The amount of employee tax applicable to the $150 paid by X to A is $3.38 (2¼ percent of $150). Inasmuch as X previously deducted 90 cents in March 1957, X is required to deduct $2.48 ($3.38 minus 90 cents) from the $60 paid in October 1957.

Example 2. In the calendar year 1957 employer Y makes several payments of cash remuneration to employee B for agricultural labor which constitutes employment. B's cash remuneration is computed on a time basis. In January employer Y makes his first payment to employee B in the amount of $20 for work performed in 1957 on each of 5 days. Y deducts 45 cents (2¼ percent of $20) as an amount equivalent to employee tax. In April Y makes his second payment of cash remuneration to B in the amount of $40 for work performed in 1957 on each of 10 days. Y deducts 90 cents (2¼ percent of $40) as an amount equivalent to employee tax. In May

B works for Y on each of 5 days and on the last of such days Y makes his third payment of cash remuneration to B in the amount of $20 for such work. This period of work brings to 20 the number of days in the calendar year 1957 on which B has performed agricultural labor for Y for cash remuneration computed on a time basis, and Y is required to collect employee tax from B even though the amount of remuneration paid is less than $150. The amount of employee tax applicable to the $80 paid by Y to B is $1.80 (2¼ percent of $80). Inasmuch as Y previously deducted $1.35 in 1957 (45 cents in January and 90 cents in April), Y is required to deduct 45 cents ($1.80 minus $1.35) from the $20 paid in May 1957.

(c) In collecting employee tax, the employer shall disregard any fractional part of a cent of such tax unless it amounts to one-half cent or more, in which case it shall be increased to 1 cent. The employer is liable for the employee tax with respect to all wages paid by him to each of his employees whether or not it is collected from the employee. If, for example, the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. Until collected from him the employee also is liable for the employee tax with respect to all the wages received by him. Any employee tax collected by or on behalf of an employer is a special fund in trust for the United States. See section 7501. The employer is indemnified against the claims and demands of any person for the amount of any payment of such tax made by the employer to the district director.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8305, July 2, 1964; T.D. 7001, 34 FR 998, Jan. 23, 1969]

§31.3102–2 Manner and time of payment of employee tax.

The employee tax is payable to the district director in the manner and at the time prescribed in Subpart G of the regulations in this part. For provisions relating to the payment by an employee of employee tax in respect of tips, see paragraph (d) of §31.3102–3.

[T.D. 7001, 34 FR 998, Jan. 23, 1969]

§31.3102–3 Collection of, and liability for, employee tax on tips.

(a) *Collection of tax from employee*— (1) *In general.* Subject to the limitations set forth in subparagraph (2) of this paragraph, the employer shall collect from each of his employees the employee tax on those tips received by the employee which constitute wages for purposes of the tax imposed by section 3101. (For provisions relating to the treatment of tips as wages, see 3121(a)(12) and 3121(q).) The employer shall make the collection by deducting or causing to be deducted the amount of the employee tax from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer (see subparagraph (3) of this paragraph). For purposes of this section the term ‘‘wages (exclusive of tips) which are under the control of the employer’’ means, with respect to a payment of wages, an amount equal to wages as defined in section 3121(a) except that tips and noncash remuneration which are wages are not included, less the sum of—

(i) The tax under section 3101 required to be collected by the employer in respect of wages as defined in section 3121(a) (exclusive of tips);

(ii) The tax under section 3402 required to be collected by the employer in respect of wages as defined in section 3401(a) (exclusive of tips); and

(iii) The amount of taxes imposed on the remuneration of an employee withheld by the employer pursuant to State and local law (including amounts withheld under an agreement between the employer and the employee pursuant to such law) except that the amount of taxes taken into account in this subdivision shall not include any amount attributable to tips.

(2) *Limitations.* An employer is required to collect employee tax on tips which constitute wages only in respect of those tips which are reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a). The employer is responsible for the collection of employee tax on tips reported to him only to the extent that the employer can—

(i) During the period beginning at the time the written statement is submitted to him and ending at the close of the 10th day of the month following the month in which the statement was submitted, or

(ii) In the case of an employer who elects to deduct the tax on an estimated basis (see paragraph (c) of this section), during the period beginning at the time the written statement is submitted to him and ending at the close of the 30th day following the quarter in which the statement was submitted,

collect the employee tax by deducting it or causing it to be deducted as provided in subparagraph (1).

(3) *Furnishing of funds to employer.* If the amount of employee tax in respect of tips reported by the employee to the employer in a written statement (or statements) furnished pursuant to section 6053(a) exceeds the wages (exclusive of tips) which are under the control of the employer, the employee may furnish to the employer, within the period specified in subparagraph (2) (i) or (ii) of this paragraph (whichever is applicable), an amount of money equal to the amount of such excess.

(b) *Less than $20 of tips.* Notwithstanding the provisions of paragraph (a) of this section, if an employee furnishes to his employer a written statement—

(1) Covering a period of less than 1 month, and

(2) The statement is furnished to the employer prior to the close of the 10th day of the month following the month in which the tips were actually received by the employee, and

(3) The aggregate amount of tips reported in the statement and in all other statements previously furnished by the employee covering periods within the same month is less than $20, and the statements, collectively, do not cover the entire month,

the employer may deduct amounts equivalent to employee tax on such tips from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of employee tax, see § 31.6413(a)–1. (As to the exclusion from wages of tips of less than $20, see § 31.3121(a)(12)–1.)

(c) *Collection of employee tax on estimated basis*—(1) *In general.* Subject to certain limitations and conditions, an employer may, at his discretion, make collection of the employee tax in respect of tips reported by an employee to the employer on an estimated basis. An employer who elects to make collection of the employee tax on an estimated basis shall:

(i) In respect of each employee, make an estimate of the amount of tips that will be reported, pursuant to section 6053(a), by the employee to the employer in a calendar quarter.

(ii) Determine the amount which must be deducted upon each payment of wages (exclusive of tips) which are under the control of the employer to be made during the quarter by the employer to the employee in order to collect from the employee during the quarter an amount equal to the amount obtained by multiplying the estimated quarterly tips by the sum of the rates of tax under subsections (a) and (b) of section 3101.

(iii) Deduct from any payment of such employee's wages (exclusive of tips) which are under the control of the employer, or from funds referred to in paragraph (a)(3) of this section, such amount as may be necessary to adjust the amount of tax withheld on the estimated basis to conform to the amount of employee tax imposed upon, and required to be deducted in respect of, tips reported by the employee to the employer during the calendar quarter in written statements furnished to the employer pursuant to section 6053(a). If an adjustment is required, the additional employee tax required to be collected may be deducted upon any payment of the employee's wages (exclusive of tips) which are under the control of the employer during the quarter and within the first 30 days following the quarter or from funds turned over by the employee to the employer for such purposes within such period. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of employee tax, see §31.6413(a)–1.

(2) *Estimating tips employee will report*— (i) *Initial estimate.* The initial estimate of the amount of tips that will be reported by a particular employee in a calendar quarter shall be made on the basis of the facts and circumstances surrounding the employment of that employee. However, if a number of employees are employed under substantially the same circumstances and working conditions, the initial estimate established for one such employee may be used as the initial estimate for other employees in that group.

(ii) *Adjusting estimate.* If the quarterly estimate of tips in respect of a particular employee continues to differ substantially from the amount of tips reported by the employee and there are no unusual factors involved (for example, an extended absence from work due to illness) the employer shall make an appropriate adjustment of his estimate of the amount of tips that will be reported by the employee.

(iii) *Reasonableness of estimate.* The employer must be prepared, upon request of the district director, to disclose the factors upon which he relied in making the estimate, and his reasons for believing that the estimate is reasonable.

(d) *Employee tax not collected by employer.* If—

(1) The amount of the employee tax imposed by section 3101 in respect of those tips received by an employee which constitute wages exceeds

(2) The amount of employee tax imposed by section 3101 (in respect of tips reported by the employee to the employer) which can be collected by the employer from such employee's wages (exclusive of tips) which are under the control of the employer or from funds referred to in paragraph (a)(3) of this section,

the employee shall be liable for the payment of tax in an amount equal to such excess. For provisions relating to the manner and time of payment of employee tax by an employee, see paragraph (d) of §31.6011(a)–1 and paragraph (a)(4) of §31.6071(a)–1. For provisions relating to statements required to be furnished by employers to employees in respect of uncollected employee tax on tips reported to the employer, see §31.6053–2.

[T.D. 7001, 34 FR 998, Jan. 23, 1969; 34 FR 1554, Jan. 31, 1969]

TAX ON EMPLOYERS

§31.3111–1 Measure of employer tax.

The employer tax is measured by the amount of wages paid after 1954 with respect to employment after 1936. See §31.3121(a)–1, relating to wages, and §§31.3121(b)–1 to 31.3121(b)–4, inclusive, relating to employment. For provisions relating to time of payment of wages, see §31.3121(a)–2.

[T.D. 6744, 29 FR 8306, July 2, 1964]

§31.3111–2 Rates and computation of employer tax.

(a) *Old-age, survivors, and disability insurance.* The rates of employer tax for old-age, survivors, and disability insurance with respect to wages paid in calendar years after 1954 are as follows:

Calendar year	Percent
1955 and 1956	2
1957 and 1958	2.25
1959	2.5
1960 and 1961	3
1962	3.125
1963 to 1965, both inclusive	3.625
1966	3.85
1967	3.9
1968	3.8
1969 and 1970	4.2
1971 and 1972	4.6
1973	4.85
1974 to 2010, both inclusive	4.95
2011 and subsequent calendar years	5.95

(b) *Hospital insurance.* The rates of employer tax for hospital insurance with respect to wages paid in calendar years after 1965 are as follows:

Calendar year	Percent
1966	0.35
1967	.50
1968 to 1972, both inclusive	.60
1973	1.0
1974 to 1977, both inclusive	0.90
1978 to 1980, both inclusive	1.10
1981 to 1985, both inclusive	1.35
1986 and subsequent calendar years	1.50

(c) *Computation of employer tax.* The employer tax is computed by applying to the wages paid by the employer the rate in effect at the time such wages are paid.

[T.D. 6983, 33 FR 18014, Dec. 4, 1968, as amended by T.D. 7374, 40 FR 30948, July 24, 1975]

§ 31.3111–3 When employer tax attaches.

The employer tax attaches at the time that the wages are paid by the employer. For provisions relating to the time of such payment, see § 31.3121(a)–2.

§ 31.3111–4 Liability for employer tax.

The employer is liable for the employer tax with respect to the wages paid to his employees for employment performed for him.

§ 31.3111–5 Manner and time of payment of employer tax.

The employer tax is payable to the district director in the manner and at the time prescribed in Subpart G of the regulations in this part.

§ 31.3112–1 Instrumentalities of the United States specifically exempted from the employer tax.

Section 3112 makes ineffectual as to the employer tax imposed by section 3111 those provisions of law which grant to an instrumentality of the United States an exemption from taxation, unless such provisions grant a specific exemption from the tax imposed by section 3111 by an express reference to such section or the corresponding section of prior law (section 1410 of the Internal Revenue Code of 1939). Thus, the general exemptions from Federal taxation granted by various statutes to certain instrumentalities of the United States without specific reference to the tax imposed by section 3111 or by section 1410 of the 1939 Code are rendered inoperative insofar as such exemptions relate to the tax imposed by section 3111. For provisions relating to the exception from employment of services performed in the employ of an instrumentality of the United States specifically exempted from the employer tax, see § 31.3121(b)(5)–1. For provisions relating to services performed for an instrumentality exempt on December 31, 1950, from the employer tax, see paragraph (c) of § 31.3121 (b) (6)–1.

GENERAL PROVISIONS

§ 31.3121(a)–1 Wages.

(a)(1) Whether remuneration paid after 1954 for employment performed after 1936 constitutes wages is determined under section 3121(a). This section and §§ 31.3121(a)(1)–1 to 31.3121(a)(15)–1, inclusive (relating to the statutory exclusions from wages), apply with respect only to remuneration paid after 1954 for employment performed after 1936. Whether remuneration paid after 1936 and before 1940 for employment performed after 1936 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 401 (Regulations 91). Whether remuneration paid after 1939 and before 1951 for employment performed after 1936 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 402 (Regulations 106). Whether remuneration paid after 1950 and before 1955 for employment performed after 1936 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 408 (Regulations 128).

(2) The term *compensation* as used in section 3231(e) of the Internal Revenue Code has the same meaning as the term *wages* as used in this section, determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

(b) The term ‘‘wages’’ means all remuneration for employment unless specifically excepted under section 3121(a) (see §§ 31.3121(a)(1)–1 to 31.3121(a)(15)–1, inclusive) or paragraph (j) of this section.

(c) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are wages if paid as compensation for employment.

(d) Generally the basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually. See, however, § 31.3121(a)(8)–1 which relates to the treatment of cash remuneration computed on a time basis for agricultural labor.

(e) Generally the medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, goods, lodging, food, or clothing. Remuneration paid in items other than cash shall be computed on the basis of the fair value of such items at the time of payment. See, however, §§ 31.3121 (a)(7)–1, 31.3121(a)(8)–1, 31.3121(a)(10)–1, and 31.3121(a)(12)–1, relating to the treatment of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business and for domestic service in a private home of the employer, for agricultural labor, for services performed by certain homeworkers, and as tips, respectively.

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called ''courtesy'' discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term ''facilities or privileges'', however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

(g) Amounts of so-called ''vacation allowances'' paid to an employee constitute wages. Thus, the salary of an employee on vacation, paid notwithstanding his absence from work, constitutes wages.

(h) Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment. For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see § 31.3121(a)–3.

(i) Remuneration for employment, unless such remuneration is specifically excepted under section 3121(a) or paragraph (j) of this section, constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.

Example. A is employed by B during the month of January 1955 in employment and is entitled to receive remuneration of $100 for the services performed for B, the employer, during the month. A leaves the employ of B at the close of business on January 31, 1955. On February 15, 1955 (when A is no longer an employee of B), B pays A the remuneration of $100 which was earned for the services performed in January. The $100 is wages and the taxes are payable with respect thereto.

(j) In addition to the exclusions specified in §§ 31.3121(a)(1)–1 to 31.3121(a)(15)–1, inclusive, the following types of payments are excluded from wages:

(1) Remuneration for services which do not constitute employment under section 3121(b) and which are not deemed to be employment under section 3121(c) (see § 31.3121(c)–1).

(2) Remuneration for services which are deemed not to be employment under section 3121(c) (see § 31.3121(c)–1).

(3) Tips or gratuities paid, prior to January 1, 1966, directly to an employee by a customer of an employer, and not accounted for by the employee to the employer. For provisions relating to the treatment of tips received by an employee after December 31, 1965, as wages, see §§ 31.3121(a)(12) and 31.3121(q).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7001, 34 FR 999, Jan. 23, 1969; T.D. 7374, 40 FR 30948, July 24, 1975; T.D. 8276, 54 FR 51027, Dec. 12, 1989; T.D. 8324, 55 FR 51696, Dec. 17, 1990; T.D. 8582, 59 FR 66189, Dec. 23, 1994]

§ 31.3121(a)–1T Question and answer relating to the definition of wages in section 3121(a) (Temporary).

The following question and answer relates to the definition of wages in section 3121(a) of the Internal Revenue Code of 1954, as amended by section 531(d)(1)(A) of the Tax Reform Act of 1984 (98 Stat. 885):

Q–1: Are fringe benefits included in the definition of ''wages'' under section 3121(a)?

A–1: Yes, unless specifically excluded from the definition of ''wages'' pursuant to section 3121(a)(1) through (20). For example, a fringe benefit provided to or on behalf of an employee is excluded from the definition of ''wages'' if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 117 or 132.

[T.D. 8004, 50 FR 755, Jan. 7, 1985]

§ 31.3121(a)–2 Wages; when paid and received.

(a) In general, wages are received by an employee at the time that they are paid by the employer to the employee. Wages are paid by an employer at the time that they are actually or constructively paid unless under paragraph (c) of this section they are deemed to be subsequently paid. For provisions relating to the time when tips received by an employee are deemed paid to the employee, see § 31.3121(q)–1.

(b) Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition. For provisions relating to the treatment of deductions from remuneration as payments of remuneration, see § 31.3123–1.

(c) (1) The first $50 of cash remuneration paid, either actually or constructively, by an employer to an employee in a calendar quarter for—

(i) Service to which § 31.3121(a)(7)–1 is applicable (service not in the course of the employer's trade or business and domestic service in a private home of the employer); or

(ii) Service to which § 31.3121(a)(10)–1 is applicable (service performed by certain home workers),

shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar quarter that the sum of such cash payments made within such quarter is at least $50.

(2)(i) The first $100 of cash remuneration paid, either actually or constructively, by an employer to an employee in the calendar year 1955 or 1956 for agricultural labor to which § 31.3121 (a)(8)–1 is applicable shall be deemed to be paid by the employer to the employee at the first moment of time in such calendar year that the sum of such cash payments made within such year is at least $100.

(ii) Cash remuneration paid, either actually or constructively, by an employer to an employee in a calendar year after 1956 for agricultural labor to which § 31.3121(a)(8)–1 is applicable, and before either of the events described in *(a)* or *(b)* of this subdivision has occurred, shall be deemed to be paid upon the occurrence of the earlier of such events, as follows:

(a) The first moment of time in such calendar year that the sum of the payments of such remuneration is at least $150, or

(b) The twentieth day in such calendar year on which the employee has performed such agricultural labor for the employer for cash remuneration computed on a time basis.

(3) If an employer pays cash remuneration to an employee for two or more of the types of service referred to in this paragraph, the provisions of this paragraph are to be applied separately to the amount of remuneration attributable to each type of service.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8306, July 2, 1964; T.D. 7001, 34 FR 999, Jan. 23, 1969]

§31.3121(a)–3 Reimbursement and other expense allowance amounts.

(a) *When excluded from wages.* If a reimbursement or other expense allowance arrangement meets the requirements of section 62(c) of the Code and §1.62–2 and the expenses are substantiated within a reasonable period of time, payments made under the arrangement that do not exceed the substantiated expenses are treated as paid under an accountable plan and are not wages. In addition, if both wages and the reimbursement or other expense allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

(b) *When included in wages*—(1) *Accountable plans*—(i) *General rule.* Except as provided in paragraph (b)(1)(ii) of this section, if a reimbursement or other expense allowance arrangement satisfies the requirements of section 62(c) and §1.62–2, but the expenses are not substantiated within a reasonable period of time or amounts in excess of the substantiated expenses are not returned within a reasonable period of time, the amount paid under the arrangement in excess of the substantiated expenses is treated as paid under a nonaccountable plan, is included in wages, and is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period.

(ii) *Per diem or mileage allowances.* If a reimbursement or other expense allowance arrangement providing a per diem or mileage allowance satisfies the requirements of section 62(c) and §1.62–2, but the allowance is paid at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion is treated as paid under a nonaccountable plan and is included in wages. In the case of a per diem or mileage allowance paid as a reimbursement, the excess portion is subject to withholding and payment of employment taxes when paid. In the case of a per diem or mileage allowance paid as an advance, the excess portion is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (i.e., the days or miles of travel) are substantiated. The Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

(2) *Nonaccountable plans.* If a reimbursement or other expense allowance arrangement does not satisfy the requirements of section 62(c) and §1.62–2 (e.g., the arrangement does not require expenses to be substantiated or require amounts in excess of the substantiated expenses to be returned), all amounts paid under the arrangement are treated as paid under a nonaccountable plan, are included in wages, and are subject to withholding and payment of employment taxes when paid.

(c) *Effective dates.* This section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990. Paragraph (b)(1)(ii) of this section applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1991, with respect to expenses paid or incurred on or after January 1, 1991.

[T.D. 8324, 55 FR 51696, Dec. 17, 1990]

§31.3121(a)(1)–1 Annual wage limitation.

(a) *In general.* (1) The term "wages" does not include that part of the remuneration paid by an employer to an employee within any calendar year—

(i) After 1954 and before 1959 which exceeds the first $4,200 of remuneration,

(ii) After 1958 and before 1966 which exceeds the first $4,800 of remuneration,

(iii) After 1965 and before 1968 which exceeds the first $6,600 of remuneration,

(iv) After 1967 and before 1972 which exceeds the first $7,800 of remuneration,

(v) After 1971 and before 1973 which exceeds the first $9,000 of remuneration,

(vi) After 1972 and before 1974 which exceeds the first $10,800 of remuneration,

(vii) After 1973 and before 1975 which exceeds the first $13,200 of remuneration, or

(viii) After 1974 which exceeds the amount equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) which is effective for such calendar year

(exclusive of remuneration excepted from wages in accordance with paragraph (j) of § 31.3121(a)–1 or §§ 31.3121(a)(2)–1 to 31.3121(a)(15)–1, inclusive) paid within the calendar year by an employer to the employee for employment performed for him at any time after 1936. For provisions relating to the treatment of tips for purposes of the annual wage limitation see § 31.3121(q)–1.

(2) The annual wage limitation applies only if the remuneration received during any 1 calendar year by an employee from the same employer for employment performed after 1936 exceeds the amount of such limitation. The limitation in such case relates to the amount of remuneration received during any 1 calendar year for employment after 1936 and not to the amount of remuneration for employment performed in any 1 calendar year.

Example. Employee A, in 1967 receives $7,000 from employer B in part payment of $8,000 due him from employment performed in 1967. In 1968 A receives from employer B the balance of $1,000 due him for employment performed in 1967, and thereafter in 1968 also receives $7,000 for employment performed in 1968 for employer B. The first $6,600 of the $7,000 received during 1967 is subject to the taxes in 1967. The remaining $400 received in 1967 is not included as wages and is not subject to the taxes. The balance of $1,000 received in 1968 for employment during 1967 is subject to the taxes during 1968 as is also the first $6,800 of the $7,000 thereafter received in 1968 ($1,000 plus $6,800 totaling $7,800, which is the annual wage limitation applicable to remuneration received in 1968 by an employee from any one employer). The remaining $200 received in 1968 is not included as wages and is not subject to the taxes.

(3) If during a calendar year the employee receives remuneration from more than one employer, the annual wage limitation does not apply to the aggregate remuneration received from all of such employers, but instead applies to the remuneration received during such calendar year from each employer with respect to employment after 1936. In such case the first remuneration received in any calendar year after 1974 up to the amount equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) (the first $13,200 received in 1974, the first $10,800 received in 1973, the first $9,000 received in 1972, the first $7,800 received in any calendar year after 1967 and before 1972, the first $6,600 received in any calendar year after 1965 and before 1968, the first $4,800 received in any calendar year after 1958 and before 1966, or the first $4,200 received in any calendar year after 1954 and before 1959) from each employer constitutes wages and is subject to the taxes, even though, under section 6413(c), the employee may be entitled to a special credit or refund of a portion of the employee tax deducted from his wages received during the calendar year. In this connection and in connection with the two examples immediately following, see § 31.6413(c)–1, relating to special credits or refunds of employee tax. In connection with the annual wage limitation in the case of remuneration paid for services performed in the employ of the United States or a wholly owned instrumentality thereof, see § 31.3122. In connection with the annual wage limitation in the case of remuneration paid for services performed in the employ of the Government of Guam, the Government of American Samoa, the District of Columbia, a political subdivision of the Government of Guam, or the Government of American Samoa, or any instrumentality of any of the foregoing which is wholly owned thereby, see § 31.3125. In connection with the application of the annual wage limitation, see also paragraph (b) of this section, relating to the circumstances under which wages paid by a predecessor employer are deemed to be paid by his

successor. In connection with the annual wage limitation in the case of remuneration paid after December 31, 1978, from two or more related corporations that compensate an employee through a common paymaster, see § 31.3121(s)–1.

Example 1. During 1968 employee C receives from employer D a salary of $1,300 a month for employment performed for D during the first 7 months of 1968, or total remuneration of $9,100. At the end of the 6th month C has received $7,800 from employer D, and only that part of his total remuneration from D constitutes wages subject to the taxes. The $1,300 received by employee C from employer D in the 7th month is not included as wages and is not subject to the taxes. At the end of the 7th month C leaves the employ of D and enters the employ of E. C receives remuneration of $1,560 a month from employer E in each of the remaining 5 months of 1968, or total remuneration of $7,800 from employer E. The entire $7,800 received by C from employer E constitutes wages and is subject to the taxes. Thus, the first $7,800 received from employer D and the entire $7,800 received from employer E constitute wages.

Example 2. During the calendar year 1968 F is simultaneously an officer (an employee) of the X Corporation, the Y Corporation, and the Z Corporation and during such year receives a salary of $7,800 from each corporation. Each $7,800 received by F from each of the Corporations X, Y, and Z (whether or not such corporations are related) constitutes wages and is subject to the taxes.

(b) *Wages paid by predecessor attributed to successor.* (1) If an employer (hereinafter referred to as a successor) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and if immediately after the acquisition the successor employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for purposes of the application of the annual wage limitation set forth in paragraph (a) of this section, any remuneration (exclusive of remuneration excepted from wages in accordance with paragraph (j) of § 31.3121(a)–1 or §§ 31.3121(a)(2)–1 to 31.3121(a)(15)–1, inclusive) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by the predecessor during such calendar year and prior to the acquisition shall be considered as having been paid by the successor.

(2) The wages paid, or considered as having been paid, by a predecessor to an employee shall, for purposes of the annual wage limitation, be treated as having been paid to such employee by a successor if:

(i) The successor during a calendar year acquired substantially all the property used in a trade or business, or used in a separate unit of a trade or business, of the predecessor;

(ii) Such employee was employed in the trade or business of the predecessor immediately prior to the acquisition and is employed by the successor in his trade or business immediately after the acquisition; and

(iii) Such wages were paid during the calendar year in which the acquisition occurred and prior to such acquisition.

(3) The method of acquisition by an employer of the property of another employer is immaterial. The acquisition may occur as a consequence of the incorporation of a business by a sole proprietor or a partnership, the continuance without interruption of the business of a previously existing partnership by a new partnership or by a sole proprietor, or a purchase or any other transaction whereby substantially all the property used in a trade or business, or used in a separate unit of a trade or business, of one employer is acquired by another employer.

(4) Substantially all the property used in a separate unit of a trade or business may consist of substantially all the property used in the performance of an essential operation of the trade or business, or it may consist of substantially all the property used in a relatively self-sustaining entity which forms a part of the trade or business.

Example 1. The M Corporation which is engaged in the manufacture of automobiles, including the manufacture of automobile engines, discontinues the manufacture of the engines and transfers all the property used in such manufacturing operation to the N Company. The N Company is considered to have acquired a separate unit of the trade or business of the M Corporation, namely, its engine manufacturing unit.

Example 2. The R Corporation which is engaged in the operation of a chain of grocery stores transfers one of such stores to the S Company. The S Company is considered to have acquired a separate unit of the trade or business of the R Corporation.

(5) A successor may receive credit for wages paid to an employee by a predecessor only if immediately prior to the acquisition the employee was employed by the predecessor in his trade or business which was acquired by the successor and if immediately after the acquisition such employee is employed by the successor in his trade or business (whether or not in the same trade or business in which the acquired property is used). If the acquisition involves only a separate unit of a trade or business of the predecessor, the employee need not have been employed by the predecessor in that unit provided he was employed in the trade or business of which the acquired unit was a part.

Example. The Y Corporation in 1968 acquires by purchase all the property of the X Company and immediately after the acquisition employs in its trade or business employee A, who, immediately prior to the acquisition, was employed by the X Company. The X Company has in 1968 (the calendar year in which the acquisition occurs) and prior to the acquisition paid $5,000 of wages to A. The Y Corporation in 1968 pays to A remuneration of $5,000 with respect to employment. Only $2,800 of the remuneration paid by the Y Corporation is considered to be wages. For purposes of the $7,800 limitation, the Y Corporation is credited with the $5,000 paid to A by the X Company. If in the same calendar year, the Z Company acquires the property by purchase from the Y Corporation and A immediately after the acquistion is employed by the Z Company in its trade or business, no part of the remuneration paid to A by the Z Company in the year of the acquisition will be considered to be wages. The Z Company will be credited with the remuneration paid to A by the Y Corporation and also with the wages paid to A by the X Company (considered for purposes of the application of the $7,800 limitation as having also been paid by the Y Corporation).

(6) Where a corporation described in section 501(c)(3) which is exempt from income tax under section 501(a) has in effect a certificate filed pursuant to section 3121(k), or pursuant to section 1426(1) of the Internal Revenue Code of 1939, waiving its exemption from the taxes imposed by the Act, the activity in which such corporation is engaged is considered to be its trade or business for the purpose of determining whether the transferred property was used in the trade or business of the predecessor and for the purpose of determining whether the employment by the predecessor and the successor of an individual whose services were retained by the successor constitute employment in a trade or business. Thus, if a charitable or religious organization, subject to the taxes by virtue of its certificate, acquires all the property of another such organization likewise subject to the taxes and retains the services of employees of the predecessor, wages paid to such employees by the predecessor in the year of the acquisition (and prior to such acquisition) will be attributed to the successor for purposes of the annual wage limitation.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8307, July 2, 1964; T.D. 6983, 33 FR 18015, Dec. 4, 1968; T.D. 7374, 40 FR 30948, July 24, 1975; T.D. 7660, 44 FR 75139, Dec. 19, 1979]

§ 31.3121(a)(2)–1 Payments under employers' plans on account of retirement, sickness or accident disability, medical or hospitalization expenses, or death.

(a) The term ''wages'' does not include the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(1) An employee's retirement,

(2) Sickness or accident disability of an employee or any of his dependents,

(3) Medical or hospitalization expenses in connection with sickness or accident disability of an employee or any of his dependents, or

(4) Death of an employee or any of his dependents.

(b) The plan or system established by an employer need not provide for payments on account of all of the specified items, but such plan or system may provide for any one or more of such items. Payments for any one or more of such items under a plan or system established by an employer solely for the dependents of his employees are not within this exclusion from wages.

(c) Dependents of an employee include the employee's husband or wife, children, and any other members of the employee's immediate family.

(d) It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

§31.3121(a)(3)–1 Retirement payments.

The term ''wages'' does not include any payment made by an employer to an employee (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) on account of the employee's retirement. Thus, payments made to an employee on account of his retirement are excluded from wages under this exception even though not made under a plan or system.

§31.3121(a)(4)–1 Payments on account of sickness or accident disability, or medical or hospitalization expenses.

The term ''wages'' does not include any payment made by an employer to, or on behalf of, an employee on account of the employee's sickness or accident disability or the medical or hospitalization expenses in connection with the employee's sickness or accident disability, if such payment is made after the expiration of 6 calendar months following the last calendar month in which such employee worked for such employer. Such payments are excluded from wages under this exception even though not made under a plan or system. If the employee does not actually perform services for the employer during the requisite period, the existence of the employer- employee relationship during that period is immaterial.

§31.3121(a)(5)–1 Payments from or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans.

(a) *Payments from or to certain tax- exempt trusts.* The term ''wages'' does not include any payment made—

(1) By an employer, on behalf of an employee or his beneficiary, into a trust, or

(2) To, or on behalf of, an employee or his beneficiary from a trust.

If at the time of such payment the trust is exempt from tax under section 501(a) as an organization described in section 401(a). A payment made to an employee of such a trust for services rendered as an employee of the trust and not as a beneficiary thereof is not within this exclusion from wages.

(b) *Payments under or to certain annuity plans.* (1) The term ''wages'' does not include any payment made after December 31, 1962—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan is a plan described in section 403(a).

(2) The term ''wages'' does not include any payment made before January 1, 1963—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan,

if at the time of such payment the annuity plan meets the requirements of section 401(a)(3), (4), (5), and (6).

(c) *Payments under or to certain bond purchase plans.* The term ''wages'' does not include any payment made after December 31, 1962—

(1) By an employer, on behalf of an employee or his beneficiary, into a bond purchase plan, or

(2) To, or on behalf of, an employee or his beneficiary under a bond purchase plan,

if at the time of such payment the plan is a qualified bond purchase plan described in section 405(a).

[T.D. 6876, 31 FR 2596, Feb. 10, 1966]

§ 31.3121(a)(6)–1 Payment by an employer of employee tax under section 3101 or employee contributions under a State law.

The term ‘‘wages’’ does not include any payment by an employer (without deduction from the remuneration of, or other reimbursement from, the employee) of either (a) the employee tax imposed by section 3101 or the corresponding section of prior law, or (b) any payment required from an employee under a State unemployment compensation law.

§ 31.3121(a)(7)–1 Payments for services not in the course of employer's trade or business or for domestic service.

(a) *Meaning of terms*—(1) *Services not in the course of employer's trade or business.* The term ‘‘services not in the course of the employer's trade or business'' includes services that do not promote or advance the trade or business of the employer. Such term does not include services performed for a corporation. As used in this section, the term does not include service not in the course of the employer's trade or business performed on a farm operated for profit or domestic service in a private home of the employer. See paragraph (f) of § 31.3121(g)–1 for provisions relating to services not in the course of the employer's trade or business performed on a farm operated for profit.

(2) *Domestic service in a private home of the employer.* Services of a household nature performed by an employee in or about a private home of the person by whom he is employed constitute domestic service in a private home of the employer. A private home is a fixed place of abode of an individual or family. A separate and distinct dwelling unit maintained by an individual in an apartment house, hotel, or other similar establishment may constitute a private home. If a dwelling house is used primarily as a boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home. In general, services of a household nature in or about a private home include services performed by cooks, waiters, butlers, housekeepers, governesses, maids, valets, baby sitters, janitors, laundresses, furnacemen, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. The term ‘‘domestic service in a private home of the employer'' does not include the services enumerated above unless such services are performed in or about a private home of the employer. Services not of a household nature, such as services performed as a private secretary, tutor, or librarian, even though performed in the employer's home, are not included within the term ‘‘domestic service in a private home of the employer''. As used in this section, the term does not include domestic service in a private home of the employer performed on a farm operated for profit or service not in the course of the employer's trade or business. See paragraph (f) § 31.3121(g)–1 for provisions relating to domestic service in a private home of the employer performed on a farm operated for profit.

(b) *Payments other than in cash.* The term ‘‘wages'' does not include remuneration paid in any medium other than cash (1) for service not in the course of the employer's trade or business, or (2) for domestic service in a private home of the employer. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any medium other than cash, such as lodging, food, clothing, car tokens, transportation passes or tickets, or other goods or commodities, for service not in the course of the employer's trade or business or for domestic service in a private home of the employer does not constitute wages.

(c) *Cash payments.* (1) The term ‘‘wages'' does not include cash remuneration paid by an employer in any calendar quarter after 1954 to an employee for—

(i) Domestic service in a private home of the employer, or

(ii) Service not in the course of the employer's trade or business,

unless the cash remuneration paid in such quarter by the employer to the employee for such service is $50 or more.

(2) The test relating to cash remuneration of $50 or more is based on the

remuneration paid in a calendar quarter rather than on the remuneration earned during a calendar quarter. It is immaterial whether the remuneration was earned before 1955 or after 1954.

Example. In the calendar quarter ending March 31, 1955, employer X pays employee A cash remuneration of $50 for service not in the course of X's trade or business. Such remuneration constitutes wages subject to the taxes even though $10 thereof represents payment for such service performed by A for X in December 1954.

In determining whether $50 or more has been paid either for domestic service in a private home of the employer or for service not in the course of the employer's trade or business, only cash remuneration for such service shall be taken into account. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, clothing, car tokens, transportation passes or tickets, or other goods or commodities, is disregarded in determining whether the cash-remuneration test is met. If an employee receives cash remuneration from an employer in a calendar quarter for both types of services the $50 cash-remuneration test is to be applied separately to each type of service. If an employee receives cash remuneration from more than one employer in a calendar quarter for domestic service in a private home of the employer or for service not in the course of the employer's trade or business, the $50 cash-remuneration test is to be applied separately to the remuneration received from each employer. See § 31.3102–1, relating to deduction of employee tax or amounts equivalent to the tax from cash payments for the services described in this section; § 31.3121(a)–2, relating to time of payment of wages for such services; and § 31.3121(i)–1, relating to computations to the nearest dollar of any payment of cash remuneration for domestic service in a private home of the employer.

§ 31.3121(a)(8)–1 Payments for agricultural labor.

(a) *Scope of this section.* For purposes of the regulations in this section, the term ''agricultural labor'' means only such agricultural labor (see § 31.3121(g)–1) as constitutes employment or is deemed to constitute employment by reason of the rules relating to included and excluded services contained in section 3121(c) (see § 31.3121(c)–1) or the corresponding section of prior law.

(b) *Payments other than in cash.* The term ''wages'' does not include remuneration paid in any medium other than cash for agricultural labor. For meaning of the term ''cash remuneration'', see paragraph (f) of the regulations in this section.

(c) *Cash payments.* (1) The term ''wages'' does not include cash remuneration paid by an employer in the calendar year 1955 or 1956 to an employee for agricultural labor unless the cash remuneration paid in such year by the employer to the employee for such labor is $100 or more.

(2)(i) The term ''wages'' does not include cash remuneration paid by an employer in any calendar year after 1956 to an employee for agricultural labor unless the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or unless the employee performs agricultural labor for the employer on 20 days or more during such year for cash remuneration computed on a time basis.

(ii) The application of the provisions of this subparagraph may be illustrated by the following example:

Example. On 18 days in 1957 A performs agricultural labor for X for cash remuneration of $8 per day, and X pays A $144 in such year. A performs no further service for X. Neither the $150-cash-remuneration test nor the 20-day test is met. Accordingly, the remuneration paid by X to A is not subject to the taxes. If in 1957 A had performed agricultural labor for X on 20 days for cash remuneration of $7.20 per day, the $144 paid by X to A would have been subject to the taxes because the 20-day test would have been met. Or if A had performed the 18 days of agricultural labor for cash remuneration of $8.50 per day and had been paid in full therefor in 1957, his cash remuneration of $153 would have been subject to the taxes because the $150-cash-remuneration test would have been met.

(d) *Application of cash-remuneration test.* (1) If an employee receives cash remuneration from an employer both for services which constitute agricultural labor and for services which do not constitute agricultural labor, only the amount of such remuneration which is attributable to agricultural labor shall be included in determining whether cash remuneration of $150 or more ($100 or more in 1955 or 1956) has been paid in the calendar year by the employer to the employee for agricultural labor.

Example. Employer X operates a store and also is engaged in farming operations. Employee A, who regularly performs services for X in connection with the operation of the store, works on X's farm when additional help is required for the farm activities. In the calendar year 1957, X pays A $140 in cash computed on a time basis for agricultural labor performed on 19 different days in such year, and $2,260 for services performed in connection with the operation of the store. Since the cash remuneration paid by X to A in the calendar year 1957 for agricultural labor is less than $150, the cash-remuneration test is not met. Since A performed agricultural labor for X on less than 20 days in 1957, the 20-day test set forth in section 3121(a)(8) is not met. The $140 paid by X to A in 1957 for agricultural labor does not constitute wages and is not subject to the taxes.

(2) The test relating to cash remuneration of $150 or more ($100 or more in 1955 or 1956) is based on the cash remuneration paid in a calendar year rather than on the remuneration earned during a calendar year. It is immaterial if such cash remuneration is paid in a calendar year other than the year in which the agricultural labor is performed.

Example. Employer X pays cash remuneration of $150 in the calendar year 1957 to employee A for agricultural labor. Such remuneration constitutes wages even though $10 of such amount represents payment for agricultural labor performed by A for X in December 1956.

(3) In determining whether $150 or more ($100 or more in 1955 or 1956) has been paid to an employee for agricultural labor, only cash remuneration for such labor shall be taken into account. If an employee receives cash remuneration in any one calendar year from more than one employer for agricultural labor, the cash-remuneration test is to be applied with respect to the remuneration received by the employee from each employer in such calendar year for such labor.

(e) *Application of 20-day test.* (1) Only agricultural labor for which cash remuneration is computed on a time basis is taken into account in determining whether an employee performs such labor for such remuneration on 20 days or more during a calendar year after 1956. For purposes of the 20-day test, the amount of such remuneration is immaterial, and it is immaterial if, in addition to cash remuneration computed on a time basis, the remuneration for such labor also includes remuneration other than cash or remuneration which is not computed on a time basis. If cash remuneration paid to an employee after 1956 for agricultural labor is computed on a time basis, such cash remuneration does not constitute ''wages'' unless it is paid in a calendar year in which either the 20-day test or the $150-cash-remuneration test is met.

Example. Employer X employs A to construct fences on a farm owned by X. The work constitutes agricultural labor and is performed on 50 days in November and December 1957. A is not employed by X at any other time. A's remuneration consists of meals and lodging, $5 cash per day, and additional cash measured by the amount of fence constructed. X pays A $140 cash in December 1957 and $160 cash in January 1958, in full payment for the work. Inasmuch as A has performed agricultural labor for X on 50 days in 1957, for remuneration computed on a time basis, the 20-day test is met for 1957 and the $140 cash paid in 1957 is subject to the taxes. It is immaterial that the $150-cash-remuneration test is not met for 1957. Inasmuch as X has paid A $160 cash remuneration in 1958 for agricultural labor, the $150-cash-remuneration test is met for 1958 and the $160 cash paid in 1958 is subject to the taxes. It is immaterial that the 20-day test is not met for 1958. If the remuneration paid by X to A in January 1958 had been in an amount less than $150, neither the $150-cash-remuneration test nor the 20-day test would have been met for the calendar year 1958, and the remuneration paid by X to A in such year would not have been subject to the taxes.

(2) For the purpose of determining whether an employee performs agricultural labor for an employer on 20 days or more during any calendar year after 1956, for cash remuneration computed on a time basis, there shall be counted as one day—

(i) Any day or portion thereof on which the employee actually performs such labor for cash remuneration computed one time basis; and

(ii) Any day or portion thereof on which the employee does not perform agricultural labor but with respect to which cash remuneration is paid or payable to the employee for such labor, such as a day on which the employee is sick or on vacation.

An employee who on a particular day reports for work and, at the direction of his employer, holds himself in readiness to perform agricultural labor shall be considered to be engaged in the actual performance of such labor on that day. For purposes of the regulations in this section, a day is a period of 24 hours commencing at midnight and ending at midnight.

Example. During the period of 20 days beginning April 11, 1957 and ending April 30, 1957, employee A was employed by employer X to perform agricultural labor on X's farm. The agreement provided that A would be furnished room and board at the farm and would be paid cash wages of $150 per month. On one day during the 20-day period A was sick and unable to work, and on another day X directed A to refrain from work because of weather conditions. At the termination of A's employment X paid A cash wages of $100 for the full 20-day period. The 20-day test had been met and the $100 cash wages were subject to the taxes.

(3) If in any one calendar year an employee performs agricultural labor for more than one employer, the 20-day test is to be applied with respect to the agricultural labor performed by the employee in such year for each employer.

(f) *Meaning of ''cash remuneration.''* Cash remuneration includes checks and other monetary media of exchange. Cash remuneration does not include payments made in any other medium, such as lodging, food, clothing, car tokens, transportation passes or tickets, farm products, or other goods or commodities.

(g) *Cross references.* (1) For provisions relating to deductions of employee tax or amounts equivalent to the tax from cash payments for agricultural labor, see § 31.3102–1.

(2) For provisions relating to the time of payment of wages for agricultural labor, see § 31.3121(a)–2.

(3) For provisions relating to records to be kept with respect to agricultural labor, see paragraph (b) of § 31.6001–2.

[T.D. 6744, 29 FR 8308, July 2, 1964]

§ 31.3121(a)(9)–1 Payments to employees for nonwork periods.

(a) The term ''wages'' does not include any payment (other than vacation or sick pay) made by an employer to an employee for a period throughout which the employment relationship exists between the employer and the employee, but in which the employee does not work (other than being subject to call for the performance of work) for the employer, if such payment is made after the calendar month in which—

(1) The employee attains age 65, if the employee is a man to whom the payment is made before January 1975, or if the employee is a woman to whom the payment is made before November 1956, or

(2) The employee attains age 62, if the employee is a man to whom the payment is made after December 1974, or if the employee is a woman to whom the payment is made after October 1956.

(b) Vacation or sick pay is not within this exclusion from wages. If the employee does any work for the employer in the period for which the payment is made, no remuneration paid by such employer to such employee with respect to such period is within this exclusion from wages.

Example. Mrs. A, an employee of X, attained the age of 62 on September 15, 1956, and discontinued the performance of regular work for X on September 30, 1956. Their employment relationship continued for several years until Mrs. A's death, and X paid Mrs. A $50 per month as consideration for Mrs. A's agreement to work when asked by X. The payment for each month was made on the first day of each succeeding month. After September 30, 1956, the only work performed by Mrs. A for X was performed on one day in October 1956. The payment made by X to Mrs. A on November 1 (for October 1956) is not excluded from wages under this exception, but the payments made thereafter are excluded from wages. The payment on November 1 was not excluded because Mrs. A worked for X on one day in October 1956. (Inasmuch as Mrs. A had attained age 62 in September 1956, the November 1 payment would have been excluded if Mrs. A had not performed any work for X in October 1956.)

[T.D. 6744, 29 FR 8309, July 2, 1964, as amended by T.D. 7373, 40 FR 30957, July 24, 1975; 40 FR 32831, Aug. 5, 1975]

§ 31.3121(a)(10)–1 Payments to certain home workers.

(a) The term ''wages'' does not include remuneration paid by an employer in any calendar quarter to an employee—

(1) For services performed after 1954 as a home worker who is an employee by reason of the provisions of section 3121(d)(3)(C) (see paragraph (d) of § 31.3121(d)–1), or

(2) For services performed after 1950 and before 1955 as a home worker who is an employee by reason of the provisions of section 1426(d)(3)(C) of the Internal Revenue Code of 1939. unless the cash remuneration paid in such quarter by the employer to the employee for such services is $50 or more. The test relating to cash remuneration of $50 or more is based on remuneration paid in a calendar quarter rather than on remuneration earned during a calendar quarter. If $50 or more of cash remuneration is paid in a particular calendar quarter, it is immaterial whether the $50 is in payment for services performed during the quarter of payment or during any other quarter.

(b) The application of paragraph (a) of this section may be illustrated by the following examples:

Example 1. A, a home worker, performs services for X, a manufacturer, in 1954 and 1955. In the performance of the home work A is an employee both in 1954 (by reason of section 1426(d)(3)(C) of the 1939 Code) and in 1955 (by reason of section 3121(d)(3)(C)). In March 1955, A returns to X articles made by A at home from materials received by A from X in 1954. X pays A cash remuneration of $50 for such work when the finished articles are delivered. The $50 includes $10 which represents remuneration for home work performed by A in 1954. The entire $50 is subject to the taxes.

Example 2. Assume that the same transactions occur, but that A is not subject in 1954 to licensing requirements under the laws of the State in which the home work is performed. A, therefore, does not perform home work in 1954 as an employee of X by reason of section 1426(d)(3)(C) of the 1939 Code, and the $10 paid in 1955 for such work is not remuneration for employment. The remaining $40 for the home work performed in 1955 is remuneration for employment, but is excluded from wages by application of the $50 cash-remuneration test.

(c) In the event an employee receives remuneration in any one calendar quarter from more than one employer for services performed as a home worker of the character described in paragraph (a) of this section, the regulations in this section are to be applied with respect to the remuneration received by the employee from each employer in such calendar quarter for such services. This exclusion from wages has no application to remuneration paid for services performed as a home worker who is an employee under either section 3121(d)(2)(see paragraph (c) of § 31.3121(d)–1) or section 1426(d)(2) of the 1939 Code, relating to common law employees.

(d) Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as clothing, car tokens, transportation passes or tickets, or other goods or commodities, is disregarded in determining whether the $50 cash-remuneration test is met. If the cash remuneration paid in any calendar quarter by an employer to an employee for services performed as a home worker of the character described in paragraph (a) of this section is $50 or more, then no remuneration, whether in cash or in any medium other than cash, paid by the employer to the employee in such calendar quarter for such services is excluded from wages under this exception.

(e) For provisions relating to whether a home worker is an employee under section 1426(d)(3)(C) of the 1939 Code, see § 408.204 of Regulations 128; 26 CFR (1939) Part 408. See also § 31.3102–1, relating to deduction of employee tax or amounts equivalent to the tax from cash payments for services performed as a home worker of the character described in paragraph (a) of this section, and § 31.3121(a)–2, relating to the time of payment of wages for such services.

§ 31.3121(a)(11)–1 Moving expenses.

(a) The term ''wages'' does not include remuneration paid on or after November 1, 1964, to or on behalf of an employee, either as an advance or a reimbursement, specifically for moving expenses incurred or expected to be incurred, if (and to the extent that) at the time of payment it is reasonable to believe that a corresponding deduction is or will be allowable to the employee under section 217. The reasonable belief contemplated by the statute may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that a deduction is allowable under section 217. The reasonable belief shall be based upon the application of section 217 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations). When used in this section, the term ''moving expenses'' has the same meaning as when used in section 217 and the regulations thereunder.

(b) Except as otherwise provided in paragraph (a) of this section, or in a numbered paragraph of section 3121(a), amounts paid to or on behalf of an employee for moving expenses are wages for purposes of section 3121(a).

[T.D. 7375, 40 FR 42350, Sept. 12, 1975]

§ 31.3121(a)(12)–1 Tips.

The term ''wages'' does not include remuneration received by an employee after December 1965 in the form of tips if—

(a) The tips are paid in any medium other than cash, or

(b) The cash tips received by an employee in any calendar month in the course of his employment by an employer are less than $20.

If the cash tips received by an employee in a calendar month after December 1965 in the course of his employment by an employer amount to $20 or more, none of the cash tips received by the employee in such calendar month are excluded from the term ''wages'' under this section. The cash tips to which this section applies include checks and other monetary media of exchange. Tips received by an employee in any medium other than cash, such as passes, tickets, or other goods or commodities do not constitute wages. If an employee in any calendar month performs services for two or more employers and receives tips in the course of his employment by each employer, the $20 test is to be applied separately with respect to the cash tips received by the employee in respect of his services for each employer and not to the total cash tips received by the employee during the month. As to the time tips are deemed paid, see § 31.3121(q)–1. For provisions relating to the treatment of tips received by an employee prior to 1966, see paragraph (j)(3) of § 31.3121 (a)–1.

[T.D. 7001, 34 FR 999, Jan. 23, 1969]

§ 31.3121(a)(13)–1 Payments under certain employers' plans after retirement, disability, or death.

(a) *In general.* The term ''wages'' does not include the amount of any payment or series of payments made after January 2, 1968, by an employer to, or on behalf of, an employee or any of his dependents under a plan established by the employer which makes provisions for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), which is paid or commences to be paid upon or within a reasonable time after the termination of an employee's employment relationship because of the employee's—

(1) Death,

(2) Retirement for disability, or

(3) Retirement after attaining an age specified in the plan established by the employer or in a pension plan of the employer at the age at which a person in the employee's circumstances is eligible for retirement.

A payment or series of payments made under the circumstances described in the preceding sentence is excluded from ''wages'' even if made pursuant to an incentive compensation plan which also provides for the making of other types of payments. However, any payment or series of payments which would have been paid if the employee's relationship had not been terminated is not excluded from ''wages'' under this section and section 3121(a)(13). For example, lump-sum payments for unused vacation time or a final paycheck received after retirement are payments which the employee would have received whether or not he retired and therefore are not excluded from ''wages'' under this section. Further, if any payment is made upon or after termination of employment for any reason other than those set out in subparagraphs (1), (2), and (3) of this paragraph such payment is not excludable from ''wages'' by this section. For example, if a pension plan provides for retirement upon disability, completion of 30 years of service, or attainment of age 65, and if an employee who is not disabled retires at age 61 after 30 years of service, none of the retirement payments made to the employee under the pension plan (including any made after he is 65) is excludable from ''wages'' under this section. However, if the pension plan had conditioned retirement after 30 years of service upon attainment of age 60, all of the retirement payments would have been excludable.

(b) *Plan.* The plan or system established by an employer need not provide for payments because of termination of employment for all the reasons set out in paragraphs (a)(1), (2), and (3) of this section, but such plan or system may provide for payments because of termination for any one or more of such reasons. Payments because of termination of employment for any one or more of such reasons under a plan or system established by an employer solely for the dependents of his employees are not within this exclusion from wages.

(c) *Dependents.* Dependents of an employee include the employee's husband or wife, children, and any other members of the employee's immediate family.

(d) *Benefit payment.* It is immaterial for purposes of this exclusion whether the amount or possibility of benefit payments is paid on account of services rendered or taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

(e) *Example.* The application of this section may be illustrated by the following example:

Example. A, an employee, receives a salary of $1,500 a month, payable on the 5th day of the month following the month for which the salary is earned. A's employer has established an incentive compensation plan for a class of his employees, including A, providing for the payment of deferred compensation on termination of employment, including termination upon an employee's death, retirement at age 65 (the retirement age specified in the plan), or retirement for disability. On March 1, 1973, A attains the age of 65 and retires. On March 5, 1973, A receives $5,500 from his employer of which $1,500 represents A's salary for services he performed in February 1973, and $4,000 represents incentive compensation paid under the employer's plan. The amount of $4,000 is excluded from ''wages'' under this section. The amount of $1,500 is not excluded from ''wages'' under this section.

[T.D. 7374, 40 FR 30949, July 24, 1975]

§ 31.3121(a)(14)–1 Payments by employer to survivor or estate of former employee.

The term ''wages'' does not include any payment by an employer to a survivor or the estate of a former employee made after 1972 and after the calendar year in which such employee died.

[T.D. 7374, 40 FR 30950, July 24, 1975, as amended by T.D. 7373, 40 FR 30957, July 24, 1975]

§ 31.3121(a)(15)–1 Payments by employer to disabled former employee.

The term ''wages'' does not include any payment made after 1972 by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any service for such employer during the period for which such payment is made.

[T.D. 7374, 40 FR 30950, July 24, 1975, as amended by T.D. 7373, 40 FR 30957, July 24, 1975]

§ 31.3121(a)(18)–1 Payments or benefits under a qualified educational assistance program.

The term ''wages'' does not include any payment made, or benefit furnished, to or for the benefit of an employee in a taxable year beginning after December 31, 1978, if at the time of such payment or furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[T.D. 7898, 48 FR 31019, July 6, 1983]

§ 31.3121(b)–1 Employment; services to which the regulations in this subpart apply.

(a) The provisions of the regulations in this subpart relating to the term ''employment'' apply with respect to services performed after 1954. Certain provisions also apply with respect to services performed before 1955 for which the remuneration is paid after 1954 (see paragraph (b) of § 31.3121(b)–2. For provisions relating generally to services performed before 1955, see paragraph (a) of § 31.3121 (b)–2. For provisions relating to the circumstances under which services which do not constitute employment are nevertheless deemed to be employment, and relating to the circumstances under which services which constitute employment are nevertheless deemed not to be employment, see § 31.3121 (c)–1. For provisions relating to who are employees and who are employers see §§ 31.3121 (d)–1 and 31.3121 (d)–2, respectively.

(b) The taxes apply with respect to remuneration paid after 1954 for services performed before 1955, as well as for services performed after 1954, to the extent that the remuneration and services constitute wages and employment. See §§ 31.3121(a)–1 to 31.3121(a)(13)–1 relating to wages.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6983, 33 FR 18015, Dec. 4, 1968]

§ 31.3121(b)–2 Employment; services performed before 1955.

(a) *General rule.* (1) Subject to the provisions of paragraph (b) of this section:

(i) Services performed after 1936 and before 1955 which were employment under the applicable law in effect before 1955 constitute employment under section 3121(b).

(ii) Services performed after 1936 and before 1955 which were not employment under the applicable law in effect before 1955 do not constitute employment under section 3121(b).

(2) Except as provided in paragraph (b) of this section, determination of whether services performed before 1955 constitute employment shall be made in accordance with the applicable provisions of law in effect before 1955 and of the regulations thereunder. The regulations applicable in determining whether service performed after 1936 and before 1955 constitute employment are as follows:

(i) Services performed after 1936 and before 1940—26 CFR (1939) Part 401 (Regulations 91).

(ii) Services performed after 1939 and before 1951—26 CFR (1939) Part 402 (Regulations 106).

(iii) Services performed after 1950 and before 1955—26 CFR (1939) Part 408 (Regulations 128).

(b) *Certain services performed before 1955 the remuneration for which is paid after 1954.* (1) Services of the following character performed before 1955, for which remuneration is paid after 1954, constitute employment under section 3121(b):

(i) Agricultural labor, as defined in section 3121(g) (see § 31.3121(g)–1), other than services of the character described in section 3121(b)(1) (relating to services performed in connection with the production or harvesting of certain oleoresinous products and services performed by certain foreign agricultural workers), which, at the time performed, constituted employment under section 1426(b) of the 1939 Code, or would have constituted employment except for the provisions of section 1426(b)(1) of such Code, as in effect at the time the services were performed.

(ii) Services not in the course of the employers' trade or business (see paragraph (a)(1) of § 31.3121(a)(7)–1) which, at the time performed, constituted employment under section 1426(b) of the 1939 Code, or would have constituted employment except for the provisions of section 1426(b)(3) of such Code, as in effect at the time the services were performed.

(2) Services of the character described in paragraphs (a) and (b) of § 31.3121(b)(1)–1, which were performed by certain foreign agricultural workers before 1955 and the remuneration for which is paid after 1954, do not constitute employment under section 3121(b), irrespective of whether they constituted employment under section 1426(b) of the 1939 Code, as in effect at the time the services were performed.

(3) This paragraph has no application to services performed before 1955 and

the remuneration for which was paid before 1955.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8309, July 2, 1964]

§ 31.3121(b)–3 Employment; services performed after 1954.

(a) *In general.* Whether services performed after 1954 constitute employment is determined in accordance with the provisions of section 3121(b).

(b) *Services performed within the United States.* Services performed after 1954 within the United States (see § 31.3121(e)–1) by an employee for his employer, unless specifically excepted by section 3121(b), constitute employment. With respect to services performed within the United States, the place where the contract of service is entered into is immaterial. The citizenship or residence of the employee or of the employer also is immaterial except to the extent provided in any specific exception from employment. Thus, the employee and the employer may be citizens and residents of a foreign country and the contract of service may be entered into in a foreign country, and yet, if the employee under such contract performs services within the United States, there may be to that extent employment.

(c) *Services performed outside the United States*—(1) *In general.* Except as provided in paragraphs (c)(2) and (3) of this section, services performed outside the United States (see § 31.3121(e)–1) do not constitute employment.

(2) *On or in connection with an American vessel or American aircraft.* (i) Services performed after 1954 by an employee for an employer ''on or in connection with'' an American vessel or American aircraft outside the United States (see § 31.3121(e)–1) constitute employment if:

(a) The employee is also employed ''on and in connection with'' such vessel or aircraft when outside the United States; and

(b) The services are performed under a contract of service, between the employee and the employer, which is entered into within the United States, or during the performance of the contract under which the services are performed and while the employee is employed on the vessel or aircraft it touches at a port within the United States; and

(c) The services are not excepted under section 3121(b).

(ii) An employee performs services on and in connection with the vessel or aircraft if he performs services on such vessel or aircraft which are also in connection with the vessel or aircraft. Services performed on the vessel by employees as officers or members of the crew, or as employees of concessionaires, of the vessel, for example, are performed under such circumstances, since such services are also connected with the vessel. Similarly, services performed on the aircraft by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while he is a passenger on a vessel are not in connection with the vessel.

(iii) If services are performed by an employee ''on and in connection with'' an American vessel or American aircraft when outside the United States and the conditions listed in paragraph (c)(2)(i) *(b)* and *(c)* of this section are met, then the services of that employee performed on or in connection with the vessel or aircraft constitute employment. The expression ''on or in connection with'' refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).

(iv) Services performed by a member of the crew or other employee whose contract of service is not entered into within the United States, and during the performance of which and while the employee is employed on the vessel or aircraft it does not touch at a port within the United States, do not constitute employment under this subparagraph, notwithstanding services performed by other members of the crew or other employees on or in connection with the vessel or aircraft may constitute employment.

(v) A vessel includes every description of watercraft, or other contrivance, used as a means of transportation on water. An aircraft includes every description of craft, or other contrivance, used as a means of transportation through the air. In the case of an aircraft, the term ''port'' means an airport. An airport means an area on land or water used regularly by aircraft for receiving or discharging passengers or cargo. For definitions of ''American vessel'' and ''American aircraft'', see §31.3121(f)–1.

(vi) With respect to services performed outside the United States on or in connection with an American vessel or American aircraft, the citizenship or residence of the employee is immaterial, and the citizenship or residence of the employer is material only in case it has a bearing in determining whether a vessel is an American vessel.

(3) *By a citizen of the United States as an employee for an American employer.* Services performed after 1954 outside the United States by a citizen of the United States as an employee for an American employer constitute employment provided the services are not specifically excepted under section 3121(b). For definitions of ''citizen of the United States'' and ''American employer'', see §§31.3121(e)–1 and 3121 (h)–1, respectively.

(4) *By a citizen of the United States as an employee for a foreign subsidiary corporation.* For provisions relating to the extension of the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act to certain services not constituting employment which are performed outside the United States by citizens of the United States in the employ of a foreign subsidiary of a domestic corporation, see section 3121(1) and Part 36 of this chapter (Regulations Relating to Contract Coverage of Employees of Foreign Subsidiaries).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8309, July 2, 1964]

§31.3121(b)–4 Employment; excepted services in general.

(a) Services performed by an employee for an employer do not constitute employment for purposes of the taxes if they are specifically excepted from employment under any of the numbered paragraphs of section 3121(b). Services so excepted do not constitute employment for purposes of the taxes even though they are performed within the United States, or are performed outside the United States on or in connection with an American vessel or American aircraft, or are performed outside the United States by a citizen of the United States for an American employer. If not otherwise provided in the regulations relating to the numbered paragraphs of section 3121(b), such regulations apply to services performed after 1954.

(b) The exception attaches to the services performed by the employee and not to the employee as an individual; that is, the exception applies only to the services in an excepted class rendered by the employee.

Example. A is an individual who is employed part time by B to perform services which are specifically excepted from employment under one of the numbered paragraphs of section 312(b). A is also employed by C part time to perform services which constitute employment. While no tax liability is incurred with respect to A's remuneration for services performed in the employ of B (the services being excepted from employment), the exception does not embrace the services performed by A in the employ of C (which constitute employment) and the taxes attached with respect to the wages (see §31.3121(a)–1) for such services.

(c) For provisions relating to the circumstances under which services which are excepted are nevertheless deemed to be employment, and relating to the circumstances under which services which are not excepted are nevertheless deemed not to be employment, see §31.3121(c)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8310, July 2, 1964]

§ 31.3121(b)(1)–1 Certain services performed by foreign agricultural workers, or performed before 1959 in connection with oleoresinous products.

(a) *Services of workers from Mexico.* Services performed before 1965 by foreign agricultural workers from the Republic of Mexico under contracts entered into in accordance with title V of the Agricultural Act of 1949, as amended, are excepted from employment. Contracts entered into pursuant to the provisions of such title V may provide for the performance only of services which constitute ''agricultural employment''. The term ''agricultural employment'' includes certain services which do not constitute ''agricultural labor'' as that term is defined in section 3121(g) (see § 31.3121(g)–1. For purposes of title V of the Agricultural Act of 1949, as amended, the term ''agricultural employment'' includes services or activities included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938, as amended, or section 3121(g) of the Internal Revenue Code. Under section 507 of the Agricultural Act of 1949, as amended, and as in effect before October 3, 1961, the term ''agricultural employment'' included also horticultural employment, cotton ginning, compressing and storing, crushing of oil seeds, and the packing, canning, freezing, drying, or other processing of perishable or seasonable agricultural products.

(b) *Services of workers from British West Indies.* Services performed by a foreign agricultural worker lawfully admitted to the United States from the Bahamas, Jamaica, or the other British West Indies, on a temporary basis to perform form agricultural labor are excepted from employment.

(c) *Services performed after 1956 by foreign workers.* Services performed after 1956 by a foreign agricultural worker lawfully admitted to the United States from any foreign country or possession thereof, including the Republic of Mexico, on a temporary basis to perform agricultural labor are excepted from employment.

(d) *Services performed before 1959 in connection with the production or harvesting of certain oleoresinous products.* Services performed before 1959 in connection with the production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin, provided the processing is carried on by the original producer of the crude gum, are expected from employment. However, the services to which this paragraph relates constitute agricultural labor as defined in section 3121(g) (see paragraph (d) of § 31.3121(g)–1). Thus, any cash remuneration paid for such services, to the extent that the services are deemed to constitute employment by reason of the rules relating to included and excluded services continued in section 3121(c) (see § 31.3121(c)–1), is taken into account in applying the test prescribed in section 3121(a)(8)(B) for determining whether cash remuneration paid for agricultural labor constitutes wages (see paragraph (c) of § 31.3121(a)(8)–1).

(e) *Cross-reference.* See paragraph (b) of § 31.3121(b)–2 for provisions relating to the status of services of the character to which paragraphs (a) and (b) of this section apply which were performed before 1955 and the remuneration for which is paid after 1954.

[T.D. 6744, 29 FR 8310, July 2, 1964]

§ 31.3121(b)(2)–1 Domestic service performed by students for certain college organizations.

(a) Services of a household nature performed in or about the club rooms or house of a local college club, or in or about the club rooms or house of a local chapter of a college fraternity or sorority, by a student who is enrolled and regularly attending classes at a school, college, or university are excepted from employment. For purposes of this exception, the statutory tests are the type of services performed by the employee, the character of the place where the services are performed, and the status of the employee as a student enrolled and regularly attending classes at a school, college, or university.

(b) In general, services of a household nature in or about the club rooms or house of a local college club or local chapter of a college fraternity or sorority include services rendered by cooks, waiters, butlers, maids, janitors, laundresses, furnacemen, handymen, gardeners, housekeepers, and housemothers.

(c) A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter. If the club rooms or house of a local college club or local chapter of a college fraternity or sorority is used primarily for the purpose of supplying board or lodging to students or the public as a business enterprise, the services performed therein are not within the exception.

(d) The term ''school, college, or university'' within the meaning of this exception is to be taken in its commonly or generally accepted sense.

(e) Services of a household nature are not within the exception if performed in or about rooming or lodging houses, boarding houses, clubs (except local college clubs) hotels, hospitals, eleemosynary institutions, or commercial offices or establishments.

(f) For provisions relating to domestic service in a private home of the employer, see §31.3121(a)(7)–1.

§31.3121(b)(3)–1 Family employment.

(a) Certain services are excepted from employment because of the existence of a family relationship between the employee and the individual employing him. The exceptions are as follows:

(1) Services performed by an individual in the employ of his or her spouse;

(2) (i) Services performed before 1961 by a father or mother in the employ of his or her son or daughter;

(ii) Services not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed after 1960 but prior to 1968 by a father or mother in the employ of his or her son or daughter;

(iii) Services not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed after 1967 by a father or mother in the employ of his or her son or daughter unless *(a)* the employer has a child (including an adopted child or stepchild) living in his or her home who is under age 18 or who has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the services are rendered; and *(b)* the employer is during the calendar quarter in which the services are rendered:

(1) A widow or widower;

(2) A divorced person who has not remarried; or

(3) A married person who has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for such child for at least 4 continuous weeks in the calendar quarter in which the services are rendered; and

(3) Services performed by a son or daughter under the age of 21 in the employ of his or her father or mother.

(b) Under paragraph (a) (1) and (2) (i) of this section, the exception is conditioned solely upon the family relationship between the employee and the individual employing him. Under paragraph (a)(2) (ii) and (iii) of this section, in addition to the family relationship, there is a further requirement that the services performed after 1960 and before 1968 for purposes of paragraph (a)(2)(ii) and after 1967 for purposes of paragraph (a)(2)(iii) shall be services not in the course of the employer's trade or business or shall be domestic service in a private home of the employer. The terms ''services not in the course of the employer's trade or business'' and ''domestic service in a private home of the employer'' have the same meaning as when used in §31.3121(a) (7)–1, except that it is immaterial under paragraphs (a)(2) (ii) and (iii) of this section whether or not such services are performed on a farm operated for profit. The mere fact that a mental or physical disability, whether temporary or permanent, renders a child or spouse incapable of self-support does not necessarily mean that the child requires the personal care and supervision of an adult or that the spouse is incapable of caring for a child within the meaning of paragraph (a)(2)(iii) of this section. A written statement by a doctor of the existence of the mental or physical condition of the child or spouse which states that the child requires the personal care and supervision of an adult or that the spouse is incapable of caring for a child and which sets forth the period of time during which the condition has existed and is likely to exist will usually be sufficient evidence to establish the existence and duration of the condition at the time of the statement. Under paragraph (a)(3) of this section, in addition to the family relationship, there is a further requirement that the son or daughter shall be under the age of 21, and the exception continues only during the time that the son or daughter is under the age of 21.

(c) Services performed in the employ of a corporation are not within the exception. Services performed in the employ of a partnership are not within the exception unless the requisite family relationship exists between the employee and each of the partners comprising the partnership.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8311, July 2, 1964; T.D. 7374, 40 FR 30950, July 24, 1975]

§ 31.3121(b)(4)–1 Services performed on or in connection with a non-American vessel or aircraft.

(a) Services performed within the United States by an employee for an employer ''on or in connection with'' a vessel not an American vessel, or ''on or in connection with'' an aircraft not an American aircraft, are excepted from employment if—

(1) The employee is employed by such employer ''on and in connection with'' such vessel or aircraft when outside the United States, and

(2) (i) The employee is not a citizen of the United States, or (ii) the employer is not an American employer.

(b) An employee performs services on and in connection with the vessel or aircraft if he performs services on the vessel or aircraft when outside the United States which are also in connection with the vessel or aircraft. Services performed on the vessel outside the United States by employees as officers or members of the crew, or by employees of concessionaires, of the vessel, for example, are performed under such circumstances, since such services are also connected with the vessel. Similarly, services performed on the aircraft outside the United States by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while he is a passenger on a vessel are not in connection with the vessel.

(c) The expression ''on or in connection with'' refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).

(d) Services performed within the United States on or in connection with a non-American vessel or aircraft for an employer by an employee who is not a citizen of the United States are excepted from employment, irrespective of whether the employer is or is not an American employer, provided the employee also is employed by such employer on and in connection with the vessel or aircraft when outside the United States. Services performed within the United States on or in connection with a non-American vessel or aircraft by an employee for an employer who is not an American employer also are excepted from employment, irrespective of whether the employee is or is not a citizen of the United States, provided the employee also is employed by such employer on and in connection with the vessel or aircraft when outside the United States. Services performed within the United States on or in connection with a non-American vessel or aircraft for an American employer by an employee who is a citizen of the United States are not excepted from employment under section 3121(b)(4), irrespective of whether the employee is employed by such employer on and in connection with the vessel or aircraft when outside the United States. Further, section 3121(b)(4) does not except from employment services performed within the United States for an employer, whether or not an American employer, on or in connection with a non-American vessel or aircraft by an employee, whether or not a citizen of the United States, who is not also employed by such employer on and in connection with the vessel or aircraft when outside the United States.

(e) Services performed outside the United States on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, by a citizen of the United States as an employee for an American employer are not excepted from employment under section 3121(b)(4), irrespective of whether the employee is employed on and in connection with such vessel or aircraft when outside the United States. Services performed outside the United States on or in connection with a vessel not an American vessel or on or in connection with an aircraft not an American aircraft, either by an employee who is not a citizen of the United States or for an employer who is not an American employer, do not, in any event, constitute employment. See paragraph (c) of §31.3121(b)–3, relating to services performed outside the United States which constitute employment.

(f) See paragraph (c)(2)(v) of §31.3121(b)–3 for definitions of ''vessel'' and ''aircraft'', §31.3121(f)–1, for definitions of ''American vessel'' and ''American aircraft'', §31.3121(e)–1, for definition of ''citizen of the United States'', and §31.3121(h)–1, for definition of ''American employer''.

§31.3121(b)(5)–1 Services in employ of an instrumentality of the United States specifically exempted from the employer tax.

Services performed in the employ of an instrumentality of the United States are excepted from employment if such instrumentality is exempt from the employer tax imposed by section 3111 by virtue of any other provision of law which specifically refers to such section 3111 or the corresponding section of prior law (section 1410 of the Internal Revenue Code of 1939) in granting exemption from the employer tax. This exception does not operate to exclude from employment services performed in the employ of an instrumentality of the United States unless the Congress has granted to such instrumentality a specific exemption from the tax imposed by section 3111 or the corresponding section of prior law. For provisions which make general exemptions from Federal taxation ineffectual as to the employer tax imposed by section 3111, see §31.3112–1. For other exceptions from employment applicable with respect to services performed in the employ of an instrumentality of the United States, see §31.3121(b)(6)–1.

§31.3121(b)(6)–1 Services in employ of United States or instrumentality thereof.

(a) *In general.* This section relates to services performed in the employ of the United States Government or in the employ of an instrumentality of the United States. Particular services which are not excepted from employment under one rule set forth in this section may nevertheless be excepted under another rule set forth in this section or under §31.3121(b)(5)–1, relating to services in the employ of an instrumentality of the United States specifically exempted from the employer tax. Moreover, services performed in the employ of the United States or of any instrumentality thereof which are not excepted from employment under paragraph (5) or (6) of section 3121(b) may nevertheless be excepted under some other paragraph of such section. For provisions relating generally to the application of the taxes in the case of services performed in the employ of the United States or a wholly owned instrumentality thereof, see 3122. For provisions relating to the computation of remuneration for service performed by an individual as a member of a uniformed service or for service performed by an individual as a volunteer or volunteer leader within the meaning of the Peace Corps Act, see §31.3121(i)–2 and §31.3121(i)–3, respectively.

(b) *Services covered under a retirement system established by a law of the United States.* Services performed in the employ of the United States or in the employ of any instrumentality thereof are excepted from employment under section 3121(b)(6)(A) if such services are covered under a law enacted by the

Congress of the United States which specifically provides for the establishment of a retirement system for employees of the United States or of such instrumentality. Determinations as to whether services are covered by a retirement system of the requisite character are to be made as of the time such services are performed. Services of an employee who has an option to have his services covered under a retirement system are not covered under such retirement system unless and until he exercises such option. The test is whether particular services performed by an employee are covered by a retirement system of the requisite character rather than whether the position in which such services are performed is covered by such retirement system.

(c) *Services performed for an instrumentality not subject to employer tax on December 31, 1950, and covered under a retirement system established by such instrumentality.* (1) Subject to the provisions of subparagraph (4) of this paragraph, services performed in the employ of an instrumentality of the United States are excepted from employment under section 3121(b)(6)(B) if—

(i) The particular instrumentality was not subject on December 31, 1950, to the employer tax imposed by section 1410 of the Internal Revenue Code of 1939, and

(ii) The services are covered by a retirement system established by such instrumentality.

(2) If the particular instrumentality was not in existence on December 31, 1950, but is created thereafter under a law which was in effect on December 31, 1950, services performed in the employ of such instrumentality are excepted from employment (unless otherwise provided in paragraph (c)(4) of this section) if—

(i) The instrumentality had it been in existence on December 31, 1950, would not have been subject on that date to the employer tax imposed by section 1410 of the Internal Revenue Code of 1939, and

(ii) The services are covered by a retirement system established by such instrumentality.

It is immaterial, for purposes of this exception, whether the exemption from the employer tax on December 31, 1950, resulted, or would have resulted, from a tax exemption as such in effect on December 31, 1950, or from the provisions of section 1426(b) (6) of the Internal Revenue Code of 1939 in effect on that date, relating to the exception from employment of services performed in the employ of certain instrumentalities of the United States.

(3) Determinations as to whether services performed in the employ of an instrumentality referred to in paragraph (c)(1) or (2) of this section are covered by a retirement system established by such instrumentality are to be made as of the time such services are performed. Services of an employee who has an option to have his services covered under a retirement system established by the instrumentality are not covered under such retirement system unless and until he exercises such option. The test is whether particular services performed by an employee are covered by a retirement system established by the instrumentality rather than whether the position in which such services are performed is covered by such retirement system.

(4) The exception from employment provided in section 3121(b)(6)(B) has no application with respect to any of the following classes of services:

(i) Services performed in the employ of a corporation which is wholly owned by the United States;

(ii) Services performed in the employ of a production credit association, a Federal Reserve Bank, or a Federal Credit Union; services performed before December 31, 1959, in the employ of a national farm loan association; services performed after December 30, 1959, in the employ of a Federal land bank association; services performed after December 31, 1959, in the employ of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives; services performed after December 31, 1972, in the employ of a Federal home loan bank; and services performed after December 31, 1966, and before January 1, 1973, in the employ of a Federal home loan bank, in the case of individuals who are in such employ on the latter date, provided that an amount equal to the taxes imposed by sections 3101 and 3111 with respect to all such services performed by all such individuals are paid under the provisions of section 3122 by July 1, 1973;

(iii) Services performed in the employ of a State, county, or community committee under the Commodity Stabilization Service;

(iv) Services performed by a civilian employee, not compensated from funds appropriated by the Congress, in the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Exchanges, Marine Corps Exchanges, or other activities, conducted by an instrumentality of the United States subject to the jurisdiction of the Secretary of Defense, at installations of the Department of Defense for the comfort, pleasure, contentment, and mental and physical improvement of personnel of such Department; or

(v) Services performed by a civilian employee, not compensated from funds appropriated by the Congress, in the Coast Guard Exchanges or other activities, conducted by an instrumentality of the United States subject to the jurisdiction of the Secretary of the Treasury, at installations of the Coast Guard for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Coast Guard.

(d) *Special classes of services.* The following classes of services performed either in the employ of the United States or in the employ of any instrumentality thereof are excepted from employment under section 3121(b)(6)(C):

(1) Services performed as the President or Vice President of the United States or a Member, Delegate, or Resident Commissioner, of or to the Congress of the United States;

(2) Services performed in the legislative branch of the United States Government;

(3) Services performed in a penal institution of the United States by an inmate thereof;

(4) (i) Except as provided in paragraph (d)(4)(ii) of this section, services performed by student nurses, medical or dental interns, residents in training, student dietitians, student physical therapists, or student occupational therapists, assigned or attached to a hospital, clinic, or medical or dental laboratory operated by any department, agency, or instrumentality of the U.S. Government, or by certain other student employees described in section 5351(2) of title 5, United States Code.

(ii) The provisions of paragraph (d)(4)(i) of this section have no application to services performed after 1965 by medical or dental interns or by medical or dental residents in training.

(5) Services performed by an individual as an employee serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency; and

(6) (i) Except as provided in paragraph (d)(6)(ii) of this section, services performed by an individual to whom subchapter III of chapter 83 of title 5, United States Code (civil service retirement) does not apply because he is, with respect to such services, subject to another retirement system, established either by a law of the United States or by the agency or instrumentality of the United States for which such services are performed.

(ii) The provisions of paragraph (d)(6)(i) of this section have no application to service performed by an individual to whom subchapter III of chapter 83 of title 5, United States Code (civil service retirement) does not apply because such individual is subject to the retirement system of the Tennessee Valley Authority, if such service is subject to the plan approved by the Secretary of Health and Human Services on December 28, 1956, pursuant to section 104 (i)(2) of the Social Security Amendments of 1956 (70 Stat. 827). See section 201(m)(4) of such amendments for provisions relating to the timeliness of payment of tax with respect to remuneration paid before 1957 for such services, and barring the imposition of interest on the amount of any such tax due for any period before December 28, 1956.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8311, July 2, 1964; T.D. 6983, 33 FR 18016, Dec. 4, 1968; T.D. 7373, 40 FR 30957, July 24, 1975]

§ 31.3121(b)(7)–1 Services in employ of States or their political subdivisions or instrumentalities.

(a) *In general.* Except as provided in other paragraphs of this section, services performed in the employ of any State, any political subdivision of a State, or any instrumentality of one or more States or political subdivisions thereof which is wholly owned by one or more States or political subdivisions are excepted from employment. For the definition of the term ''State'', as used in this section, see § 31.3121(e)–1.

(b) *Covered transportation service.* The exception from employment under section 3121(b)(7) does not apply to covered transportation service as defined in section 3121(j). See that section and 31.3121(j)–1.

(c) *Government of American Samoa.* The exception from employment under section 3121(b)(7) does not apply to services performed after 1960 in the employ of the Government of American Samoa, any political subdivision thereof, or any instrumentality of such Government or political subdivision, or combination thereof, which is wholly owned thereby, performed by an officer or employee thereof (including a member of the legislature of such Government or political subdivision).

(d) *District of Columbia.* The exception from employment under section 3121(b)(7) does not apply to services performed after September 30, 1965, in the employ of the District of Columbia or any instrumentality which is wholly owned thereby, if such service is not covered by a retirement system established by a law of the United States. Notwithstanding the preceding sentence the following classes of services performed either in the employ of the District of Columbia or in the employ of any instrumentality which is wholly owned thereby are excepted from employment:

(1) Services performed in a hospital or penal institution by a patient or inmate thereof.

(2) Services performed by student nurses, student dietitians, student physical therapists, or student occupational therapists assigned or attached to a hospital, clinic, or medical or dental laboratory operated by the District of Columbia or by any wholly owned instrumentality thereof, or by certain other student employees described in section 5351(2) of title 5, United States Code. This subparagraph does not apply to services performed by medical or dental interns or by medical or dental residents in training described in such section 5351(2).

(3) Services performed by an individual as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or other similar emergency.

(4) Services performed by a member of a board, committee, or council of the District of Columbia, paid on a per diem, meeting, or other fee basis.

(e) *Government of Guam.* The exception from employment under section 3121(b)(7) does not apply to services performed after 1972 in the employ of the Government of Guam or any instrumentality which is wholly owned thereby, by an employee properly classified as a temporary or intermittent employee, if such service is not covered by a retirement system established by a law of Guam. The preceding sentence shall not apply to the services performed by an elected official or a member of the legislature or in a hospital or penal institution by a patient or inmate thereof. For purposes of this paragraph—

(1) Any person whose services as an officer or employee of such Government or instrumentality is not covered by a retirement system established by a law of the United States shall not, with respect to such service, be regarded as an employee of the United States or any agency or instrumentality thereof, and

(2) The remuneration for service described in subparagraph (1) (including fees paid to a public official) shall be deemed to have been paid by such Government or instrumentality.

[T.D. 6744, 29 FR 8312, July 2, 1964, as amended by T.D. 6983, 33 FR 18016, Dec. 4, 1968; T.D. 7373, 40 FR 30958, July 24, 1975]

§ 31.3121(b)(7)–2 Service by employees who are not members of a public retirement system.

(a) *Table of contents.* This paragraph contains a listing of the major headings of this § 31.3121(b)(7)–2.

§ 31.3121(b)(7)–2 Service by employees who are not members of a public retirement system.

(b) *Introduction.* Under section 3121(b)(7)(F), wages of an employee of a State or local government are generally subject to tax under FICA after July 1, 1991, unless the employee is a member of a retirement system maintained by the State or local government entity. This section 31.3121(b)(7)–2 provides rules for determining whether an employee is a ‘‘member of a retirement system’’. These rules generally treat an employee as a member of a retirement system if he or she participates in a system that provides retirement benefits, and has an accrued benefit or receives an allocation under the system that is comparable to the benefits he or she would have or receive under Social Security. In the case of part-time, seasonal and temporary employees, this minimum retirement benefit is required to be nonforfeitable.

(c) *General rule*—(1) *Inclusion in employment of service by employees who are not members of a retirement system.* Except in the case of service described in sections 3121(b)(7)(F) (i) through (v), the exception from employment under section 3121(b)(7) does not apply to service in the employ of a State or any political subdivision thereof, or of any instrumentality of one or more of the foregoing that is wholly owned thereby, after July 1, 1991, unless the employee is a member of a retirement system of such State, political subdivision or instrumentality at the time the service is performed. An employee is not a member of a retirement system at the time service is performed unless at that time he or she is a qualified participant (as defined in paragraph (d) of this section) in a retirement system that meets the requirements of paragraph (e) of this section with respect to that employee.

(2) *Treatment of individuals employed in more than one position.* Under section 3121(b)(7)(F), whether an employee is a member of a retirement system is determined on an entity-by-entity rather than a position-by-position basis. Thus, if an employee is a member of a retirement system with respect to service he or she performs in one position in the employ of a State, political subdivision or instrumentality thereof, the employee is generally treated as a member of a retirement system with respect to all service performed for the same State, political subdivision or instrumentality in any other positions. A State is a separate entity from its political subdivisions, and an instrumentality is a separate entity from the State or political subdivision by which it is owned for purposes of this rule. See paragraph (e)(2) of this section, however, for rules relating to service and compensation required to be taken into account in determining whether an employee is a member of a retirement system for purposes of this section. This rule is illustrated by the following examples:

Example 1. An individual is employed full-time by a county and is a qualified participant (as defined in paragraph (d) of this section) in its retirement plan with regard to such employment. In addition to this full-time employment, the individual is employed part-time in another position with the same county. The part-time position is not covered by the county retirement plan, however, and neither the service nor the compensation in the part-time position is considered in determining the employee's retirement benefit under the county retirement plan. Nevertheless, if the retirement plan meets the requirements of paragraph (e) of this section with respect to the individual, the exclusion from employment under section 3121(b)(7) applies to both the employee's full-time and part-time service with the county.

Example 2. An individual is employed full-time by a State and is a member of its retirement plan. The individual is also employed part-time by a city located in the State, but does not participate in the city's retirement plan. The services of the individual for the city are not excluded from employment under section 3121(b)(7), because the determination of whether services constitute employment for such purposes is made separately with respect to each political subdivision for which services are performed.

(d) *Definition of qualified participant*—(1) *General rule*—(i) *Defined benefit retirement systems.* Whether an employee is a qualified participant in a defined benefit retirement system is determined as services are performed. An employee is a qualified participant in a defined benefit retirement system (within the meaning of paragraph (e)(1) of this section) with respect to services performed on a given day if, on that day, he or she is or ever has been an actual participant in the retirement system and, on that day, he or she actually has a total accrued benefit under the retirement system that meets the minimum retirement benefit requirement of paragraph (e)(2) of this section. An employee may not be treated as an actual participant or as actually having an accrued benefit for this purpose to the extent that such participation or benefit is subject to any conditions (other than vesting), such as a requirement that the employee attain a minimum age, perform a minimum period of service, make an election in order to participate, or be present at the end of the plan year in order to be credited with an accrual, that have not been satisfied. The rules of this paragraph (d)(1)(i) are illustrated by the following examples:

Example 1. A State maintains a defined benefit plan that is a retirement system within the meaning of paragraph (e)(1) of this section. Under the terms of the plan, employees in positions covered by the plan must complete 6 months of service before becoming participants. The exception from employment in section 3121(b)(7) does not apply to services of an employee during the employee's 6 months of service prior to his or her initial entry into the plan. The same result occurs even if, upon the satisfaction of this service requirement, the employee is given credit under the plan for all service with the employer (i.e., if service is credited for the 6-month waiting period). This is true even if the employee makes a required contribution in order to gain the retroactive credit. The same result also occurs if the employee can elect to participate in the plan before the end of the 6-month waiting period, but does not elect to do so.

Example 2. A political subdivision maintains a defined benefit plan that is a retirement system within the meaning of paragraph (e)(1) of this section. Under the terms of the plan, service during a plan year is not credited for accrual purposes unless a participant has at least 1,000 hours of service during the year. Benefits that accrue only upon satisfaction of this 1,000-hour requirement may not be taken into account in determining whether an employee is a qualified participant in the plan before the 1,000-hour requirement is satisfied.

(ii) *Defined contribution retirement systems.* Whether an employee is a qualified participant in a defined contribution retirement system is determined as services are performed. An employee is a qualified participant in a defined contribution or other individual account retirement system (within the meaning of paragraph (e)(1) of this section) with respect to services performed on a given day if, on that day, he or she has satisfied all conditions (other than vesting) for receiving an allocation to his or her account (exclusive of earnings) that meets the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation during any period ending on that day and beginning on or after the beginning of the plan year of the retirement system. This is the case regardless of whether the allocations were made or accrued before the effective date of section 3121(b)(7)(F). This rule is illustrated by the following examples:

Example 1. A State-owned hospital maintains a nonelective defined contribution plan that is a retirement system within the meaning of paragraph (e)(1) of this section. Under the terms of the plan, employees must be employed on the last day of a plan year in order to receive any allocation for the year. Employees may not be treated as qualified participants in the plan before the last day of the year.

Example 2. Assume the same facts as in *Example 1* except that, under the terms of the plan, an employee who terminates service before the end of a plan year receives a pro rata portion of the allocation he or she would have received at the end of the year, e.g., based on compensation earned since the beginning of the plan year. If the pro rata allocation available on a given day would meet the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation from the beginning of the plan year through that day (or some later day), employees are treated as qualified participants in the plan on that day.

Example 3. A political subdivision maintalns an elective defined contribution plan that is a retirement system within the meaning of paragraph (e)(1) of this section. The plan has a calendar year plan year and two open seasons—in December and June—when employees can change their contribution elections. In December, an employee elects not to contribute to the plan. In June, the employee elects (beginning July 1) to contribute a uniform percentage of compensation for each pay period to the plan for the remainder of the plan year. The employee is not a qualified participant in the plan during the period January–June, because no allocations are made to the employee's account with respect to compensation during that time, and it is not certain at that time that any allocations will be made. If the level of contributions during the period July–December meets the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation during that period, however, the employee is treated as a qualified participant during that period.

Example 4. Assume the same facts as in *Example 3,* except that the plan allows participants to cancel their elections in cases of economic hardship. In October, the employee suffers an economic hardship and cancels the election (effective November 1). If the contributions during the period July–October are high enough to meet the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to compensation during that period, the employee is treated as a qualified participant during that period. In addition, if the contributions during the period July–October are high enough to meet the requirements for the entire period July–December, the employee is treated as a qualified participant in the plan throughout the period July–December, even though no allocations are made to the employee's account in the last two months of the year. There is no requirement that the period used to determine whether an employee is a qualified participant on a given day remain the same from day to day, as long as the period begins on or after the beginning of the plan year and ends on the date the determination is being made.

(2) *Special rule for part-time, seasonal and temporary employees*—(i) *In general.* A part-time, seasonal or temporary employee is generally not a qualified participant on a given day unless any benefit relied upon to meet the requirements of paragraph (d)(1) of this section is 100-percent nonforfeitable on that day. This requirement may be applied solely to the portion of an employee's benefit under the retirement system attributable to compensation and service while an employee is a part-time, seasonal or temporary employee, provided that such service is taken into account with respect to the remaining portion of the benefit for vesting purposes. Rules similar to the rules in section 411(a)(11) are applicable in determining whether a benefit is nonforfeitable. Thus, a benefit does not fail to be nonforfeitable solely because it can be immediately distributed upon separation of service without the consent of the employee, provided that the present value of the benefit does not exceed the cash-out limit in effect under § 1.411(a)–11T(c)(3)(ii) of this chapter.

(ii) *Treatment of employees entitled to certain distributions upon death or separation from service.* A part-time, seasonal or temporary employee's benefit under a retirement system is considered nonforfeitable within the meaning of paragraph (d)(2)(i) of this section on a given day if on that day the employee is unconditionally entitled under the retirement system to a single-sum distribution on account of death or separation from service of an amount that is at least equal to 7.5 percent of the participant's compensation (within the meaning of paragraph (e)(2)(iii)(B) of this section) for all periods of credited service taken into account in determining whether the employee's benefit under the retirement system meets the minimum retirement benefit requirement of paragraph (e)(2) of this section. An employee will be considered to be unconditionally entitled to a single-sum distribution notwithstanding the fact that the distribution may be forfeitable (in whole or in part) upon a finding of such employee's criminal misconduct. The participant must be entitled to interest on the distributable amount through the date of distribution, at a rate meeting the requirements of paragraph (e)(2)(iii)(C) of this section, as part of the single sum. See paragraph (f)(2)(i)(C) for a transition rule relating to this nonforfeitable benefit safe harbor. The rule of this paragraph (d)(2)(ii) is illustrated by the following example:

Example. An employee is required to contribute 7.5 percent of his or her compensation to a State's defined benefit plan each year. The contribution is ''picked up'' by the employer in accordance with section 414(h). Under the plan, these amounts plus interest accrued since the date each amount was contributed are refundable to the employee in all cases upon the employee's death or separation from service with the employer. If the interest rate meets the requirements of paragraph (e)(2)(iii)(C) of this section, then the employee's benefits under the plan are considered nonforfeitable and thus meet the requirement of paragraph (d)(2)(i) of this section. Of course, the benefit under the plan must still meet the minimum retirement benefit requirement for defined benefit plans of paragraph (e)(2)(ii) of this section.

(iii) *Definitions of part-time, seasonal and temporary employee*—(A) *Definition of part-time employee.* For purposes of this section, a part-time employee is any employee who normally works 20 hours or less per week. A teacher employed by a post-secondary educational institution (e.g., a community or junior college, post-secondary vocational school, college, university or graduate school) is not considered a part-time employee for purposes of this section if he or she normally has classroom hours of one-half or more of the number of classroom hours designated by the educational institution as constituting full-time employment, provided that such designation is reasonable under all the facts and circumstances. In addition, elected officials and election workers (otherwise described in section 3121(b)(7)(F)(iv) but paid in excess of $100 annually) are not considered part-time, seasonal or temporary employees for purposes of this section. The rules of this paragraph (d)(2)(iii) are illustrated by the following example:

Example. A community college treats a teacher as a full-time employee if the teacher is assigned to work 15 classroom hours per week. A new teacher is assigned to work 8 classroom hours per week. Because the assigned classroom hours of the teacher are at least one-half of the school's definition of full-time teacher, the teacher is not a part-time employee.

(B) *Definition of seasonal employee.* For purposes of this section, a seasonal employee is any employee who normally works on a full-time basis less than 5 months in a year. Thus, for example, individuals who are hired by a political subdivision during the tax return season in order to process incoming returns and work full-time over a 3-month period are seasonal employees.

(C) *Definition of temporary employee.* For purposes of this section, a temporary employee is any employee performing services under a contractual arrangement with the employer of 2 years or less duration. Possible contract extensions may be considered in determining the duration of a contractual arrangement, but only if, under the facts and circumstances, there is a significant likelihood that the employee's contract will be extended. Future contract extensions are considered significantly likely to occur for purposes of this rule if on average 80 percent of similarly situated employees (i.e., those in the same or a similar job classification with expiring employment contracts) have had bona fide offers to renew their contracts in the immediately preceding 2 academic or calendar years. In addition, future contract extensions are considered significantly likely to occur if the employee with respect to whom the determination is being made has a history of contract extensions with respect to his or her current position. An employee is not considered a temporary employee for purposes of this rule solely because he or she is included in a unit of employees covered by a collective bargaining agreement of 2 years or less duration.

(D) *Treatment of employees participating in certain systems.* Whether an employee is a part-time, seasonal or temporary employee with respect to allocations or benefits under a retirement system is generally determined based on service in the position in which the allocations or benefits were earned, and does not take into account service in other positions with the same or different States, political subdivisions or instrumentalities thereof. All of an employee's service in other positions with the same or different

States, political subdivisions or instrumentalities thereof may be taken into account for purposes of determining whether an employee is a part-time, seasonal or temporary employee with respect to benefits under the retirement system, however, *Provided that:* The employee's service in the other positions is or was covered by the retirement system; all service aggregated for purposes of determining whether an employee is a part-time, seasonal or temporary employee (and related compensation) is aggregated under the system for all purposes in determining benefits (including vesting); and the employee is treated at least as favorably as a full-time employee under the retirement system for benefit accrual purposes. The rule of this paragraph (d)(2)(iii)(D) is illustrated by the following example:

Example. Assume that an employee works 15 hours per week for a county and 10 hours per week for a municipality, and that both of these political subdivisions contribute to the same state-wide public employee retirement system. Assume further that the employee's service in both positions is aggregated under the system for all purposes in determining benefits (including vesting). If the employee is covered under the retirement system with respect to both positions and is treated for benefit accrual purposes at least as favorably as full-time employees under the retirement system, then the employee is not considered a part-time employee of either the county or the municipality for purposes of the nonforfeitable benefit requirement of paragraph (d)(2)(i) of this section.

(3) *Alternative lookback rule*—(i) *In general.* An employee may be treated as a qualified participant in a retirement system throughout a calendar year if he or she was a qualified participant in such system (within the meaning of paragraphs (d) (1) and (2) of this section) at the end of the plan year of the system ending in the previous calendar year. This rule is illustrated by the following examples:

Example 1. A political subdivision maintains a plan that is a retirement system within the meaning of paragraph (e)(1) of this section. An employee is a qualified participant within the meaning of paragraph (d)(1) of this section in the plan on the last day of the plan year ending on May 31, 1995. If the alternative lookback rule is used to determine FICA liability, no such liability exists with respect to the employee or employer for calendar year 1996 by reason of section 3121(b)(7)(F). The same result would apply if the determination is being made with respect to calendar year 1992 and the lookback year was the plan year ending May 31, 1991, even though that plan year ended before the effective date of section 3121(b)(7)(F).

Example 2. A political subdivision maintains an elective defined contribution plan described in section 457(b) of the Code. An employee is eligible to participate in the plan but does not elect to contribute for a plan year. Under the general rule of paragraph (d)(1) of this section, the employee is not a qualified participant in the plan during the plan year because contributions sufficient to meet the minimum retirement benefit requirement of paragraph (e)(2) of this section are not being made. However, if an employee's status as a qualified participant is being determined under the alternative lookback rule, then the employee is a qualified participant for the calendar year in which the determination is being made if he of she was a qualified participant as of the end of the plan year that ended in the previous calendar year.

(ii) *Application in first year of participation.* If the alternative lookback rule is used, an employee who participates in the retirement system may be treated as a qualified participant on any given day during his or her first plan year of participation in a retirement system (within the meaning of paragraph (e)(1) of this section) if and only if it is reasonable on such day to believe that the employee will be a qualified participant (within the meaning of paragraphs (d)(1) and (2) of this section) on the last day of such plan year. In the case of a defined contribution retirement system, the determination of whether the employee is actually (or is expected to be) a qualified participant at the end of the plan year must take into account all compensation since the commencement of participation. See paragraph (d)(3)(iv) of this section. If this reasonable belief is correct, and the employee is a qualified participant on the last day of his or her first plan year of participation, then the exception from employment in section 3121(b)(7) will apply without regard to section 3121(b)(7)(F) to services of the employee for the balance of the calendar year in which the plan year ends. For purposes of this paragraph (d)(3)(ii), it is not reasonable to assume the establishment of a new plan until such establishment actually occurs. In addition, the rule in this paragraph (d)(3)(ii) may not be used to treat an employee as a qualified participant until the employee actually becomes a participant in the retirement system. In the case of a retirement system that does not permit a new employee to participate until the first day of the first month beginning after the employee's commencement of service, or some earlier date, a new employee who is not a part-time, seasonal or temporary employee may be treated as a qualified participant until such date. This 1-month rule of administrative convenience applies without regard to whether the employer has a reasonable belief that the employee will be a qualified participant. The rules of this paragraph (d)(3)(ii) are illustrated by the following examples:

Example 1. A political subdivision maintains a plan that is a retirement system within the meaning of paragraph (e)(1) of this section and uses the alternative lookback rule of this paragraph (d)(3). Under the terms of the plan, service during a plan year is not credited for accrual purposes unless a participant has at least 1,000 hours of service during the year. Assume that an employee becomes a participant. If it is reasonable to believe that the employee will be credited with 1,000 hours of service by the last day of his or her first year of participation and thereby become a qualified participant by reason of accruing a benefit that meets the minimum retirement benefit requirement of paragraph (e)(2) of this section, the services of the employee are not subject to FICA tax from the date of initial participation until the end of that plan year. If the employee is a qualified participant on the last day of his or her first plan year of participation, then the exception from employment for purposes of FICA will apply to services of the employee for the balance of the calendar year in which the plan year ended.

Example 2. Assume the same facts as *Example 1*, except that the employee is a newly hired employee and the plan provides that an employee may not participate until the first day of his or her first full month of employment. Under the 1-month rule of convenience, the employee may be treated as a qualified participant until the first date on which he or she could participate in the plan.

(iii) *Application in last year of participation.* If the alternative lookback rule is used, an employee may be treated as a qualified participant on any given day during his or her last year of participation in a retirement system (within the meaning of paragraph (e)(1) of this section) if and only if it is reasonable to believe on such day that the employee, will be a qualified participant (within the meaning of paragraphs (d)(1) and (2) of this section) on his or her last day of participation. For purposes of this paragraph (d)(3)(iii), an employee's last year of participation means the plan year that the employer reasonably ascertains is the final year of such employee's participation (e.g., where the employee has a scheduled retirement date or where the employer intends to terminate the plan).

(iv) *Special rule for defined contribution retirement systems.* An employee may not be treated as a qualified participant in a defined contribution retirement system under this paragraph (d)(3) if compensation for less than a full plan year or other 12-month period is regularly taken into account in determining allocations to the employee's account for the plan year unless, under all of the facts and circumstances, such arrangement is not a device to avoid the imposition of FICA taxes. For example, an arrangement under which compensation taken into account is limited to the contribution base described in section 3121(x)(1) is not considered a device to avoid FICA taxes by reason of such limitation. See paragraph (e)(2)(iii)(B) of this section for a rule permitting the use of such limitation. This rule is illustrated by the following example:

Example. A political subdivision maintains a defined contribution plan that covers all of its full-time employees and is a retirement system within the meaning of paragraph (e)(1) of this section. Under the plan, a portion of each participant's compensation in the final month of every plan year is allocated to the participant's account. Employees covered under the plan generally may not be treated as qualified participants under the alternative lookback rule for any portion of the calendar year following the year in which such allocation is made.

(v) *Consistency requirement.* Beginning with calendar year 1992, if the alternative lookback rule is used to determine whether an employee is a qualified participant, it must be used consistently from year to year and with respect to all employees of the State, political subdivision or instrumentality thereof making the determination. If a retirement system is sponsored by more than one State, political subdivision or instrumentality, this consistency requirement applies separately to each plan sponsor.

(4) *Treatment of former participants*—(i) *In general.* In general, the rules of this paragraph (d) apply equally to former participants who continue to perform service for the same State, political subdivision or instrumentality thereof or who return after a break in service. Thus, for example, a former employee of a political subdivision with a deferred benefit under a defined benefit retirement system maintained by the political subdivision who is reemployed by the political subdivision but does not resume participation in the retirement system, may continue to be a qualified participant in the system after becoming reemployed if his or her total accrued benefit under the system meets the minimum retirement benefit requirement of paragraph (e)(2) of this section (taking into account all periods of service (including current service) required to be taken into account under that paragraph). See also paragraph (e)(2)(v) of this section for situations in which benefits under a retirement system may be taken into account even though they relate to service for another employer.

(ii) *Treatment of re-hired annuitants.* An employee who is a former participant in a retirement system maintained by a State, political subdivision or instrumentality thereof, who has previously retired from service with the State, political subdivision or instrumentality, and who is either in pay status (i.e., is currently receiving retirement benefits) under the retirement system or has reached nomal retirement age under the retirement system, is deemed to be a qualified participant in the retirement system without regard to whether he or she continues to accrue a benefit or whether the distribution of benefits under the retirement system has been suspended pending cessation of services. This rule also applies in the case of an employee who has retired from service with another State, political subdivision or instrumentality thereof that maintains the same retirement system as the current employer, provided the employee is a former participant in the system by reason of the employee's former employment. Thus, for example, if a teacher retires from service with a school district that participates in a state-wide teachers' retirement system, begins to receive benefits from the system, and later becomes a substitute teacher in another school district that participates in the same state-wide system, the employee is treated as a re-hired annuitant under this paragraph (d)(4)(ii).

(e) *Definition of retirement system*—(1) *Requirement that system provide retirement-type benefits.* For purposes of section 3121(b)(7)(F), a retirement system includes any pension, annuity, retirement or similar fund or system within the meaning of section 218 of the Social Security Act that is maintained by a State, political subdivision or instrumentality thereof to provide retirement benefits to its employees who are participants. Whether a plan is maintained to provide retirement benefits with respect to an employee is determined under the facts and circumstances of each case. For example, a plan providing only retiree health insurance or other deferred welfare benefits is not considered a retirement system for this purpose. The legal form of the system is generally not relevant. Thus, for example, a retirement system may include a plan described in section 401(a), an annuity plan or contract under section 403 or a plan described in section 457(b) or (f) of the Internal Revenue Code. In addition, the Social Security system is not a retirement system for purposes of section 3121(b)(7)(F) and this section. These rules are illustrated by the following examples:

Example 1. Under an employment arrangement, a portion of an employee's compensation is regularly deferred for 5 years. Because a plan that defers the receipt of compensation for a short span of time rather than until retirement is not a plan that provides retirement benefits, this arrangement is not a retirement system for purposes of section 3121(b)(7)(F).

Example 2. An individual holds two positions with the same political subdivision. The wages earned in one position are subject to FICA tax pursuant to an agreement (under section 218 of the Social Security Act) between the Secretary of Health and Human Services and the State in which the political subdivision is located. Because the Social Security system is not a retirement system for purposes of section 3121(b)(7)(F), the exception from employment in section 3121(b)(7) does not apply to service in the other position unless the employee is otherwise a member of a retirement system of such political subdivision.

(2) *Requirement that system provide minimum level of benefits*—(i) *In general.* A pension, annuity, retirement or similar fund or system is not a retirement system with respect to an employee unless it provides a retirement benefit to the employee that is comparable to the benefit provided under the Old-Age portion of the Old-Age, Survivor and Disability Insurance program of Social Security. Whether a retirement system meets this requirement is generally determined on an individual-by-individual basis. Thus, for example, a pension plan that is not a retirement system with respect to an employee may nevertheless be a retirement system with respect to other employees covered by the system.

(ii) *Defined benefit retirement systems.* A defined benefit retirement system maintained by a State, political subdivision or instrumentality thereof meets the requirements of this paragraph (e)(2) with respect to an employee on a given day if and only if, on that day, the employee has an accrued benefit under the system that entitles the employee to an annual benefit commencing on or before his or her Social Security retirement age that is at least equal to the annual Primary Insurance Amount the employee would have under Social Security. For this purpose, the Primary Insurance Amount an individual would have under Social Security is determined as it would be under the Social Security Act if the employee had been covered under Social Security for all periods of service with the State, political subdivision or instrumentality, had never performed service for any other employer, and had been fully insured within the meaning of section 214(a) of the Social Security Act, except that all periods of service with the State, political subdivision or instrumentality must be taken into account (i.e., without reduction for low-earning years).

(iii) *Defined contribution retirement systems*—(A) *In general.* A defined contribution retirement system maintained by a State, political subdivision or instrumentality thereof meets the requirements of paragraph (e)(2)(i) of this section with respect to an employee if and only if allocations to the employee's account (not including earnings) for a period are at least 7.5 percent of the employee's compensation for service for the State, political subdivision or instrumentality during the period. Matching contributions by the employer may be taken into account for this purpose.

(B) *Definition of compensation.* The definition of compensation used in determining whether a defined contribution retirement system meets the minimum retirement benefit requirement must generally be no less inclusive than the definition of the employee's base pay as designated by the employer or the retirement system, provided such designation is reasonable under all the facts and circumstances. Thus, for example, a defined contribution retirement system will not fail to meet this requirement merely because it disregards for all purposes one or more of the following: overtime pay, bonuses, or single-sum amounts received on account of death or separation from service under a bona fide vacation, compensatory time or sick pay plan, or under severance pay plans. Furthermore, any compensation remaining after such amounts are disregarded that is in excess of the contribution base described in section 3121(x)(1) at the beginning of the plan year may also be disregarded. The rules of this paragraph are illustrated by the following example:

Example. A political subdivision maintains an elective defined contribution plan that is a retirement system within the meaning of paragraph (e)(1) of this section. The plan has a calendar year plan year. In 1995, an employee contributes to the plan at a rate of 7.5 percent of base pay. Assume that the employee will reach the maximum contribution base described in section 3121(x)(1) in October of 1995. The employee is a qualified participant in the plan for all of the 1995 plan year without regard to whether the employee ceases to participate at any time after reaching the maximum contribution base.

(C) *Reasonable interest rate requirement.* A defined contribution retirement system does not satisfy this paragraph (e)(2) with respect to an employee unless the employee's account is credited with earnings at a rate that is reasonable under all the facts and circumstances, or employees' accounts are held in a separate trust that is subject to general fiduciary standards and are credited with actual earnings on the trust fund. Whether the interest rate with which an employee's account is credited is reasonable is determined after reducing the rate to adjust for the payment of any administrative expenses. The rule of this paragraph (e)(2)(iii)(C) is illustrated by the following example:

Example. A political subdivision maintains a defined contribution plan described in section 457(b). Under the plan, the accounts of participants are credited annually on the basis of a variable interest rate formula determined as of the beginning of the plan year. The formula requires an interest rate (after adjustment for administrative expense payments) equal to 100 percent of the Applicable Federal Rate for long-term debt instruments. This interest rate constitutes a reasonable rate of interest.

(iv) *Treatment of emloyees employed in more than one position with the same entity.* All service and compensation of an employee with respect to his or her employment with a State, political subdivision or instrumentality thereof must generally be considered in determining whether a benefit meets the requirement of this paragraph (e)(2). However, for individuals employed simultaneously in multiple positions with the same entity, this determination may (but is not required to) be made solely by reference to the service and compensation related to a single position of the employee with the State, political subdivision or instrumentality thereof making the determination, provided that the position is not a part-time, seasonal or temporary position.

(v) *Treatment of employees participating in certain systems.* In general, only compensation from and service for the State, political subdivision or instrumentality thereof that employs the employee (and the allocations or benefits related to such compensation or service) on a given day are considered in determining whether the employee's benefit under the retirement system on that day meets the requirements of this paragraph (e)(2), even if the employee has other allocations or benefits under the same retirement system from service with another State, political subdivision or instrumentality thereof. However, an employee's total allocations or benefits under a retirement system maintained by multiple States, political subdivisions or instrumentalities thereof (including the current employer) may be taken into account if:

(A) The compensation and service on which the additional allocations or benefits are based are also taken into account in determining whether the employee's allocations or benefits satisfy the minimum retirement benefit requirement;

(B) The retirement system takes all service and compensation of the employee in all positions covered by the system into account for all benefit determination purposes; and

(C) If the employee is a part-time, seasonal or temporary employee, he or she is treated under the plan for benefit accrual purposes in as favorable a manner as a full-time employee participating in the system.

(vi) *Additional testing methods.* Additional testing methods may be designated by the Commissioner in revenue procedures, revenue rulings, notices or other documents of general applicability.

(f) *Transition rules*—(1) *Application of qualified participant rules during 1991*—(i) *In general.* An employee may be treated as a qualified participant in a retirement system (within the meaning of paragraph (e)(1) of this section) on a given day during the period July 1 through December 31, 1991, if it is reasonable on that day to believe that he or she will be a qualified participant under the general rule in paragraphs (d) (1) and (2) of this section by January 1, 1992 (taking into account only service and compensation on or after such date). For purposes of this paragraph (f)(1)(i), given the facts and circumstances of a particular case, it may be reasonable to assume that the terms of a plan will be changed or that a new retirement system will be established by the end of calendar year 1991, as long as affirmative steps have been taken to accomplish this result.

(ii) *Extension of reliance period if legislative action required.* If a plan amendment or other action is necessary in order to treat an employee as a member of a retirement system for purposes of this section, such amendment or other action may only be taken by a legislative body that does not convene during the period July 1, 1991, through December 31, 1991, and the other requirements of paragraph (f)(1)(i) of this section are met, the end of the reasonable reliance period (including the rule that service and compensation prior to that date may be disregarded) provided under paragraph (f)(1)(i) of this section is extended from December 31, 1991, to the date that is the last day of the first legislative session commencing after December 31, 1991. These rules are illustrated by the following examples:

Example 1. A State maintains a defined benefit plan that meets the requirements of paragraph (e) of this section. The plan does not cover a particular class of full-time employees as of July 1, 1991. However, in light of the enactment of section 3121(b)(7)(F), State officials administering the plan for the State intend to request that the legislature amend the State statute to include that class of employees in the existing plan and otherwise to modify the terms of the plan to meet the requirements of section 3121(b)(7)(F) and this section. The State legislature meets from January through March each year, and legislative action is required to expand coverage under the plan. State officials administering the plan have publicized the proposed amendment providing for the addition of these employees to the plan. Under the transition rule for 1991, if it is reasonable to believe that the legislature will pass this bill in the 1992 session, service by the employees who will be covered under the plan by reason of the amendment is not treated as employment by reason of section 3121(b)(7)(F) during the period prior to April 1, 1992. This is true regardless of whether the plan provides retroactive coverage for the period July 1, 1991 through March 31, 1992.

Example 2. Assume the same facts as in *Example 1,* except that legislative action is not required in order to expand coverage under the plan, and that publication of the proposed change to the plan occurs in 1991. Assume further that coverage is expanded under the plan to include the new class of full-time employees as of April 1, 1992. Despite this action, in this situation the service by those employees during the period January 1, 1992 through March 31, 1992 is not excluded from ‘‘employment’’ under section 3121(b)(7)(F), and wages for that period are generally subject to FICA taxes even if the plan provides retroactive coverage for any portion of the period July 1, 1991 to March 31, 1992.

(2) *Additional transition rules for plans in existence on November 5, 1990*—(i) *Application of minimum retirement benefit requirement to defined benefit retirement systems in plan years beginning before 1993*—(A) *In general.* A defined benefit retirement system maintained by a State, political subdivision or instrumentality thereof on November 5, 1990, is not subject to the minimum retirement benefit requirement of paragraph (e)(2) of this section for any plan year beginning before January 1, 1993, with respect to individuals who were actually covered under the system on November 5, 1990. Such a retirement system is also not subject to the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to an employee who becomes a participant after November 5, 1990, if he or she is employed in a position that was covered under the retirement system on November 5, 1990, without regard to whether such coverage was mandatory or elective. A retirement system is not described in this paragraph (f)(2)(i)(A) if there has been a material decrease in the level of retirement benefits under the retirement system pursuant to an amendment adopted subsequent to November 5, 1990. Whether such a material decrease in benefits has occurred is determined under the facts and circumstances of each case. A decrease in benefits is not material to the extent that it does not decrease the benefit payable at normal retirement age. These rules are illustrated by the following examples:

Example 1. The retirement formula under a retirement plan that was in existence on November 5, 1990, is amended to use career average compensation instead of a high 3-year average, without any increase in the benefit formula. This amendment constitutes a material decrease in the level of benefit under the retirement plan. Therefore, the retirement plan is subject to the minimum retirement benefit requirement for the plan year for which the amendment is effective and for all succeeding plan years.

Example 2. A defined benefit retirement plan that was in existence on November 5, 1990, is subsequently amended to include part-time employees. Previously, this class of employees was not covered under the plan either on a mandatory or on an elective basis. The plan is subject to the minimum retirement benefit requirement with respect to the part-time employees because this class of employees was previously excluded from coverage under the retirement plan. Of course, the nonforfeitable benefit rule applies to the benefit relied upon to meet the minimum retirement benefit requirement with respect to any part-time, seasonal or temporary employee covered during this period.

(B) *Treatment in plan years beginning after 1992 of benefits accrued during previous plan years.* The general rule that a defined benefit retirement system meets the minimum retirement benefit requirement on the basis of total benefits and service accrued to date is modified for plans in existence on November 5, 1990. If a defined benefit retirement system in existence on November 5, 1990, does not meet the minimum retirement benefit requirement solely because the benefits accrued for an employee (with respect to whom the system is entitled to relief under paragraph (f)(2)(i)(A) of this section) as of the last day of the last plan year beginning before January 1, 1993, do not meet the minimum retirement benefit requirement of paragraph (e)(2) of this section with respect to service and compensation before that time, then the retirement system will be deemed to comply with the requirements of paragraph (e)(2) of this section if the future service accruals would comply with the requirement of paragraph (e)(2) of this section. If retirement benefits under a retirement system in existence on November 5, 1990 are materially decreased within the meaning of paragraph (f)(2)(i)(A) of this section, then the date the decrease is effective is substituted for January 1, 1993 for purposes of this paragraph. The rule of this paragraph (f)(2)(i)(B) is illustrated by the following example:

Example. A defined benefit plan maintained by a State was in existence on November 5, 1990. It provides a retirement benefit on the last day of the 1992 plan year that is insufficient to meet the requirements of paragraph (e)(2) of this section based on employees' total service and compensation with the State at that time. The plan will nevertheless meet the requirements of paragraph (e)(2) of this section if it is amended to provide benefits sufficient to meet the requirements of paragraph (e)(2) of this section based on employees' service and compensation in plan years beginning after December 31, 1992.

(C) *Treatment of part-time, seasonal or temporary employees.* A defined benefit retirement system is not exempt from the minimum retirement benefit requirement with respect to a part-time, seasonal or temporary employee during the transition period provided in paragraph (f)(2)(i)(A) of this section unless any retirement benefit provided to the employee is 100-percent nonforfeitable within the meaning of paragraph (d)(2) of this section. In determining whether the benefit is nonforfeitable, the special rule in paragraph (d)(2)(ii) of this section is modified in two respects during the transition period: first, the percentage of compensation required to be available for distribution is reduced from 7.5 percent to 6 percent; and second, the period of service with respect to which compensation must be determined is modified to include all periods of participation by the employee in the system since July 1, 1991.

(ii) *Application of minimum retirement benefit requirement to defined contribution retirement systems in plan years beginning before 1993.* A defined contribution retirement system maintained by a State, political subdivision or instrumentality thereof on November 5, 1990, meets the minimum retirement benefit requirement of paragraph (e) (2) of this section with respect to an employee for any plan year beginning before January 1, 1993, if mandatory allocations to the employee's account (not including earnings) for a period are at least 6 percent (rather than 7.5 percent) of the employee's compensation for service to the State, political subdivision or instrumentality during the period, and the plan otherwise meets the requirements of paragraph (e)(2)(iii) of this section. This transition rule is only available with respect to an employee who is actually covered under the system on November 5, 1990, and to an employee who becomes a participant after November 5, 1990, if he or she is employed in a position that was covered under the retirement system on November 5, 1990, without regard to whether such coverage was mandatory or elective. In addition, this transition rule is not available with respect to a part-time, seasonal or temporary employee unless the mandatory allocation required under this paragraph (f)(2)(ii) is 100-percent nonforfeitable within the meaning of paragraph (d)(2) of this section. A retirement system is not described in this paragraph (f)(2)(ii) if there has been a material decrease in the level of retirement benefits under the retirement system pursuant to an amendment adopted subsequent to November 5, 1990. Whether such a material decrease in benefits has occurred is determined under all the facts and circumstances.

(iii) *Application of qualified participant rules.* A participant with respect to whom relief is granted under paragraph (f)(2)(i)(A) of this section may be treated as a qualified participant in the defined benefit retirement system on a given day if, on that day, he or she is actually a participant in the retirement system, and, on that day, it is reasonable to believe that the participant will actually accrue a benefit before the end of the plan year of such retirement system in which the determination is made. A participant is not treated as accruing a benefit for purposes of this rule if his or her accrued benefits increase solely as a result of an increase in compensation. However, an employee is treated as a qualified participant for a plan year if the employee meets all of the applicable conditions for accruing the maximum current benefit for such year but fails to accrue a benefit solely because of a uniformly applicable benefit limit under the plan. In addition, an employee may be treated as a qualified participant in the system on a given day if the employee is a re-hired annuitant within the meaning of paragraph (d)(4)(ii) of this section. This rule is illustrated by the following example:

Example. A political subdivision maintains a defined benefit plan that is a retirement system within the meaning of paragraph (e)(1) of this section but does not meet the requirements of paragraph (e)(2) of this section. If the plan is not subject to the minimum retirement benefit requirement, an employee who is a participant in the retirement plan as of the end of a plan year beginning before January 1, 1993, and may reasonably be expected to accrue a benefit under the plan by the end of such plan year may be treated as a qualified participant in the plan throughout the plan year regardless of the actual amount of the accrual.

[T.D. 8354, 56 FR 29570, June 28, 1991; 56 FR 40246, Aug. 14, 1991, as amended by T.D. 8794, 63 FR 70338, Dec. 21, 1998]

§ 31.3121(b)(8)–1 Services performed by a minister of a church or a member of a religious order.

(a) *In general.* Services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, or by a member of a religious order in the exercise of his duties required by such order, are excluded from employment, except that services performed by a member of such an order in the exercise of such duties (whether performed for the order or for another employer) are included in employment if an election of coverage under section 3121(r) and § 31.3121(r)–1 is in effect with respect to such order or with respect to the autonomous subdivision thereof to which such member belongs. For provisions relating to the election available to certain ministers and members of religious orders with respect to the extension of the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act to certain services performed by them, see Part 1 of this chapter (Income Tax Regulations).

(b) *Service by a minister in the exercise of his ministry.* Except as provided in paragraph (c)(3) of this section, service performed by a minister in the exercise of his ministry includes the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination. The following rules are applicable in determining whether services performed by a minister are performed in the exercise of his ministry:

(1) Whether service performed by a minister constitutes the conduct of religious worship or the ministration of

sacerdotal functions depends on the tenets and practices of the particular religious body constituting his church or church denomination.

(2) Service performed by a minister in the control, conduct, and maintenance of a religious organization relates to directing, managing, or promoting the activities of such organization. Any religious organization is deemed to be under the authority of a religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenets and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith. The term ''religious organization'' has the same meaning and application as is given to the term for income tax purposes.

(3) (i) If a minister is performing service in the conduct of religious worship or the ministration of sacerdotal functions, such service is in the exercise of his ministry whether or not it is performed for a religious organization.

(ii) The rule in paragraph (b)(3)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged to perform service as chaplain at N University. M devotes his entire time to performing his duties as chaplain which include the conduct of religious worship, offering spiritual counsel to the university students, and teaching a class in religion. M is performing service in the exercise of his ministry.

(4) (i) If a minister is performing service for an organization which is operated as an integral agency, of a religious organization under the authority of a religious body constituting a church or church denomination, all service performed by the minister in the conduct of religious worship, in the ministration of sacerdotal functions, or in the control conduct, and maintenance of such organization (see paragraph (b)(2) of this section) is in the exercise of his ministry.

(ii) The rule in paragraph (b)(4)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by the N Religious Board to serve as director of one of its departments. He performs no other service. The N Religious Board is an integral agency of O, a religious organization operating under the authority of a religious body constituting a church denomination. M is performing service in the exercise of his ministry.

(5) (i) If a minister, pursuant to an assignment or designation by a religious body constituting his church, performs service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization, all service performed by him, even though such service may not involve the conduct of religious worship or the ministration of sacerdotal functions, is in the exercise of his ministry.

(ii) The rule in paragraph (b)(5)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is assigned by X, the religious body constituting his church, to perform advisory service to Y Company in connection with the publication of a book dealing with the history of M's church denomination. Y is neither a religious organization nor operated as an integral agency of a religious organization. M performs no other service for X or Y. M is performing service in the exercise of his ministry.

(c) *Service by a minister not in the exercise of his ministry.* (1) Section 3121(b)(8)(A) does not except from employment service performed by a duly ordained, commissioned, or licensed minister of a church which is not in the exercise of his ministry.

(2) (i) If a minister is performing service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization and the service is not performed pursuant to an assignment or designation by his ecclesiastical superiors, then only the service performed by him in the conduct of religious worship or the ministration of sacerdotal functions is in the exercise of his ministry. See, however, paragraph (c)(3) of this section.

(ii) The rule in paragraph (c)(2)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by N University to teach history and mathematics. He performs no other service for N although from time to time he performs marriages and conducts funerals for relatives and friends. N University is neither a religious organization nor operated as an integral agency of a religious organization. M is not performing the service for N pursuant to an assignment or designation by his ecclesiastical superiors. The service performed by M for N University is not in the exercise of his ministry. However, service performed by M in performing marriages and conducting funerals is in the exercise of his ministry.

(3) Service performed by a duly ordained, commissioned, or licensed minister of a church as an employee of the United States, or a State, Territory, or possession of the United States, or the District of Columbia, or a foreign government, or a political subdivision of any of the foregoing, is not considered to be in the exercise of his ministry for purposes of the taxes, even though such service may involve the ministration of sacerdotal function or the conduct of religious worship. Thus, for example, service performed by an individual as a chaplain in the Armed Forces of the United States is considered to be performed by a commissioned officer in his capacity as such, and not by a minister in the exercise of his ministry. Similarly, service performed by an employee of a State as a chaplain in a State prison is considered to be performed by a civil servant of the State and not by a minister in the exercise of his ministry.

(d) *Service in the exercise of duties required by a religious order.* Service performed by a member of a religious order in the exercise of duties required by such order includes all duties required of the member by the order. The nature or extent of such service is immaterial so long as it is a service which he is directed or required to perform by his ecclesiastical superiors.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.3121(b)(8)–2 Services in employ of religious, charitable, educational, or certain other organizations exempt from income tax.

(a) Services performed by an employee in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a) are excepted from employment. However, this exception does not apply to services with respect to which a certificate, filed pursuant to section 3121 (k) or (r), or section 1426(l) of the Internal Revenue Code of 1939, is in effect. For provisions relating to the services with respect to which such a certificate is in effect, see §§ 31.3121(k)–1 and 31.3121(r)–1.

(b) For provisions relating to exemption from income tax of an organization described in section 501(c)(3), see Part 1 of this chapter (Income Tax Regulations). For provisions relating to waiver by an organization of its exemption from the taxes imposed by sections 3101 and 3111, see § 31.3121(k)–1. See also § 31.3121(b)(8)–1, relating to services performed by a minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; § 31.3121(b)(10)–1, relating to services for remuneration of less than $50 for calendar quarter in the employ of certain organizations exempt from income tax; § 31.3121(b)(10)–2, relating to services performed in the employ of a school, college, or university by certain students; and § 31.3121(b)(13)–1, relating to services performed by certain student nurses and hospital interns.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.3121(b)(9)–1 Railroad industry; services performed by an employee or an employee representative as defined in section 3231.

Services performed by an individual as an ‘‘employee’’ or as an ‘‘employee representative’’, as those terms are defined in section 3231, are excepted from employment. For definitions of employee and employee representatives, see §§ 31.3231(b)–1 and 31.3231(c)–1.

§ 31.3121(b)(10)–1 Services for remuneration of less than $50 for calendar quarter in the employ of certain organizations exempt from income tax.

(a) Services performed by an employee in a calendar quarter in the employ of an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 are excepted from employment if the remuneration for the services is less than

$50. The test relating to remuneration of $50 is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. The exception applies separately with respect to each organization for which the employee renders services in a calendar quarter. The type of services performed by the employee and the place where the services are performed are immaterial; the statutory tests are the character of the organization in the employ of which the services are performed and the amount of the remuneration for services performed by the employee in the calendar quarter. For provisions relating to exemption from income tax under section 501(a) or 521, see Part 1 of this chapter (Income Tax Regulations).

Example 1. X is a local lodge of a fraternal organization and is exempt from income tax under section 501(a) as an organization of the character described in section 501(c)(8). X has two paid employees, A, who serves exclusively as recording secretary for the lodge, and B, who performs services for the lodge as janitor of its clubhouse. For services performed during the first calendar quarter of 1955 (that is, January 1, 1955, through March 31, 1955, both dates inclusive) A earns a total of $30. For services performed by certain student quarter B earns $180. Since the remuneration for the services performed by A during such quarter is less than $50, all of such services are expected, and the taxes do not attach with respect to any of the remuneration for such services. Since the remuneration for the services performed by B during such quarter, however, is not less than $50, none of such services are excepted, and the taxes attached with respect to all of the remuneration for such services (that is, $180) as and when paid.

Example 2. The facts are the same as in example 1, above, except that on April 1, 1955, A's salary is increased and, for services performed during the calendar quarter beginning on that date (that is, April 1, 1955, through June 30, 1955, both dates inclusive), A earns a total of $60. Although all of the services performed by A during the first quarter were excepted, none of A's services performed during the second quarter are excepted since the remuneration for such services is not less than $50. The taxes attach with respect to all of the remuneration for services performed during the second quarter (that is, $60) as and when paid.

Example 3. The facts are the same as in example 1, above, except that A earns $120 for services performed during the year 1955, and such amount is paid to him in a lump sum at the end of the year. The services performed by A in any calendar quarter during the year are excepted if the portion of the $120 attributable to services performed in that quarter is less than $50. If, however, the portion of the $120 attributable to services performed in any calendar quarter during the year is not less than $50, the services during that quarter are not excepted, and the taxes attach with respect to that portion of the remuneration attributable to his services in that quarter.

(b) See § 31.3121(b)(8)–2, relating to services performed in the employ of religious, charitable, educational, and certain other organizations exempt from income tax; § 31.3121(b)(8)–1, relating to services performed by a minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; § 31.3121(b)(10)–2, relating to services performed by certain students in the employ of a school, college, or university or of a nonprofit organization auxiliary to a school, college, or university; and § 31.3121(b)(13)–1, relating to services performed by certain student nurses and hospital interns.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7373, 40 FR 30958, July 24, 1975]

§ 31.3121(b)(10)–2 Services performed by certain students in the employ of a school, college, or university, or of a nonprofit organization auxiliary to a school, college, or university.

(a) (1) Services performed in the employ of a school, college, or university (whether or not such organization is exempt from income tax) are excepted from employment, if the services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university.

(2) Services performed after 1972 in the employ of an organization which is—

(i) Described in section 509(a)(3) and § 1.509(a)–4;

(ii) Organized, and at all times thereafter operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of a school, college, or university; and

(iii) Operated, supervised, or controlled by or in connection with such school, college, or university;

are excepted from employment, if the services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university. The preceding sentence shall not apply to services performed in the employ of a school, college, or university of a State or a political subdivision thereof by a student referred to in section 218(c)(5) of the Social Security Act (42 U.S.C. 418(c)(5)) if such services are covered under the agreement between the Secretary of Health, Education, and Welfare and such State entered into pursuant to section 218 of such Act. For the definitions of ''operated, supervised, or controlled by'', ''supervised or controlled in connection with'', and ''operated in connection with'', see paragraphs (g), (h), and (i), respectively, of § 1.509(a)–4.

(b) For purposes of this exception, the amount of remuneration for services performed by the employee in the calendar quarter, the type of services performed by the employee, and the place where the services are performed are immaterial. The statutory tests are (1) the character of the organization in the employ of which the services are performed as a school, college, or university, or as an organization described in paragraph (a)(2) of this section, and (2) the status of the employee as a student enrolled and regularly attending classes at the school, college, or university by which he is employed or with which his employer is affiliated.

(c) The status of the employee as a student performing the services shall be determined on the basis of the relationship of such employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university, as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services. An employee who performs services in the employ of an organization described in paragraph (a)(2) of this section, as an incident to and for the purpose of pursuing a course of study at a school, college, or university with which such organization is affiliated, has the status of a student in the performance of such services.

(d) The term ''school, college, or university'' within the meaning of this exception is to be taken in its commonly or generally accepted sense.

(e) For provisions relating to domestic service performed by a student in a local college club, or local chapter of a college fraternity or sorority, see § 31.3121(b)(2)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7373, 40 FR 30958, July 24, 1975]

§ 31.3121(b)(11)–1 Services in the employ of a foreign government.

(a) Services performed by an employee in the employ of a foreign government are excepted from employment. The exception includes not only services performed by ambassadors, ministers, and other diplomatic officers and employees but also services performed as a consular or other officer or employee of a foreign government, or as a nondiplomatic representative thereof.

(b) For purposes of this exception, the citizenship or residence of the employee is immaterial. It is also immaterial whether the foreign government grants an equivalent exemption with respect to similar services performed in the foreign country by citizens of the United States.

§ 31.3121(b)(12)–1 Services in employ of wholly owned instrumentality of foreign government.

(a) Services performed by an employee in the employ of certain instrumentalities of a foreign government are excepted from employment. The exception includes all services performed in the employ of an instrumentality of the government of a foreign country, if—

(1) The instrumentality is wholly owned by the foreign government;

(2) The services are of a character similar to those performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(3) The Secretary of State certifies to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality and employees thereof exemption is claimed, grants an equivalent exemption with respect

to services performed in the foreign country by employees of the United States Government and of instrumentalities thereof.

(b) For purposes of this exception, the citizenship or residence of the employee is immaterial.

§ 31.3121(b)(13)–1 Services of student nurse or hospital intern.

(a) Services performed as a student nurse in the employ of a hospital or a nurses' training school are excepted from employment, if the student nurse is enrolled and regularly attending classes in a nurses' training school and such nurses' training school is chartered or approved pursuant to State law.

(b) Services performed before 1966 as an intern (as distinguished from a resident doctor), in the employ of a hospital are excepted from employment, if the intern has completed a 4 years' course in a medical school chartered or approved pursuant to State law.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6983, 33 FR 18017, Dec. 4, 1968]

§ 31.3121(b)(14)–1 Services in delivery or distribution of newspapers, shopping news, or magazines.

(a) *Services of individuals under age 18.* Services performed by an employee under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution (as, for example, by a regional distributor) to any point for subsequent delivery or distribution, are excepted from employment. Thus, the services performed by an employee under the age of 18 in making house-to-house delivery or sale of newspapers or shopping news, including handbills and other similar types of advertising material, are excepted from employment. The services are excepted irrespective of the form or method of compensation. Incidental services by the employees who makes the house-to-house delivery, such as services in assembling newspapers, are considered to be within the exception. The exception continues only during the time that the employee is under the age of 18.

(b) *Services of individuals of any age.* Services performed by an employee in, and at the time of, the sale of newspapers or magazines to ultimate consumers under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, are excepted from employment. The services are excepted whether or not the employee is guaranteed a minimum amount of compensation for such services, or is entitled to be credited with the unsold newspapers or magazines turned back. Moreover, the services are excepted without regard to the age of the employee. Services performed other than at the time of sale to the ultimate consumer are not within the exception. Thus, the services of a regional distributor which are antecedent to but not immediately part of the sale to the ultimate consumer are not within the exception. However, incidental services by the employee who makes the sale to the ultimate consumer, such as services in assembling newspapers or in taking newspapers or magazines to the place of sale, are considered to be within the exception.

§ 31.3121(b)(15)–1 Services in employ of international organization.

(a) Subject to the provisions of section 1 of the International Organizations Immunities Act (22 U.S.C. 288), services performed in the employ of an international organization as defined in section 7701(a)(18) are excepted from employment.

(b) (1) Section 7701(a)(18) provides as follows:

SEC. 7701. *Definitions.* (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(18) *International organization.* The term ''international organization'' means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f).

(2) Section 1 of the International Organizations Immunities Act provides as follows:

SEC. 1 [*International Organizations Immunities Act.*] For the purposes of this title [International Organizations Immunities Act], the term ''international organization'' means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The president shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this title.

§ 31.3121(b)(16)–1 Services performed under share-farming arrangement.

(a) The term ''employment'' does not include services performed by an individual under an arrangement with the owner or tenant of land pursuant to which—

(1) Such individual undertakes to produce agricultural or horticultural commodities (including livestock, bees, poultry, and fur-bearing animals and wildlife) on such land,

(2) The agricultural or horticultural commodities produced by such individual, or the proceeds therefrom, are to be divided between such individual and such owner or tenant, and

(3) The amount of such individual's share depends on the amount of the agricultural or horticultural commodities produced.

For purposes of this exception, the arrangement pursuant to which the individual's services are performed must meet the specified statutory conditions.

(b) If the arrangement between the parties provides that the individual who undertakes to produce a crop or livestock is to be compensated at a specified rate of pay or is to receive a fixed sum of money or a stipulated quantity of the commodities to be produced, without regard to the amount actually produced, as distinguished from a proportionate share of the crop or livestock, or the proceeds therefrom, the services performed by such individual in the production of such crop or livestock is not within the exception.

(c) For provisions relating to the status, under the Self-Employment Contributions Act of 1954, of the services which are excepted from ''employment'' under this section, see the regulations under section 1402(a) in Part 1 of this chapter (Income Tax Regulations).

[T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(b)(17)–1 Services in employ of Communist organization.

The term ''employment'' does not include services performed in the employ of any organization in any calendar quarter beginning after June 30, 1956, and during any part of which such organization is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act of 1950 (50 U.S.C. 781 et seq.), as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization.

[T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(b)(18)–1 Services performed by a resident of the Republic of the Philippines while temporarily in Guam.

(a) Services performed after 1960 by a resident of the Republic of the Philippines while in Guam on a temporary basis as a nonimmigrant alien admitted to Guam pursuant to section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101) are excepted from employment.

(b) Section 101(a)(15)(H) of the Immigration and Nationality Act provides as follows:

SEC. 101. *Definitions.* [Immigration and Nationality Act (66 Stat. 166)]

(a) As used in this chapter—

* * * * *

(15) The term ''immigrant'' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

(H) An alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring merit and ability; or (ii) who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as an industrial trainee;

[T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(b)(19)–1 Services of certain nonresident aliens.

(a) (1) Services performed after 1961 by a nonresident alien individual who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, are excepted from employment if the services are performed to carry out a purpose for which the individual was admitted. For purposes of this section an alien individual who is temporarily present in the United States as a nonimmigrant under such subparagraph (F) or (J) is deemed to be a nonresident alien individual. The preceding sentence does not apply to the extent it is inconsistent with section 7701(b) and the regulations under that section. A nonresident alien individual who is temporarily present in the United States as a nonimmigrant under such subparagraph (J) includes an alien individual admitted to the United States as an ''exchange visitor'' under section 201 of the United States Information and Educational Exchange Act of 1948 (22 U.S.C. 1446).

(2) If services are performed by a nonresident alien individual's alien spouse or minor child, who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act, as amended, the services are not deemed for purposes of this section to be performed to carry out a purpose for which such individual was admitted. The services of such spouse or child are excepted from employment under this section only if the spouse or child was admitted for a purpose specified in such subparagraph (F) or (J) and if the services are performed to carry out such purpose.

(b) Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, provides in part as follows:

SEC. 101. *Definitions.* [Immigration and Nationality Act (68 Stat. 166)]

(a) As used in this chapter—* * *

(15) The term ''immigrant'' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

(F) (i) An alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

* * * * *

(J) An alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

* * * * *

[Sec. 101, Immigration and Nationality Act, as amended by sec. 101, Act of June 27, 1952, 66 Stat. 166; sec. 109, Act of Sept. 21, 1961, 75 Stat. 534]

[T.D. 6744, 29 FR 8313, July 2, 1964, as amended by T.D. 8411, 57 FR 15241, Apr. 27, 1992]

§ 31.3121(b)(20)–1 Service performed on a boat engaged in catching fish.

(a) *In general.* (1) Service performed on or after December 31, 1954, by an individual on a boat engaged in catching fish or other forms of aquatic animal life (hereinafter ''fish'') are excepted from employment if—

(i) The individual receives a share of the boat's (or boats' for a fishing operation involving more than one boat) catch of fish or a share of the proceeds from the sale of the catch,

(ii) The amount of the individual's share depends solely on the amount of the boat's (or boats' for a fishing operation involving more than one boat) catch of fish.

(iii) The individual does not receive and is not entitled to receive, any cash remuneration, other than remuneration that is described in sub-division (1) of this subparagraph, and

(iv) The crew of the boat (or of each boat from which the individual receives a share of the catch) normally is made up of fewer than 10 individuals.

(2) The requirement of paragraph (a)(1)(ii) is not satisfied if there exists an agreement with the boat's (or boats') owner or operator by which the individual's remuneration is determined partially or fully by a factor not dependent on the size of the catch. For example, if a boat is operated under a remuneration arrangement, *e.g.*, a collective agreement which specifies that crew members, in addition to receiving a share of the catch, are entitled to an hourly wage for repairing nets, regardless of whether this wage is actually paid, then all the crew members covered by the arrangement are entitled to receive cash remuneration other than a share of the catch and their services are not excepted from employment by section 3121(b)(20).

(3) The operating crew of a boat includes all persons on the boat (including the captain) who receive any form of remuneration in exchange for services rendered while on a boat engaged in catching fish. See § 1.6050A–1 for reporting requirements for the operator of a boat engaged in catching fish with respect to individuals performing services described in this section.

(4) During the same return period, service performed by a crew member may be excepted from employment by section 3121(b)(20) and this section for one voyage and not so excepted on a subsequent voyage on the same or on a different boat.

(5) During the same voyage, service performed by one crew member may be excepted from employment by section 3121(b)(20) and this section but service performed by another crew member may not be so excepted.

(b) *Special rule.* Services performed after December 31, 1954, and before October 4, 1976, on a boat by an individual engaged in catching fish are not excepted from employment for any voyage (for purposes of section 3121(b) and the corresponding regulations), even though the individual satisfies the requirements of paragraphs (a)(1)(i) through (iv) of this section, if the owner or operator of the boat engaged in catching fish treated the individual as an employee. For purposes of this subparagraph, the individual was treated as an employee if—

(1) Form 941 was voluntarily filed by the boat operator or owner, regardless of whether the tax imposed by chapter 21 was withheld. For purposes of this subdivision, the filing of Form 941 is not voluntary if the filing was the result of action taken by the Service pursuant to section 6651(a) (relating to addition to the tax for failure to file tax return or to pay tax);

(2) The boat owner or operator withheld from the individual's share the tax imposed by chapter 21, regardless of whether the tax was paid over to the Service; or

(3) The boat owner or operator made full or partial payment of the tax imposed by chapter 21, unless the payment was made pursuant to section 7422(a) (relating to no civil actions for refund prior to filing claim for refund).

However, for purposes of this paragraph crew members whose services, but for paragraphs (a)(1)(i) through (iii), would have been excepted from employment by section 3121(b)(20) are not required to pay self-employment tax on income earned in performing those services. See §1.1402(c)–3(g). Moreover, in such cases the employer is not entitled to a refund of the employer's share of any tax imposed by chapter 21 that was paid.

[T.D. 7716, 45 FR 57123, Aug. 27, 1980]

§31.3121(c)–1 Included and excluded services.

(a) If a portion of the services performed by an employee for an employer during a pay period constitutes employment, and the remainder does not constitute employment, all the services performed by the employee for the employer during the period shall for purposes of the taxes be treated alike, that is, either all as included or all as excluded. The time during which the employee performs services which under section 3121(b) constitute employment, and the time during which he performs services which under such section do not constitute employment, within the pay period, determine whether all the services during the pay period shall be deemed to be included or excluded.

(b) If one-half or more of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then all the services of that employee for that person in that pay period shall be deemed to be employment.

(c) If less than one-half of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then none of the services of that employee for that person in that pay period shall be deemed to be employment.

(d) The application of the provisions of paragraphs (a), (b), and (c) of this section may be illustrated by the following example:

Example. The AB Club, which is a local college club within the meaning of section 3121(b)(2), employs D, a student who is enrolled and is regularly attending classes at a university, to perform domestic service for the club and to keep the club's books. The domestic services performed by D for the AB Club do not constitute employment, and his services as the club's bookkeeper constitute employment. D receives a payment at the end of each month for all services which he performs for the club. During a particular month D spends 60 hours in performing domestic service for the club and 40 hours as the club's bookkeeper. None of D's services during the month are deemed to be employment, since less than one-half of his services during the month constitutes employment. During another month D spends 35 hours in the performance of domestic services and 60 hours in keeping the club's books. All of D's services during the month are deemed to be employment, since one-half or more of his services during the month constitutes employment.

(e) For purposes of this section, a ''pay period'' is the period (of not more than 31 consecutive calendar days) for which a payment of remuneration is ordinarily made to the employee by the employer. Thus, if the periods for which payments of remuneration are made to the employee by the employer are of uniform duration, each such period constitutes a ''pay period''. If, however, the periods occasionally vary in duration, the ''pay period'' is the period for which a payment of remuneration is ordinarily made to the employee by the employer, even though that period does not coincide with the actual period for which a particular payment of remuneration is made. For example, if an employer ordinarily pays a particular employee for each calendar week at the end of the week, but the employee receives a payment in the middle of the week for the portion of the week already elapsed and receives the remainder at the end of the week, the ''pay period'' is still the calendar week; or if, instead, that employee is sent on a trip by such employer and receives at the end of the third week a single remuneration payment for three weeks' services, the ''pay period'' is still the calendar week.

(f) If there is only one period (and such period does not exceed 31 consecutive calendar days) for which a payment of remuneration is made to the employee by the employer, such period is deemed to be a ''pay period'' for purposes of this section.

(g) The rules set forth in this section do not apply (1) with respect to any services performed by the employee for the employer if the periods for which such employer makes payments of remuneration to the employee vary to the extent that there is no period ‘‘for which a payment of remuneration is ordinarily made to the employee’’, or (2) with respect to any services performed by the employee for the employer if the period for which a payment of remuneration is ordinarily made to the employee by such employer exceeds 31 consecutive calendar days, or (3) with respect to any service performed by the employee for the employer during a pay period if any of such service is excepted by section 3121(b)(9) (see § 31.3121(b)(9)–1).

(h) If during any period for which a person makes a payment of remuneration to an employee only a portion of the employee’s services constitutes employment, but the rules prescribed in this section are not applicable, the taxes attach with respect to such services as constitute employment as defined in section 3121(b).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8313, July 2, 1964]

§ 31.3121(d)–1 Who are employees.

(a) *In general.* (1) Whether an individual is an employee with respect to services performed after 1954 is determined in accordance with section 3121(d) and (o) and section 3506. This section of the regulations applies with respect only to services performed after 1954. Whether an individual is an employee with respect to services performed after 1936 and before 1940 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 401 (Regulations 91). Whether an individual is an employee with respect to services performed after 1939 and before 1951 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 402 (Regulations 106). Whether an individual is an employee with respect to services performed after 1950 and before 1955 shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 408 (Regulations 128).

(2) Section 3121(d) contains three separate and independent tests for determining who are employees. Paragraphs (b), (c), and (d) of this section relate to the respective tests. Paragraph (b) relates to the test for determining whether an officer of a corporation is an employee of the corporation. Paragraph (c) relates to the test for determining whether an individual is an employee under the usual common law rules. Paragraph (d) relates to the test for determining which individuals in certain occupational groups who are not employees under the usual common law rules are included as employees. If an individual is an employee under any one of the tests, he is to be considered an employee for purposes of the regulations in this subpart whether or not he is an employee under any of the other tests.

(3) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(4) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees.

(5) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment (see § 31.3121(b)–3).

(b) *Corporate officers.* Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) *Special classes of employees.* (1) In addition to individuals who are employees under paragraph (b) or (c) of this section, other individuals are employees if they perform services for remuneration under certain prescribed circumstances in the following occupational groups:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services for his principal;

(ii) As a full-time life insurance salesman;

(iii) As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(iv) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(2) In order for an individual to be an employee under this paragraph, the individual must perform services in an occupation falling within one of the enumerated groups. If the individual does not perform services in one of the designated occupational groups, he is not an employee under this paragraph. An individual who is not an employee under this paragraph may nevertheless be an employee under paragraph (b) or (c) of this section. The language used to designate the respective occupational groups relates to fields of endeavor in which particular designations are not necessarily in universal use with respect to the same service. The designations are addressed to the actual services without regard to any technical or colloquial labels which may be attached to such services. Thus, a determination whether services fall within one of the designated occupational groups depends upon the facts of the particular situation.

(3) The factual situations set forth below are illustrative of some of the individuals falling within each of the above enumerated occupational groups. The illustrative factual situations are as follows:

(i) *Agent-driver or commission-driver.* This occupational group includes agent-drivers or commission-drivers who are engaged in distributing meat or meat products, vegetables or vegetable products, fruit or fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services for their principals. An agent-driver or commission-driver includes an individual who operates his own truck or the truck of the person for whom he performs services, serves customers designated by such person as well as those solicited on his own, and whose compensation is a commission on his sales or the difference between the price he charges his customers and the price he pays to such person for the product or service.

(ii) *Full-time life insurance salesman.* An individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company is a full-time life insurance salesman. Such a salesman ordinarily uses the office space provided by the company or its general agent, and stenographic assistance, telephone facilities, forms, rate books, and advertising materials are usually made available to him without cost. An individual who is engaged in the general insurance business under a contract or contracts of service which do not contemplate that the individual's principal business activity will be the solicitation of life insurance or annuity contracts, or both, for one company, or any individual who devotes only part time to the solicitation of life insurance contracts, including annuity contracts, and is principally engaged in other endeavors, is not a full-time life insurance salesman.

(iii) *Home workers.* This occupational group includes a worker who performs services off the premises of the person for whom the services are performed, according to specifications furnished by such person, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him. For provisions relating to the determination of wages in the case of a home worker to whom this subdivision is applicable, see § 31.3121(a)(10)–1.

(iv) *Traveling or city salesman.* (*a*) This occupational group includes a city or traveling salesman who is engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person or persons) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations. An agent-driver or commission-driver is not within this occupational group. City or traveling salesmen who sell to retailers or to the others specified, operate off the premises of their principals, and are generally compensated on a commission basis, are within this occupational group. Such salesmen are generally not controlled as to the details of their services or the means by which they cover their territories, but in the ordinary case they are expected to call on regular customers with a fair degree of regularity.

(*b*) In order for a city or traveling salesman to be included within this occupational group, his entire or principal business activity must be devoted to the solicitation of orders for one principal. Thus, the multiple-line salesman generally is not within this occupational group. However, if the salesman solicits orders primarily for one principal, he is not excluded from this occupational group solely because of side-line sales activities on behalf of one or more other persons. In such a case, the salesman is within this occupational group only with respect to the services performed for the person for whom he primarily solicits orders and not with respect to the services performed for such other persons. The following examples illustrate the application of the foregoing provisions:

Example 1. Salesman A's principal business activity is the solicitation of orders from retail pharmacies on behalf of the X Wholesale Drug Company. A also occasionally solicits orders for drugs on behalf of the Y and Z Companies. A is within this occupational group with respect to his services for the X Company but not with respect to his services for either the Y Company or the Z Company.

Example 2. Salesman B's principal business activity is the solicitation of orders from retail hardware stores on behalf of the R Tool

Company and the S Cooking Utensil Company. B regularly solicits orders on behalf of both companies. B is not within this occupational group with respect to the services performed for either the R Company or the S Company.

Example 3. Salesman C's principal business activity is the house-to-house solicitation of orders on behalf of the T Brush Company. C occasionally solicits such orders from retail stores and restaurants. C is not within this occupational group.

(4)(i) The fact that an individual falls within one of the enumerated occupational groups, however, does not make such individual an employee under this paragraph unless *(a)* the contract of service contemplates that substantially all the services to which the contract relates in the particular designated occupation are to be performed personally by such individual, *(b)* such individual has no substantial investment in the facilities used in connection with the performance of such services (other than in facilities for transportation) and *(c)* such services are part of a continuing relationship with the person for whom the services are performed and are not in the nature of a single transaction.

(ii) The term ''contract of service'', as used in this paragraph, means an arrangement, formal or informal, under which the particular services are performed. The requirement that the contract of service shall contemplate that substantially all the services to which the contract relates in the particular designated occupation are to be performed personally by the individual means that it is not contemplated that any material part of the services to which the contract relates in such occupation will be delegated to any other person by the individual who undertakes under the contract to perform such services.

(iii) The facilities to which reference is made in this paragraph include equipment and premises available for the work or enterprise as distinguished from education, training, and experience, but do not include such tools, instruments, equipment, or clothing, as are commonly or frequently provided by employees. An investment in an automobile by an individual which is used primarily for his own transportation in connection with the performance of services for another person has no significance under this paragraph, since such investment is comparable to outlays for transportation by an individual performing similar services who does not own an automobile. Moreover, the investment in facilities for the transportation of the goods or commodities to which the services relate is to be excluded in determining the investment in a particular case. If an individual has a substantial investment in facilities of the requisite character, he is not an employee within the meaning of this paragraph, since a substantial investment of the requisite character standing alone is sufficient to exclude the individual from the employee concept under this paragraph.

(iv) If the services are not performed as part of a continuing relationship with the person for whom the services are performed, but are in the nature of a single transaction, the individual performing such services is not an employee of such person within the meaning of this paragraph. The fact that the services are not performed on consecutive workdays does not indicate that the services are not performed as part of a continuing relationship.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8314, July 2, 1964; T.D. 7691, 45 24129, Apr. 9, 1980]

§ 31.3121(d)–2 Who are employers.

(a) Every person is an employer if he employs one or more employees. Neither the number of employees employed nor the period during which any such employee is employed is material for the purpose of determining whether the person for whom the services are performed is an employer.

(b) An employer may be an individual, a corporation, a partnership, a trust, an estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. A trust or estate, rather than the fiduciary acting for on behalf of the trust or estate, is generally the employer.

(c) Although a person may be an employer under this section, services performed in his employ may be of such a nature, or performed under such circumstances, as not to constitute employment (see § 31.3121(b)–3).

§ 31.3121(e)–1 State, United States, and citizen.

(a) When used in the regulations in this subpart, the term ''State'' includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Territories of Alaska and Hawaii before their admission as States, and (when used with respect to services performed after 1960) Guam and American Samoa.

(b) When used in the regulations in this subpart, the term ''United States'', when used in a geographical sense, means the several states (including the Territories of Alaska and Hawaii before their admission as States), the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands. When used in the regulations in this subpart with respect to services performed after 1960, the term ''United States'' also includes Guam and American Samoa when the term is used in a geographical sense. The term ''citizen of the United States'' includes a citizen of the Commonwealth of Puerto Rico or the Virgin Islands, and, effective January 1, 1961, a citizen of Guam or American Samoa.

[T.D. 6744, 29 FR 8314, July 2, 1964]

§ 31.3121(f)–1 American vessel and aircraft.

(a) The term ''American vessel'' means any vessel which is documented (that is, registered, enrolled, or licensed) or numbered in conformity with the laws of the United States. It also includes any vessel which is neither documented nor numbered under the laws of the United States, nor documented under the laws of any foreign country, if the crew of such vessel is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State. (For provisions relating to the terms ''State'' and ''citizen'', see § 31.3121 (e)–1.)

(b) The term ''American aircraft'' means any aircraft registered under the laws of the United States.

(c) For provisions relating to services performed outside the United States on or in connection with an American vessel or American aircraft, see paragraph (c)(2) of § 31.3121(b)–3.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8314, July 2, 1964]

§ 31.3121(g)–1 Agricultural labor.

(a) *In general.* (1) The term ''agricultural labor'' as defined in section 3121(g) includes services of the character described in paragraph (b), (c), (d), (e), and (f) of this section. In general, however, the term does not include services performed in connection with forestry, lumbering, or landscaping.

(2) The term ''farm'' as used in the regulations in this subpart includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, orchards, and such greenhouses and other similar structures as are used primarily for the raising of agricultural or horticultural commodities. Greenhouses and other similar structures used primarily for other purposes (for example, display, storage, and fabrication of wreaths, corsages, and bouquets) do not constitute ''farms''.

(3) For provisions relating to the exception from employment provided with respect to services performed by certain foreign agricultural workers and to services performed before 1959 in connection with the production or harvesting of certain oleoresinous products, see § 31.3121(b)(1)–1. For provisions relating to the exclusion from wages of remuneration paid in any medium other than cash for agricultural labor and to the test for determining whether cash remuneration paid for agricultural labor constitutes wages, see § 31.3121(a)(8)–1.

(b) *Services described in section 3121(g)(1).* (1) Services performed on a farm by an employee of any person in connection with any of the following activities constitute agricultural labor:

(i) The cultivation of the soil;

(ii) The raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, fur-bearing animals, or wildlife; or

(iii) The raising or harvesting of any other agricultural or horticultural commodity.

(2) Services performed in connection with the production or harvesting of maple sap, or in connection with the raising or harvesting of mushrooms, or in connection with the hatching of poultry constitute agricultural labor only if such services are performed on a farm. Thus, services performed in connection with the operation of a hatchery, if not operated as part of a poultry or other farm, do not constitute agricultural labor.

(c) *Services described in section 3121(g)(2).* (1) The following services performed by an employee in the employ of the owner or tenant or other operator of one or more farms constitute agricultural labor, provided the major part of such services is performed on a farm:

(i) Services performed in connection with the operation, management, conservation, improvement, or maintenance of any of such farms or its tools or equipment; or

(ii) Services performed in salvaging timber, or clearing land of brush and other debris, left by a hurricane.

(2) The services described in paragraph (c)(1)(i) of this section may include, for example, services performed by carpenters, painters, mechanics, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semiskilled workers, which contribute in any way to the conduct of the farm or farms, as such, operated by the person employing them, as distinguished from any other enterprise in which such person may be engaged.

(3) Since the services described in this paragraph must be performed in the employ of the owner or tenant or other operator of the farm, the term ''agricultural labor'' does not include services performed by employees of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties.

(d) *Services described in section 3121(g)(3).* Services performed by an employee in the employ of any person in connection with any of the following operations constitute agricultural labor without regard to the place where such services are performed:

(1) The ginning of cotton;

(2) The operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying or storing water for farming purposes; or

(3) The production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin, provided such processing is carried on by the original producer of such crude gum.

(e) *Services described in section 3121(g)(4).* (1) Services performed by an employee in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity constitute agricultural labor if:

(i) Such services are performed by the employee in the employ of an operator of a farm or in the employ of a group of operators of farms (other than a cooperative organization);

(ii) Such services are performed with respect to the commodity in its unmanufactured state; and

(iii) Such operator produced more than one-half of the commodity with respect to which such services are performed during the pay period, or such group of operators produced all of the commodity with respect to which such services are performed during the pay period.

(2) The term ''operator of a farm'' as used in this paragraph means an owner, tenant, or other person, in possession of a farm and engaged in the operation of such farm.

(3) The services described in this paragraph do not constitute agricultural labor if performed in the employ of a cooperative organization. The term ''organization'' includes corporations, joint-stock companies, and associations which are treated as corporations pursuant to section 7701(a)(3) of the Internal Revenue Code. For purposes of this paragraph, any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar quarter in which the services involved are performed.

(4) Processing services which change the commodity from its raw or natural state do not constitute agricultural labor. For example the extraction of juices from fruits or vegetables is a processing operation which changes the character of the fruits or vegetables from their raw or natural state and, therefore, does not constitute agricultural labor. Likewise, services performed in the processing of maple sap into maple sirup or maple sugar do not constitute agricultural labor. On the other hand, services rendered in the cutting and drying of fruits or vegetables are processing operations which do not change the character of the fruits or vegetables and, therefore, constitute agricultural labor, if the other requisite conditions are met. Services performed with respect to a commodity after its character has been changed from its raw or natural state by a processing operation do not constitute agricultural labor.

(5) The term ''commodity'' refers to a single agricultural or horticultural product, for example, all apples are to be treated as a single commodity, while apples and peaches are to be treated as two separate commodities. The services with respect to each such commodity are to be considered separately in determining whether the condition set forth in paragraph (e)(1)(iii) of this section has been satisfied. The portion of the commodity produced by an operator or group of operators with respect to which the services described in this paragraph are performed by a particular employee shall be determined on the basis of the pay period in which such services were performed by such employee.

(6) The services described in this paragraph do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the services described in this paragraph must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

(f) *Services described in section 3121(g)(5).* (1) Service not in the course of the employer's trade or business (see paragraph (a)(1) of § 31.3121(a)(7)–1) or domestic service in a private home of the employer (see paragraph (a)(2) of § 31.3121(a)(7)–1) constitutes agricultural labor if such service is performed on a farm operated for profit. The determination whether remuneration for any such service performed on a farm operated for profit constitutes wages is to be made under § 31.3121(a)(8)–1 rather than under § 31.3121(a)(7)–1. For provisions relating to the exception from employment provided with respect to any such service performed after 1960 by a father or mother in the employ of his or her son or daughter, see § 31.3121(b)(3)–1.

(2) Generally, a farm is not operated for profit if it is occupied by the employer primarily for residential purposes, or is used primarily for the pleasure of the employer or his family such as for the entertainment of guests or as a hobby of the employer or his family.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8315, July 2, 1964]

§ 31.3121(h)–1 American employer.

(a) The term ''American employer'' means an employer which is (1) the United States or any instrumentality thereof, (2) an individual who is a resident of the United States, (3) a partnership, if two-thirds or more of the partners are residents of the United States, (4) a trust, if all of the trustees are residents of the United States, or (5) a corporation organized under the laws of the United States or of any State. For provisions relating to the terms ''State'' and ''United States'', see § 31.3121(e)–1.

(b) For provisions relating to services performed outside the United States by a citizen of the United States as an employee for an American employer, see paragraph (c)(3) of § 31.3121(b)–3 and paragraph (e) of § 31.3121(b)(4)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6744, 29 FR 8315, July 2, 1964]

§ 31.3121(i)–1 Computation to nearest dollar of cash remuneration for domestic service.

An employer may, for purposes of the act, elect to compute to the nearest dollar any payment of cash remuneration for domestic service described in section 3121(a)(7)(B) (see § 31.3121(a)(7)–1) which is more or less than a whole-dollar amount. For the purpose of the computation to the nearest dollar, the payment of a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case it shall be increased to one dollar. For example, any amount actually paid between $4.50 and $5.49, inclusive, may be treated as $5 for purposes of the taxes imposed by the act. If an employer elects this method of computation with respect to any payment of cash remuneration made in a calendar quarter for domestic service in his private home, he must use the same method in computing each payment of cash remuneration of more or less than a whole-dollar amount made to each of his employees in such calendar quarter for domestic service in his private home. Moreover, if an employer elects this method of computation with respect to payments of the prescribed character made in any calendar quarter, the amount of each payment of cash remuneration so computed to the nearest dollar shall, in lieu of the amount actually paid, be deemed to constitute the amount of cash remuneration for purposes of the act. Thus, the amount of cash payments so computed to the nearest dollar shall be used for purposes of determining whether such payments constitute wages; for purposes of applying the employee and employer tax rates to the wage payments; for purposes of any required record keeping; and for purposes of reporting and paying the employee tax and employer tax with respect to such wage payments.

§ 31.3121(i)–2 Computation of remuneration for service performed by an individual as a member of a uniformed service.

In the case of an individual performing service after December 31, 1956, as a member of a uniformed service (see section 31.3121(n)), to which the provisions of section 3121(m)(1) (see § 31.3121(m)) are applicable, the term ‘‘wages’’ shall, subject to the provisions of section 3121(a)(1) (see § 31.3121(a)–1), include as the individual's remuneration for such service only his basic pay as described in section 102(10) of the Servicemen's and Veterans' Survivor Benefits Act (38 U.S.C. 401(1), 403; 72 Stat. 1126).

[T.D. 6744, 29 FR 8315, July 2, 1964]

§ 31.3121(i)–3 Computation of remuneration for service performed by an individual as a volunteer or volunteer leader within the meaning of the Peace Corps Act.

In the case of an individual performing service in his capacity as a volunteer or volunteer leader within the meaning of the Peace Corps Act (see section 31.3121(p)), the term ‘‘wages’’ shall, subject to the provisions of section 3121(a)(1) (see § 31.3121(a)–1), include as such individual's remuneration for such service only amounts paid pursuant to section 5(c) or section 6(1) of the Peace Corps Act (22 U.S.C. 2501; 75 Stat. 612).

[T.D. 6744, 29 FR 8315, July 2, 1964]

§ 31.3121(i)–4 Computation of remuneration for service performed by certain members of religious orders.

In any case where an individual is a member of a religious order (as defined in section 3121(r)(2) and paragraph (b) of § 31.3121(r)–1) performing service in the exercise of duties required by such order, and an election of coverage under section 3121(r) and § 31.3121(r)–1 is in effect with respect to such order or the autonomous subdivision thereof to which such member belongs, the term ‘‘wages’’ shall, subject to the provisions of section 3121(a)(1) (relating to definition of wages), include as such individual's remuneration for such service the fair market value of any board, lodging, clothing, and other perquisites furnished to such member by such order or subdivision or by any other person or organization pursuant to an agreement (whether written or oral) with such order or subdivision. Such other perquisites shall include any cash either paid by such order or subdivision or paid by another employer and not required by such order or subdivision to be remitted to it. For purposes of this section, perquisites shall be considered to be furnished over the period during which the member receives the benefit of them. (See example 4 of this section.) In no case shall the amount included as such individual's remuneration under this paragraph be less than $100 a month. All relevant facts and elements of value shall be considered in every case. Where the fair market value of any board, lodging, clothing, and other perquisites furnished to all members of an electing religious order or autonomous subdivision (or to all in a group of members) does not vary significantly, such order or subdivision may treat all of its members (or all in such group of members) as having a uniform wage. The provisions of this section may be illustrated by the following examples of the treatment of particular perquisites:

Example 1. M is a religious order which requires its members to take a vow of poverty and which has made an election under section 3121(r). Under section 3121(i)(4), M must include in the wages of its members the fair market value of the clothing it provides for its members. M and several other religious orders using essentially the same type of religious habit purchase clothing for their members from either of two suppliers in arms-length transactions. The fair market value of such clothing (*i.e.*, the price at which such items would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell) is determined by reference to the actual sales price of these suppliers to the religious orders.

Example 2. N is a religious order which requires its members to take a vow of poverty and which has made an election under section 3121(r). N operates a seminary adjacent to a university. Students at the university obtain lodging and board on campus from the university for its fair market value of $2,000 for the school year. Such lodging and board is essentially the same as that provided by N at its seminary to N's members subject to a vow of poverty. Accordingly, the amount to be included in the ''wages'' of such members with respect to lodging and board for the same period of time is $2,000.

Example 3. O is a religious order which requires its members to take a vow of poverty and to observe silence, and which has made an election under section 3121(r). O operates a monastery in a remote rural area. Under section 3121(i)(4), O must include in the wages of its members assigned to this monastery the fair market value of the board and lodging furnished to them. In making a determination of the fair market value of such board and lodging, the remoteness of the monastery, as well as the smallness of the rooms and the simplicity of their furnishings, affect this determination. However, the facts that the facility is used by a religious order as a monastery and that the order's members maintain silence do not affect the fair market value of such items.

Example 4. P is a religious order which requires its members to take a vow of poverty and which has made an election under section 3121(r). Several of P's members are attending a university on a full-time basis. The fair market value of the board and lodging of each of such members at the university is $1,000 per semester. P pays the university $1,000 at the beginning of each semester for the board and lodging of each of such members. In addition, P gives each such member a $400 cash advance to cover his miscellaneous expenses during the semester. Under section 3121(i)(4), P must prorate the fair market value of such members' board and lodging, as well as the miscellaneous items, over the semester and include such value in the determination of ''wages''.

Example 5. Q is a religious order which is a corporation organized under the laws of Wisconsin, which requires its members to take a vow of poverty, and which has made an election under section 3121(r). Q has convents in rural South America and in suburbs and central city areas of the United States. Characteristically, in the United States its suburban convents provide somewhat larger and newer rooms for its members than do its convents in city areas. Moreover, its suburban convents have more extensive grounds and somewhat more elaborate facilities than do its older convents in city areas. However, both types of convents limit resident members to a single, plainly furnished room and provide them meals which are comparable. Q's members in South America live in extremely primitive dwellings and otherwise have extremely modest perquisites. Under section 3121(i)(4), Q may report a uniform wage for its members who live in suburban convents and city convents in the United

States, as the board, lodging, and perquisites furnished these members do not vary significantly from one convent to the other. Q may report another uniform wage (but not less than $100 per month apiece) for its members who are citizens of the United States and who reside in South America based on the fair market value of the perquisites furnished these individuals, as the fair market value of the perquisites furnished these individuals varies significantly from that of those furnished its members who live in its domestic convents but does not vary significantly among members in South America whose wages are subject to tax.

[T.D. 7280, 38 FR 18369, July 10, 1973]

§ 31.3121(j)–1 Covered transportation service.

(a) *Transportation systems acquired in whole or in part after 1936 and before 1951*—(1) *In general.* Except as provided in subparagraph (2) of this paragraph, all service performed in the employ of a State or political subdivision thereof in connection with its operation of a public transportation system constitutes covered transportation service if any part of the transportation system was acquired from private ownership after 1936 and before 1951. For purposes of this subparagraph, it is immaterial whether any part of the transportation system was acquired before 1937 or after 1950, whether the employee was hired before, during, or after 1950, or whether the employee had been employed by the employer from whom the State or political subdivision acquired its transportation system or any part thereof.

(2) *General retirement system protected by State constitution.* Except as provided in paragraph (a)(3) of this section, service performed in the employ of a State or political subdivision in connection with its operation of a public transportation system acquired in whole or in part from private ownership after 1936 and before 1951 does not constitute covered transportation service, if substantially all service in connection with the operation of the transportation system was, on December 31, 1950, covered under a general retirement system providing benefits which are protected from diminution or impairment under the State constitution by reason of an express provision, dealing specifically with retirement systems established by the State or political subdivisions of the State, which forbids such diminution or impairment.

(3) *Additions to certain transportation systems by acquisition after 1950.* This subparagraph is applicable only in case of an acquisition after 1950 from private ownership of an addition to an existing public transportation system which was acquired in whole or in part by a State or political subdivision thereof from private ownership after 1936 and before 1951 and then only in case service for such existing transportation system did not constitute covered transportation service by reason of the provisions of subparagraph (2) of this paragraph. Service in connection with the operation of such transportation system (including any additions acquired after 1950) constitutes covered transportation service commencing with the first day of the third calendar quarter following the calendar quarter in which the addition to the existing transportation system was acquired, if such service is performed by an employee who became an employee of the State or political subdivision in connection with and at the time of its acquisition from private ownership of such addition and who before the acquisition of such addition rendered service in employment in connection with the operation of the addition so acquired by such State or political subdivision. However, service performed by such employee in connection with the operation of the transportation system does not constitute covered transportation service if, on the first day of the third calendar quarter following the calendar quarter in which the addition was acquired, such service is covered by a general retirement system which does not, with respect to such employee, contain special provisions applicable only to employees who became employees of the State or political subdivision in connection with and at the time of its acquisition of such addition.

(b) *Transportation systems in operation on December 31, 1950, no part of which was acquired after 1936 and before 1951*—(1) *In general.* Except as provided in paragraph (b)(2) of this section, no service performed in the employ of a State or a political subdivision thereof in connection with its operation of a public transportation system constitutes covered transportation service if no part of such transportation system operated by the State or political subdivision on December 31, 1950, was acquired from private ownership after 1936 and before 1951.

(2) *Additions acquired after 1950.* This subparagraph is applicable only in case of an acquisition after 1950 from private ownership of an addition to an existing public transportation system which was operated by a State or political subdivision on December 31, 1950, but no part of which was acquired from private ownership after 1936 and before 1951. Service in connection with the operation of such transportation system (including any additions acquired after 1950) constitutes covered transportation service commencing with the first day of the third calendar quarter following the calendar quarter in which the addition to the existing transportation system was acquired, if such service is performed by an employee who became an employee of the State or political subdivision in connection with and at the time of its acquisition from private ownership of such addition and who before the acquisition of such addition rendered service in employment in connection with the operation of the addition so acquired by such State or political subdivision. However, service performed by such employee in connection with the operation of the transportation system does not constitute covered transportation service if, on the first day of the third calendar quarter following the calendar quarter in which the addition was acquired, such service is covered by a general retirement system which does not, with respect to such employee, contain special provisions applicable only to employees who became employees of the State or political subdivision in connection with and at the time of its acquisition of such addition.

(c) *Transportation systems acquired after 1950.* All service performed in the employ of a State or political subdivision thereof in connection with its operation of a public transportation system constitutes covered transportation service if the transportation system was not operated by the State or political subdivision before 1951 and, at the time of its first acquisition after 1950 from private ownership of any part of its transportation system, the State or political subdivision did not have a general retirement system covering substantially all service performed in connection with the operation of the transportation system.

(d) *Definitions.* For purposes of this section:

(1) The term ''general retirement system'' means any pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof for employees of the State, political subdivision, or both; but such term does not include such a fund or system which covers only service performed in positions connected with the operation of its public transportation system.

(2) A transportation system or a part thereof is considered to have been acquired by a State or political subdivision from private ownership if prior to the acquisition service performed by the employees in connection with the operation of the system or an acquired part thereof constituted employment under the act or under subchapter A of chapter 9 of the Internal Revenue Code of 1939 or was covered by an agreement entered into pursuant to section 218 of the Social Security Act (42 U.S.C. 418), and some of such employees became employees of the State or political subdivision in connection with and at the time of such acquisition.

(3) The term ''political subdivision'' includes an instrumentality of a State, of one or more political subdivisions of a State, or of a State and one or more of its political subdivisions.

(4) The term ''employment'' includes service covered by an agreement entered into pursuant to section 218 of the Social Security Act.

§ 31.3121(k)–1 Waiver of exemption from taxes.

(a) *Who may file a waiver certificate*—(1) *In general.* If services performed in the employ of an organization are excepted from employment under section 3121(b)(8)(B), the organization may file a waiver certificate on Form SS–15, together with a list on Form SS–15a, certifying that it desires to have the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act extended to services performed by its employees. (For provisions relating to the exception under section 3121(b)(8)(B), see that section and § 31.3121(b)(8)–2.) A certificate in effect under section 1426(1) of the Internal Revenue Code of 1939 on December 31, 1954, remains in effect under, and is subject to the provisions of, section 3121(k). If the period covered by a certificate filed under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939, is terminated by an organization, a certificate may not thereafter be filed by the organization under section 3121(k). For regulations relating to certificates filed under section 1426(l) of the Internal Revenue Code of 1939, see 26 CFR (1939) 408.216 (Regulations 128).

(2) *Organizations having two separate groups of employees.* If an organization is eligible to file a certificate under section 3121(k), and the organization employs both individuals who are in positions covered by a pension, annuity, retirement, or similar fund or system established by a State or by a political subdivision thereof and individuals who are not in such positions, the organization shall divide its employees into two separate groups for purposes of any certificate filed after August 28, 1958. One group shall consist of all employees who are in positions covered by such a fund or system and (i) are members of such fund or system, or (ii) are not members of such fund or system but are eligible to become members thereof. The other group shall consist of all remaining employees. An organization which has so divided its employees into two groups may file a certificate after August 28, 1958, with respect to the employees in either group, or may file a separate certificate after such date with respect to employees in each group.

(3) *Certificates filed before September 14, 1960.* A certificate filed before September 14, 1960, is void unless at least two-thirds of the employees, determined on the basis of the facts which existed as of the date the certificate was filed, concurred in the filing of the certificate, and the organization certified to such concurrence in the certificate. All individuals who were employees of the organization within the meaning of section 3121(d) (see § 31.3121(d)–1) shall be included in determining whether two-thirds of the employees of the organization concurred in the filing of the certificate; except that there shall not be included (i) those employees who at the time of the filing of the certificate were performing for the organization services only of the character specified in paragraphs (8)(A), (10)(B), and (13) of section 3121(b) (see §§ 31.3121(b)(8)–1, 31.3121(b)(10)–2, and 31.3121(b)(13)–1, respectively), (ii) those alien employees who at the time of the filing of the certificate were performing services for such organization under an arrangement which provided for the performance only of services outside the United States not on or in connection with an American vessel or American aircraft, and (iii) in connection with certificates filed after August 28, 1958, those employees who at the time of the filing of the certificate were in a group to which such certificate was not applicable because of the provisions of section 3121(k)(1)(E). (See paragraph (a)(2) of this section.) As used in this subparagraph, the term ‘‘alien employee’’ does not include an employee who was a citizen of the Commonwealth of Puerto Rico or a citizen of the Virgin Islands, and the term ‘‘United States’’ includes Puerto Rico and the Virgin Islands.

(b) *Execution and amendment of certificate*—(1) *Use of prescribed forms.* An organization filing a certificate pursuant to section 3121(k) shall use Form SS–15, in accordance with the regulations and instructions applicable thereto. The certificate may be filed only if it is accompanied by a list on Form SS–15a, containing the signature, address, and social security account number, if any, of each employee, if any, who concurs in the filing of the certificate. (For provisions relating to account numbers, see § 31.6011(b)–2.) If no employee concurs in a certificate filed after September 13, 1960, that fact should be stated on the Form SS–15a. (For provisions relating to the concurrence of employees in certificates filed before September 14, 1960, see paragraph (a)(3) of this section.)

(2) *Amendment of list on Form SS–15a*—(i) *Certificate filed after August 28, 1958.* The list on Form SS–15a accompanying a certificate filed after August 28, 1958, under section 3121(k), may be amended at any time before the expiration of the twenty-fourth month following the calendar quarter in which the certificate is filed, by filing a supplemental list or lists on Form SS–15a Supplement, containing the signature, address, and social security account number, if any, of each additional employee who concurs in the filing of the certificate.

(ii) *Certificate filed before August 29, 1958.* The list on Form SS–15a which accompanied a certificate filed before August 29, 1958, under section 3121(k) or under section 1426(l) of the Internal Revenue Code of 1939, may be amended by filing a supplemental list or lists on Form SS–15a Supplement at any time after August 31, 1954, and before the expiration of the twenty-fourth month following the first calendar quarter for which the certificate was in effect, or before January 1, 1959, whichever is the later.

(3) *Where to file certificate or amendment.* The certificate on Form SS–15 and accompanying list on Form SS–15a of an organization which is required to make a return on Form 941 pursuant to § 31.6011(a)–1 or § 31.6011(a)–4 shall be filed with the internal revenue officer designated in the instructions applicable to Form SS–15 and Form SS–15a. The Form SS–15 and Form SS–15a of any other organization shall be filed in accordance with the provisions of § 31.6091–1 which are otherwise applicable to returns. Each Form SS–15a Supplement shall be filed with the internal revenue officer with whom the related Forms SS–15 and SS–15a were filed.

(c) *Effect of waiver*—(1) *In general.* The exception from employment under section 3121(b)(8)(B) does not apply to services with respect to which a certificate, filed pursuant to section 3121(k), or section 1426(l) of the Internal Revenue Code of 1939, is in effect. (See §§ 31.3121(b)(8) and 31.3121(b)(8)–2). If an organization has divided its employees into two groups, as set forth in paragraph (a)(2) of this section, a certificate filed with respect to either group shall have no effect with respect to services performed by an employee as a member of the other group; and the provisions of this subparagraph shall apply as if each group were separately employed by a different organization. A certificate is not terminated if the organization loses its exemption under section 501(a) as an organization of the character described in section 501(c)(3), but continues effective with respect to any subsequent periods during which the organization is so exempt. The certificate of an organization may be in effect without being applicable to services performed by every employee of the organization. Subparagraph (2) of this paragraph relates to the beginning of the period for which a certificate is in effect. Subparagraph (3) of this paragraph relates to the services with respect to which a certificate is in effect. Even though a certificate is in effect with respect to the services of an employee, such services may be excepted from employment under some provision of section 3121(b) other than paragraph (8)(B) thereof. For example, service performed in any calendar quarter in the employ of an organization described in section 501(c)(3) and exempt from income tax under section 501(a) is excepted from employment under section 3121(b)(10)(A) if the remuneration for such service is less than $50, regardless of whether the organization files a certificate.

(2) *Beginning of effective period of waiver*—(i) *Certificate filed after July 30, 1965.* A certificate filed after July 30, 1965, by an organization pursuant to section 3121(k) shall be in effect for the period beginning with one of the following dates, which shall be designated by the organization on the certificate:

(a) The first day of the calendar quarter in which the certificate is filed,

(b) The first day of the calendar quarter immediately following the quarter in which the certificate is filed, or

(c) The first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that such date may not be earlier than the first day of the 20th calendar quarter preceding the quarter in which such certificate is filed. Thus, a certificate filed in December 1965 may be made effective, pursuant to this paragraph (c)(2)(i)*(c)*, for the period beginning

with the first day of the calendar quarter beginning October 1, 1960, or the first day of any other calendar quarter beginning after October 1, 1960, and before October 1, 1965.

(ii) *Certificate filed after August 28, 1958, and before July 31, 1965.* A certificate filed after August 28, 1958, and before July 31, 1965, by an organization pursuant to section 3121(k) shall be in effect for the period beginning with one of the following dates, which shall be designated by the organization on the certificate:

(a) The first day of the calendar quarter in which the certificate is filed,

(b) The first day of the calendar quarter immediately following the quarter in which the certificate is filed, or

(c) The first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that, in the case of a certificate filed before 1960, such date may not be earlier than January 1, 1956, and in the case of a certificate filed after 1959 (but before July 31, 1965), such date may not be earlier than the first day of the fourth calendar quarter preceding the quarter in which the certificate is filed. Thus, a certificate filed in December 1959 may be made effective for the calendar quarter beginning January 1, 1956; but a certificate filed in January 1960 may not be made effective for a calendar quarter beginning before January 1, 1959.

(iii) *Certificate filed after 1956 and before August 29, 1958.* A certificate filed by an organization after 1956 and before August 29, 1958 pursuant to section 3121(k), became effective for the period beginning with one of the following dates, as designated by the organization on the certificate:

(a) The first day of the calendar quarter in which the certificate was filed, or

(b) The first day of the calendar quarter immediately following the quarter in which the certificate was filed.

(iv) *Certificate filed before 1957.* A certificate filed before 1957 pursuant to section 3121(k) became effective for the period beginning with the first day following the close of the calendar quarter in which the certificate was filed. In no case, however, shall a certificate filed under the provisions of section 3121(k) be in effect with respect to services performed before January 1, 1955. (For regulations relating to waiver certificates filed under section 1426(l) of the Internal Revenue Code of 1939, see 26 CFR (1939) 408.216 (Regulations 128).)

(3) *Services to which certificate applies*—(i) *In general.* If an organization's certificate is in effect (see paragraph (c)(2) of this section), the certificate becomes effective with respect to services performed in its employ by each individual *(a)* who enters the employ of the organization after the calendar quarter in which the certificate is filed, as set forth in paragraph (c)(3)(ii) of this section, or *(b)* whose signature appears on the list on Form SS–15a, as set forth in paragraph (c)(3)(iii) of this section, or *(c)* whose signature appears on a Form SS–15a Supplement, as set forth in paragraph (c)(3)(iv) or (v) of this section. The first date on which such a certificate becomes effective with respect to an employee's services shall be the earliest date applicable under this subparagraph. An organization's certificate is not effective with respect to the services of an employee who is in its employ in the calendar quarter in which the certificate is filed and who does not sign Form SS–15a or Form SS–15a Supplement, so long as his employment relationship with the organization, at the close of the calendar quarter in which the certificate is filed and thereafter, continues without interruption.

(ii) *Employee hired after quarter in which certificate is filed.* If an individual enters the employ of an organization on or after the first day following the close of the calendar quarter in which the organization files a certificate pursuant to section 3121(k), the certificate shall be in effect with respect to services performed by the individual in the employ of the organization on and after the day he enters the employ of the organization. A former employee of the organization who is rehired on or after the first day following the close of the calendar quarter in which such a certificate is filed shall be considered to have entered the employ of the organization after such calendar quarter, regardless of whether such individual concurred in the filing of the certificate.

(iii) *Employee who signs Form SS–15a.* A certificate on Form SS–15 filed by an organization pursuant to section 3121(k) shall be in effect with respect to services performed by an individual in the employ of the organization on and after the first day for which the certificate is in effect, if such individual's signature appears on the list on Form SS–15a which accompanies such certificate.

(iv) *Employee who signs Form SS–15a Supplement to concur in certificate filed after August 28, 1958.* If the list on Form SS–15a accompanying a certificate filed after August 28, 1958, by an organization pursuant to section 3121(k) is amended in accordance with paragraph (b)(2)(i) of this section by the filing of a supplemental list on Form SS–15a Supplement, the certificate shall be in effect with respect to the services of each individual whose signature appears on the supplemental list, performed in the employ of the organization—

(a) On and after the first day for which the certificate is in effect, if the supplemental list is filed on or before the last day of the month following the calendar quarter in which the certificate is filed, or

(b) On and after the first day of the calendar quarter in which the supplemental list is filed, if such list is filed after the close of the first month following the calendar quarter in which the certificate is filed.

(v) *Employee who signed Form SS–15a Supplement to concur in certificate filed before August 29, 1958.* If the list on Form SS–15a which accompanied a certificate filed before August 29, 1958, by an organization pursuant to section 3121(k), or pursuant to section 1426(l) of the Internal Revenue Code of 1939, was amended in accordance with paragraph (b)(2)(ii) of this section by the filing of a supplemental list on Form SS–15a Supplement, the certificate shall be in effect with respect to the services of each individual whose signature appears on the supplemental list, performed in the employ of the organization—

(a) On and after the first day for which the certificate is in effect, if the supplemental list was filed on or before the last day of the month following the first calendar quarter for which the certificate was in effect, or

(b) On and after the first day following the close of the calendar quarter in which the supplemental list was filed, but not before January 1, 1955, if such list was filed after the close of the first month following the first calendar quarter for which the certificate is in effect.

(4) *Administrative provisions applicable when certificate has retroactive effect.* For purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), in any case in which a certificate filed pursuant to section 3121(k)(1) is effective pursuant to section 3121(k)(1)(B)(iii) (as originally enacted and as amended by section 316(a) of the Social Security Amendments of 1965) for one or more calendar quarters prior to the quarter in which the certificate is filed, the due date for the return and payment of the tax for such prior calendar quarters resulting from the filing of such certificate shall be the last day of the calendar month following the calendar quarter in which the certificate is filed. The statutory period for the assessment of the tax for such prior calendar quarters shall not expire before the expiration of 3 years from such due date. A waiver certificate (as described in section 3121(k)(1) and this section) furnished to the Internal Revenue Service after February 12, 1976, shall not be considered filed with the Internal Revenue Service unless interest paid to the organization (or credited to its account) in connection with a claim for credit or refund of taxes, which claim was based upon the exemption from taxes the organization is waiving by such certificate, is repaid. The interest so paid must be repaid only to the extent such interest relates to any taxes for which the organization or its employees would be liable by reason of the waiver certificate. Furthermore, when a waiver certificate has been filed prior to the payment of a refund of taxes based upon the exemption from taxes the organization in waiving, no credit or refund in respect of the taxes for which the exemption has been waived shall be allowed. If repayment of the interest is made as required by this subparagraph, on or before the last

day of the calendar month following the calendar quarter in which the certificate is furnished to the Internal Revenue Service, such certificate shall be considered to have been filed on the date it was originally furnished. If repayment occurs after that day, such certificate shall be considered to have been filed on the date of the repayment. References in this subparagraph to a waiver certificate refer also to any supplement to such a certificate.

(d) *Termination of waiver by organization*. (1) The period for which a certificate filed pursuant to section 3121(k), or pursuant to section 1426(l) of the Internal Revenue Code of 1939, is in effect may be terminated by the organization upon giving to the district director with whom the organization is filing returns 2 years' advance notice in writing of its desire to terminate the effect of the certificate at the end of a specified calendar quarter, but only if, at the time of the receipt of such notice by the district director, the certificate has been in effect for a period of not less than 8 years. The notice of termination shall be signed by the president or other principal officer of the organization. Such notice shall be dated and shall show (i) the title of the officer signing the notice, (ii) the name, address, and identification number of the organization, (iii) the district director with whom the certificate was filed, (iv) the date on which the certificate became effective, and (v) the date on which the certificate is to be terminated. No particular form is prescribed for the notice of termination.

(2) In computing the effective period which must precede the date of receipt of the notice of termination, there shall be disregarded any period or periods as to which the organization was not exempt from income tax under section 501(a) as an organization of the character described in section 501(c)(3) or under section 101(6) of the Internal Revenue Code of 1939.

(3) The notice of termination may be revoked by the organization by giving, prior to the close of the calendar quarter specified in the notice of termination, a written notice of such revocation. The notice of revocation shall be filed with the district director with whom the notice of termination was filed. The notice of revocation shall be signed by the president or other principal officer of the organization. Such notice shall be dated and shall show (i) the title of the officer signing the notice, (ii) the name, address, and identification number of the organization, and (iii) the date of the notice of termination to be revoked. No particular form is prescribed for the notice of revocation.

(e) *Termination of waiver by Commissioner.* (1) The period for which a certificate filed pursuant to section 3121(k), or pursuant to section 1426(l) of the Internal Revenue Code of 1939, is in effect may be terminated by the Commissioner, with the prior concurrence of the Secretary of Health, Education, and Welfare, upon a finding by the Commissioner that the organization has failed to comply substantially with the requirements applicable with respect to the taxes imposed by the act (or the corresponding provisions of prior law) or is no longer able to comply therewith. The Commissioner shall give the organization not less than 60 days' advance notice in writing that the period covered by the certificate will terminate at the end of the calendar quarter specified in the notice of termination.

(2) The notice of termination may be revoked by the Commissioner, with the prior concurrence of the Secretary of Health, Education, and Welfare, by giving written notice of revocation to the organization before the close of the calendar quarter specified in the notice of termination.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6983, 33 FR 18018, Dec. 4, 1968; T.D. 7012, 34 FR 7693, May 15, 1969; T.D. 7476, 42 FR 17874, Apr. 4, 1977]

§31.3121(k)–2 Waivers of exemption; original effective date changed retroactively.

(a) *Certificates filed after 1955 and before August 29, 1958.* (1) An organization which filed a certificate under section 3121(k) after 1955 and before August 29, 1958, may file a request on Form SS–15b at any time before 1960 to have such certificate made effective, with respect to the services of individuals who concurred in the filing of such certificate (initially, or by signing a supplemental list on Form SS–15a Supplement which was filed before Aug. 29, 1958) and whose signatures also appeared on such request on Form SS–15b, for the period beginning with the first day of any calendar quarter after 1955 which preceded the first calendar quarter for which the certificate originally was effective.

(2) For purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), the due date for the return and payment of the tax for any calendar quarter resulting from the filing of a request referred to in paragraph (a)(1) of this section shall be the last day of the calendar month following the calendar quarter in which the request is filed. The statutory period for the assessment of such tax shall not expire before the expiration of 3 years from such due date.

(b) *Certificate filed before 1966.* (1) An organization which filed a certificate on Form SS–15 under section 3121(k)(1)(A) before January 1, 1966, may amend such certificate during 1965 or 1966 to make the certificate effective beginning with the first day of a calendar quarter preceding the date designated by the organization on the certificate (see paragraph (c)(2) of § 31.3121(k)–1). The amendment of the certificate shall be made by filing a Certificate For Retroactive Coverage on Form SS–15b. A certificate on Form SS–15 may be amended to be effective for the period beginning with the first day of any calendar quarter which precedes the calendar quarter for which the certificate was originally effective, except that such a certificate may not be made effective, through an amendment, for any calendar quarter which begins earlier than the 20th calendar quarter preceding the calendar quarter in which the organization files a Certificate For Retroactive Coverage on Form SS–15b. Thus, if a Certificate For Retroactive Coverage is filed in May 1966 in respect of a certificate on Form SS–15 filed in 1965, the certificate on Form SS–15 may not be made effective for a calendar quarter preceding the quarter beginning April 1, 1961. A certificate on Form SS–15 which is amended by a Certificate For Retroactive Coverage on Form SS–15b will be effective for the period preceding the first calendar quarter for which the certificate originally was effective only with respect to the services of individuals who concurred in the filing of the certificate (initially, or by signing a supplemental list on Form SS–15a Supplement which was filed prior to the date on which the Certificate For Retroactive Coverage was filed) and whose signatures also appear on the Certificate For Retroactive Coverage on Form SS–15b. A Certificate For Retroactive Coverage shall be filed with the district director with whom the related Form SS–15 was filed.

(2) For purposes of computing interest and for purposes of section 6651 (relating to addition to tax for failure to file tax return), the due date for the return and payment of the tax for any calendar quarter resulting from the filing of an amendment referred to in paragraph (b)(1) of this section shall be the last day of the calendar month following the calendar quarter in which the amendment is filed. The statutory period for the assessment of such tax shall not expire before the expiration of 3 years from such due date.

[T.D. 6983, 33 FR 18018, Dec. 4, 1968]

§ 31.3121(k)–3 Request for coverage of individual employed by exempt organization before August 1, 1956.

(a) *Application of this section.* This section is applicable to requests made after July 31, 1956, and before September 14, 1960, under section 403 of the Social Security Amendments of 1954, as amended, except that nothing in this section shall render invalid any act performed pursuant to, and in accordance with, Revenue Ruling 57–11, Cumulative Bulletin 1957–1, page 344, or Revenue Ruling 58–514, Cumulative Bulletin 1958–2, page 733. (For regulations relating to requests made before August 1, 1956, under section 403 of the Social Security Amendments of 1954, see 26 CFR (1939) 408.216(c) and (d) (Regulations 128).)

(b) *Organization which did not have waiver certificate in effect*—(1) *Coverage requested by employee before August 27, 1958.* Pursuant to section 403(a) of the Social Security Amendments of 1954, as amended by section 401 of the Social Security Amendments of 1956, any individual who, as an employee, performed services after December 31, 1950, and before August 1, 1956, for an organization described in section 501(c)(3) which was exempt from income tax under section 501(a), or which was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, but which failed to file, before August 1, 1956, a valid waiver certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939, may request after July 31, 1956, and before August 27, 1958, that such part of the remuneration received by him for services performed in the employ of the organization after 1950 and before 1957 with respect to which employee and employer taxes were paid be deemed to constitute remuneration for employment, if:

(i) Any of the services performed by the individual after December 31, 1950, and before January 1, 1957, would have constituted employment if such a certificate on Form SS–15 filed by the organization had been in effect for the period during which the services were performed and the individual's signature had appeared on the accompanying list on Form SS–15a;

(ii) The employee and employer taxes were paid with respect to any part of the remuneration received by the individual from the organization for such services;

(iii) A part of such taxes was paid before August 1, 1956;

(iv) Such taxes as were paid before August 1, 1956, were paid by the organization in good faith and upon the assumption that it had filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939; and

(v) No refund (or credit) of such taxes had been obtained by either the employee or the employer, exclusive of any refund (or credit) which would have been allowable if the services performed by the individual had constituted employment.

(2) *Coverage requested by employee after August 26, 1958, and before September 14, 1960.* Requests may be made after August 26, 1958, and before September 14, 1960, pursuant to section 403(a) of the Social Security Amendments of 1954, as amended by section 401 of the Social Security Amendments of 1956, by the Act of August 27, 1958 (Pub. L. 85–785, 72 Stat. 938), and by section 105(b)(6) of the Social Security Amendments of 1960. Any individual who, as an employee, performed services after December 31, 1950, and before August 1, 1956, for an organization described in section 501(c)(3) which was exempt from income tax under section 501(a), or which was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, but which did not have in effect during the entire period in which the individual was so employed a valid waiver certificate under section 3121(k), or under section 1326(l) of the Internal Revenue Code of 1939, may request after August 26, 1958, and before September 14, 1960, that such part of the remuneration received by him for services performed in the employ of the organization after 1950 and before 1957 with respect to which employee and employer taxes were paid be deemed to constitute remuneration for employment, if:

(i) Any of the services performed by the individual after December 31, 1950, and before January 1, 1957, would have constituted employment if such a certificate on Form SS–15 filed by the organization had been in effect for the period during which the services were performed and the individual's signature had appeared on the accompanying list on Form SS–15a;

(ii) The employee and employer taxes were paid with respect to any part of the remuneration received by the individual from the organization for such services performed during the period in which the organization did not have a valid waiver certificate in effect;

(iii) A part of such taxes was paid before August 1, 1956;

(iv) Such taxes as were paid before August 1, 1956, were paid by the organization in good faith, and either without knowledge that a waiver certificate was necessary or upon the assumption that it had filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939; and

(v) No refund (or credit) of such taxes has been obtained by either the employee or the employer, exclusive of any refund (or credit) which would be allowable if the services performed by the individual had constituted employment.

(3) *Execution and filing of request.* (i) Except where the alternative procedure set forth in paragraph (b)(3)(ii) of this section is followed, the request of an individual under section 403(a) of the Social Security Amendments of 1954, as amended, is required to be made and filed as provided in this subdivision. The request shall be made in writing, be signed and dated by the individual, and include:

(a) The name and address of the organization for which the services were performed;

(b) The name, address, and social security account number of the individual;

(c) A statement that the individual has not obtained refund or credit (other than a refund or credit which would have been allowable if the services had constituted employment) from the district director of any part of the employee tax paid with respect to remuneration received by him from the organization for services performed after 1950 and before 1957; and

(d) A request that all remuneration received by him from the organization for such services with respect to which employee and employer taxes had been paid shall be deemed to constitute remuneration for employment to the extent authorized by section 403(a) of the Social Security Amendments of 1954, as amended.

The request of an individual shall be accompanied by a statement of the organization incorporating the substance of each of the five conditions listed in paragraph (b)(1) or (2), whichever is appropriate, of this section. The statement of the organization shall show also that the individual performed services for the organization after December 31, 1950, and before August 1, 1956; that the organization was an organization described in section 501(c)(3) which was exempt from income tax under section 501(a) or was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, and the district director with whom returns on Form 941 were filed. The organization's statement shall be signed by the president or other principal officer of the organization who shall certify that the statement is correct to the best of his knowledge and belief. If the statement of the organization is not submitted with the individual's request, the individual shall include in his request an explanation of his inability to submit the statement. Other information may be required, but should be submitted only upon receipt of a specific request therefore. No particular form is prescribed for the request of the individual or the statement of the organization required to be submitted with the request. The individual's request should be filed with the district director with whom the organization files returns on Form 941. If the individual is deceased or mentally incompetent and the request is made by the legal representative of the individual or other person authorized to act on his behalf, the request shall be accompanied by evidence showing such person's authority to make the request.

(ii) An organization which has or had in its employ individuals with respect to whom section 403(a) of the Social Security Amendments of 1954, as amended, is applicable may, if it so desires, prepare a form or forms for use by any such individual or individuals in making requests under such section. Any such form shall provide space for the signature of the individual or individuals and contain such information as required to be included in a request (see paragraph (b)(3)(i) of this section). Any such form used by more than one individual, and any such form used by one individual which is signed and returned to the organization, shall be submitted by the organization, together with its statement (as required in paragraph (b)(3)(i) of this section), to the district director with whom the organization files its returns on Form 941. An individual is not required to use a form prepared by the organization but may, at his election, file his request in accordance with the provisions of paragraph (b)(3)(i) of this section.

(4) *Optional tax payments by organization.* An organization which prior to August 1, 1956, reported and paid employee and employer taxes with respect to any portion of the remuneration paid to an individual, who is eligible to file a request under section 403(a) of

the Social Security Amendments of 1954, as amended, for services performed by him after 1950 and before 1957, may report and pay such taxes before September 14, 1960, with respect to any remaining portion of such remuneration which would have constituted wages if a certificate had been in effect with respect to such services. Such taxes may be reported as an adjustment without interest in the manner prescribed in Subpart G of the regulations in this part.

(5) *Effect of request.* If a request is made and filed under the conditions stated in this paragraph with respect to one or more individuals, remuneration for services performed by each such individual after 1950 and before 1957, with respect to which the employee and employer taxes are paid on or before the date on which the request was filed with the district director, will be deemed to constitute remuneration for employment to the extent that such services would have constituted employment as defined in section 3121(b), or in section 1426(b) of the Internal Revenue Code of 1939, if a certificate had been in effect with respect to such services. However, the provisions of section 3121(a) and §§31.3121(a)–1 to 31.3121(a)(10)–1, inclusive, of the regulations in this part or the provisions of section 1426(a) of the Internal Revenue Code of 1939 and the regulations in 26 CFR (1939) 408.226 and 408.227 (Regulations 128), as the case may be, are applicable in determining the extent to which such remuneration for employment constitutes wages for purposes of the employee and employer taxes.

(c) *Individual who failed to sign list of concurring employees*—(1) *In general.* Pursuant to section 403(b) of the Social Security Amendments of 1954, as amended, any individual who, as an employee, performed services after December 31, 1950, and before August 1, 1956, for an organization which filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939, but who failed to sign the list of employees concurring in the filing of such certificate, may request on or before January 1, 1959, that the remuneration received by him for such services be deemed to constitute remuneration for employment, if:

(i) Any of the services performed by the individual after December 31, 1950, and before August 1, 1956, would have constituted employment if the signature of such individual had appeared on the list of employees who concurred in the filing of the certificate;

(ii) The employee and employer taxes were paid before August 1, 1956, with respect to any part of the remuneration received by the individual from the organization for such services; and

(iii) No refund (or credit) of such taxes has been obtained either by the employee or the employer, exclusive of any refund (or credit) which would be allowable if the services performed by the individual had constituted employment.

(2) *Execution and filing of request.* (i) Except where the alternative procedure set forth in subdivision (ii) of this subparagraph is followed, the request of an individual under section 403(b) of the Social Security Amendments of 1954, as amended, shall be made and filed as provided in this subdivision. The request shall be filed on or before January 1, 1959, be made in writing, be signed and dated by the individual, and include:

(a) The name and address of the organization for which the services were performed;

(b) The name, address, and social security account number of the individual;

(c) A statement that the individual has not obtained a refund or credit (other than a refund or credit which would be allowable if the services had constituted employment) from the district director of any part of the employee tax paid before August 1, 1956, with respect to remuneration received by him from the organization;

(d) A request that all remuneration received by the individual from the organization for services performed after 1950 and before August 1, 1956, with respect to which employee and employer taxes were paid before August 1, 1956, shall be deemed to constitute remuneration for employment to the extent authorized by section 403(b) of the Social Security Amendments of 1954, as amended; and

(e) A statement that the individual understands that, upon the filing of

such request with the district director, *(1)* he will be deemed to have concurred in the certificate which was previously filed by the organization, and *(2)* the employee and employer taxes will be applicable to all wages received, and to be received, by him for services performed for the organization on or after the effective date of such certificate to the extent that such taxes would have been applicable if he had signed the list on Form SS–15a submitted with the certificate.

The request of an individual shall be accompanied by a statement of the organization incorporating the substance of each of the three conditions listed in paragraph (c)(1) of this section. The statement of the organization should also show that the individual performed services for the organization after December 31, 1950, and before August 1, 1956; that the organization filed a valid certificate under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939; and the district director with whom returns on Form 941 are filed. Such statement shall be signed by the president or other principal officer of the organization who shall certify that the statement is correct to the best of his knowledge and belief. If the statement of the organization is not submitted with the individual's request, the individual shall include in his request an explanation of his inability to submit such statement. Other information may be required, but should be submitted only upon receipt of a specific request therefor. No particular form is prescribed for the request of the individual or the statement of the organization required to be submitted with the request. The individual's request should be filed with the district director with whom the organization files returns on Form 941. If the individual is deceased or mentally incompetent and the request is made by the legal representative of the individual or other person authorized to act on his behalf, the request shall be accompanied by evidence showing such persons' authority to make the request.

(ii) An organization which has or had in its employ individuals with respect to whom section 403(b) of the Social Security Amendments of 1954, as amended, is applicable, may, if it so desires, prepare a form or forms for use by any such individual or individuals in making requests under such section. Any such form shall provide space for the signature of the individual or individuals and contain such information as is required by paragraph (c)(1)(i) of this section to be included in a request. Any such form used by more than one individual, and any such form used by one individual, and any such form used by one individual which is signed and returned to the organization, shall be submitted by the organization, together with its statement (as required in paragraph (c)(1)(i) of this section), to the district director with whom the organization files returns on Form 941. An individual is not required to use a form prepared by the organization but may, at his election, file his request in accordance with the provisions of subdivisions (i) of this subparagraph.

(3) *Effect of request.* An individual who makes and files a request under the conditions stated in this paragraph with respect to services performed as an employee of an organization described in section 501(c)(3) which was exempt from income tax under section 501(a), or which was exempt from income tax under section 101(6) of the Internal Revenue Code of 1939, will be deemed to have signed the list accompanying the certificate filed by the organization under section 3121(k), or under section 1426(l) of the Internal Revenue Code of 1939. Accordingly, all services performed by the individual for the organization on and after the effective date of the certificate will constitute employment to the same extent as if he had, in fact, signed the list. The employee tax and employer tax are applicable with respect to any remuneration paid to the employee by the organization which constitutes wages. If less than the correct amount of such taxes has been paid, the additional amount due should be reported as an adjustment without interest within the time specified in subpart G of the regulations in this part.

[T.D. 6744, 29 FR 8318, July 2, 1964]

§ 31.3121(k)–4 Constructive filing of waivers of exemption from social security taxes by certain tax-exempt organizations.

(a) *Constructive filing of waiver certificate where no refund or credit has been allowed.* (1) This paragraph applies (except as provided in subparagraph (3) of this paragraph) to an organization if all of the following four conditions are met.

(i) The organization is one described in section 501(c)(3) of the Internal Revenue Code of 1954, which is exempt from income tax under section 501(a) of the Code.

(ii) The organization did not file a valid waiver certificate under section 3121(k)(1) of the Internal Revenue Code of 1954 (or the corresponding provision of prior law) as of the later of October 19, 1976, or the earliest date on which it satisfies paragraph (a)(1)(iii) of this section.

(iii) The taxes imposed by sections 3101 and 3111 of the Code were paid with respect to remuneration paid by the organization to its employees, as though such certificate had been filed, during any period that includes all or part of at least three consecutive calendar quarters and that did not terminate before the end of the third calendar quarter of 1973.

(iv) The Internal Revenue Service did not allow (or erroneously allowed) a refund or credit of any part of the taxes paid as described in subdivision (iii) of this subparagraph with respect to remuneration for services performed on or after April 1, 1973. For purposes of the previous sentence, a refund or credit which would have been allowed, even if a valid waiver certificate filed under section 3121(k)(1) had been in effect, shall be disregarded. A refund or credit will be regarded as having been erroneously allowed if it was credited by the Internal Revenue Service to the taxpayer account of the organization or any of its employees on or after September 9, 1976, even though it was properly made under the law in effect when made.

(2) (i) An organization to which this paragraph applies shall be deemed to have filed a valid waiver certificate under section 3121(k)(1) (or the corresponding provision of prior law) for purposes of section 210(a)(8)(B) of the Social Security Act and section 3121(b)(8)(B). The waiver certificate shall be deemed to have been filed on the first day of the period described in paragraph (a)(1)(iii) of this section and shall be effective on the first day of the calendar quarter in which such period began. However, such waiver is effective only with respect to remuneration for services performed after 1950.

(ii) The waiver certificate shall be deemed to have been accompanied by a list containing the signature, address, and social security number (if any) of each employee with respect to whom the taxes imposed by sections 3101 and 3111 were paid as described in paragraph (a)(1)(iii) of this section. Each such employee shall be deemed to have concurred in the filing of the certificate for purposes of section 210(a)(8)(B) of the Social Security Act and section 3121(b)(8)(B). A statement containing the name, address, and employer identification number of the organization, and the name, last known address, and social security number (if any) of each employee described in the preceding sentence shall be filed by the organization at the request of the Internal Revenue Service.

(iii) The services of all employees entering or reentering the employ of an organization on or after the first day following the close of the calendar quarter in which the organization is deemed to have filed the waiver certificate, performed on or after the day of such entry or reentry, shall be covered by the certificate.

(3) This paragraph (a) shall not apply to an organization if—

(i) Prior to the end of the period referred to in paragraph (a)(1)(iii) (and, in addition, in the case of an organization organized on or before October 9, 1969, prior to October 19, 1976), the organization had applied for a ruling or determination letter acknowledging it to be exempt from income tax under section 501(c)(3);

(ii) The organization subsequently received such ruling or determination letter;

(iii) The organization did not pay any taxes under sections 3101 and 3111 with respect to any employee for any calendar quarter ending after the twelfth month following the date of mailing of the ruling or determination letter; and

(iv) The organization did not pay any taxes under sections 3101 and 3111 with respect to any calendar quarter beginning after the later of December 31, 1975, or the date on which the ruling or determination letter was issued.

(4) In the case of an organization which is deemed under this paragraph to have filed a valid waiver certificate under section 3121(k)(1), if the period with respect to which the taxes imposed by sections 3101 and 3111 were paid by the organization (as described in paragraph (a)(1)(iii) of this section) terminated prior to October 1, 1976, taxes under sections 3101 and 3111 with respect to remuneration paid by the organization after the termination of such period and prior to July 1, 1977, which remained unpaid on December 20, 1977 (or which were paid after October 19, 1976, but prior to December 20, 1977), shall not be due or payable (or, if paid, shall be refunded). Similarly, an organization that received a refund or credit of the taxes described in paragraph (a)(1)(iii) of this section after September 8, 1976, shall not be liable for the taxes imposed by sections 3101 and 3111 with respect to remuneration paid by it prior to July 1, 1977, for which the organization received the refund or credit. The waiver certificate, which an organization described in this subparagraph is deemed to have filed, shall not apply to any service with respect to the remuneration for which the taxes imposed by sections 3101 and 3111 are not due or payable (or are refunded) by reason of this subparagraph.

(5) In the case of an organization which is deemed under this paragraph to have filed a valid waiver certificate under section 3121(k)(1), if the taxes imposed by sections 3101 and 3111 were not paid during the period referred to in paragraph (a)(1)(iii) of this section (whether the period has terminated or not) with respect to remuneration paid by the organization to individuals who became its employees after the close of the calendar quarter in which such period began, taxes under sections 3101 and 3111 with respect to remuneration paid prior to July 1, 1977, to such employees, which remain unpaid on December 20, 1977 (or which were paid after October 19, 1976, but prior to December 20, 1977), shall not be due or payable (or, if paid, shall be refunded). The waiver certificate, which an organization described in this subparagraph is deemed to have filed, shall not apply to any service with respect to remuneration for which the taxes imposed by sections 3101 and 3111 are not due or payable (or are refunded) by reason of this subparagraph.

(6) This subparagraph allows certain employees to obtain social security coverage for service not covered by a deemed-filed waiver certificate by reason of section 3121(k)(4)(C) and paragraph (a)(4) or (5) of this section. To qualify under this subparagraph, all of the following conditions must be met.

(i) An individual performed service as an employee of an organization which is deemed under this paragraph to have filed a waiver certificate under section 3121(k)(1), on or after the first day of the period described in paragraph (a)(1)(iii) of this section and before July 1, 1977.

(ii) The service performed by the individual does not constitute employment (as defined in section 210 (a) of the Social Security Act and section 3121(b) of the Code) because the waiver certificate which the organization is deemed to have filed is inapplicable to such service by reason of section 3121(k)(4)(C), but would constitute employment (as so defined) in the absence of section 3121(k)(4)(C).

(iii) The individual files a request on or before April 15, 1980, in the manner and form, and with such official, as may be prescribed by regulations under title II of the Social Security Act.

(iv) That request is accompanied by full payment of the taxes, which would have been paid under section 3101 with respect to the remuneration for the service described in paragraph (a)(6)(ii) of this section but for the application of section 3121(k)(4)(C) (or by satisfactory evidence that appropriate arrangements have been made for the payment of such taxes in installments as provided in section 3121(k)(8) and paragraph (d) of this section).

If these conditions are satisfied, the remuneration paid for the service described in paragraph (a)(6)(i) of this section shall be deemed to constitute remuneration for employment. In any case where remuneration paid by an organization to an individual is deemed under this subparagraph to constitute remuneration for employment, such organization shall be liable (notwithstanding any other provision of the Code or regulations) for payment of the taxes it would have been required to pay under section 3111 with respect to such remuneration but for the application of section 3121(k)(4)(C). The due date for the return and payment by the organization of the taxes described in the preceding sentence shall be the last day of the calendar month following the calendar quarter in which the organization is notified in writing of the employee's request. However, see paragraph (d) of this section which permits the payment of these taxes in installments.

(b) *Constructive filing of waiver certificate where refund or credit has been allowed and new certificate is not filed.* (1) This paragraph applies to an organization which meets two conditions. First, it must be an organization to which paragraph (a) of this section would apply but for its failure to satisfy the requirement of paragraph (a)(1)(iv) of this section because a refund or credit of taxes was allowed before September 9, 1976. Second, it must not have filed an actual valid waiver certificate under section 3121(k)(1) in accordance with the requirements of paragraph (c) of this section.

(2) An organization to which this paragraph applies shall be deemed, for purposes of section 210(a)(8)(B) of the Social Security Act and section 3121(b)(8)(B), to have filed a valid waiver certificate under section 3121(k)(1) on April 1, 1978. Such certificate shall be effective for the period beginning on the first day of the first calendar quarter with respect to which the refund or credit referred to in paragraph (b)(1) of this section was allowed (or, if later, on July 1, 1973).

(3) If an organization is deemed under this paragraph to have filed a waiver certificate on April 1, 1978, the provisions of paragraph (a)(2)(ii) and (iii) of this section (relating to employees covered by a deemed-filed waiver certificate) shall apply. Such certificate shall supersede any certificate which may have been actually filed by such organization prior to that date.

(4) Where an organization is deemed under this paragraph to have filed a waiver certificate on April 1, 1978, the due date for the return and payment of the taxes imposed by sections 3101 and 3111 for wages paid prior to April 1, 1978, with respect to services constituting employment by reason of such certificate shall be August 1, 1978. However, see paragraph (d) of this section which permits the payment of these taxes in installments. Such taxes (along with the amount of any interest paid in connection with the refund or credit described in paragraph (b)(1) of this section) shall be a liability of such organization, payable from its own funds. No portion of such taxes (or interest) shall be deducted from the wages of (or otherwise collected from) the individuals who performed such services, and those individuals shall have no liability for the payment thereof.

(5) This subparagraph allows certain employees of organizations covered under this paragraph to obtain social security coverage for periods prior to those covered by a deemed-filed waiver certificate. To qualify under this subparagraph, all of the following conditions must be met.

(i) An individual performed service, as an employee of an organization deemed under this paragraph to have filed a waiver certificate under section 3121(k)(1), at any time prior to the period for which such certificate is effective.

(ii) The taxes imposed by sections 3101 and 3111 were paid with respect to remuneration paid for such service, but such service (or any part thereof) does not constitute employment (as defined in section 210(a) of the Social Security Act and section 3121(b)) because the applicable taxes so paid were refunded or credited (otherwise than through a refund or credit which would have been allowed if a valid waiver certificate filed under section 3121(k)(1) had been in effect) prior to September 9, 1976.

(iii) Any portion of such service (with respect to which taxes were paid and refunded or credited as described in paragraph (b)(5)(ii) of this section) would constitute employment (as so defined) if the organization had actually filed under section 3121(k)(1) a valid waiver certificate effective as provided in paragraph (c)(2) of this section (with such individual's signature appearing on the accompanying list).

If this subparagraph applies, the remuneration paid for the portion of such service described in paragraph (b)(5)(iii) of this section shall be deemed to constitute remuneration for employment (as defined in section 210(a) of the Social Security Act and section 3121(b)), where such individual filed a request on or before April 15, 1980 (in the manner and form, and with such official, as may be prescribed by regulations under title II of the Social Security Act), accompanied by full repayment of the taxes which were paid under section 3101 with respect to such remuneration and were refunded or credited (or by satisfactory evidence that arrangements have been made for the payment of such taxes in installments as provided in section 3121(k)(8) and paragraph (d) of this section). In any case where remuneration paid by an organization to an individual is deemed under this subparagraph to constitute remuneration for employment such organization shall be liable (notwithstanding any other provision of the Code or regulations) for repayment of any taxes which it paid under section 3111 with respect to such remuneration and which were refunded or credited to it. Any interest received by the organization or its employees in connection with a refund or credit with respect to such taxes shall be remitted with the repayment of taxes pursuant to this subparagraph.

(c) *Actual filing of waiver certificate by April 1, 1978, where refund or credit has been allowed.* (1) An organization may file an actual waiver certificate in accordance with paragraphs (c)(2) and (3) of this section if it is an organization to which paragraph (a) of this section would apply but for its failure to meet the condition set forth in paragraph (a)(1)(iv) of this section.

(2) An organization described in paragraph (c)(1) of this section was permitted to file an actual waiver certificate on or before April 1, 1978. This certificate must be effective for the period beginning on or before the first day of the first calendar quarter with respect to which a refund or credit described in paragraph (b)(1) of this section was allowed (or, if later, with the first day of the earliest calendar quarter for which such certificate may be in effect under section 3121(k)(1)(B)(iii)). Such waiver certificate must have been accompanied by a list described in section 3121(k)(1)(A), containing the signature, address, and social security number of each concurring employee (if any).

(3) Such a waiver certificate shall be valid only if the organization complied with the following notification requirements and, on or before April 30, 1978, filed (with the service center of the Internal Revenue Service with which the waiver certificate was filed) a certification that it had complied with these notification requirements. However, these requirements shall be conclusively presumed to have been met with respect to any employees who concurred in the filing of the waiver certificate.

(i) Written notification of the option to obtain social security coverage for the retroactive period covered by the waiver certificate is required to have been given to all current and former employees of the organization with respect to whose remuneration taxes imposed by sections 3101 and 3111 were paid for any part of the period covered by the waiver certificate. For purposes of the preceding sentence, in the case of a former employee a mailing of notification to his or her last known address shall constitute delivery to the former employee. This notification must have been given at least 30 days prior to the date by which the employee was required to inform the organization whether he or she elects the retroactive social security coverage.

(ii) The notification required by this subparagraph must have stated the earliest date for which the waiver certificate is effective and the date by which the employee must have informed the organization of a decision to elect the retroactive coverage. In addition, the notification must have advised the employee how to obtain information as to the quarters of social security coverage to be obtained and any taxes or interest for which the employee would be liable if the election was made. The organization must have provided this information to any interested employee at least 14 days prior to the last day on which such employee was to have informed the organization of any election.

(iii) If the notification resulted in any employee electing the retroactive coverage whose signature did not appear on the list of concurring employees which accompanied a previously filed waiver certificate, the certification that was supplied on or before April 30, 1978, must have been accompanied by a special amendment to that list. Any employee whose name appears on this special amended list shall be treated as if his or her name appeared on the list of concurring employees filed with the waiver certificate. The preceding sentence shall only apply with respect to amended lists of concurring employees filed to comply with the requirements of this subparagraph.

(4) Any interest received in connection with a refund or credit described in paragraph (b)(1) of this section must have been repaid on or before April 30, 1978, with respect to each employee who concurs in the filing of a waiver certificate pursuant to this paragraph. Notwithstanding the provisions of paragraph (c)(4) of § 31.3121(k)–1, if such interest was repaid on or before April 30, 1978, the waiver certificate shall be considered to have been filed on the date it was originally furnished to the Internal Revenue Service.

(d) *Installment payment of taxes for retroactive coverage.* This paragraph applies if—

(1) An organization is deemed under paragraph (a) of this section to have filed a valid waiver certificate, but the applicable period described in paragraph (a)(1)(iii) has terminated and all or part of the taxes imposed by sections 3101 and 3111, with respect to remuneration paid by such organization to its employees after the close of such period, remains payable notwithstanding section 3121(k)(4)(C) and paragraph (a)(4) of this section; or

(2) An organization described in paragraph (c) files a valid waiver certificate by March 31, 1978, or, not having filed the certificate by that date, is seemed to have filed the certificate on April 1, 1978, under paragraph (b); or

(3) An individual files a request under paragraph (a)(6) or (b)(5) to have service treated as constituting remuneration for employment (as defined in section 210(a) of the Social Security Act and section 3121(b)).

If this paragraph applies, the taxes due under sections 3101 and 3111 (together with any additions to tax or interest other than interest described in paragraph (c)(4)) with respect to service constituting employment by reason of the waiver certificate for any period prior to the first day of the calendar quarter in which the certificate is filed or deemed filed, or with respect to service constituting employment by reason of an employee request, may be paid in installments over an appropriate period of time, as determined by the district director. In determining the appropriate period of time, the district director shall exercise forbearance and, to the extent possible, grant the organization an installment agreement that will allow it sufficient funds to carry out its basic mission. If any installment is not paid on or before the date fixed for its payment, the total unpaid amount shall become payable immediately and shall be paid upon notice and demand.

(e) *Application of certain provisions to cases of constructive filing.* (1) Except as provided in paragraphs (e)(2) and (3) of this section, all of the provisions of section 3121(k) (other than subparagraphs (B), (F), and (H) of section 3121(k)(1)) and the regulations thereunder (including the provisions requiring the payment of taxes under sections 3101 and 3111 with respect to the services involved), shall apply with respect to any certificate which is deemed to have been filed under paragraph (a) or (b) of this section, in the same way they would apply if the certificate had been actually filed on that day under section 3121(k)(1).

(2) The provisions of section 3121(k)(1)(E) shall not apply unless the taxes described in paragraph (a)(1)(iii) of this section were paid by the organization as though a separate certificate had been filed with respect to one or both of the groups to which such provisions relate.

(3) The action of the organization in obtaining the refund or credit described in paragraph (b)(1) of this section shall not be considered a termination of such organization's coverage period for purposes of section 3121(k)(3).

(4) Any organization which is deemed to have filed a waiver certificate under paragraph (a) or (b) of this section shall be considered for purposes of section 3102(b) to have been required to deduct the taxes imposed by section 3101 with respect to the services involved.

[T.D. 7647, 44 FR 59524, Oct. 16, 1979]

§ 31.3121(l)–1 Agreements entered into by domestic corporations with respect to foreign subsidiaries.

For provisions relating to the extension of the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act to certain services performed outside the United States by citizens of the United States in the employ of a foreign subsidiary of a domestic corporation, see the Regulations Relating to Contract Coverage of Employees of Foreign Subsidiaries (part 36 of this chapter).

§ 31.3121(o)–1 Crew leader.

The term ''crew leader'' means an individual who furnishes individuals to perform agricultural labor for another person, if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by them and if such individual has not entered into a written agreement with such person whereby such individual has been designated as an employee of such person. For purposes of this chapter a crew leader is deemed to be the employer of the individuals furnished by him to perform agricultural labor, after 1956, for another person, and the crew leader is deemed not to be an employee of such other person with respect to the performance of services by him after 1956 in furnishing such individuals or as a member of the crew. An individual is not a crew leader within the meaning of section 3121(o) and of this section if he does not pay the agricultural workers furnished by him to perform agricultural labor for another person, or if there is an agreement between such individual and the person for whom the agricultural labor is performed whereby such individual is designated as an employee of such person. Whether or not such individual is an employee will be determined under the usual common-law rules (see paragraph (c) of § 31.3121(d)–1).

[T.D. 6744, 29 FR 8320, July 2, 1964]

§ 31.3121(q)–1 Tips included for employee taxes.

(a) *In general.* Except as otherwise provided in paragraph (b) of this section, tips received after 1965 by an employee in the course of his employment shall be considered remuneration for employment. (For definition of the term ''employee'' see 3121(d) and § 31.3121(d)–1.) Tips reported by an employee to his employer in a written statement furnished to the employer pursuant to section 6053(a) (see § 31.6053–1) shall be deemed to be paid to the employee at the time the written statement is furnished to the employer. Tips received by an employee which are not reported to his employer in a written statement furnished pursuant to section 6053(a) shall be deemed to be paid to the employee at the time the tips are actually received by the employee. For provisions relating to the collection of employee tax in respect of tips from the employee, see § 31.3102–3.

(b) *Tips not included for employer taxes.* Tips received after 1965 by an employee in the course of his employment do not constitute remuneration for employment for purposes of computing wages subject to the taxes imposed by subsections (a) and (b) of section 3111.

(c) *Tips received by an employee in course of his employment.* Tips are considered to be received by an employee in the course of his employment for an employer regardless of whether the tips are received by the employee from a person other than his employer or are paid to the employee by the employer. However, only those tips which are received by an employee on his own behalf (as distinguished from tips received on behalf of another employee) shall be considered as remuneration paid to the employee. Thus, where employees practice tip splitting (for example, where waiters pay a portion of the tips received by them to the busboys), each employee who receives a portion of a tip left by a customer of the employer is considered to have received tips in the course of his employment.

(d) *Computation of annual wage limitation.* In connection with the application of the annual wage limitation (see § 31.3121(a)(1)–1), tips reported by an employee to his employer in a written statement furnished to the employer pursuant to section 6053(a) shall be taken into account for purposes of the tax imposed by section 3101. However, since tips received by an employee in the course of his employment do not constitute remuneration for employment for purposes of the tax imposed by section 3111, they are disregarded for purposes of the annual wage limitation in respect of such tax. Accordingly, separate computations for purposes of the annual wage limitation may be required in respect of an employee who receives tips. The provisions of this paragraph may be illustrated by the following example:

Example. During 1966, A is employed as a waiter by X restaurant and is paid wages by X restaurant at the rate of $100 a week. At the end of October 1966, A has been paid weekly wages in the amount of $4,300 and has reported tips in the amount of $2,200. On November 6, 1966, A is paid an additional week's wages in the amount of $100 and on November 9, 1966, A furnishes X restaurant a report of tips actually received by him during October. The annual wage limitation of $6,600 (weekly wages of $4,400 ($4,300 plus $100) and tips of $2,200) had been reached for purposes of the tax imposed by section 3101 prior to November 9 and, accordingly, no portion of the tips included in the report furnished on that date constitutes wages. However, since tips do not constitute remuneration for employment for purposes of the tax imposed by section 3111, the weekly wages paid to A during the remainder of 1966 will be subject to the tax imposed by section 3111.

[T.D. 7001, 34 FR 1000, Jan. 23, 1969]

§ 31.3121(r)–1 Election of coverage by religious orders.

(a) *In general.* A religious order whose members are required to take a vow of poverty, or any autonomous subdivision of such an order, may elect to have the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act extended to services performed by its members in the exercise of duties required by such order or subdivision. See section 3121(i)(4) and § 31.3121(i)–4 for provisions relating to the computation of the amount of remuneration of such members. For purposes of this section, a subdivision of a religious order is autonomous if it directs and governs its members, if it is responsible for its members' care and maintenance, if it is responsible for the members' support and maintenance in retirement, and if the members live under the authority of a religious superior who is elected by them or appointed by higher authority.

(b) *Definition of member*—(1) *In general.* For purposes of section 3121(r) and this section, a member of a religious order means any individual who is subject to a vow of poverty as a member of such order, who performs tasks usually required (and to the extent usually required) of an active member of such order, and who is not considered retired because of old age or total disability.

(2) *Retirement because of old age*—(i) *In general.* For purposes of section 3121(r)(2) and this paragraph, an individual is considered retired because of old age if (A) in view of all the services performed by the individual and the surrounding circumstances it is reasonable to consider him to be retired, and (B) his retirement occurred by reason of old age. Even though an individual performs some services in the exercise of duties required by the religious order, the first test (the retirement test) is met where it is reasonable to consider the individual to be retired.

(ii) *Factors to be considered.* In determining whether it is reasonable to consider an individual to be retired, consideration is first to be given to all of the following factors:

(A) *Nature of services.* Consideration is given to the nature of the services performed by the individual in the exercise of duties required by his religious order. The more highly skilled and valuable such services are, the more likely the individual rendering such services is not reasonably considered retired. Also, whether such services are of a type performed principally by retired members of the individual's religious order may be significant.

(B) *Amount of time.* Consideration is also given to the amount of time the individual devotes to the performance of services in the exercise of duties required by his religious order. This time includes all the time spent by him in any activity in connection with services that might appropriately be performed in the exercise of duties required of active members by the order. Normally, an individual who, solely by reason of his advanced age, performs services of less than 45 hours per month shall be considered retired. In no event shall an individual who, solely by reason of his advanced age, performs services of less than 15 hours per month not be considered retired.

(C) *Comparison of services rendered before and after retirement.* In addition, consideration is given to the nature and extent of the services rendered by the individual before he ''retired,'' as compared with the services performed thereafter. A large reduction in the importance or amount of services performed by the individual in the exercise of duties required by his religious order tends to show that the individual is retired; absence of such reduction tends to show that the individual is not retired. Normally, an individual who reduces by at least 75 percent the amount of services performed shall be considered retired.

Where consideration of the factors described in paragraph (b)(2)(ii) of this section does not establish whether an individual is or is not reasonably considered retired, all other factors are considered.

(iii) *Examples.* The rules of this subparagraph may be illustrated by the following examples:

Example 1. A is a member of a religious order who is subject to a vow of poverty. A's religious order is principally engaged in providing nursing services, and A has been fully trained in the nursing profession. In accordance with the practices of her order, upon attaining the age of 65, A is relieved of her nursing duties by reason of her age, and is assigned to a mother house where she is required to perform only such duties as light housekeeping and ordinary gardening. A is reasonably considered retired since the services she is performing are simple in nature, are markedly less skilled than those professional services which she previously performed, are of a type performed principally by retired members of her order, and are performed at a location to which members frequently retire.

Example 2. Assume the same facts as in example 1 except that A is not reassigned to a mother house. Instead, she is reassigned to full-time duties in a hospital not utilizing her nursing skills. Whether A has met the retirement test requires consideration of the nature of her work. If A's new duties are almost entirely of a make-work nature primarily to occupy her body and mind, she is reasonably considered retired. However, if they are essential to the operation of the hospital, she is not reasonably considered retired.

Example 3. B is a member of a religious order who is subject to a vow of poverty. As such, he provides supportive services to his order, such as housekeeping, cooking, and gardening. By reason of having attained the age of 62, he reduces the number of hours spent per day in these services from 8 hours to 2 hours. B is reasonably considered retired in view of the large reduction in the amount of time he devotes to his duties.

Example 4. C is a member of a religious order who is subject to a vow of poverty. In his capacity as a member of the order, he performs duties as president of a university. Upon attaining the age of 65, C is relieved of his duties as president of the university and instead becomes a member of its faculty, teaching two courses whereas full-time members of the faculty normally teach four comparable courses. Although C's duties are no longer as demanding as those he previously performed, and although the amount of his time required for them is less than full time, he is nonetheless performing duties requiring a high degree of skill for a substantial amount of time. Accordingly, C is not reasonably considered retired.

Example 5. Assume the same facts as in example 4, except that C teaches only one course upon being relieved of his position as president by reason of age. C is reasonably considered retired.

Example 6. D is a member of a contemplative order who is subject to a vow of poverty. In accordance with the practices of his order, upon attaining the age of 70, D reduces by 50 percent the amount of time spent performing the normal duties of active members of his order. D is not reasonably considered retired.

Example 7. Assume the same facts as in example 6, except that because of his age D no longer participates in the more rigorous liturgical services of the order and that the amount of time which he spends in all duties which might appropriately be performed by active members of his order is reduced by 75 percent. D is reasonably considered retired in view of the large reduction in his participation in the usual devotional routine of his order.

(3) *Retirement because of total disability.* For purposes of section 3121(r)(2) and this paragraph, an individual is considered retired because of total disability (i) if he is unable, by reason of a medically determinable physical or mental impairment, to perform the tasks usually required of an active member of his order to the extent necessary to maintain his status as an active member, and (ii) if such impairment is reasonably expected to prevent his resumption of the performance of such tasks to such extent. A physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. Statements of the individual, including his own description of his impairment (symptoms), are, alone, insufficient to establish the presence of a physical or mental impairment.

(4) *Evidentiary requirements with respect to retirement.* There shall be attached to the return of taxes paid pursuant to an election under section 3121(r) a summary of the facts upon which any determination has been made by the religious order or autonomous subdivision that one or more of its members retired during the period covered by such return. Each summary shall contain the name and social security number of each such retired member as well as the date of his retirement. Such order or subdivision shall maintain records of the details relating to each such ''retirement'' sufficient to show whether or not such member or members has in fact retired.

(c) *Certificates of election*—(1) *In general.* A religious order or an autonomous subdivision of such an order desiring to make an election of coverage pursuant to section 3121(r) and this section shall file a certificate of election on Form SS–16 in accordance with the instructions thereto. However, in the case of an election made before August 9, 1973, a document other than Form SS–16 shall constitute a certificate of election if it purports to be a binding election of coverage and if it is filed with an appropriate official of the Internal Revenue Service. Such a document shall be given the effect it would have if it were a certificate of election containing the provisions required by paragraph (c)(2) of this section. However, it should subsequently be supplemented by a Form SS–16.

(2) *Provisions of certificates.* Each certificate of election shall provide that—

(i) Such election of coverage by such order or subdivision shall be irrevocable,

(ii) Such election shall apply to all current and future members of such order, or in the case of a subdivision thereof to all current and future members of such order who belong to such subdivision,

(iii) All services performed by a member of such order or subdivision in the exercise of duties required by such order or subdivision shall be deemed to have been performed by such member as an employee of such order or subdivision, and

(iv) The wages of each member, upon which such order or subdivision shall pay the taxes imposed on employees and employers by sections 3101 and 3111, will be determined as provided in section 3121(i)(4).

(d) *Effective date of election*—(1) *In general.* Except as provided in paragraph (e) of this section, a certificate of election of coverage filed by a religious order or its subdivision pursuant to section 3121(r) and this section shall be in effect, for purposes of section 3121(b)(8)(A) and for purposes of section 210(a)(8)(A) of the Social Security Act, for the period beginning with whichever of the following may be designated by the electing religious order or subdivision:

(i) The first day of the calendar quarter in which the certificate is filed,

(ii) The first day of the calendar quarter immediately following the quarter in which the certificate is filed, or

(iii) The first day of any calendar quarter preceding the calendar quarter in which the certificate is filed, except that such date may not be earlier than the first day of the 20th calendar quarter preceding the quarter in which such certificate is filed.

(2) *Retroactive elections.* Whenever a date is designated as provided in paragraph (d)(1)(iii) of this section, the election shall apply to services performed before the quarter in which the certificate is filed only if the member performing such services was a member at the time such services were performed and is living on the first day of the quarter in which such certificate is filed. Thus, the election applies to an individual who is no longer a member of a religious order on the first day of such quarter if he performed services as a member at any time on or after the date so designated and is living on the first day of the quarter in which such certificate is filed. For purposes of computing interest and for purposes of section 6651 (relating to additions to tax for failure to file tax return or to pay tax), in any case in which such a date is designated the due date for the return and payment of the tax, for calendar quarters prior to the quarter in which the certificate is filed, resulting from the filing of such certificate shall be the last day of the calendar month following the calendar quarter in which the certificate is filed. The statutory period for the assessment of the tax for such prior calendar quarters shall not expire before the expiration of 3 years from such due date.

(e) *Coordination with coverage of lay employees.* If at the time the certificate of election of coverage is filed by a religious order or autonomous subdivision, a certificate of waiver of exemption under section 3121(k) (extending coverage to any lay employees) is not in effect, the certificate of election shall not become effective unless the order or subdivision files a Form SS–15, and a Form SS–15a to accompany the certificate on Form SS–15, as provided by section 3121(k) and §§ 31.3121(k)–1 through 31.3121(k)–3. The preceding sentence applies even though an order or subdivision has no lay employees at the time it files a certificate of election of coverage. The effective date of the certificate of waiver of exemption must be no later than the date on which the certificate of election becomes effective, and it must be specified on the certificate of waiver of exemption that such certificate is irrevocable. The certificate of waiver of exemption required under this paragraph shall be filed notwithstanding the provisions of section 3121(k)(3) (relating to no renewal of the waiver of exemption) which otherwise would prohibit the filing of a waiver of exemption if an earlier waiver of exemption had previously been terminated. If at the time the certificate of election of coverage is filed a certificate of waiver of exemption is in effect with respect to the electing religious order or autonomous subdivision, the filing of the certificate of election shall constitute an amendment of the certificate of waiver of exemption making the latter certificate irrevocable.

[T.D. 7280, 38 FR 18370, July 10, 1973]

§ 31.3121(s)–1 Concurrent employment by related corporations with common paymaster.

(a) *In general.* For purposes of sections 3102, 3111, and 3121(a)(1), except as otherwise provided in paragraph (c) of this section, when two or more related corporations concurrently employ the same individual and compensate that individual through a common paymaster which is one of the related corporations that employs the individual, each of the corporations is considered to have paid only the remuneration it actually disburses to that individual. This rule applies whether the remuneration was paid with respect to the employment relationship of the individual with the disbursing corporation or was paid on behalf of another related corporation. Accordingly, if all of the remuneration to the individual from the related corporations is disbursed through the common paymaster, the total amount of taxes imposed with respect to the remuneration under sections 3102 and 3111 is determined as though the individual has only one employer (the common paymaster). The common paymaster is responsible for filing information and tax returns and issuing Forms W–2 with respect to wages it is considered to have paid under this section. Section 3121(s) and this section apply only to remuneration disbursed in the form of money, check or similar instrument by one of the related corporations or its agent.

(b) *Definitions.* The definitions contained in this paragraph are applicable only for purposes of this section and §31.3306(p)–1.

(1) *Related corporations.* Corporations shall be considered related corporations for an entire calendar quarter (as defined in §31.0–2(a)(9)) if they satisfy any one of the following four tests at any time during that calendar quarter:

(i) The corporations are members of a ''controlled group of corporations'', as defined in section 1563 of the Code, or would be members if section 1563(a)(4) and (b) did not apply and if the phrase ''more than 50 percent'' were substituted for the phrase ''at least 80 percent'' wherever it appears in section 1563(a).

(ii) In the case of a corporation that does not issue stock, either fifty percent or more of the members of one corporation's board of directors (or other governing body) are members of the other corporation's board of directors (or other governing body), or the holders of fifty percent or more of the voting power to select such members are concurrently the holders of more than fifty percent of that power with respect to the other corporation.

(iii) Fifty percent or more of one corporation's officers are concurrently officers of the other corporation.

(iv) Thirty percent or more of one corporation's employees are concurrently employees of the other corporation.

The following examples illustrate the application of this paragraph:

Example 1. (a) X Corporation employs individuals A, B, D, E, F, G, and H. Y Corporation employs individuals A, B, and C. Z Corporation employs individuals A, C, I, J, K, L, and M. X Corporation is the paymaster for all thirteen individuals. The corporations have no officers or stockholders in common.

(b) X and Y are related corporations because at least 30 percent of Y's employees are also employees of X. Y and Z are related corporations because at least 30 percent of Y's employees are also employees of Z. X and Z are not related corporations because neither corporation has 30 percent of its employees concurrently employed by the other corporation.

(c) For purposes of determining the amount of the tax liability under sections 3102 and 3111, individual B is treated as having one employer. Individual C has two employers for these purposes, although Y and Z are related corporations, because C is not employed by X Corporation, the common paymaster. Individual A also is treated as having two employers for the purposes of these sections because X and Y Corporations are treated as one employer, and Z Corporation is treated as a second employer (since it is not related to the paymaster, X Corporation). Of course, individuals D, E, F, G, H, I, J, K, L, and M are not concurrently employed by two or more corporations, and, accordingly, section 3121 (s) is inapplicable to them.

Example 2. M and N Corporations are both related to Corporation O but are not related to each other. Individual A is concurrently employed by all three corporations and paid by O, their common paymaster. Although M and N are not related, O is treated as the employer for A's employment with M, N, and O.

Example 3. Corporations X, Y, and Z meet the definition of related corporations for the first time on April 12, 1979, and cease to meet it on July 5, 1979. A is concurrently employed by X, Y, and Z throughout 1979. In each of the four calendar quarters of 1979, A's remuneration from X, Y, and Z is $2,000, $10,000, and $30,000, respectively. All of the remuneration to A from X, Y, and Z for the year is disbursed by X, the common paymaster. Under these circumstances, the amount of wages subject to sections 3102 and 3111 is as follows:

For the first calendar quarter

X	Y	Z
$2,000	$10,000	$22,900

For the second calendar quarter

X	Y	Z
$20,900	0	0

($22,900 – $2,000)

For the third calendar quarter

X	Y	Z
0	0	0

For the fourth calendar quarter

X	Y	Z
0	$10,000	0

Of course, if the corporations had been related throughout all of 1979, only $22,900 of X's first quarter disbursement would have constituted wages subject to sections 3102 and 3111.

(2) *Common paymaster*—(i) *In general.* A common paymaster of a group of related corporations is any member thereof that disburses remuneration to employees of two or more of those corporations on their behalf and that is responsible for keeping books and records for the payroll with respect to those employees. The common paymaster is not required to disburse remuneration to all the employees of those two or more related corporations, but the provisions of this section do not apply to any remuneration to an employee that is not disbursed through a common paymaster. The common paymaster may pay concurrently employed individuals under this section by one combined paycheck, drawn on a single bank account, or by separate paychecks, drawn by the common paymaster on the accounts of one or more employing corporations.

(ii) *Multiple common paymasters.* A group of related corporations may have more than one common paymaster. Some of the related corporations may use one common paymaster and others of the related corporations use another common paymaster with respect to a certain class of employees. A corporation that uses a common paymaster to disburse remuneration to certain of its employees may use a different common paymaster to disburse remuneration to other employees.

(iii) *Examples.* The rules of this subparagraph are illustrated by the following examples:

Example 1. S, T, U, and V are related corporations with 2,000 employees collectively. Forty of these employees are concurrently employed by two or more of the corporations, during a calendar quarter. The four corporations arrange for S to disburse remuneration to thirty of these forty employees for their services. Under these facts, S is the common paymaster of S, T, U, and V with respect to the thirty employees. S is not a common paymaster with respect to the remaining employees.

Example 2. (a) W, X, Y, and Z are related corporations. The corporations collectively have 20,000 employees. Two hundred of the employees are top-level executives and managers, sixty of whom are concurrently employed by two or more of the corporations during a calendar quarter. Six thousand of the employees are skilled artisans, all of whom are concurrently employed by two or more of the corporations during the calendar year. The four corporations arrange for Z to disburse remuneration to the sixty executives who are concurrently employed by two or more of the corporations. W and X arrange for X to disburse remuneration to the artisans who are concurrently employed by W and X.

(b) A is an executive who is concurrently employed only by W, Y, and Z during the calendar year. Under these facts, Z is a common paymaster for W, Y, and Z with respect to A. Assuming that the other requirements of this section are met, the amount of the tax liability under sections 3102 and 3111 is determined as if Z were A's only employer for the calendar quarter.

(c) B is a skilled artisan who is concurrently employed only by W and X during the calendar year. Under these facts, X is a common paymaster for S and X with respect to B. Assuming that the other requirements of this section are met, the amount of the tax liability under sections 3102 and 3111 is determined as if X were B's only employer for the calendar quarter.

(3) *Concurrent employment.* For purposes of this section, the term ''concurrent employment'' means the contemporaneous existence of an employment relationship (within the meaning of section 3121(b)) between an individual and two or more corporations. Such a relationship contemplates the performance of services by the employee for the benefit of the employing corporation (not merely for the benefit of the group of corporations), in exchange for remuneration which, if deductible for the purposes of Federal income tax, would be deductible by the employing corporation. The contemporaneous existence of an employment relationship with each corporation is the decisive factor; if it exists, the fact that a particular employee is on leave or otherwise temporarily inactive is immaterial. However, employment is not concurrent with respect to one of the related corporations if the employee's employment relationship with that corporation is completely nonexistent during periods when the employee is not performing services for that corporation. An employment relationship is completely nonexistent if all rights and obligations of the employer and employee with respect to employment have terminated, other than those that customarily exist after employment relationships terminate. Examples of

rights and obligations that customarily exist after employment relationships terminate include those with respect to remuneration not yet paid, employer's property used by the employee not yet returned to the employer, severance pay, and lump-sum termination payments from a deferred compensation plan. Circumstances that suggest that an employment relationship has become completely nonexistent include unconditional termination of participation in deferred compensation plans of the employer, forfeiture of seniority claims, and forfeiture of unused fringe benefits such as vacation or sick pay. Of course, the continued existence of an employment relationship between an individual and a corporation is not necessarily established by the individual's continued participation in a deferred compensation plan, retention of seniority rights, etc., since continuation of those benefits may be attributable to employment with a second corporation related to the first corporation if the corporations have common benefits plans or if the benefits are continued as a matter of corporate reciprocity. An individual who does not perform substantial services in exchange for remuneration from a corporation is presumed not employed by that corporation. Concurrent employment need not exist for any particular length of time to meet the requirements of this section, but this section only applies to remuneration disbursed by a common paymaster to an individual who is concurrently employed by the common paymaster and at least one other related corporation at the time the individual performs the services for which the remuneration is paid. If the employment relationship is nonexistent during a quarter, that employee may not be counted towards the 30-percent test set forth in paragraph (b)(1)(iv) of this section; however, even if the employment relationship is nonexistent, section 3121(s) of the Code would apply to remuneration paid to the former employee for services rendered while the employee was a common employee. The principles of this subparagraph are illustrated by the following examples.

Example 1. M, N, and O are related corporations which use N as a common paymaster with respect to officers. Their respective headquarters are located in three separate cities several hundred miles apart. A is an officer of M, N, and O who performs substantial services for each corporation. A does not work a set length of time at each corporate headquarters, and when A leaves one corporate headquarters, it is not known when A will return, although it is expected that A will return. Under these facts, A is concurrently employed by the three corporations.

Example 2. P, Q, and R are related corporations whose geographical zones of business activity do not overlap. P, Q, and R have a common pension plan and arrange for Q to be a common paymaster for managers and executives. All three corporations maintain cafeterias for the use of their employees. B is a cafeteria manager who has worked at P's headquarters for 3 years. On June 1, 1980, B is transferred from P to the position of cafeteria manager of R. There are no plans for B's return to P. B's accrued pension benefits, vacation and sick pay, do not change as a result of the transfer. The decision to transfer B was made by Q, the parent corporation. Under these facts, B is not concurrently employed by P and R, because B's employment relationship with P was completely nonexistent during B's employment with R. Furthermore, section 3121(s) is inapplicable since B also was not employed by Q, the common paymaster, because B never contracted to perform services for remuneration from Q, and Q did not have the right to control the day-to-day duties of B's work.

Example 3. C is employed by two related corporations, S and T. C was concurrently employed by these corporations between April 1, 1979, and June 30, 1979. The corporations used T as the common paymaster with respect to C's wages between May 1, 1979, and September 30, 1979. T pays C on May 15 for services performed between April 1 and April 30, on July 15 for services performed between June 1 and June 30, and on August 15 for services performed between July 1 and July 31. Section 3121 (s) applies to the first two payments but does not apply to the third payment (there was no concurrent employment). However, if the third payment was made by T for services performed for T, T counts the amounts previously disbursed to C in 1979 while C was concurrently employed by S and T towards the wage base (see section 3121 (a)(1)).

(c) *Allocation of employment taxes*—(1) *Responsibility to pay tax.* If the requirements of this section are met, the common paymaster has the primary responsibility for remitting taxes pursuant to sections 3102 and 3111 with respect to the remuneration it disburses as the common paymaster. The common paymaster computes these taxes as though it were the sole employer of the concurrently employed individuals. If the common paymaster fails to remit these taxes (in whole or in part), it remains liable for the full amount of the unpaid portion of these taxes. In addition, each of the other related corporations using the common paymaster is jointly and severally liable for its appropriate share of these taxes. That share is an amount equal to the lesser of:

(i) The amount of the liability of the common paymaster under section 3121(s), after taking account of any tax payments made, or

(ii) The amount of the liability under sections 3102 and 3111 which, but for section 3121(s), would have existed with respect to the remuneration from such other related corporation, reduced by an allocable portion of any taxes previously paid by the common paymaster with respect to that remuneration.

The portion of taxes previously paid by the common paymaster that is allocable to each related corporation is determined by multiplying the amount of taxes paid by a fraction, the numerator of which is the portion of the amount of employment tax liability of the common paymaster under section 3121(s) that is allocable to such related corporation under paragraph (c)(2) of this section, and the denominator of which is the total amount of the common paymaster's liability under section 3121(s), both determined without regard to any prior tax payments. These rules apply whether or not the tax on employees was withheld from the employees' wages.

(2) *Allocation of tax*—(i) *In general.* If the related corporations maintain a record of the remuneration disbursed to the employee for services performed for each corporation, the remuneration-based allocation rules of paragraph (c)(2)(ii) of this section apply. If the related corporations do not maintain this record of remuneration, the group-wide allocation rules of paragraph (c)(2)(iii) of this section apply. In all cases, allocations must be made with respect to each payment of wages. The allocation of employment tax liabilities pursuant to this subparagraph also determines which related corporation may be entitled to income tax deductions with respect to the payments of those taxes.

(ii) *Remuneration-based allocation rules.* Under the remuneration-based method of allocation, each related corporation that remunerates an employee through a common paymaster has allocated to it for each pay period an amount of tax determined according to the following formula:

$$\frac{\text{Portion of wage payment constituting remuneration to the employee for services performed for the corporation}}{\text{Total wage payment constituting remuneration to the employee for all services performed for the related corporations using the common paymaster}} \times \text{Tax on employees under section 3102 and tax on employers under section 3111 that the common paymaster is required to remit with respect to the wage payment}$$

If the remuneration disbursed to an employee for services performed for a corporation is inappropriate, the district director may adjust the remuneration records of the related corporations to reflect appropriate remuneration. The district director may use the principles of § 1.482–2(b) in making the adjustments.

Example. (i) X and Y are related corporations which use Y as common paymaster for their executives. A is a concurrently employed executive who performs services during the first quarter of 1979 for X and Y. Y remunerates $4,000 gross pay every week to A, calculated as follows:

Wage payments	Remuneration			Tax on employers under section 3111	Tax on employees withheld under section 3102	Total
	X	Y	Total			
1	$3,000	$1,000	$4,000	$245.20	$245.20	$490.40
2–3		8,000	8,000	490.40	490.40	980.80
4	1,000	3,000	4,000	245.20	245.20	490.40
5	4,000		4,000	245.20	245.20	490.40

Wage payments	Remuneration			Tax on employers under section 3111	Tax on employees withheld under section 3102	Total
	X	Y	Total			
6	2,000	2,000	4,000	177.77	177.77	355.54
7–13	10,000	18,000	28,000	0	0	0
Total	20,000	32,000	52,000	1,403.77	1,403.77	2,807.54

The amounts of remuneration to A are determined by the district director to be appropriate. Under these facts, the tax is allocated to X and Y in the following amounts:

Wage payments	X	Y
1	$\frac{\$3,000}{\$4,000} \times \$490.40 = \$367.80$	$\frac{\$1,000}{\$4,000} \times \$490.40 = \$122.60$
2-3	--	$\frac{\$8,000}{\$8,000} \times \$980.00 = \$980.80$
4	$\frac{\$1,000}{\$4,000} \times \$490.40 = \$122.60$	$\frac{\$3,000}{\$4,000} \times \$490.00 = \$367.80$
5	$\frac{\$4,000}{\$4,000} \times \$490.40 = \$490.40$	--
6	$\frac{\$2,000}{\$4,000} \times \$355.54 = \$177.77$	$\frac{\$2,000}{\$4,000} \times \$355.54 = \$177.77$
7-13	$\frac{\$10,000}{\$28,000} \times -0- = -0-$	$\frac{\$18,000}{\$28,000} \times -0- = -0-$
	$1,158.57	$1,648.97

(ii) If Y remits none of the taxes to the Internal Revenue Service, X is liable for $2,452.00 (the entire amount due pursuant to sections 3102 and 3111 with respect to the remuneration to A from X) (12.26% × $20,000). Any amount remitted by X to the Internal Revenue Service under these circumstances is also credited against the liability of the common paymaster, Y. However, only the portion of the employment taxes allocated to X under (i) above may be deducted by X as employment taxes paid by it in respect of wages paid by it to its employees.

(iii) If Y remits $1,000.00 of the total $2,807.54 due, Y as common paymaster remains liable for $1,807.54 ($2,807.54 minus $1,000). X's liability is the lesser of $1,807.54 (the liability of the common paymaster), or X's total liability, in the absence of section 3121 (s), on wages paid through the common paymaster ($2,452.00) minus a credit for an allocable part of the amount remitted by Y. The part is $412.66

$$\frac{\$1,158.57 \text{ (X's allocable share of tax)}}{\$2,807.54 \text{ (total tax)}} \quad \$1,000$$

(tax remitted). Since $1,807.54 is less than $2,039.34 ($2,452.00 minus $412.66), X and Y are jointly and severally liable for $1,807.54.

(iii) *Group-wide allocation rules.* Under the group-wide method of allocation, the district director may allocate the taxes imposed by sections 3102 and 3111 in an appropriate manner to a related corporation that remunerates an employee through a common paymaster if the common paymaster fails to remit the taxes to the Internal Revenue Service. Allocation in an appropriate manner varies according to the circumstances. It may be based on sales, property, corporate payroll, or any other basis that reflects the distribution of the services performed by the employee, or a combination of the foregoing bases. To the extent practicable, the district director may use the principles of § 1.482–2(b) in making the allocations.

(d) *Effective date.* This section is effective with respect to wages paid after December 31, 1978.

[T.D. 7660, 44 FR 75139, Dec. 19, 1979; 45 FR 17986, Mar. 20, 1980]

§ 31.3121(v)(2)-1 Treatment of amounts deferred under certain nonqualified deferred compensation plans.

(a) *Timing of wage inclusion*—(1) *General timing rule for wages.* Remuneration for employment that constitutes wages within the meaning of section 3121(a) generally is taken into account for purposes of the Federal Insurance Contributions Act (FICA) taxes imposed under sections 3101 and 3111 at the time the remuneration is actually or constructively paid. See § 31.3121(a)-2(a).

(2) *Special timing rule for an amount deferred under a nonqualified deferred compensation plan*—(i) *In general.* To the extent that remuneration deferred under a nonqualified deferred compensation plan constitutes wages within the meaning of section 3121(a), the remuneration is subject to the special timing rule described in this paragraph (a)(2). Remuneration is considered deferred under a nonqualified deferred compensation plan within the meaning of section 3121(v)(2) and this section only if it is provided pursuant to a plan described in paragraph (b) of this section. The amount deferred under a nonqualified deferred compensation plan is determined under paragraph (c) of this section.

(ii) *Special timing rule.* Except as otherwise provided in this section, an amount deferred under a nonqualified deferred compensation plan is required to be taken into account as wages for FICA tax purposes as of the later of—

(A) The date on which the services creating the right to that amount are performed (within the meaning of paragraph (e)(2) of this section); or

(B) The date on which the right to that amount is no longer subject to a substantial risk of forfeiture (within the meaning of paragraph (e)(3) of this section).

(iii) *Inclusion in wages only once (nonduplication rule).* Once an amount deferred under a nonqualified deferred compensation plan is taken into account (within the meaning of paragraph (d)(1) of this section), then neither the amount taken into account nor the income attributable to the amount taken into account (within the meaning of paragraph (d)(2) of this section) is treated as wages for FICA tax purposes at any time thereafter.

(iv) *Benefits that do not result from a deferral of compensation.* If a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) provides both a benefit that results from the deferral of compensation (within the meaning of paragraph (b)(3) of this section) and a benefit that does not result from the deferral of compensation, the benefit that does not result from the deferral of compensation is not subject to the special timing rule described in this paragraph (a)(2). For example, if a nonqualified deferred compensation plan provides retirement benefits which result from the deferral of compensation and disability pay (within the meaning of paragraph (b)(4)(iv)(C) of this section) which does not result from the deferral of compensation, the retirement benefits provided under the plan are subject to the special timing rule in this paragraph (a)(2) and the disability pay is not.

(v) *Remuneration that does not constitute wages.* If remuneration under a nonqualified deferred compensation plan does not constitute wages within the meaning of section 3121(a), then that remuneration is not taken into account as wages for FICA tax purposes under either the general timing rule described in paragraph (a)(1) of this section or the special timing rule described in this paragraph (a)(2). For example, benefits under a death benefit plan described in section 3121(a)(13) do not constitute wages for FICA tax purposes. Therefore, these benefits are not included as wages under the general timing rule described in paragraph (a)(1) of this section or the special timing rule described in this paragraph (a)(2), even if the death benefit plan would otherwise be considered a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section.

(b) *Nonqualified deferred compensation plan*—(1) *In general.* For purposes of this section, the term *nonqualified deferred compensation plan* means any plan or other arrangement, other than a plan described in section 3121(a)(5), that is established (within the meaning of paragraph (b)(2) of this section) by an employer for one or more of its employees, and that provides for the deferral of compensation (within the meaning of paragraph (b)(3) of this section). A nonqualified deferred compensation plan may be adopted unilaterally by the employer or may be negotiated among or agreed to by the employer and one or more employees or employee representatives. A plan may constitute a nonqualified deferred compensation plan under this section without regard to whether the deferrals under the plan are made pursuant to an election by the employee or whether the amounts deferred are treated as deferred compensation for income tax purposes (e.g., whether the amounts are subject to the deduction rules of section 404). In addition, a plan may constitute a nonqualified deferred compensation plan under this section whether or not it is an employee benefit plan under section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended (29 U.S.C. 1002(3)). For purposes of this section, except where the context indicates otherwise, the *term* plan includes a plan or other arrangement.

(2) *Plan establishment*—(i) *Date plan is established.* For purposes of this section, a plan is established on the latest of the date on which it is adopted, the date on which it is effective, and the date on which the material terms of the plan are set forth in writing. For purposes of this section, a plan will be deemed to be set forth in writing if it is set forth in any other form that is approved by the Commissioner. The material terms of the plan include the amount (or the method or formula for determining the amount) of deferred compensation to be provided under the plan and the time when it may or will be provided.

(ii) *Plan amendments.* In the case of an amendment that increases the amount deferred under a nonqualified deferred compensation plan, the plan is not considered established with respect to the additional amount deferred until the plan, as amended, is established in accordance with paragraph (b)(2)(i) of this section.

(iii) *Transition rule for written plan requirement.* For purposes of this section, an unwritten plan that was adopted and effective before March 25, 1996, is treated as established under this section as of the later of the date on which it was adopted or became effective, provided that the material terms of the plan are set forth in writing before January 1, 2000.

(3) *Plan must provide for the deferral of compensation*—(i) *Deferral of compensation defined.* A plan provides for the *deferral of compensation* with respect to an employee only if, under the terms of the plan and the relevant facts and circumstances, the employee has a legally binding right during a calendar year to compensation that has not been actually or constructively received and that, pursuant to the terms of the plan, is payable to (or on behalf of) the employee in a later year. An employee does not have a legally binding right to compensation if that compensation may be unilaterally reduced or eliminated by the employer after the services creating the right to the compensation have been performed. For this purpose, compensation is not considered subject to unilateral reduction or elimination merely because it may be reduced or eliminated by operation of the objective terms of the plan, such as the application of an objective provision creating a substantial risk of forfeiture (within the meaning of section 83). Similarly, an employee does not fail to have a legally binding right to compensation merely because the amount of compensation is determined under a formula that provides for benefits to be offset by benefits provided under a plan that is qualified under section 401(a), or because benefits are reduced due to investment losses or, in a final average pay plan, subsequent decreases in compensation.

(ii) *Compensation payable pursuant to the employer's customary payment timing arrangement.* There is no deferral of compensation (within the meaning of this paragraph (b)(3)) merely because compensation is paid after the last day of a calendar year pursuant to the timing arrangement under which the employer ordinarily compensates employees for services performed during a payroll period described in section 3401(b).

(iii) *Short-term deferrals.* If, under a nonqualified deferred compensation plan, there is a deferral of compensation (within the meaning of this paragraph (b)(3)) that causes an amount to be deferred from a calendar year to a date that is not more than a brief period of time after the end of that calendar year, then, at the employer's option, that amount may be treated as if it were not subject to the special timing rule described in paragraph (a)(2) of this section. An employer may apply this option only if the employer does so for all employees covered by the plan and all substantially similar nonqualified deferred compensation plans. For purposes of this paragraph (b)(3)(iii), whether compensation is deferred to a date that is not more than a brief period of time after the end of a calendar year is determined in accordance with § 1.404(b)–1T, Q&A–2, of this chapter.

(4) *Plans, arrangements, and benefits that do not provide for the deferral of compensation*—(i) *In general.* Notwithstanding paragraph (b)(3)(i) of this section, an amount or benefit described in any of paragraphs (b)(4)(ii) through (viii) of this section is not treated as resulting from the deferral of compensation for purposes of section 3121(v)(2) and this section and, thus, is not subject to the special timing rule of paragraph (a)(2) of this section.

(ii) *Stock options, stock appreciation rights, and other stock value rights.* The grant of a stock option, stock appreciation right, or other stock value right does not constitute the deferral of compensation for purposes of section 3121(v)(2). In addition, amounts received as a result of the exercise of a stock option, stock appreciation right, or other stock value right do not result from the deferral of compensation for purposes of section 3121(v)(2) if such amounts are actually or constructively received in the calendar year of the exercise. For purposes of this paragraph (b)(4)(ii), a *stock value right* is a right granted to an employee with respect to one or more shares of employer stock that, to the extent exercised, entitles the employee to a payment for each share of stock equal to the excess, or a percentage of the excess, of the value of a share of the employer's stock on the date of exercise over a specified price (greater than zero).

Thus, for example, the term stock value right does not include a phantom stock or other arrangement under which an employee is awarded the right to receive a fixed payment equal to the value of a specified number of shares of employer stock.

(iii) *Restricted property.* If an employee receives property from, or pursuant to, a plan maintained by an employer, there is no deferral of compensation (within the meaning of section 3121(v)(2)) merely because the value of the property is not includible in income (under section 83) in the year of receipt by reason of the property being nontransferable and subject to a substantial risk of forfeiture. However, a plan under which an employee obtains a legally binding right to receive property (whether or not the property is restricted property) in a future year may provide for the deferral of compensation within the meaning of paragraph (b)(3) of this section and, accordingly, may constitute a nonqualified deferred compensation plan, even though benefits under the plan are or may be paid in the form of property.

(iv) *Certain welfare benefits*—(A) *In general.* Vacation benefits, sick leave, compensatory time, disability pay, severance pay, and death benefits do not result from the deferral of compensation for purposes of section 3121(v)(2), even if those benefits constitute wages within the meaning of section 3121(a).

(B) *Severance pay.* Benefits that are provided under a severance pay arrangement (within the meaning of section 3(2)(B)(i) of ERISA) that satisfies the conditions in 29 CFR 2510.3–2(b)(1)(i) through (iii) are considered severance pay for purposes of this paragraph (b)(4)(iv). If benefits are provided under a severance pay arrangement (within the meaning of section 3(2)(B)(i) of ERISA), but do not satisfy one or more of the conditions in 29 CFR 2510.3–2(b)(1)(i) through (iii), then whether those benefits are severance pay within the meaning of this paragraph (b)(4)(iv) depends upon the relevant facts and circumstances. For this purpose, relevant facts and circumstances include whether the benefits are provided over a short period of time commencing immediately after (or shortly after) termination of employment or for a substantial period of time following termination of employment and whether the benefits are provided after any termination or only after retirement (or another specified type of termination). Benefits provided under a severance pay arrangement (within the meaning of section 3(2)(B)(i) of ERISA) are in all cases severance pay within the meaning of this paragraph (b)(4)(iv) if the benefits payable under the plan upon an employee's termination of employment are payable only if that termination is involuntary.

(C) *Death benefits and disability pay*—(*1*) *General definition.* Payments made under a nonqualified deferred compensation plan in the event of death are death benefits within the meaning of this paragraph (b)(4)(iv), but only to the extent the total benefits payable under the plan exceed the lifetime benefits payable under the plan. Similarly, payments made under a nonqualified deferred compensation plan in the event of disability are disability pay within the meaning of this paragraph (b)(4)(iv), but only to the extent the disability benefits payable under the plan exceed the lifetime benefits payable under the plan. Accordingly, any benefits that a nonqualified deferred compensation plan provides in the event of death or disability that are associated with an amount deferred under this section are disregarded in applying this section to the extent the benefits payable under the plan in the event of death or in the event of disability have a value in excess of the lifetime benefits payable under the plan.

(*2*) *Total benefits payable defined.* For purposes of paragraph (b)(4)(iv)(C)(*1*) of this section, the term *total benefits payable* under a plan means the present value of the total benefits payable to or on behalf of the employee (including benefits payable in the event of the employee's death) under the plan, disregarding any benefits that are payable only in the event of disability and determined separately with respect to each form of distribution or other election that may apply with respect to the employee.

(*3*) *Disability benefits payable defined.* For purposes of paragraph (b)(4)(iv)(C)(*1*) of this section, the term *disability benefits payable* under a plan means the present value of the benefits payable to or on behalf of the employee under the plan, including benefits payable in the event of the employee's disability but excluding death benefits within the meaning of this paragraph (b)(4)(iv).

(*4*) *Lifetime benefits payable defined.* For purposes of paragraph (b)(4)(iv)(C)(*1*) of this section, the term *lifetime benefits payable* under a plan means the present value of the benefits that could be payable to the employee under the plan during the employee's lifetime, determined under the plan's optional form of distribution or other election that is or was available to the employee at any time with respect to the amount deferred and that provides the largest present value to the employee during the employee's lifetime of any such form or election so available.

(*5*) *Rules of application.* For purposes of determining present value under this paragraph (b)(4)(iv)(C), present value is determined as of the time immediately preceding the time the amount deferred under a nonqualified deferred compensation plan is required to be taken into account under paragraph (e) of this section, using actuarial assumptions that are reasonable as of that date but taking into consideration only benefits that result from the deferral of compensation, as determined under this paragraph (b), and benefits payable in the event of death or disability. In addition, for purposes of paragraph (b)(4)(iv)(C)(*4*) of this section, present value must be determined without any discount for the probability that the employee may die before benefit payments commence and without regard to any benefits payable solely in the event of disability.

(v) *Certain benefits provided in connection with impending termination*—(A) *In* *general.* Benefits provided in connection with impending termination of employment under paragraph (b)(4)(v)(B) or (C) of this section do not result from the deferral of compensation within the meaning of section 3121(v)(2).

(B) *Window benefits*—(*1*) *In general.* For purposes of this paragraph (b)(4)(v), except as provided in paragraph (b)(4)(v)(B)(*3*) of this section, a window benefit is provided in connection with impending termination of employment. For this purpose, a window benefit is an early retirement benefit, retirement-type subsidy, social security supplement, or other form of benefit made available by an employer for a limited period of time (no greater than one year) to employees who terminate employment during that period or to employees who terminate employment during that period under specified circumstances.

(*2*) *Special rule for recurring window benefits.* A benefit will not be considered a window benefit if an employer establishes a pattern of repeatedly providing for similar benefits in similar situations for substantially consecutive, limited periods of time. Whether the recurrence of these benefits constitutes a pattern of amendments is determined based on the facts and circumstances. Although no one factor is determinative, relevant factors include whether the benefits are on account of a specific business event or condition, the degree to which the benefits relate to the event or condition, and whether the event or condition is temporary or discrete or is a permanent aspect of the employer's business.

(*3*) *Transition rule for window benefits.* In the case of a window benefit that is made available for a period of time that begins before January 1, 2000, an employer may choose to treat the window benefit as a benefit that results from the deferral of compensation if the sole reason the window benefit would otherwise fail to be provided pursuant to a nonqualified deferred compensation plan is the application of paragraph (b)(4)(v)(B)(*1*) of this section.

(*C*) *Termination within 12 months of establishment of a benefit or plan.* For purposes of this paragraph (b)(4)(v), a benefit is provided in connection with impending termination of employment, without regard to whether it constitutes a window benefit, if—

(*1*) An employee's termination of employment occurs within 12 months of the establishment of the plan (or amendment) providing the benefit; and

(*2*) The facts and circumstances indicate that the plan (or amendment) is established in contemplation of the employee's impending termination of employment.

(vi) *Benefits established after termination.* Benefits established with respect to an employee after the employee's termination of employment do not result from a deferral of compensation within the meaning of section 3121(v)(2). However, cost-of-living adjustments on benefit payments under a nonqualified deferred compensation plan (within the meaning of paragraph (b) of this section) shall not be considered benefits established after the employee's termination of employment for purposes of this paragraph (b)(4)(vi) merely because the employee does not obtain the right to the adjustment until after the employee's termination of employment. For purposes of the preceding sentence, *cost-of-living adjustments* are payments that satisfy conditions similar to those of 29 CFR 2510.3–2(g)(1)(ii) and (iii).

(vii) *Excess parachute payments.* An excess parachute payment (as defined in section 280G(b)) under an agreement entered into or renewed after June 14, 1984, in taxable years ending after such date, does not result from the deferral of compensation within the meaning of section 3121(v)(2). For this purpose, any contract entered into before June 15, 1984, that is amended after June 14, 1984, in any relevant significant aspect, is treated as a contract entered into after June 14, 1984.

(viii) *Compensation for current services.* A plan does not provide for the deferral of compensation within the meaning of section 3121(v)(2) if, based on the relevant facts and circumstances, the compensation is paid for current services.

(5) *Examples.* This paragraph (b) is illustrated by the following examples:

Example 1. (i) In December of 2001, Employer L tells Employee A that, if specified goals are satisfied for 2002, Employee A will receive a bonus on July 1, 2003, equal to a specified percentage of 2002 compensation. Because Employee A meets the specified goals, Employer L pays the bonus to Employee A on July 1, 2003, consistent with its oral commitment.

(ii) This arrangement is not a nonqualified deferred compensation plan under this section because its terms were not set forth in writing and, therefore, it was not established in accordance with paragraph (b)(2) of this section.

Example 2. (i) In 2004, Employer M establishes a compensation arrangement for Employee B under which Employer M agrees to pay Employee B a specified amount based on a percentage of his salary for 2004. The amount due is to be paid out of the general assets of Employer M and is payable in 2008.

(ii) Employee B has a legally binding right during 2004 to an amount of compensation that has not been actually or constructively received and that, pursuant to the terms of the arrangement, is payable in a later year. Therefore, the arrangement provides for the deferral of compensation.

Example 3. (i) Employer N establishes a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) for Employee C in 1984. The plan is amended on January 1, 2001, to increase benefits, and the amendment provides that the increase in benefits is on account of Employee C's performance of services for Employer N from 1985 through 2000.

(ii) The additional benefits that resulted from the plan amendment cannot be taken into account as amounts deferred for 1985 through 2000, even though the plan was established before then. Pursuant to paragraphs (b)(2)(ii) and (e)(1) of this section, the additional benefits cannot be taken into account before the latest of the date on which the amendment is adopted, the date on which the amendment is effective, or the date on which the material terms of the plan, as amended, are set forth in writing.

Example 4. (i) In 2002, Employer O, a state or local government, establishes a plan for certain employees that provides for the deferral of compensation and that is subject to section 457(a).

(ii) Paragraph (b)(1) of this section provides that nonqualified deferred compensation plan means any plan that is established by an employer and that provides for the deferral of compensation, other than a plan described in section 3121(a)(5). Section 3121(a)(5) lists, among other plans, an exempt governmental deferred compensation plan as defined in section 3121(v)(3). Under section 3121(v)(3)(A), this definition does not include any plan to which section 457(a) applies. Thus, the plan established by Employer O is not an exempt governmental deferred compensation plan described in section 3121(v)(3) and, consequently, is not a plan described in section 3121(a)(5). Accordingly, the plan is a nonqualified deferred compensation plan within the meaning of section 3121(v)(2) and paragraph (b)(1) of this section.

(iii) However, the general timing rule of paragraph (a)(1) of this section and the special timing rule of paragraph (a)(2) of this section apply only to remuneration for employment that constitutes wages. Under section 3121(b)(7), certain service performed in the employ of a state, or any political subdivision of a state, is not employment. Thus, even though the plan is a nonqualified deferred compensation plan, the extent to which section 3121(v)(2) applies to a participating employee will depend on whether or not the service performed for Employer O is excluded from the definition of employment under section 3121(b)(7).

Example 5. (i) In 2000, Employer P establishes a plan that provides for bonuses to be paid to employees based on an objective formula that takes into account the employees' performance for the year. Employer P does not have the discretion to reduce the amount of any employee's bonus after the end of the year. The bonus is not actually calculated until March 1 of the following year, and is paid on March 15 of that following year.

(ii) The plan provides for the deferral of compensation because the employees have a legally binding right, as of the last day of a calendar year, to an amount of compensation that has not been actually or constructively received and, pursuant to the terms of the plan, that compensation is payable in a later year. However, because the bonuses under the plan are paid within a brief period of time after the end of the calendar year from which they are deferred, Employer P may choose, pursuant to paragraph (b)(3)(iii) of this section, to treat all the bonuses as if they are not subject to the special timing rule of paragraph (a)(2) of this section.

(iii) If the employer uses the special timing rule, the amount deferred would be taken into account as wages on December 31, 2000. If the employer chooses not to use the special timing rule, the amount of the bonus is wages on the date it is actually or constructively paid, March 15, 2000.

Example 6. (i) Employer Q establishes a plan under which bonuses based on performance in one year may be paid on February 1 of the following year at the discretion of the board of directors. The board of directors meets in January of each year to determine the amount, if any, of the bonuses to be paid based on performance in the prior year.

(ii) Because an employee does not have a legally binding right to any bonus until January of the year in which the bonus is paid, any bonus paid under the plan in that year is not deferred from the preceding calendar year, and the plan does not provide for the deferral of compensation within the meaning of paragraph (b)(3)(i) of this section.

Example 7. (i) Employer R maintains a plan for employees that provides nonqualified stock options described in §1.83–7(a) of this chapter. Under the plan, employees are granted in 2001 the option to acquire shares of employer stock at the fair market value of the shares on the date of grant ($50 per share). The options can be exercised at any time from the date of grant through 2010. The options do not have a readily ascertainable fair market value for purposes of section 83 at the date of grant, and shares are issued upon the exercise of the options without being subject to a substantial risk of forfeiture within the meaning of section 83. In 2005, when the fair market value of a share of employer stock is $80, Employee D exercises an option to acquire 1,000 shares.

(ii) Under paragraph (b)(4)(ii) of this section, neither the grant of a stock option nor amounts received currently as a result of the exercise of a stock option result from the deferral of compensation for purposes of section 3121(v)(2). Thus, under the general timing rule of paragraph (a)(1) of this section, the $30,000 spread between the amount paid for the shares ($50,000) and the fair market value of the shares on the date of exercise ($80,000) is taken into account as wages for FICA tax purposes in the year of exercise.

(iii) If the options had been granted at $45 per share, $5 per share below the fair market value on date of grant, the $35,000 spread between the amount paid for the shares ($45,000) and the fair market value of the shares on the date of exercise ($80,000) would similarly be taken into account as wages for FICA tax purposes in the year of exercise.

Example 8. (i) Employer T establishes a phantom stock plan for certain employees. Under the plan, an employee is credited on the last day of each calendar year with a dollar amount equal to the fair market value of 1,000 shares of employer stock. Upon termination of employment for any reason, each employee is entitled to receive the value on the date of termination, in cash or employer stock, of the shares with which he or she has been credited.

(ii) Because compensation to which the employee has a legally binding right as of the last day of one year is paid in a subsequent year, the phantom stock plan provides for the deferral of compensation. The phantom stock plan does not provide stock value rights within the meaning of paragraph (b)(4)(ii) of this section because it provides for awards equal in value to the full fair market value of a specified number of shares of Employer T stock, rather than the excess of that fair market value over a specified price.

Example 9. (i) Employer U establishes a severance pay arrangement (within the meaning of section 3(2)(b)(i) of ERISA) which provides for payments solely upon an employee's death, disability, or dismissal from employment. The amount of the payments to an employee is based on the length of continuous active service with Employer U at the time of dismissal, and is paid in monthly installments over a period of three years.

(ii) Because benefits payable under the plan upon termination of employment are payable only upon an employee's involuntary termination, the plan is a severance pay plan within the meaning of paragraph (b)(4)(iv)(B) of this section. Thus, the benefits are not treated as resulting from the deferral of compensation for purposes of section 3121(v)(2).

Example 10. (i) Employer V establishes a nonqualified deferred compensation plan under which employees will receive benefit payments commencing at age 65 as a life annuity or in one of several actuarially equivalent annuity forms. If an employee dies before benefit payments commence under the plan, a benefit is payable to the employee's designated beneficiary in a single lump sum payment equal to the present value of the employee's annuity benefit. This benefit (sometimes called a full reserve death benefit) is calculated using the applicable interest rate specified in section 417(e) and, for the period after age 65, the applicable mortality table specified in section 417(e), both of which are reasonable actuarial assumptions. During 2002, Employee E obtains a legally binding right to an annuity benefit under the plan, payable at age 65. This annuity benefit has a present value of $10,000 at the end of 2002, determined using the same assumptions as are used under the plan to calculate the full reserve death benefit.

(ii) The present value, at the end of 2002, of the total benefits payable to or on behalf of Employee E (i.e., the sum of the present value of the annuity benefit commencing at age 65, and the present value of the full reserve death benefit, with both determined using the actuarial assumptions described in paragraph (i) of this *Example 10*, except also taking into account the probability of death prior to age 65) is $10,000. This present value does not exceed the present value of the annuity benefits that could be payable to Employee E under the plan during Employee E's lifetime determined without a discount for the possibility that Employee E might die before age 65 (also $10,000). Thus, the benefit payable in the event of Employee E's death is not a death benefit for purposes of paragraph (b)(4)(iv) of this section.

(iii) The same result would apply in the case of a plan that bases benefits on an interest bearing account balance and pays the account balance at termination of employment or death (because the sum of the deferred benefits payable in the future if the employee terminates employment before death with a discount for the probability of death before that date plus the present value of the benefit payable in the event of death necessarily equals the present value of the deferred benefits payable with no discount for the probability of death).

Example 11. (i) The facts are the same as in Example 10, except that, in lieu of the full reserve death benefit, the plan provides a monthly life annuity benefit to an employee's spouse in the event of the employee's death before benefit payments commence equal to 100 percent of the monthly annuity that would be payable to the employee at age 65 under the life annuity form. Employee E is age 63 and has a spouse who is age 51. The sum of the present value of Employee E's annuity benefit commencing at age 65 determined with a discount for the possibility that Employee E might die before age 65 and the present value of the 100 percent annuity death benefit for Employee E's spouse exceeds $10,000.

(ii) The amount deferred for 2002 is $10,000 (because the 100 percent annuity death benefit for Employee E's spouse is disregarded to the extent that the total benefits payable to or on behalf of Employee E exceeds the present value of the annuity benefits that could be payable to Employee E under the plan during Employee E's lifetime without a discount for the probability of Employee E's death before benefit payments commence).

Example 12. (i) On January 1, 2001, Employer W establishes a plan that covers only Employee F, who owns a significant portion of the business and who has 30 years of service as of that date. The plan provides that, upon Employee F's termination of employment at any time, he will receive $200,000 per year for each of the immediately succeeding five years. Employee F terminates employment on March 1, 2001.

(ii) Because Employee F terminates employment within 12 months of the establishment of the plan and the facts and circumstances set forth above indicate that the plan was established in contemplation of impending termination of employment, the plan is considered to be established in connection with impending termination within the meaning of paragraph (b)(4)(v) of this section. Therefore, the benefits provided under the plan are not treated as resulting from the deferral of compensation for purposes of section 3121(v)(2).

Example 13. (i) Employer X establishes a plan on January 1, 2004, to supplement the qualified retirement benefits of recently hired 55-year old Employee G, who forfeited retirement benefits with her former employer in order to accept employment with Employer X. The plan provides that Employee G will receive $50,000 per year for life beginning at age 65, regardless of when she terminates employment. On April 15, 2004, Employee G unexpectedly terminates employment.

(ii) The facts and circumstances indicate that the plan was not established in contemplation of impending termination. Thus, even though Employee G terminated employment within 12 months of the establishment of the plan, the plan is not considered to be established in connection with impending termination within the meaning of paragraph (b)(4)(v) of this section. Benefits provided under the plan are treated as resulting from the deferral of compensation for purposes of section 3121(v)(2).

Example 14. (i) Employer Y establishes a plan to provide supplemental retirement benefits to a group of management employees who are at various stages of their careers. All employees covered by the plan are subject to the same benefit formula. Employee H is planning to (and actually does) retire within six months of the date on which the plan is established.

(ii) Even though Employee H terminated employment within 12 months of the establishment of the plan, the plan is not considered to have been established in connection with Employee H's impending termination within the meaning of paragraph (b)(4)(v) of this section because the facts and circumstances indicate otherwise.

Example 15. (i) Employee J owns 100 percent of Employer Z, a corporation that provides consulting services. Substantially all of Employer Z's revenue is derived as a result of the services performed by Employee J. In each of 2001, 2002, and 2003, Employer Z has gross receipts of $180,000 and expenses (other than salary) of $80,000. In each of 2001 and 2002, Employer Z pays Employee J a salary of $100,000 for services performed in each of those years. On December 31, 2002, Employer Z establishes a plan to pay Employee J $80,000 in 2003. The plan recites that the payment is in recognition of prior services. In 2003, Employer Z pays Employee J a salary of $20,000 and the $80,000 due under the plan.

(ii) The facts and circumstances described above indicate that the $80,000 paid pursuant to the plan is based on services performed by Employee J in 2003 and, thus, is paid for current services within the meaning of paragraph (b)(4)(viii) of this section. Accordingly, the plan does not provide for the deferral of compensation within the meaning of section 3121(v)(2), and the $80,000 payment is included as wages in 2003 under the general timing rule of paragraph (a)(1) of this section.

(c) *Determination of the amount deferred*—(1) *Account balance plans*—(i) *General rule.* For purposes of this section, if benefits for an employee are provided under a nonqualified deferred compensation plan that is an account balance plan, the amount deferred for a period equals the principal amount credited to the employee's account for the period, increased or decreased by any income attributable to the principal amount through the date the principal amount is required to be taken into account as wages under paragraph (e) of this section.

(ii) *Definitions*—(A) *Account balance plan.* For purposes of this section, an account balance plan is a nonqualified deferred compensation plan under the terms of which a principal amount (or amounts) is credited to an individual account for an employee, the income attributable to each principal amount is credited (or debited) to the individual account, and the benefits payable to the employee are based solely on the balance credited to the individual account.

(B) *Income.* For purposes of this section, *income* means any increase or decrease in the amount credited to an employee's account that is attributable to amounts previously credited to the employee's account, regardless of whether the plan denominates that increase or decrease as income.

(iii) *Additional rules*—(A) *Commingled accounts.* A plan does not fail to be an account balance plan merely because, under the terms of the plan, benefits payable to an employee are based solely on a specified percentage of an account maintained for all (or a portion of) plan participants under which principal amounts and income are credited (or debited) to such account.

(B) *Bifurcation permitted.* An employer may treat a portion of a nonqualified deferred compensation plan as a separate account balance plan if that portion satisfies the requirements of this paragraph (c)(1) and the amount payable to employees under that portion is determined independently of the amount payable under the other portion of the plan.

(C) *Actuarial equivalents.* A plan does not fail to be an account balance plan merely because the plan permits employees to elect to receive their benefits under the plan in a form of benefit other than payment of the account balance, provided the amount of benefit payable in that other form is actuarially equivalent to payment of the account balance using actuarial assumptions that are reasonable. Conversely, a plan is not an account balance plan if it provides an optional form of benefit that is not actuarially equivalent to the account balance using actuarial assumptions that are reasonable. For this purpose, the determination of whether forms are actuarially equivalent using actuarial assumptions that are reasonable is determined under the rules applicable to nonaccount balance plans under paragraph (c)(2)(iii) of this section.

(2) *Nonaccount balance plans*—(i) *General rule.* For purposes of this section, if benefits for an employee are provided under a nonqualified deferred compensation plan that is not an account balance plan (a nonaccount balance plan), the amount deferred for a period equals the present value of the additional future payment or payments to which the employee has obtained a legally binding right (as described in paragraph (b)(3)(i) of this section) under the plan during that period.

(ii) *Present value defined.* For purposes of this section, *present value* means the value as of a specified date of an amount or series of amounts due thereafter, where each amount is multiplied by the probability that the condition or conditions on which payment of the amount is contingent will be satisfied, and is discounted according to an assumed rate of interest to reflect the time value of money. For purposes of this section, the present value must be determined as of the date the amount deferred is required to be taken into account as wages under paragraph (e) of this section using actuarial assumptions and methods that are reasonable as of that date. For this purpose, a discount for the probability that an employee will die before commencement of benefit payments is permitted, but only to the extent that benefits will be forfeited upon death. In addition, the present value cannot be discounted for the probability that payments will not be made (or will be reduced) because of the unfunded status of the plan, the risk associated with any deemed or actual investment of amounts deferred under the plan, the risk that the employer, the trustee, or another party will be unwilling or unable to pay, the possibility of future plan amendments, the possibility of a future change in the law, or similar risks or contingencies. Nor is the present value affected by the possibility that some of the payments due under the plan will be eligible for one of the exclusions from wages in section 3121(a).

(iii) *Treatment of actuarially equivalent benefits*—(A) *In general.* In the case of a nonaccount balance plan that permits employees to receive their benefits in more than one form or commencing at more than one date, the amount deferred is determined by assuming that payments are made in the normal form of benefit commencing at normal commencement date if the requirements of paragraph (c)(2)(iii)(B) of this section are satisfied. Accordingly, in the case of a nonaccount balance plan that permits employees to receive their benefits in more than one form or commencing at more than one date, unless the requirements of paragraph (c)(2)(iii)(B) of this section are satisfied, the amount deferred is treated as not reasonably ascertainable under the rules of paragraph (e)(4)(i)(B) of this section until a form of benefit and a time of commencement are selected.

(B) *Use of normal form commencing at normal commencement date.* The requirements of this paragraph (c)(2)(iii)(B) are satisfied by a nonaccount balance plan if the plan has a single normal form of benefit commencing at normal commencement date for the amount deferred and each other optional form is actuarially equivalent to the normal form of benefit commencing at normal commencement date using actuarial assumptions that are reasonable. For this purpose, each form of benefit for payment of the amount deferred commencing at a date is a separate optional form. For purposes of this paragraph (c)(2)(iii)(B), each optional form is actuarially equivalent to the normal form of benefit commencing at normal commencement date only if the terms of the plan in effect when the amount is deferred provide for every optional form to be actuarially equivalent and further provide for actuarial assumptions to determine actuarial equivalency that will be reasonable at the time the optional form is selected, without regard to whether market interest rates are higher or lower at the time the optional form is selected than at the time the amount is deferred. Thus, a plan that provides for every optional form to be actuarially equivalent satisfies this paragraph (c)(2)(iii)(B) if it provides for actuarial equivalence to be determined—

(*1*) When an optional form is selected or when benefit payments under the optional form commence, based on assumptions that are reasonable then;

(*2*) Based on an index that reflects market rates of interest from time to time (for example, the plan specifies that all benefits will be actuarially equivalent using the applicable interest rate and applicable mortality table specified in section 417(e)); or

(*3*) Based on actuarial assumptions specified in the plan and provides for those assumptions to be revised to be reasonable assumptions if they cease to be reasonable assumptions.

(C) *Fixed mortality assumptions permitted.* A plan does not fail to satisfy paragraph (c)(2)(iii)(B) of this section merely because the plan specifies a fixed mortality assumption that is reasonable at the time the amount is deferred, even if that assumption is not reasonable at the time the optional form is selected. (But see paragraph (c)(2)(iii)(E) of this section for additional rules that apply if the mortality assumption is not reasonable at the time the optional form is selected.)

(D) *Normal form of benefit commencing at normal commencement date defined.* For purposes of this paragraph (c)(2)(iii), the normal form of benefit commencing at normal commencement date under the plan is the form, and date of commencement, under which the payments due to the employee under the plan are expressed, prior to adjustments for form or timing of commencement of payments.

(E) *Rule applicable if actuarial assumptions cease to be reasonable.* If the terms of the plan in effect when an amount is deferred provide for actuarial assumptions to determine actuarial equivalency that will be reasonable at the time the optional form is selected or payments commence as provided in paragraph (c)(2)(iii)(B) of this section, but, at that time, the actuarial assumptions used under the plan are not reasonable, the employee will be treated as obtaining a legally binding right at that time (or, if earlier, at the date on which the plan is amended to provide actuarial assumptions that are not reasonable) to any additional benefits that result from the use of an unreasonable actuarial assumption. This might occur, for example, if the plan specifies that the actuarial assumptions will be reasonable assumptions to be set at the time the optional form is selected and the assumptions used are in fact not reasonable at that time.

(3) *Separate determination for each period.* The amount deferred under this paragraph (c) is determined separately for each period for which there is an amount deferred under the plan. In addition, paragraphs (d) and (e) of this section are applied separately with respect to the amount deferred for each such period. Thus, for example, the fraction described in paragraph (d)(1)(ii)(B) of this section and the amount of the true-up at the resolution date described in paragraph (e)(4)(ii)(B) of this section are determined separately with respect to each amount deferred. See paragraph (e)(4)(ii)(D) of this section for special rules for allocating amounts deferred over more than one year.

(4) *Examples.* This paragraph (c) is illustrated by the following examples. (The examples illustrate the rules in this paragraph (c) and include various interest rate and mortality table assumptions, including the applicable section 417(e) mortality table, the GAM 83 (male) mortality table, and UP–84 mortality table. These tables can be obtained from the Society of Actuaries at its internet site at http://www.soa.org.) The examples are as follows:

Example 1. (i) Employer M establishes a nonqualified deferred compensation plan for Employee A. Under the plan, 10 percent of annual compensation is credited on behalf of Employee A on December 31 of each year. In addition, a reasonable rate of interest is credited quarterly on the balance credited to Employee A as of the last day of the preceding quarter. All amounts credited under the plan are 100 percent vested and the benefits payable to Employee A are based solely on the balance credited to Employee A's account.

(ii) The plan is an account balance plan. Thus, pursuant to paragraph (c)(1) of this section, the amount deferred for a calendar year is equal to 10 percent of annual compensation.

Example 2. (i) Employer N establishes a nonqualified deferred compensation plan for Employee B. Under the plan, 2.5 percent of annual compensation is credited quarterly on behalf of Employee B. In addition, a reasonable rate of interest is credited quarterly on the balance credited to Employee B's account as of the last day of the preceding quarter. All amounts credited under the plan are 100 percent vested, and the benefits payable to Employee B are based solely on the balance credited to Employee B's account. As permitted by paragraph (e)(5) of this section, any amount deferred under the plan for the calendar year is taken into account as wages on the last day of the year.

(ii) The plan is an account balance plan. Thus, pursuant to paragraph (c)(1) of this section, the amount deferred for a calendar year equals 10 percent of annual compensation (i.e., the sum of the principal amounts credited to Employee B's account for the year) plus the interest credited with respect to that 10 percent principal amount through the last day of the calendar year. If Employer N had not chosen to apply paragraph (e)(5) of this section and, thus, had taken into account 2.5 percent of compensation quarterly, the interest credited with respect to those quarterly amounts would not have been treated as part of the amount deferred for the year.

Example 3. (i) Employer O establishes a nonqualified deferred compensation plan for a group of five employees. Under the plan, a specified sum is credited to an account for the benefit of the group of employees on July 31 of each year. Income on the balance of the account is credited annually at a rate that is reasonable for each year. The benefit payable to an employee is equal to one-fifth of the account balance and is payable, at the employee's option, in a lump sum or in 10 annual installments that reflect income on the balance.

(ii) The plan is an account balance plan notwithstanding the fact that the employee's benefit is equal to a specified percentage of an account maintained for a group of employees.

Example 4. (i) The facts are the same as in *Example 3*, except that the plan also permits an employee to elect a life annuity that is actuarially equivalent to the account balance based on the applicable interest rate and applicable mortality table specified in section 417(e) at the time the benefit is elected by the employee.

(ii) Under paragraphs (c)(1)(iii)(C) and (c)(2)(iii) of this section, the plan does not fail to be an account balance plan merely because the plan permits employees to elect to receive their benefits under the plan in a form that is actuarially equivalent to payment of the account balance using actuarial assumptions that are reasonable at the time the form is selected.

Example 5. (i) Employer P establishes a nonqualified deferred compensation plan for a group of employees. Under the plan, each participating employee has a fully vested right to receive a life annuity, payable monthly beginning at age 65, equal to the product of 2 percent for each year of service and the employee's highest average annual compensation for any 3-year period. The plan also provides that, if an employee dies before age 65, the present value of the future payments will be paid to his or her beneficiary. As permitted under paragraph (e)(5) of this section, any amount deferred under the plan for a calendar year is taken into account as FICA wages as of the last day of the year. As of December 31, 2002, Employee C is age 60, has 25 years of service, and high 3-year average compensation of $100,000 (the average for the years 2000 through 2002). As of December 31, 2003, Employee C is age 61, has 26 years of service, and has high 3-year average compensation of $104,000. As of December 31, 2004, Employee C is age 62, has 27 years of service, and has high 3-year average compensation of $105,000. The assumptions that Employer P uses to determine the amount deferred for 2003 (a 7 percent interest rate and, for the period after commencement of benefit payments, the GAM 83 (male) mortality table) and for 2004 (a 7.5 percent interest rate and, for the period after commencement of benefit payments, the GAM 83 (male) mortality table) are assumed, solely for purposes of this example, to be reasonable actuarial assumptions.

(ii) As of December 31, 2002, Employee C has a legally binding right to receive lifetime payments of $50,000 (2 percent × 25 years × $100,000) per year. As of December 31, 2003, Employee C has a legally binding right to receive lifetime payments of $54,080 (2 percent × 26 years × $104,000) per year. Thus, during 2003, Employee C has earned a legally binding right to additional lifetime payments of $4,080 ($54,080 − $50,000) per year beginning at age 65. The amount deferred for 2003 is the present value, as of December 31, 2003, of these additional payments, which is $28,767 ($4,080 × the present value factor for a deferred annuity payable at age 65, using the specified actuarial assumptions for 2003). Similarly, during 2004, Employee C has earned a legally binding right to additional lifetime payments of $2,620 (2 percent × 27 years × $105,000, minus $54,080) per year beginning at age 65. The amount deferred for 2004 is the present value, as of December 31, 2004, of these additional payments, which is $18,845 ($2,620 × the present value factor for a deferred annuity payable at age 65, using the specified actuarial assumptions for 2004).

Example 6. (i) Employer Q establishes a nonqualified deferred compensation plan for Employee D on January 1, 2001, when Employee D is age 63. During 2001, Employee D obtains a fully vested right to receive a life annuity under the nonqualified deferred compensation plan equal to the excess of $200,000 over the life annuity benefits payable to Employee D under a qualified defined benefit pension plan sponsored by Employer Q. The life annuity benefit payable annually under the qualified plan is the lesser of $200,000 and the section 415(b)(1)(A) limitation in effect for the year, where the section 415(b)(1)(A) limitation is automatically adjusted to reflect changes in the cost of living. Benefits under both the qualified and nonqualified plan are payable monthly beginning at age 65. For purposes of this example, the section 415(b)(1)(A) limit for 2001 is assumed to be $140,000. The nonqualified plan provides no benefits in the event Employee D dies prior to commencement of benefit payments. As permitted under paragraph (e)(5) of this section, any amount deferred under the plan for a calendar year is taken into account as FICA wages as of the last day of the year. The assumptions that Employer Q uses to determine the amount deferred for 2001 (a 7 percent interest rate, a 3 percent increase in the cost of living and the GAM 83 (male) mortality table) are assumed, solely for purposes of this example, to be reasonable actuarial assumptions. As of December 31, 2001, Employee D has a legally binding right to receive lifetime payments as set forth in the following table:

Year	Annual gross amount	Assumed qualified plan annual payment (based on cost of living)	Net annual payment under nonqualified plan
2003	$200,000	$145,000	$55,000
2004	200,000	150,000	50,000
2005	200,000	155,000	45,000
2006	200,000	160,000	40,000
2007	200,000	165,000	35,000
2008	200,000	170,000	30,000
2009	200,000	175,000	25,000
2010	200,000	180,000	20,000
2011	200,000	185,000	15,000
2012	200,000	190,000	10,000
2013	200,000	195,000	5,000

Year	Annual gross amount	Assumed qualified plan annual payment (based on cost of living)	Net annual payment under nonqualified plan
2014 and thereafter	200,000	205,000 or greater	0

(ii) The amount deferred for 2001 is the present value, as of December 31, 2001, of the net lifetime payments under the nonqualified plan, or $223,753.

(d) *Amounts taken into account and income attributable thereto*—(1) *Amounts taken into account*—(i) *In general.* For purposes of this section, an amount deferred under a nonqualified deferred compensation plan is taken into account as of the date it is included in computing the amount of *wages* as defined in section 3121(a), but only to the extent that any additional FICA tax that results from such inclusion (including any interest and penalties for late payment) is actually paid before the expiration of the applicable period of limitations for the period in which the amount deferred was required to be taken into account under paragraph (e) of this section. Because an amount deferred for a calendar year is combined with the employee's other wages for the year for purposes of computing FICA taxes with respect to the employee for the year, if the employee has other wages that equal or exceed the wage base limitations for the Old-Age, Survivors, and Disability Insurance (OASDI) portion (or, in the case of years before 1994, the Hospital Insurance (HI) portion) of FICA for the year, no portion of the amount deferred will actually result in additional OASDI (or HI) tax. However, because there is no wage base limitation for the HI portion of FICA for years after 1993, the entire amount deferred (in addition to all other wages) is subject to the HI tax for the year and, thus, will not be considered taken into account for purposes of this section unless the HI tax relating to the amount deferred is actually paid. In determining whether any additional FICA tax relating to the amount deferred is actually paid, any FICA tax paid in a year is treated as paid with respect to an amount deferred only after FICA tax is paid on all other wages for the year.

(ii) *Amounts not taken into account*—(A) *Failure to take an amount deferred into account under the special timing rule.* If an amount deferred for a period (as determined under paragraph (c) of this section) is not taken into account, then the nonduplication rule of paragraph (a)(2)(iii) of this section does not apply, and benefit payments attributable to that amount deferred are included as wages in accordance with the general timing rule of paragraph (a)(1) of this section. For example, if an amount deferred is required to be taken into account in a particular year under paragraph (e) of this section, but the employer fails to pay the additional FICA tax resulting from that amount, then the amount deferred and the income attributable to that amount must be included as wages when actually or constructively paid.

(B) *Failure to take a portion of an amount deferred into account under the special timing rule.* If, as of the date an amount deferred is required to be taken into account, only a portion of the amount deferred (as determined under paragraph (c) of this section) has been taken into account, then a portion of each subsequent benefit payment that is attributable to that amount is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section and the balance is subject to the general timing rule of paragraph (a)(1) of this section. The portion that is excluded from wages is fixed immediately before the attributable benefit payments commence (or, if later, the date the amount deferred is required to be taken into account) and is determined by multiplying each such payment by a fraction, the numerator of which is the amount that was taken into account (plus income attributable to that amount determined under paragraph (d)(2) of this section through the date the portion is fixed) and the denominator of which is the present value of the future benefit payments attributable to the amount deferred, determined as of the date the portion is fixed. For this purpose, if the requirements of paragraph (c)(2)(iii)(B) of this section are satisfied, the present value is determined by assuming that payments are made in the normal form of benefit commencing at normal commencement date. In addition, if the employer demonstrates that the amount deferred was determined using reasonable actuarial assumptions as determined by the Commissioner, the present value of the future benefit payments attributable to the amount deferred is determined using those assumptions. In any other case, see paragraph (d)(2)(iii) of this section.

(2) *Income attributable to the amount taken into account*—(i) *Account balance plans*—(A) *In general.* For purposes of the nonduplication rule of paragraph (a)(2)(iii) of this section, in the case of an account balance plan, the *income attributable to the amount taken into account* means any amount credited on behalf of an employee under the terms of the plan that is income (within the meaning of paragraph (c)(1)(ii)(B) of this section) attributable to an amount previously taken into account (within the meaning of paragraph (d)(1) of this section), but only if the income reflects a rate of return that does not exceed either the rate of return on a predetermined actual investment (as determined in accordance with paragraph (d)(2)(i)(B) of this section) or, if the income does not reflect the rate of return on a predetermined actual investment (as so determined), a reasonable rate of interest (as determined in accordance with paragraph (d)(2)(i)(C) of this section).

(B) *Rules relating to actual investment—(1) In general.* For purposes of this paragraph (d)(2)(i), the rate of return on a predetermined actual investment for any period means the rate of total return (including increases or decreases in fair market value) that would apply if the account balance were, during the applicable period, actually invested in one or more investments that are identified in accordance with the plan before the beginning of the period. For this purpose, an account balance plan can determine income based on the rate of return of a predetermined actual investment regardless of whether assets associated with the plan or the employer are actually invested therein and regardless of whether that investment is generally available to the public. For example, an account balance plan could provide that income on the account balance is determined based on an employee's prospective election among various investment alternatives that are available under the employer's section 401(k) plan, even if one of those investment alternatives is not generally available to the public. In addition, an actual investment includes an investment identified by reference to any stock index with respect to which there are positions traded on a national securities exchange described in section 1256(g)(7)(A).

(*2*) *Certain rates of return not based on predetermined actual investment.* A rate of return will not be treated as the rate of return on a predetermined actual investment within the meaning of this paragraph (d)(2)(i)(B) if the rate of return (to any extent or under any conditions) is based on the greater of the rate of return of two or more actual investments, is based on the greater of the rate of return on an actual investment and a rate of interest (whether or not the rate of interest would otherwise be reasonable under paragraph (d)(2)(i)(C) of this section), or is based on the rate of return on an actual investment that is not predetermined. For example, if a plan bases the rate of return on the greater of the rate of return on a predetermined actual investment (such as the value of the employer's stock), and a 0 percent interest rate (i.e., without regard to decreases in the value of that investment), the plan is using a rate of return that is not a rate of return on a predetermined actual investment within the meaning of this paragraph (d)(2)(i)(B).

(C) *Rules relating to reasonable interest rates—(1) In general.* If income for a period is credited to an account balance plan on a basis other than the rate of return on a predetermined actual investment (as determined in accordance with paragraph (d)(2)(i)(B) of this section), then, except as otherwise provided in this paragraph (d)(2)(i)(C), the determination of whether the income for the period is based on a reasonable rate of interest will be made at the time the amount deferred is required to be taken into account and annually thereafter.

(*2*) *Fixed rates permitted.* If, with respect to an amount deferred for a period, an account balance plan provides for a fixed rate of interest to be credited, and the rate is to be reset under the plan at a specified future date that is not later than the end of the fifth calendar year that begins after the beginning of the period, the rate is reasonable at the beginning of the period, and the rate is not changed before the reset date, then the rate will be treated as reasonable in all future periods before the reset date.

(ii) *Nonaccount balance plans.* For purposes of the nonduplication rule of paragraph (a)(2)(iii) of this section, in the case of a nonaccount balance plan, the *income attributable to the amount taken into account* means the increase, due solely to the passage of time, in the present value of the future payments to which the employee has obtained a legally binding right, the present value of which constituted the amount taken into account (determined as of the date such amount was taken into account), but only if the amount taken into account was determined using reasonable actuarial assumptions and methods. Thus, for each year, there will be an increase (determined using the same interest rate used to determine the amount taken into account) resulting from the shortening of the discount period before the future payments are made, plus, if applicable, an increase in the present value resulting from the employee's survivorship during the year. As a result, if the amount deferred for a period is determined using a reasonable interest rate and other reasonable actuarial assumptions and methods, and the amount is taken into account when required under paragraph (e) of this section, then, under the nonduplication rule of paragraph (a)(2)(iii) of this section, none of the future payments attributable to that amount will be subject to FICA tax when paid.

(iii) *Unreasonable rates of return*—(A) *Account balance plans.* This paragraph (d)(2)(iii)(A) applies to an account balance plan under which the income credited is based on neither a predetermined actual investment, within the meaning of paragraph (d)(2)(i)(B) of this section, nor a rate of interest that is reasonable, within the meaning of paragraph (d)(2)(i)(C) of this section, as determined by the Commissioner. In that event, the employer must calculate the amount that would be credited as income under a reasonable rate of interest, determine the excess (if any) of the amount credited under the plan over the income that would be credited using the reasonable rate of interest, and take that excess into account as an additional amount deferred in the year the income is credited. If the employer fails to calculate the amount that would be credited as income under a reasonable rate of interest and to take the excess into account as an additional amount deferred in the year the income is credited, or the employer otherwise fails to take the full amount deferred into account, then the excess of the income credited under the plan over the income that would be credited using AFR will be treated as an amount deferred in the year the income is credited. For purposes of this section, *AFR* means the mid-term applicable federal rate (as defined pursuant to section 1274(d)) for January 1 of the calendar year, compounded annually. In addition, pursuant to paragraph (d)(1)(ii) of this section, the excess over the income that would result from the application of AFR and any income attributable to that excess are subject to the general timing rule of paragraph (a)(1) of this section.

(B) *Nonaccount balance plans.* If any actuarial assumption or method used to determine the amount taken into account under a nonaccount balance plan is not reasonable, as determined by the Commissioner, then the income attributable to the amount taken into account is limited to the income that would result from the application of the AFR and, if applicable, the applicable mortality table under section 417(e)(3)(A)(ii)(I) (the 417(e) mortality table), both determined as of the January 1 of the calendar year in which the amount was taken into account. In addition, paragraph (d)(1)(ii)(B) of this section applies and, in calculating the fraction described in paragraph (d)(1)(ii)(B) of this section (at the date specified in paragraph (d)(1)(ii)(B) of this section), the numerator is the amount taken into account plus income (as limited under this paragraph (d)(2)(iii)(B)), and the present value in the denominator is determined using the AFR, the 417(e) mortality table, and reasonable assumptions as to cost of living, each determined as of the time the amount deferred was required to be taken into account.

(3) *Examples.* This paragraph (d) is illustrated by the following examples:

Example 1. (i) In 2001, Employer M establishes a nonqualified deferred compensation plan for Employee A under which all benefits are 100 percent vested. In 2002, Employee A has $200,000 of current annual compensation from Employer M that is subject to FICA tax. The amount deferred under the plan on behalf of Employee A for 2002 is $20,000. Thus, Employee A has total wages for FICA tax purposes of $220,000. Because Employee A has other wages that exceed the OASDI wage base for 2002, no additional OASDI tax is due as a result of the $20,000 amount deferred. Because there is no wage base limitation for the HI portion of FICA, additional HI tax liability results from the $20,000 amount deferred. However, Employer M fails to pay the additional HI tax.

(ii) Under paragraph (d)(1)(i) of this section, an amount deferred is considered taken into account as wages for FICA tax purposes as of the date it is included in computing FICA wages, but only if any additional FICA tax liability that results from inclusion of the amount deferred is actually paid. Because the HI tax resulting from the $20,000 amount deferred was not paid, that amount deferred was not taken into account within the meaning of paragraph (d)(1) of this section. Thus, pursuant to paragraph (d)(1)(ii) of this section, benefit payments attributable to the $20,000 amount deferred will be included as wages in accordance with the general timing rule of paragraph (a)(1) of this section and will be subject to the HI portion of FICA tax when actually or constructively paid (and the OASDI portion of FICA tax to the extent Employee A's wages do not exceed the OASDI wage base limitation).

Example 2. (i) The facts are the same as in *Example 1,* except that Employer M takes all actions necessary to correct its failure to pay the additional tax before the applicable period of limitations expires for 2002 (including payment of any applicable interest and penalties).

(ii) Because the HI tax resulting from the $20,000 amount deferred is paid, that amount deferred is considered taken into account for 2002. Thus, in accordance with paragraph (a)(2)(iii) of this section, neither the amount deferred nor the income attributable to the amount taken into account will be treated as wages for FICA tax purposes at any time thereafter.

Example 3. (i) Employer N establishes a nonqualified deferred compensation plan under which all benefits are 100 percent vested. Under the plan, an employee's account is credited with a contribution equal to 10 percent of salary on December 31 of each year. The employee's account balance also is increased each December 31 by *interest* on the total amounts credited to the employee's account as of the preceding December 31. The interest rate specified in the plan results in income credits that are not based on the rate of return on a predetermined actual investment within the meaning of paragraph (d)(2)(i)(B) of this section, and that are greater than the income that would result from application of a reasonable rate of interest within the meaning of paragraph (d)(2)(i)(C) of this section. Employer N fails to take into account an additional amount for the excess of the income credited under the plan over a reasonable rate of interest.

(ii) Pursuant to paragraph (d)(2)(iii)(A) of this section, the income credits in excess of the income that would be credited using the AFR are considered additional amounts deferred in the year credited.

Example 4. (i) The facts are the same as in *Example 3,* except that the annual increase is based on Moody's Average Corporate Bond Yield.

(ii) Because this index reflects a reasonable rate of interest, the income credited under the plan is considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section.

Example 5. (i) The facts are the same as in *Example 3,* except that the annual increase (or decrease) is based on the rate of total return on Employer N's publicly traded common stock.

(ii) Because the income credited under the plan does not exceed the actual rate of return on a predetermined actual investment, the income credited is considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section.

Example 6. (i) The facts are the same as in *Example 3,* except that the annual rate of increase or decrease is equal to the greater of the rate of total return on a specified aggressive growth mutual fund or the rate of return on a specified income-oriented mutual fund. Employer N fails to take into account an additional amount for the excess of the income credited under the plan over a reasonable rate of interest.

(ii) Because the rate of increase or decrease is based on the greater of two rates of returns, the increase is not based on the return on a predetermined actual investment within the meaning of paragraph (d)(2)(i)(B) of this section. Thus, if the rate of return credited under the plan (i.e., the greater of the rates of return of the two mutual funds) exceeds the income that would be credited using the AFR, the excess is not considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section and, pursuant to paragraph (d)(2)(iii)(A) of this section, is considered an additional amount deferred.

Example 7. (i) The facts are the same as in *Example 6,* except that the annual increase or decrease with respect to 50 percent of the employee's account is equal to the rate of total return on the specified aggressive growth mutual fund and the annual increase or decrease with respect to the other 50 percent of the employee's account is equal to the increase or decrease in the Standard & Poor's 500 Index.

(ii) Because the increase or decrease attributable to any portion of the employee's account is based on the return on a predetermined actual investment, the entire increase or decrease is considered income attributable to the amount taken into account within the meaning of paragraph (d)(2)(i) of this section.

Example 8. (i) The facts are the same as in *Example 3,* except that, pursuant to the terms of the plan, before the beginning of each year, the board of directors of Employer N designates a specific investment on which the following year's annual increase or decrease will be based. The board is authorized to switch investments more frequently on a prospective basis. Before the beginning of 2004, the board designates Company A stock as the investment for 2004. Before the beginning of 2005, the board designates Company B stock as the investment for 2005. At the end of 2005, the board determines that the return on Company B stock was lower than expected and changes its designation for 2005 to the rate of return on Company C stock, which had a higher return during 2005. Employer N fails to take into account an additional amount for the excess of the income credited under the plan over a reasonable rate of interest.

(ii) The annual increase or decrease for 2004 is based on the return of a predetermined actual investment. Although the annual increase or decrease for 2005 is based on an actual investment, the actual investment is not predetermined since it was not designated before the beginning of 2005. Pursuant to paragraph (d)(2)(iii)(A) of this section, the excess of the income credited under the plan over the income determined using AFR is an additional amount deferred for 2005.

Example 9. (i) Employer O establishes a nonqualified deferred compensation plan for Employee B. Under the plan, if Employee B survives until age 65, he has a fully vested right to receive a lump sum payment at that age, equal to the product of 10 percent per year of service and Employee B's highest average annual compensation for any 3-year period, but no benefits are payable in the event Employee B dies prior to age 65. As permitted under paragraph (e)(5) of this section, any amount deferred under the plan for the calendar year is taken into account as wages as of the last day of the year. As of December 31, 2002, Employee B has 25 years of service and Employee B's high 3-year average compensation is $100,000 (the average for the years 2000 through 2002). As of December 31, 2002, Employee B has a legally binding right to receive a payment at age 65 of $250,000 (10 percent × 25 years × $100,000). As of December 31, 2003, Employee B is age 63, has 26 years of service, and has high 3-year average compensation of $104,000. As of December 31, 2003, Employee B has a legally binding right to receive a payment at age 65 of $270,400 (10 percent × 26 years × $104,000). Thus, during 2003, Employee B has earned a legally binding right to an additional payment at age 65 of $20,400 ($270,400 − $250,000). The assumptions that Employer O uses to determine the amount deferred for 2003 are a 7 percent interest rate and the GAM 83 (male) mortality table, which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions. The amount deferred for 2003 is the present value, as of December 31, 2003, of the $20,400 payment, which is $17,353. Employer O takes this amount into account by including it in Employee B's FICA wages for 2003 and paying the additional FICA tax.

(ii) Under paragraph (d)(2)(ii) of this section, the income attributable to the amount that was taken into account is the increase in the present value of the future payment due solely to the passage of time, because the amount deferred was determined using reasonable actuarial assumptions and methods. As of the payment date at age 65, the present value of the future payment earned during 2003 is $20,400. The entire difference between the $20,400 and the $17,353 amount deferred ($3,047) is the increase in the present value of the future payment due solely to the passage of time, and thus constitutes income attributable to the amount taken into account. Because the amount deferred was taken into account, the entire payment of $20,400 represents either an amount deferred that was previously taken into account ($17,353) or income attributable to that amount ($3,047). Accordingly, pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section, none of the payment is included in wages.

Example 10. (i) The facts are the same as in *Example 9,* except that, instead of providing a lump sum equal to 10 percent of average compensation per year of service, the plan provides Employee B with a fully vested right to receive a life annuity, payable monthly beginning at age 65, equal to the product of 2 percent for each year of service and Employee B's highest average annual compensation for any 3-year period. The plan also provides that, if Employee B dies before age 65, the present value of the future payments will be paid to his or her beneficiary. As of December 31, 2002, Employee B has a legally binding right to receive lifetime payments of $50,000 (2 percent × 25 years × $100,000) per year. As of December 31, 2003, Employee B has a legally binding right to receive lifetime payments of $54,080 (2 percent × 26 years × $104,000) per year. Thus, during 2003, Employee B has earned a legally binding right to additional lifetime payments of $4,080 ($54,080 − $50,000) per year beginning at age 65. The amount deferred for 2003 is $32,935, which is the present value, as of December 31, 2003, of these additional payments, determined using the same actuarial assumptions and methods used in *Example 9,* except that there is no discount for the probability of death prior to age 65. Employer O takes this amount into account by including it in Employee B's FICA wages for 2003 and paying the additional FICA tax.

(ii) Under paragraph (d)(2)(ii) of this section, the income attributable to the amount that was taken into account is the increase in the present value of the future payments due solely to the passage of time, because the amount deferred was determined using reasonable actuarial assumptions and methods. Because the amount deferred was taken into account, each annual payment of $4,080 attributable to the amount deferred in 2003 represents either an amount deferred that was previously taken into account or income attributable to that amount. Accordingly, pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section, none of the payments are included in wages.

Example 11. (i) The facts are the same as in *Example 10,* except that no amount is taken into account for 2003 because Employer O fails to pay the additional FICA tax.

(ii) Under paragraph (d)(1)(ii)(A) of this section, if an amount deferred for a period is not taken into account, then the benefit payments attributable to that amount deferred are included as wages in accordance with the general timing rule of paragraph (a)(1) of this section. In this case, assuming that the amounts deferred in other periods were taken into account, $4,080 of each year's total benefit payments will be included in wages when actually or constructively paid, in accordance with the general timing rule.

Example 12. (i) Employer P establishes an account balance plan on January 1, 2002, under which all benefits are 100 percent vested. The plan provides that amounts deferred will be credited annually with interest beginning in 2002 at a rate that is greater than a reasonable rate of interest. Employer P treats the excess over the applicable interest rate in section 417(e) as an additional amount deferred for 2002 and in each year thereafter, and takes the additional amount into account by including it in FICA wages and paying the additional FICA tax for the year.

(ii) Under the nonduplication rule in paragraph (a)(2)(iii) of this section, the benefits paid under the plan will be excluded from wages for FICA tax purposes.

Example 13. (i) The facts are the same as in *Example 9,* except that, in determining the amount deferred, Employer O uses a 15 percent interest rate, which, solely for purposes of this example, is assumed not to be a reasonable interest rate. Employer O determines that the amount deferred for 2003 is the present value, as of December 31, 2003, of the $20,400 payment, which is $15,023. Employer O includes $15,023 in wages and pays any resulting FICA tax. Solely for purposes of this example, it is assumed that the AFR as of January 1, 2003, is 7 percent.

(ii) Under paragraph (d)(2)(iii)(B) of this section, if any actuarial assumption or method is not reasonable, then the income attributable to the amount taken into account is limited to the income that would result from application of the AFR and, if applicable, the 417(e) mortality table. Because the 15 percent interest rate is unreasonable, the income attributable to the amount taken into account is limited to the income that would result from using a 7 percent interest rate and, in this case, an increase for survivorship using the 417(e) mortality table. Under these assumptions, the income attributable to the $15,023 amount taken into account for 2003 is $1,199 in 2004 and $1,313 in 2005. Under paragraph (d)(1)(ii) of this section, the sum of these amounts ($17,535) is excluded from Employee B's wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section, and the balance of the payment ($2,865) is subject to the general timing rule of paragraph (a)(1) of this section and, thus, is included in Employee B's wages when actually or constructively paid.

(iii) The same result can be reached by multiplying the attributable benefit payments by a fraction, the numerator of which is the amount taken into account, and the denominator of which is the amount deferred that would have been taken into account at the same time had the amount deferred been calculated using the AFR and the 417(e) mortality table. These assumptions are determined as of January 1 of the calendar year in which the amount was taken into account.

In this *Example 13*, the fraction would be $15,023 divided by $17,478, which equals .85954. The $20,400 payment is multiplied by this fraction to determine the amount of the payment that is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section. Thus, $17,535 ($20,400 x .85954) is excluded from wages and the balance ($2,865) is subject to FICA tax when actually or constructively paid.

Example 14. (i) The facts are the same as *Example 10*, except that Employer O calculates the amount deferred for 2003 as $18,252 and takes that amount into account by including that amount in wages and paying any resulting FICA tax. The assumptions that Employer O uses to determine the amount deferred are a 15 percent interest rate and, for the period after commencement of benefit payments, the GAM 83 (male) mortality table. The 15 percent interest rate is assumed, solely for purposes of this example, not to be a reasonable actuarial assumption. Solely for purposes of this example, it is assumed that the AFR as of January 1, 2003, is 7 percent.

(ii) Under paragraph (d)(2)(iii)(B) of this section, if any actuarial assumption or method used is not reasonable, then the income attributable to the amount taken into account is limited to the income that would result from application of the AFR and, if applicable, the 417(e) mortality table. Because the 15 percent interest rate is not reasonable, the income attributable to the amount taken into account is equal to the income that would result from using a 7 percent interest rate and the amount taken into account is treated as if it represented a portion of the amount deferred for purposes of applying paragraph (d)(1)(ii)(B) of this section. Under these assumptions, the income attributable to the $18,252 amount taken into account for 2003 is $1,278 in 2004 and $1,367 in 2005. Under paragraph (d)(1)(ii)(B) of this section, the portion of each benefit payment attributable to the amount deferred that is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section is determined at benefit commencement by multiplying each benefit payment by a fraction, the numerator of which is the amount taken into account (plus income attributable to that amount) and the denominator of which is the present value of future benefit payments attributable to the amount deferred. Because the interest rate assumption is not reasonable, not only is the income limited to the application of the AFR, but the present value in the denominator must be determined using the AFR and (if applicable) the 417(e) mortality table. In this case, the present value is $40,283 and thus the fraction is $20,897 divided by $40,283, or .51875. Thus, $2,116 (.51875 × $4,080) of each year's benefit payment is excluded from wages and the balance of each year's payment ($1,964) is subject to the general timing rule of paragraph (a)(1) of this section and is included in wages when actually or constructively paid.

(iii) The same result can be reached by multiplying the attributable benefit payments by a fraction the numerator of which is the amount taken into account, and the denominator of which is the amount deferred that would have been taken into account at the same time had the amount deferred been calculated using the AFR and the 417(e) mortality table. These assumptions are determined as of January 1 of the calendar year in which the amount was taken into account. In this *Example 14*, the fraction would be $18,252 divided by $35,185, which equals .51875. The $4,080 annual payment is multiplied by this fraction to determine the amount of the payment that is excluded from wages pursuant to the nonduplication rule of paragraph (a)(2)(iii) of this section. Thus, $2,116 ($4,080 × .51875) is excluded from wages and the balance ($1,964) is subject to FICA tax when actually or constructively paid.

(e) *Time amounts deferred are required to be taken into account*—(1) *In general.* Except as otherwise provided in this paragraph (e), an amount deferred under a nonqualified deferred compensation plan must be taken into account as wages for FICA tax purposes as of the later of the date on which services creating the right to the amount deferred are performed (within the meaning of paragraph (e)(2) of this section) or the date on which the right to the amount deferred is no longer subject to a substantial risk of forfeiture (within the meaning of paragraph (e)(3) of this section). However, in no event may any amount deferred under a nonqualified deferred compensation plan be taken into account as wages for FICA tax purposes prior to the establishment of the plan providing for the amount deferred (or, if later, the plan amendment providing for the amount deferred). Therefore, if an amount is deferred pursuant to the terms of a legally binding agreement that is not put in writing until after the amount would otherwise be taken into account under this paragraph (e)(1), the amount deferred (including any attributable income) must be taken into account as wages for FICA tax purposes as of the date the material terms of the plan are put in writing.

(2) *Services creating the right to an amount deferred.* For purposes of this

section, services creating the right to an amount deferred under a nonqualified deferred compensation plan are considered to be performed as of the date on which, under the terms of the plan and all the facts and circumstances, the employee has performed all of the services necessary to obtain a legally binding right (as described in paragraph (b)(3)(i) of this section) to the amount deferred.

(3) *Substantial risk of forfeiture.* For purposes of this section, the determination of whether a substantial risk of forfeiture exists must be made in accordance with the principles of section 83 and the regulations thereunder.

(4) *Amount deferred that is not reasonably ascertainable under a nonaccount balance plan*—(i) *In general*—(A) *Date required to be taken into account.* Notwithstanding any other provision of this paragraph (e), an amount deferred under a nonaccount balance plan is not required to be taken into account as wages under the special timing rule of paragraph (a)(2) of this section until the first date on which all of the amount deferred is reasonably ascertainable (the resolution date). In this case, the amount required to be taken into account as of the resolution date is determined in accordance with paragraph (c)(2) of this section.

(B) *Definition of reasonably ascertainable.* For purposes of this paragraph (e)(4), an amount deferred is considered reasonably ascertainable on the first date on which the amount, form, and commencement date of the benefit payments attributable to the amount deferred are known, and the only actuarial or other assumptions regarding future events or circumstances needed to determine the amount deferred are interest and mortality. For this purpose, the form and commencement date of the benefit payments attributable to the amount deferred are treated as known if the requirements of paragraph (c)(2)(iii)(B) of this section (under which payments are treated as being made in the normal form of benefit commencing at normal commencement date) are satisfied. In addition, an amount deferred does not fail to be reasonably ascertainable on a date merely because the exact amount of the benefit payable cannot readily be calculated on that date or merely because the exact amount of the benefit payable depends on future changes in the cost of living. If the exact amount of the benefit payable depends on future changes in the cost of living, the amount deferred must be determined using a reasonable assumption as to the future changes in the cost of living. For example, the amount of a benefit is treated as known even if the exact amount of the benefit payable cannot be determined until future changes in the cost of living are reflected in the section 415 limitation on benefits payable under a qualified retirement plan.

(ii) *Earlier inclusion permitted*—(A) *In general.* With respect to an amount deferred that is not reasonably ascertainable, an employer may choose to take an amount into account at any date or dates (an early inclusion date or dates) before the resolution date (but not before the date described in paragraph (e)(1) of this section with respect to the amount deferred). Thus, for example, with respect to an amount deferred under a nonaccount balance plan that is not reasonably ascertainable because the plan permits employees to receive their benefits in more than one form or commencing at more than one date (and the requirements of paragraph (c)(2)(iii) of this section are not satisfied), an employer may choose to take an amount into account on the date otherwise described in paragraph (e)(1) of this section before the form and commencement date are selected (based on assumptions as to the form and commencement date for the benefit payments) or may choose to wait until the form and commencement date of the benefit payments are selected. An employer that chooses to take an amount into account at an early inclusion date under this paragraph (e)(4)(ii) for an employee under a plan is not required until the resolution date to identify the period to which the amount taken into account relates.

(B) *True-up at resolution date.* If, with respect to an amount deferred for a period, an employer chooses to take an amount into account as of an early inclusion date in accordance with this paragraph (e)(4)(ii) and the benefit payments attributable to the amount deferred exceed the benefit payments that are actuarially equivalent to the amount taken into account at the early inclusion date (payable in the same form and using the same commencement date as the benefit payments attributable to the amount deferred), then the present value of the difference in the benefits, determined in accordance with paragraph (c)(2) of this section, must be taken into account as of the resolution date.

(C) *Actuarial assumptions.* For purposes of determining the benefits that are actuarially equivalent to the amount taken into account as of an early inclusion date, the amount taken into account is converted to an actuarially equivalent benefit payable in the same form and commencing on the same date as the actual benefit payments attributable to the amount deferred using an interest rate, and, if applicable, mortality and cost-of-living assumptions, that were reasonable as of the early inclusion date. Thus, with respect to an amount deferred for a period, the amount required to be taken into account as of the resolution date is the present value (determined using an interest rate, and, if applicable, mortality and cost-of-living assumptions, that are reasonable as of the resolution date) of the excess, if any, of the future benefit payments attributable to the amount deferred over the future benefits payable in the same form and commencing on the same date that are actuarially equivalent to the portion of the amount deferred that was taken into account as of the early inclusion date (where actuarial equivalence is determined using an interest rate, and, if applicable, mortality and cost-of-living assumptions, that were reasonable as of the early inclusion date).

(D) *Allocation rules for amounts deferred over more than one period*—*(1) General rule.* The rules of this paragraph (e)(4)(ii)(D) apply for purposes of determining whether an amount has been included under this paragraph (e)(4) before the earliest date permitted under paragraph (e)(1) of this section.

(*2*) *Future compensation increases.* Increases in an employee's compensation after the early inclusion date must be disregarded.

(*3*) *Early retirement subsidies.* An early retirement subsidy that the employee ultimately receives may be taken into account at an early inclusion date if the employee would have a legally binding right to the subsidy at the early inclusion date but for any condition that the employee continue to render services. Accordingly, an employer may take into account at an early inclusion date any early retirement subsidy that the employee ultimately receives to the extent that elimination or reduction of that subsidy would violate section 411(d)(6)(B)(i) if that section applied to the plan.

(*4*) *Allocation with respect to offsets.* In any case in which a series of amounts are deferred over more than one period, the amounts deferred are not reasonably ascertainable until a single resolution date and the benefit payments attributable to the entire series are determined under a formula that provides a gross benefit that in the aggregate is subject to an objective reduction for future events under the terms of the plan, such as an offset for the aggregate benefits payable under a plan qualified under section 401(a), the attribution of benefit payments to the amount deferred in each period is determined under the rules of this paragraph (e)(4)(ii)(D)(*4*). In a case described in the preceding sentence, the benefit payments made as a result of the series of amounts deferred may be treated as attributable to the amount deferred as of the earliest period in which the employee obtained a legally binding right to a benefit under the plan equal to the excess, if any, of the amount of the gross benefit attributable to that period (determined at the resolution date), over the amount of the reduction determined as of the end of that period. Thus, for example, if an employee obtains a legally binding right in each of several years to benefit payments from a nonqualified deferred compensation plan that provides for a specified gross benefit for the years to be offset by the benefits payable under a qualified plan, the amount deferred in the first year may be treated as equal to the gross benefit for the year, reduced by the offset applicable at the end of the year (even if the offset increases after the end of the year).

(E) *Treatment of benefits paid before the resolution date.* If a benefit payment is attributable to an amount deferred that is not reasonably ascertainable at the time of payment (or is paid before the date selected under paragraph (e)(5) of this section), and the employer has previously taken an amount into account with respect to the amount deferred under the early inclusion rule of this paragraph (e)(4), then, in lieu of the pro rata rule provided in paragraph (d)(1)(ii)(B) of this section, a first-in-first-out rule applies in determining the portion of the benefit payment attributable to the amount taken into account. Under this first-in-first-out rule, the benefit payment is compared to the sum of the amount taken into account at the early inclusion date and the income attributable to that amount. If the benefit payment equals or exceeds the amount taken into account at the early inclusion date and the income attributable to that amount as of the date of the benefit payment, the benefit payment is included as wages under the general timing rule of paragraph (a)(1) of this section to the extent of any excess, and the amount taken into account at the early inclusion date (and income attributable to that amount) is disregarded thereafter with respect to the amount deferred. If the amount taken into account at the early inclusion date and the income attributable to that amount as of the date of the benefit payment exceeds the benefit payment, the benefit payment is not included as wages under the general timing rule of paragraph (a)(1) of this section and, in determining the amount that must be taken into account thereafter with respect to the amount deferred, the amount taken into account at the early inclusion date, plus attributable income as of the date of the benefit payment, is reduced by the amount of the benefit payment, and only the excess plus future income attributable to the excess (credited using assumptions that were reasonable on the early inclusion date) is taken into consideration. If amounts have been taken into account at more than one early inclusion date, this paragraph (e)(4)(ii)(E) applies on a first-in-first-out basis, beginning with the amount taken into account at the earliest early inclusion date (including income attributable thereto).

(5) *Rule of administrative convenience.* For purposes of this section, an employer may treat an amount deferred as required to be taken into account under this paragraph (e) on any date that is later than, but within the same calendar year as, the actual date on which the amount deferred is otherwise required to be taken into account under this paragraph (e). For example, if services creating the right to an amount deferred are considered performed under paragraph (e)(2) of this section periodically throughout a year, the employer may nevertheless treat the services creating the right to that amount deferred as performed on December 31 of that year. If an employer uses the rule of administrative convenience described in this paragraph (e)(5), any determination of whether the income attributable to an amount deferred under an account balance plan is based on a reasonable rate of interest or whether the actuarial assumptions used to determine the present value of an amount deferred in a nonaccount balance plan are reasonable will be made as of the date the employer selects to take the amount into account.

(6) *Portions of an amount deferred required to be taken into account on more than one date.* If different portions of an amount deferred are required to be taken into account under paragraph (e)(1) of this section on more than one date (e.g., on account of a graded vesting schedule), then each such portion is considered a separate amount deferred for purposes of this section.

(7) *Examples.* This paragraph (e) is illustrated by the following examples:

Example 1. (i) Employer M establishes a nonqualified deferred compensation plan for Employee A on November 1, 2005. Under the plan, which is an account balance plan, Employee A obtains a legally binding right on the last day of each calendar year (if Employee A is employed on that date) to be credited with a principal amount equal to 5 percent of compensation for the year. In addition, a reasonable rate of interest is credited quarterly. Employee A's account balance is nonforfeitable and is payable upon Employee A's termination of employment. For 2006, the principal amount credited to Employee A under the plan (which, in this case, is also the amount deferred within the meaning of paragraph (c) of this section) is $25,000.

(ii) Under paragraph (e)(2) of this section, the services creating the right to the $25,000 amount deferred are considered performed as of December 31, 2006, the date on which Employee A has performed all of the services necessary to obtain a legally binding right to the amount deferred. Thus, in accordance with paragraph (e)(1) of this section, the $25,000 amount deferred must be taken into account as of December 31, 2006, which is the later of the date on which services creating the right to the amount deferred are performed or the date on which the right to the amount deferred is no longer subject to a substantial risk of forfeiture.

Example 2. (i) The facts are the same as in *Example 1,* except that the principal amount credited under the plan on the last day of each year (and attributable interest) is forfeited if the employee terminates employment within five years of that date.

(ii) Under paragraph (e)(3) of this section, the determination of whether the right to an amount deferred is subject to a substantial risk of forfeiture is made in accordance with the principles of section 83. Under § 1.83–3(c) of this chapter, a substantial risk of forfeiture generally exists where rights in property that are transferred are conditioned, directly or indirectly, upon the future performance of substantial services. Because Employee A's right to receive the $25,000 principal amount (and attributable interest) is conditioned on the performance of services for five years, a substantial risk of forfeiture exists with respect to that amount deferred until December 31, 2011.

(iii) December 31, 2011, is the later of the date on which services creating the right to the amount deferred are performed or the date on which the right to the amount deferred is no longer subject to a substantial risk of forfeiture. Thus, in accordance with paragraph (e)(1) of this section, the amount deferred (which, pursuant to paragraph (c)(1) of this section, is equal to the $25,000 principal amount credited to Employee A's account on December 31, 2006, plus the interest credited with respect to that principal amount through December 31, 2011) must be taken into account as of December 31, 2011.

Example 3. (i) The facts are the same as in *Example 2,* except that the principal amount credited under the plan on the last day of each year (and attributable interest) becomes nonforfeitable according to a graded vesting schedule under which 20 percent is vested as of December 31, 2007; 40 percent is vested as of December 31, 2008; 60 percent is vested as of December 31, 2009; 80 percent is vested as of December 31, 2010; and 100 percent is vested as of December 31, 2011. Because these dates are later than the date on which the services creating the right to the amount deferred are considered performed (December 31, 2006), the amount deferred is required to be taken into account as of these dates that fall in five different years.

(ii) Paragraph (e)(6) of this section provides that, if different portions of an amount deferred are required to be taken into account under paragraph (e)(1) of this section on more than one date, then each such portion is considered a separate amount deferred for purposes of this section. Thus, $5,000 of the principal amount, plus interest credited through December 31, 2007, is taken into account as an amount deferred on December 31, 2007; $5,000 of the principal amount, plus interest credited through December 31, 2008, is taken into account as a separate amount deferred on December 31, 2008; etc.

Example 4. (i) On November 21, 2001, Employer N establishes a nonqualified deferred compensation plan under which all benefits are 100 percent vested. The plan provides for Employee B (who is age 45) to receive a lump sum benefit of $500,000 at age 65. This benefit will be forfeited if Employee B dies before age 65.

(ii) Because the amount, form, and commencement date of the benefit are known, and the only assumptions needed to determine the amount deferred are interest and mortality, the amount deferred is reasonably ascertainable within the meaning of paragraph (e)(4)(i) of this section on November 21, 2001.

Example 5. (i) The facts are the same as in *Example 4,* except that plan provides that the lump sum will be paid at the later of age 65 or termination of employment and provides that the $500,000 payable to Employee B is increased by 5 percent per year for each year that payment is deferred beyond age 65.

(ii) Because the commencement date of the benefit payment is contingent on when Employee B terminates employment, the commencement date of the benefit payment is not known. Thus, the amount deferred is not reasonably ascertainable within the meaning of paragraph (e)(4)(i) of this section, unless the plan satisfies the requirements of paragraph (c)(2)(iii)(B) of this section. Because the fixed 5 percent factor may not be reasonable at the time benefit payments commence (i.e., 5 percent might be higher or lower than a reasonable interest rate when payments commence), the plan fails to satisfy paragraph (c)(2)(iii)(B) of this section and accordingly the amount deferred is not reasonably ascertainable until termination of employment.

Example 6. (i) The facts are the same as in *Example 4,* except that the $500,000 is payable to Employee B at the later of age 55 or termination of employment.

(ii) Because the commencement date of the benefit payment is contingent on when Employee B terminates employment, the commencement date of the benefit payment is not known. Thus, the amount deferred is not reasonably ascertainable until termination of employment.

Example 7. (i) The facts are the same as in *Example 4,* except that Employee B may elect to take the benefit in the form of a life annuity of $50,000 per year (commencing at age 65).

(ii) Because the plan permits employees to elect to receive benefits in more than one form and the alternative forms may not have the same value when Employee B makes his election, the plan fails to satisfy the requirements of paragraph (c)(2)(iii)(B) of this section until a form of benefit is selected. Thus, the amount deferred is not reasonably ascertainable until then.

Example 8. (i) Employer O establishes a nonqualified deferred compensation plan. The plan is a supplemental executive retirement plan (SERP) that provides Employee C with a fully vested right to receive a pension, in the form of a life annuity payable monthly, beginning at age 65, equal to the excess of 3 percent of Employee C's final 3-year average pay for each year of participation up to 15 years, over the amount payable to Employee C from Employer O's qualified pension plan. The amount payable under the qualified pension plan is a life annuity payable monthly, beginning at age 65, equal to 1.5 percent of final 3-year average pay for each year of employment, excluding pay in excess of the section 401(a)(17) compensation limit. No benefits are payable under the SERP if Employee C dies before age 65. Employee C becomes a participant in the SERP on January 1, 2001, at age 44. The amount deferred under the SERP for any year is not reasonably ascertainable prior to termination of employment because the amount of the benefit is not known and the determination of the amount deferred requires assumptions other than interest and mortality (e.g., an assumption as to Employee C's average pay for the final three years of employment). As permitted by paragraph (e)(4)(i) of this section, Employer O chooses not to take any amount into account for any year before the resolution date. Employee C terminates employment on December 31, 2018 when he is age 62.

(ii) As of the date Employee C terminates employment, the amount of the benefit is known and the only actuarial or other assumptions needed to determine the amount deferred are an interest rate assumption and a mortality assumption. At that time, the amount deferred in each past year becomes reasonably ascertainable, and Employer O is able to determine that during 2001 Employee C earned a legally binding right to a life annuity of $4,000 per year beginning in 2021 when Employee C is age 65. Employer O determines the present value of Employee C's future benefit payments under the SERP as of this resolution date (December 31, 2018), using a 7 percent interest rate and the UP–84 mortality table, which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2018. The special timing rule will be satisfied if the resulting present value, $26,950, is taken into account on that date in accordance with paragraph (d)(1) of this section.

Example 9. (i) The facts are the same as in *Example 8,* except that the plan provides that Employee C may choose to receive early retirement benefits on an unreduced basis at any time after age 60 if Employee C has completed 15 years of service by that date.

(ii) As of the date Employee C terminates employment, the amount of the benefit is known and the only actuarial or other assumptions needed to determine the amount deferred are an interest rate assumption and a mortality assumption. At that time, the amount deferred in each past year becomes reasonably ascertainable, and Employer O is able to determine that during 2001 Employee C earned a legally binding right to a life annuity of $4,000 per year beginning on December 31, 2018 when Employee C is age 62. Employer O determines the present value of Employee C's future benefit payments under the SERP as of this resolution date (December 31, 2018), using a 7 percent interest rate and the UP–84 mortality table, which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2018. The special timing rule will be satisfied if the resulting present value, $37,576, is taken into account on that date in accordance with paragraph (d)(1) of this section.

Example 10. (i) The facts are the same as in *Example 9,* except that, as permitted under paragraph (e)(4)(ii) of this section, Employer O chooses to take an amount into account before the amount deferred for 2001 is reasonably ascertainable. The amount that Employer O takes into account on December 31, 2001, is $13,043 (the present value of a life annuity of $4,000 per year, payable at age 62, using a 6 percent interest rate and the UP–84 mortality table). Employer O does not take any other amount into account before the resolution date.

(ii) In accordance with paragraph (e)(4)(ii)(B) of this section, Employer O must determine any additional amount required to be taken into account in 2018. If the $4,000 payable in the form of a life annuity beginning at age 62 exceeds the life annuity which is actuarially equivalent to the $13,043 previously taken into account, the present value of the excess must be taken into account. In this *Example 10,* the $13,043 previously taken into account is actuarially equivalent to a $4,000 annuity commencing at age 62 using a 6 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2001). Accordingly, no additional amount need be taken into account in 2018, regardless of any changes in market rates of interest between 2001 and 2018.

Example 11. (i) The facts are the same as in Example 9, except that, as permitted under paragraph (e)(4)(ii) of this section, Employer O chooses to take an amount into account before the amount deferred for 2001 is reasonably ascertainable. The amount that Employer O takes into account on December 31, 2001, is $9,569 (the present value of a life annuity of $4,000 per year, payable at age 65, using a 6 percent interest rate and the UP–84 mortality table). Employer O does not take any other amount into account before the resolution date.

(ii) In accordance with paragraph (e)(4)(ii)(B) of this section, Employer O must determine any additional amount required to be taken into account in 2018. If the $4,000 payable in the form of a life annuity beginning in 2018 at age 62 exceeds the life annuity which is actuarially equivalent to the $9,569 previously taken into account, the present value of the excess must be taken into account. In this case, the $9,569 previously taken into account is actuarially equivalent to a $2,935 annuity commencing at age 62 using a 6 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2001). Accordingly, an additional amount needs to be taken into account in 2018 equal to the present value of the excess of the $4,000 annual stream of benefit payments to which Employee C obtained a legally binding right during 2001 over the $2,935 annual stream of benefit payments which is actuarially equivalent to the amount previously taken into account. This present value (i.e., the present value of a life annuity equal to $4,000 minus $2,935, or $1,065 annually) is determined by Employer O to be $10,005 as of the resolution date using a 7 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2018).

Example 12. (i) The facts are the same as in *Example 9,* except that the amount that Employer O takes into account on December 31, 2001, is $15,834 (the present value of $4,000, payable at age 60, using a 6 percent interest rate and the UP–84 mortality table). Employer O does not take any other amount into account before the resolution date.

(ii) In accordance with paragraph (e)(4)(ii)(B) of this section, Employer O must determine any additional amount required to be taken into account in 2018. If the $4,000 payable in the form of a life annuity beginning at age 62 exceeds the life annuity which is actuarially equivalent to the $15,834 previously taken into account, the present value of the excess must be taken into account. In this case, the $15,834 previously taken into account is actuarially equivalent to a $4,856 annuity commencing at age 62 using a 6 percent interest rate and the UP–84 mortality table (which, solely for purposes of this example, are assumed to be reasonable actuarial assumptions for December 31, 2001). Because the life annuity of $4,856 per year (which is equivalent to the amount taken into account at the early inclusion date) exceeds the $4,000 annuity attributable to the amount deferred in 2001, no additional amount is required to be taken into account for that amount deferred as of the resolution date. Employer O may claim a refund or credit for the overpayment of FICA tax with respect to amounts taken into account prior to the resolution date to the extent permitted by sections 6402, 6413, and 6511.

Example 13. (i) The facts are the same as in *Example 12,* except that Employee C became a participant in the SERP on January 1, 2000. In addition, Employer O determines in 2018 that during 2000 Employee C earned a legally binding right to a life annuity of $1,500 per year beginning on December 31, 2018.

(ii) Employer O may allocate the $15,834 previously taken into account among any amounts deferred on or before the early inclusion date. At the resolution date, Employer O will have to take into account the present value of an annuity equal to the excess of the life annuity attributable to the amounts deferred for 2000 and 2001 over a life annuity of $4,856 per year.

Example 14. (i) In 2003, Employer P establishes a nonqualified deferred compensation plan for Employee D. The plan provides that, in consideration of Employee D's services to be performed on Project X in 2004, Employee D will have a nonforfeitable right to receive 1 percent per year of Employer P's net profits associated with Project X for each of the immediately succeeding three years. No services beyond 2004 are required. The 1 percent of net profits payable each year will be paid on March 31 of the immediately succeeding year. One percent of net profits associated with Project X is $750,000 in 2005, $400,000 in 2006, and $90,000 in 2007. Employee D receives $750,000 on March 31, 2006, $400,000 on March 31, 2007, and $90,000 on March 31, 2008.

(ii) Because the services creating the right to all of the amount deferred are performed in 2004, the benefit payments based on the

2005, 2006, and 2007 net profits are all attributable to the amount deferred in 2004. However, because the present value of Employee D's future benefit is contingent on future profits, the determination of the amount deferred requires the use of assumptions other than interest, mortality, and cost of living. Thus, all of the amount deferred in 2004 will not be reasonably ascertainable within the meaning of paragraph (e)(4)(i) of this section until December 31, 2007 (which is the resolution date). Employer P does not choose to take any amount into account prior to the amount deferred becoming reasonably ascertainable.

(iii) However, paragraph (d)(1)(ii)(A) of this section provides that a benefit payment attributable to an amount deferred under a nonqualified deferred compensation plan must be included as wages when actually or constructively paid if the amount deferred has not been taken into account as wages under the special timing rule of paragraph (a)(2) of this section. Thus, the benefit payments in 2006 and 2007 must be included as wages when paid.

(iv) As of December 31, 2007, all of the amount deferred under the plan becomes reasonably ascertainable because the amount of the benefit payable attributable to the amount deferred is treated as known under paragraph (e)(4)(i)(B) of this section, and the only assumption needed to determine the present value of the future benefits is interest. However, since Employer P was required to treat the payments in 2006 and 2007 as wages when paid under the general timing rule of paragraph (a)(1) of this section, only the present value of the payment to be made in 2008 is required to be taken into account as of the resolution date (December 31, 2007) under the special timing rule of paragraph (a)(2) of this section. Using an interest rate of 10 percent per year (which, solely for purposes of this *Example 14,* is assumed to be reasonable), Employer P determines that on December 31, 2007, the present value of the future benefits is $87,881, and Employer P includes that additional amount in wages for 2007. (Note that Employer P can choose to use the lag method of withholding described in paragraph (f)(3) of this section, which allows the resolution date amount to be taken into account no later than March 31, 2008, provided that the amount deferred is increased by interest using the AFR for January of 2008.)

Example 15. (i) The facts are the same as in *Example 14,* except that Employer P chooses the early inclusion option permitted by paragraph (e)(4)(ii) of this section to take $1,000,000 into account on December 31, 2004, before the amount deferred for 2004 is reasonably ascertainable.

(ii) Pursuant to paragraph (e)(4)(ii)(E) of this section, in applying the nonduplication rule of paragraph (a)(2)(iii) of this section, a first-in-first-out rule applies in determining the benefit payments that are attributable to amounts previously taken into account. Using the 10 percent interest rate, Employer P determines that the $750,000 benefit payment on March 31, 2006, and the March 31, 2007, benefit payment of $400,000 are less than the $1,000,000 taken into account at the early inclusion date, plus attributable income, and, therefore, are not included in wages when paid.

(iii) Under paragraph (e)(4)(ii)(E) of this section, if an employer chooses to take an amount into account before the resolution date, the amount taken into account (plus income attributable to that amount) is disregarded to the extent the amount is attributed to benefit payments made before the resolution date. Thus, Employer P must reduce the $1,000,000 taken into account in 2004 (plus income attributable to that amount) based upon the two benefit payments ($750,000 and $400,000) that were excluded from wages. Using an interest rate of 10 percent, Employer P determines that the amount taken into account in 2004 plus interest to the resolution date and reduced based upon the two benefit payments is $15,228 and the additional amount that is required to be taken into account as of December 31, 2007, is $72,653 ($87,881–$15,228).

Example 16. (i) Employee E obtains a fully vested, legally binding right during 2002, 2003, and 2004 to payments from a nonqualified deferred compensation plan of Employer Q under which the benefits are based on a formula that includes an actuarial offset by the account balance under a qualified defined contribution plan of Employer Q as of December 31, 2004. The payments from the nonqualified deferred compensation plan are to commence on December 31, 2005. At the resolution date for the amounts earned during 2002, 2003, and 2004, which is December 31, 2004, Employee E has a legally binding right to a net annual benefit of $100,000 payable for life to commence on December 31, 2005. On the resolution date, Employer Q determines that on December 31, 2002, Employee E had a legally binding right to receive $100,000 annually for life beginning on December 31, 2005 (as a result of the gross benefit under the nonqualified plan being $120,000 annually for life, and the offset being $20,000 annually for life, as of December 31, 2002). On December 31, 2003, Employee E had a legally binding right to receive $95,000 annually for life beginning on December 31, 2005 (as a result of the gross benefit under the nonqualified plan being $135,000 annually for life, and the offset being $40,000 annually for life, as of December 31, 2003). On December 31, 2004, Employee E had a legally binding right to receive $100,000 annually for life beginning on December 31, 2005 (as a result of the gross benefit under the nonqualified plan being $145,000 annually for life, and the offset being

$45,000 annually for life, as of December 31, 2004).

(ii) In this case, pursuant to paragraph (e)(4)(ii)(D)(*4*) of this section, Employer Q can attribute the entire $100,000 life annuity to the amount deferred for 2002, even though Employee E's benefit under the nonqualified deferred compensation plan is reduced to $95,000 in 2003.

Example 17. (i) In 2010, Employee F performs services for which she earns a right to 10 percent of the proceeds from the sale of a motion picture. In 2011, Employee F performs services for which she earns a right to 10 percent of the proceeds from the sale of another motion picture. These proceeds are calculated by subtracting the total advertising expenses for both movies. Payment is to be made in the year following the date on which both pictures have been sold, but not later than 2018. At the end of 2010, the advertising expenses for both pictures totaled $300,000. The first motion picture is sold for $10,000,000 in 2014. The second motion picture is sold for $17,000,000 in 2017. At the end of 2017, the advertising expenses totaled $1,700,000. In 2018, Employee F is paid $2,530,000 (10 percent of the sum of $10,000,000 and $17,000,000 minus $1,700,000).

(ii) Pursuant to paragraph (e)(4)(ii)(D)(*4*) of this section, $970,000 (10 percent of the excess of the gross proceeds from the sale of the first motion picture at the resolution date in 2017 over the advertising expenses incurred at the end of 2010) of the payment made in 2018 can be attributed to the amount deferred in 2010 (and with the remaining payment of $1,560,000 to be attributed to the amount deferred in 2011).

(f) *Withholding*—(1) *In general.* Unless an employer applies an alternative method described in paragraph (f)(2) or (3) of this section, an amount deferred under a nonqualified deferred compensation plan for any employee is treated, for purposes of withholding and depositing FICA tax, as wages paid by the employer and received by the employee at the time it is taken into account in accordance with paragraph (e) of this section. However, paragraphs (f)(2) and (3) of this section provide alternative methods which may be used with respect to an amount deferred for an employee. An employer is not required to be consistent in applying the alternatives described in this paragraph (f) with respect to different employees or amounts deferred.

(2) *Estimated method*—(i) *In general.* Under the alternative method provided in this paragraph (f)(2), the employer may make a reasonable estimate of the amount deferred on the date on which the amount is taken into account in accordance with paragraph (e) of this section and take that estimated amount into account as wages paid by the employer and received by the employee on that date (the estimate date), for purposes of withholding and depositing FICA tax.

(ii) *Underestimate of the amount deferred*—(A) *General rule.* If the employer underestimates the amount deferred (as determined after calculating the actual amount deferred that should have been taken into account as of the date on which the amount was taken into account in accordance with paragraph (e) of this section, using an interest rate and other actuarial assumptions that are reasonable as of that date), the employer may treat the shortfall as wages paid as of the estimate date or as of any date that is no later than three months after the estimate date. In either case, the shortfall does not include the income credited to the amount deferred after the amount is taken into account in accordance with paragraph (e) of this section.

(B) *Shortfall is treated as wages paid on a date after the estimate date.* If the employer chooses to treat the shortfall as wages paid on a date that is no later than three months after the estimate date, the employer must take that shortfall into account as wages paid by the employer and received by the employee on that date, for purposes of withholding and depositing FICA tax.

(C) *Shortfall is treated as wages paid on the estimate date.* If the employer chooses to treat the shortfall as wages paid as of the estimate date, the shortfall is treated as an error for purposes of withholding and depositing FICA tax. Appropriate adjustments may be made in accordance with section 6205(a) and the regulations thereunder; however, for purposes of § 31.6205–1(b), the error need not be treated as ascertained before the date that is three months after the estimate date.

(D) *Reporting.* The employer must report the shortfall as wages on Form 941, Employer's Quarterly Federal Tax Return (and, if applicable, Form 941c, Supporting Statement to Correct Information) and Form W–2, Wage and Tax Statement (or, if applicable, Form W–

2c, Corrected Wage and Tax Statement) in accordance with its treatment of the shortfall under paragraph (f)(2)(ii) (B) or (C) of this section.

(iii) *Overestimate of the amount deferred.* If the employer overestimates the amount deferred (as determined after calculating the actual amount deferred that should have been taken into account as of the date on which the amount was taken into account in accordance with paragraph (e) of this section, using an interest rate and actuarial assumptions that are reasonable as of that date) and deposits more than the amount required, the employer may claim a refund or credit in accordance with sections 6402, 6413, and 6511. A Form 941c, or an equivalent statement, must accompany each claim for refund. In addition, Form W–2 or, if applicable, Form W–2c must also reflect the actual amount deferred that should have been taken into account.

(3) *Lag method.* Under the alternative method provided in this paragraph (f)(3), an amount deferred, plus interest, may be treated as wages paid by the employer and received by the employee, for purposes of withholding and depositing FICA tax, on any date that is no later than three months after the date the amount is required to be taken into account in accordance with paragraph (e) of this section. For purposes of this paragraph (f)(3), the amount deferred must be increased by interest through the date on which the wages are treated as paid, at a rate that is not less than AFR. If the employer withholds and deposits FICA tax in accordance with this paragraph (f)(3), the employer will be treated as having taken into account the amount deferred plus income to the date on which the wages are treated as paid.

(4) *Examples.* This paragraph (f) is illustrated by the following examples:

Example 1. (i) Employer M maintains a nonqualified deferred compensation plan that is an account balance plan. The plan provides for annual bonuses based on current year profits to be deferred until termination of employment. Employer M's profits for 2003, and thus the amount deferred, is reasonably ascertainable, but Employer M calculates the amount deferred on March 3, 2004, when the relevant data is available.

(ii) In accordance with the alternative method described in paragraph (f)(2) of this section, Employer M makes a reasonable estimate that the amount deferred that must be taken into account as of December 31, 2003, for Employee A is $20,000, and withholds and deposits FICA tax on that amount as if it were wages paid by Employer M and received by Employee A on that date. In January of 2004, Employer M files and furnishes Form W–2 for Employee A including the $20,000 in FICA wages. On March 3, 2004, Employer M determines that the actual amount deferred that should have been taken into account on December 31, 2003, was $22,000.

(iii) In accordance with the alternative method described in paragraph (f)(2)(ii) of this section, Employer M may treat the additional $2,000 as wages paid to and received by Employee A on December 31, 2003, the estimate date. Employer M may treat the $2,000 shortfall as an error ascertained on March 3, 2004, and withhold and deposit FICA tax on that amount. Form W–2c for Employee A for 2003 must include the $2,000 shortfall in FICA wages. Employer M must also correct the information on Form 941 for the last quarter of 2003, reporting the adjustment on Form 941 for the first quarter of 2004, accompanied by Form 941c for the last quarter of 2003.

(iv) Instead, Employer M may treat the $2,000 shortfall as wages paid on March 31, 2004, and withhold and deposit FICA tax on that amount as if it were wages paid by Employer M and received by Employee A on that date. Form W–2 for Employee A for 2004 and Form 941 for the first quarter of 2004 must include the $2,000 shortfall in FICA wages.

Example 2. (i) The facts are the same as in *Example 1,* except that on March 3, 2004, Employer M determines that the actual amount deferred that should have been taken into account on December 31, 2003, was $19,000.

(ii) Under paragraph (f)(2)(iii) of this section, Employer M may, in accordance with sections 6402, 6413, and 6511, claim a refund or credit for the overpayment of tax resulting from the overestimate. In addition, Employer M must file and furnish a Form W–2c for Employee A and must correct the information on Form 941 for the last quarter of 2003.

Example 3. (i) The facts are the same as in *Example 1,* except that Employer M does not make a reasonable estimate of the amount deferred that must be taken into account as of December 31, 2003. Instead, Employer M withholds and deposits FICA tax on the amount deferred plus interest on that amount using AFR (for January 2004) as if it were wages paid by Employer M and received by Employee A on March 15, 2004.

(ii) Under the alternative method described in paragraph (f)(3) of this section, the amount taken into account on March 15, 2004 (including the interest), will be treated as FICA wages paid to and received by Employee A on March 15, 2004.

Example 4. (i) The facts are the same as in *Example 1,* except that an amount is also deferred for Employee B which is required to be taken into account on October 15, 2003, and Employer M chooses to use the lag method in paragraph (f)(3) of this section in order to provide time to calculate the amount deferred.

(ii) Employer M may use any date not later than January 15, 2004, to take the amount deferred into account (provided that the amount deferred includes interest, at AFR for January 1, 2003, through December 31, 2003, and at AFR for January 1, 2004, through January 15, 2004).

(g) *Effective date and transition rules*—(1) *General effective date.* Except for paragraphs (g)(2) through (4) of this section, this section is applicable on and after January 1, 2000. Thus, paragraphs (a) through (f) of this section apply to amounts deferred on or after January 1, 2000; to amounts deferred before January 1, 2000, which cease to be subject to a substantial risk of forfeiture on or after January 1, 2000, or for which a resolution date occurs on or after January 1, 2000; and to benefits actually or constructively paid on or after January 1, 2000.

(2) *Reasonable, good faith interpretation for amounts deferred and benefits paid before January 1, 2000*—(i) *In general.* For periods before January 1, 2000 (including amounts deferred before January 1, 2000, and any benefits actually or constructively paid before January 1, 2000, that are attributable to those amounts deferred), an employer may rely on a reasonable, good faith interpretation of section 3121(v)(2), taking into account pre-existing guidance. An employer will be deemed to have determined FICA tax liability and satisfied FICA withholding requirements in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer has complied with paragraphs (a) through (f) of this section. For purposes of paragraphs (g)(2) through (4) of this section, and subject to paragraphs (g)(2)(ii) and (iii) of this section, whether an employer that has not complied with paragraphs (a) through (f) of this section has determined FICA tax liability and satisfied FICA withholding requirements in accordance with a reasonable, good faith interpretation of section 3121(v)(2) will be determined based on the relevant facts and circumstances, including consistency of treatment by the employer and the extent to which the employer has resolved unclear issues in its favor.

(ii) *Plan must be established or adopted.* If an amount is deferred under a plan before January 1, 2000, and benefit payments attributable to that amount are actually or constructively paid on or after January 1, 2000, then in no event will an employer's treatment of the amount deferred be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats that amount as taken into account as wages for FICA tax purposes prior to the establishment of the plan (within the meaning of paragraph (b)(2) of this section) providing for the deferred compensation (or, if later, the establishment of the plan as amended to provide for the deferred compensation, as provided in paragraph (b)(2)(ii) of this section). If an amount is deferred under a plan before January 1, 2000, and benefit payments attributable to that amount are actually or constructively paid before January 1, 2000, then in no event will the employer's treatment of that amount deferred be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats that amount as taken into account as wages for FICA tax purposes prior to the adoption of the plan providing for the deferred compensation (or, if later, the adoption of the plan amendment providing the deferred compensation). For example, awards, bonuses, raises, incentive payments, and other similar amounts granted under a plan as compensation for past services may not be taken into account under section 3121(v)(2) prior to the establishment (or, if applicable, the adoption) of the plan.

(iii) *Certain changes in position for stock options, stock appreciation rights, and other stock value rights not reasonable, good faith interpretation.* In the case of a stock option, stock appreciation right, or other stock value right (as defined in paragraph (b)(4)(ii) of this section) that is exercised before January 1, 2000, an employer that treats the exercise as not subject to FICA tax as a result of the nonduplication rule of section 3121(v)(2)(B) is not acting in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer has not treated that grant and all earlier grants as subject to section 3121(v)(2) by reporting the current value of such options and rights as FICA wages on Form 941 filed for the quarter during which each grant was made (or, if later, for the quarter during which each grant ceased to be subject to a substantial risk of forfeiture).

(3) *Optional adjustments to conform with this section for pre-effective-date open periods*—(i) *General rule.* If an employer determined FICA tax liability with respect to section 3121(v)(2) in any period ending before January 1, 2000, for which the applicable period of limitations has not expired on January 1, 2000 (pre-effective-date open periods), in a manner that was not in accordance with this section, the employer may adjust its FICA tax determination for that period to conform to this section. Thus, if an amount deferred was taken into account in a pre-effective-date open period when it was not required to be taken into account (e.g., an amount taken into account before it became reasonably ascertainable), the employer may claim a refund or credit for any FICA tax paid on that amount to the extent permitted by sections 6402, 6413, and 6511.

(ii) *Consistency required.* In the case of a plan that is not a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section), if any payment was actually or constructively paid to an employee under the plan in a pre-effective-date open period and that payment was not included in FICA wages by reason of the employer's treatment of the plan as a nonqualified deferred compensation plan, then the employer may claim a refund or credit for FICA tax paid on amounts treated as amounts deferred under the plan (in accordance with the employer's treatment of the plan as a nonqualified deferred compensation plan) for that employee for pre-effective-date open periods only to the extent that the FICA tax paid on all amounts treated as amounts deferred for the employee in all pre-effective-date open periods under the plan exceeds the FICA tax that would have been due on the benefits actually or constructively paid to the employee in those periods under the plan if those benefits were included in FICA wages when paid. If any benefit payments attributable to amounts deferred after December 31, 1993, were actually or constructively paid to an employee under a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) in a pre-effective-date open period, but these payments were treated as subject to FICA tax because the employer treated the plan as not being a nonqualified deferred compensation plan, then the employer may claim a refund or credit for the FICA tax paid on those benefit payments only to the extent that the FICA tax paid on those benefit payments exceeds the FICA tax that would have been due on the amounts deferred to which those benefit payments are attributable if those amounts deferred had been taken into account when they would have been required to have been taken into account under this section (if this section had been in effect then).

(iii) *Reporting.* Any employer that adjusts its FICA tax determination in accordance with paragraphs (g)(3)(i) and (ii) of this section must make appropriate adjustments on Form 941 and Form 941c for the affected periods, and, in addition, must file and furnish Form W–2, or, if applicable, Form W–2c, for any affected employee so that the Social Security Administration may correctly post the amount deferred to the employee's earnings record. The adjustments may be made in accordance with section 6205(a) and the regulations thereunder; however, for purposes of § 31.6205–1(b), the error is not required to be treated as ascertained before March 31, 2000.

(4) *Application of reasonable, good faith standard*—(i) *Plans that are not subject to section 3121(v)(2).* If a plan is not a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section, but, for a period ending prior to January 1, 2000, and, pursuant to a reasonable, good faith interpretation of section 3121(v)(2), an amount under the plan was taken into account (within the meaning of paragraph (d)(1) of this section) as an amount deferred

under a nonqualified deferred compensation plan, then, pursuant to paragraph (g)(2) of this section, the following rules shall apply—

(A) With respect to benefit payments actually or constructively paid before January 1, 2000, that are attributable to amounts previously taken into account under the plan, no additional FICA tax will be due;

(B) On or after January 1, 2000, benefit payments under the plan must be taken into account as wages when actually or constructively paid in accordance with paragraph (a)(1) of this section; and

(C) To the extent permitted by paragraph (g)(3) of this section, the employer may claim a refund or credit for FICA tax actually paid on amounts taken into account prior to January 1, 2000.

(ii) *Plans that are subject to section 3121(v)(2) for which the amount deferred has not been fully taken into account*—(A) *In general.* The rules of paragraphs (g)(4)(ii)(B) through (E) of this section apply if a plan is a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) and, with respect to an amount deferred under the plan for an employee prior to January 1, 2000, the employer, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), either took into account an amount that is less than the amount that would have been required to be taken into account if paragraphs (a) through (f) of this section had been in effect for that period or took no amount into account. Thus, paragraphs (g)(4)(ii)(B) through (E) of this section apply both to an employer that treated the plan as if it were not a nonqualified deferred compensation plan within the meaning of section 3121(v)(2) (by withholding and paying FICA tax due on benefits actually or constructively paid under the plan during that period, if any) and to an employer that treated the plan as a nonqualified deferred compensation plan within the meaning of section 3121(v)(2).

(B) *No additional tax required.* Pursuant to paragraph (g)(2) of this section, no additional FICA tax will be due for any period ending prior to January 1, 2000.

(C) *General timing rule applicable.* In accordance with paragraph (d)(1)(ii) of this section, except as provided in paragraphs (g)(4)(ii) (D) and (E), the general timing rule described in paragraph (a)(1) of this section applies to benefits actually or constructively paid on or after January 1, 2000, attributable to an amount deferred in a period before January 1, 2000, to the extent the amount taken into account was less than the amount that would have been required to be taken into account if paragraphs (a) through (f) of this section had been in effect before January 1, 2000.

(D) *Special rule for amounts deferred before 1994.* The difference between the amount that was taken into account in any period ending prior to January 1, 1994, and the amount that would have been required or permitted to be taken into account in that period if paragraphs (a) through (f) of this section had been in effect is treated as if it had been taken into account within the meaning of paragraph (d)(1) of this section. For example, in the case of an amount deferred before 1994 that was not reasonably ascertainable (and which was not subject to a substantial risk of forfeiture), the employer is treated as if it had anticipated the actual amount, form, and commencement date for the benefit payments attributable to the amount deferred and had taken the amount deferred into account at an early inclusion date before 1994 using a method permitted under this section. Thus, with respect to such an amount deferred, the employer is not required to take any additional amount into account when the amount deferred becomes reasonably ascertainable, and no additional FICA tax will be due when the benefit payments attributable to the amount deferred are actually or constructively paid.

(E) *Special rule for amounts required to be taken into account in 1994 or 1995.* In the case of an amount deferred that would have been required to be taken into account in 1994 or 1995 if paragraphs (a) through (f) of this section had been in effect, an employer will be treated as taking the amount deferred into account under paragraph (d)(1) of this section to the extent the employer takes the amount into account by treating it as wages paid by the employer and received by the employee as of any date prior to April 1, 2000.

(iii) *Plans that are subject to section 3121(v)(2) for which more than the amount deferred has been taken into account.* If a plan is a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section) and an amount was taken into account under the plan for an employee before January 1, 2000, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), but that amount could not have been taken into account before January 1, 2000, if paragraphs (a) through (f) of this section had been in effect then, the following rules apply—

(A) The determination of the amount deferred for any period beginning on or after January 1, 2000, must be made in accordance with paragraph (c) of this section, and the time when amounts deferred under the plan are required to be taken into account must be determined in accordance with paragraph (e) of this section, without regard to any such amount that was taken into account for any period ending before January 1, 2000; and

(B) To the extent permitted by sections 6402, 6413, and 6511, the employer may claim a refund or credit for an overpayment of tax caused by the overinclusion of wages that occurred before January 1, 2000.

(5) *Examples.* This paragraph (g) is illustrated by the following examples:

Example 1. (i) In 1996, Employer M establishes a nonqualified deferred compensation plan that is a nonaccount balance plan for Employee A. All benefits under the plan are 100 percent vested. In order to determine the amount deferred on behalf of Employee A under the plan for 1996 and 1997, Employer M must make assumptions as to the date on which Employee A will retire and the form of benefit Employee A will elect, in addition to interest, mortality, and cost-of-living assumptions. Based on assumptions made with respect to all of these contingencies, Employer M determines that the amount deferred for 1996 is $50,000 and the amount deferred for 1997 is $55,000. In 1996 and 1997, Employee A's total wages (without regard to the amounts deferred) exceed the OASDI wage bases. Employer M withholds and deposits HI tax on the $50,000 and $55,000 amounts. Employee A does not retire before January 1, 2000. Employer M chooses under paragraph (g)(3) of this section to apply this section to 1996 and 1997 before the January 1, 2000, general effective date.

(ii) Under this section, the amounts deferred in 1996 and 1997 are not reasonably ascertainable (within the meaning of paragraph (e)(4)(i) of this section) before January 1, 2000. Thus, as long as the applicable period of limitations has not expired for the periods in 1996 and 1997, Employer M may, to the extent permitted under paragraph (g)(3) of this section, apply for a refund or credit for the HI tax paid on the amounts deferred for 1996 and 1997 and, in accordance with paragraph (e)(4) of this section, take into account the amounts deferred when they become reasonably ascertainable.

Example 2. (i) Employer N adopts a plan on January 1, 1994, that covers Employee B, who has 10 years of service as of that date. The plan provides that, in consideration of Employee B's outstanding services over the past 10 years, Employee B will be paid a $500,000 lump sum distribution upon termination of employment at any time. On January 15, 1996, Employee B terminates employment with Employer N. Employer N determines, based on a reasonable, good faith interpretation of section 3121(v)(2), that the plan is a nonqualified deferred compensation plan under that section. Employer N treats the $500,000 as having been taken into account as an amount deferred in 1993 and earlier years.

(ii) Under paragraph (g)(2)(ii) of this section, if all amounts are deferred and all benefits are paid under a plan before January 1, 2000, then in no event will an employer's treatment of amounts deferred under the plan be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats these amounts as taken into account as wages for FICA tax purposes prior to the adoption of the plan. Accordingly, Employer N's treatment is not in accordance with a reasonable, good faith interpretation of section 3121(v)(2) because Employer N treated amounts as taken into account in years before the adoption of the plan. As a result, the payment made to Employee B in 1996 was subject to both the OASDI and HI portions of FICA tax when paid.

Example 3. (i) Employer O adopts a bonus plan on December 1, 1993, that becomes effective and legally binding on January 1, 1994. Under the plan, which is not set forth in writing, a specified bonus amount (which is 100 percent vested) is credited to Employee C's account each December 31. A reasonable rate of interest on Employee C's account balance is credited quarterly. Employee C's account balance will begin to be paid in equal annual installments over 10 years beginning on January 1, 2000. Employer O determines, based on a reasonable, good faith interpretation of section 3121(v)(2), that the bonus plan is a nonqualified deferred compensation plan under that section and, therefore, treats the amounts credited from January 1, 1994, through December 31, 1999, as amounts deferred and, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), takes those amounts deferred into account as wages for FICA tax purposes as of those dates. The bonus plan is set forth in writing on May 1, 1999, and, thus, is treated as established as of January 1, 1994.

(ii) Under paragraph (g)(2)(ii) of this section, if an amount is deferred before January 1, 2000, and the attributable benefit is paid on or after January 1, 2000, then in no event will an employer's treatment of the amount deferred under a plan be considered to be in accordance with a reasonable, good faith interpretation of section 3121(v)(2) if the employer treats the amount deferred as taken into account as wages for FICA tax purposes prior to the establishment of the plan (within the meaning of paragraph (b)(2) of this section). Because the bonus plan is treated as established on January 1, 1994 (pursuant to the transition rule for unwritten plans in paragraph (b)(2)(iii) of this section), and because Employer O, in accordance with a reasonable, good faith interpretation of section 3121(v)(2), took amounts deferred into account in 1994 through 1999, the amounts paid to Employee C attributable to those amounts deferred will not be subject to FICA tax when paid.

Example 4. (i) In 1985, Employer P establishes a compensation arrangement for Employee D that provides for a lump sum payment to be made after termination of employment but the arrangement is not a nonqualified deferred compensation plan (within the meaning of paragraph (b)(1) of this section). However, prior to January 1, 2000, and in accordance with a reasonable, good faith interpretation of section 3121(v)(2), Employer P treats the arrangement as a nonqualified deferred compensation plan under section 3121(v)(2). Employer P determines that Employee D's total wages (without regard to the amount deferred) for each year from 1985 through 1993 exceed the applicable OASDI and HI wage bases for each of those years and, consequently, there is no FICA tax liability with respect to the amounts deferred for those years. In 1994, Employee D's total wages (without regard to the amount deferred) exceed the OASDI wage base. However, because there is no limit on the HI wage base, the amount deferred for 1994 results in additional HI tax liability of $290, which is timely paid by Employer P.

(ii) Employee D terminates employment with Employer P in 1995 and receives a plan payment of $50,000. In that year, Employee D also receives wages of $60,000 from Employer P. In accordance with its treatment of the plan as a nonqualified deferred compensation plan under section 3121(v)(2), Employer P does not treat the $50,000 payment in 1995 as wages for FICA tax purposes in that year.

(iii) Because amounts under a plan were taken into account (within the meaning of paragraph (d)(1) of this section) as amounts deferred under a nonqualified deferred compensation plan pursuant to a reasonable, good faith interpretation of section 3121(v)(2)(A), but that plan is not a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section, the transition rules provided in paragraph (g)(4)(i) of this section apply. Thus, no additional FICA tax will be due on the benefits paid in 1995.

(iv) Because $290 of HI tax was paid on the amount deferred in 1994, Employer P is entitled to a refund or credit for that amount to the extent permitted under sections 6402, 6413, and 6511—but only to the extent that $290 exceeds the FICA tax that would have been due on the $50,000 payment in 1995 if that payment had been subject to FICA tax when paid (i.e., if paragraphs (a) through (f) of this section had been effective for those years). In 1995, Employee D had other wages of $60,000. Thus, only $1,200 (the $61,200 OASDI wage base, less the $60,000 of other wages) of the $50,000 payment would have been subject to OASDI; the full $50,000 would have been subject to HI. This would have resulted in $148.80 of OASDI tax ($1,200 x 12.4 percent) and $1,450 of HI tax ($50,000 x 2.9 percent). Employer P is not entitled to a refund or credit under the consistency rule of paragraph (g)(3)(ii) because the $290 of HI tax paid in 1994 is less than the total $1,598.80 of FICA tax liability that would have resulted if this section had applied for 1995.

(v) However, if the benefit payment is instead actually or constructively paid on or after January 1, 2000, the benefit payment must be taken into account as wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section (and paragraph (g)(4)(i)(B) of this section).

Example 5. (i) In 1985, Employer Q establishes a compensation arrangement for Employee E that is a nonqualified deferred compensation plan within the meaning of paragraph (b)(1) of this section. However, prior to January 1, 2000, Employer Q determines, based on a reasonable, good faith interpretation of section 3121(v)(2), that the arrangement is not a nonqualified deferred compensation plan within the meaning of that section. Thus, when Employee E retires at the end of 1996 and benefit payments under the arrangement begin in 1997, Employer Q withholds and deposits FICA tax on the amounts paid to Employee E. Payments under the arrangement continue on or after January 1, 2000. Employer Q does not choose (under paragraph (g)(3) of this section) to adjust its FICA tax determination for a pre-effective-date open period by treating this section as in effect for all amounts deferred and benefits actually or constructively paid for any such period. The periods in 1994 and 1995 are not pre-effective-date open periods for Employer Q.

(ii) Under paragraph (g)(4)(ii) of this section, for purposes of determining whether benefits actually or constructively paid on or after January 1, 2000, were previously taken into account for purposes of applying the nonduplication rule of section 3121(v)(2)(B), any amount that would have been required to have been taken into account before 1994 will be treated as if it had been taken into account within the meaning of paragraph (d)(1) of this section. Under the nonduplication rule, benefit payments attributable to an amount that has been so treated as taken into account is not treated as wages for FICA tax purposes at any later time (such as upon payment).

(iii) Because Employer Q does not adjust its FICA tax determination by treating this section as in effect for all amounts deferred for periods ending after December 31, 1993, any benefit payments attributable to amounts deferred in periods ending after December 31, 1993, will be included in wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section.

Example 6. (i) The facts are the same as in *Example 5,* except that Employer Q chooses (in accordance with paragraph (g)(3) of this section) to adjust its FICA tax determination for all pre-effective-date open periods by treating this section as in effect for all amounts deferred for those periods. In addition, Employer Q chooses (in accordance with paragraph (g)(4)(ii)(E) of this section) to take the amounts deferred for 1994 and 1995 into account by treating these amounts as FICA wages paid and received by Employee E on January 15, 2000.

(ii) In accordance with the nonduplication rule of paragraph (a)(2)(iii) of this section, because all amounts deferred for Employee E under the plan were taken into account (or treated as taken into account), any benefit payments made to Employee E under the plan will not be included as FICA wages when actually or constructively paid.

Example 7. (i) The facts are the same as in Example 5, except that Employer Q does not withhold and deposit the FICA tax due on benefits actually or constructively paid before January 1, 2000.

(ii) Because Employer Q did not withhold and deposit the FICA tax due on benefits actually or constructively paid before January 1, 2000, Employer Q did not determine FICA tax liability and satisfy FICA tax withholding requirements in accordance with a reasonable, good faith interpretation of section 3121(v)(2). Thus, the transition rules provided in paragraphs (g)(3) and (4) of this section do not apply. As a result, any amount that would have been required to have been taken into account under this section before 1994 is not treated as if it had been so taken into account under paragraph (g)(4)(ii)(D) of this section, and benefit payments attributable to amounts deferred before January 1, 2000, are treated as FICA wages when actually or constructively paid in accordance with the general timing rule of paragraph (a)(1) of this section.

Example 8. (i) In 1993, Employer R establishes a nonqualified deferred compensation plan for Employee F under which Employee F will have a fully vested right to receive a lump sum payment in 2000 equal to 50 percent of Employee F's highest rate of salary. On December 31, 1993, Employee F's highest salary is $1 million. In accordance with a reasonable, good faith interpretation of section 3121(v)(2), Employer R determines that, for 1993, there is an amount deferred that must be taken into account as wages for FICA tax purposes. Based on Employer R's estimate that Employee F's highest salary will be $3 million in 2000, Employer R determines that the amount deferred is equal to the present value in 1993 of $1.5 million payable in 2000. However, because Employee F has other wages in 1993 that exceed the applicable OASDI and HI wage bases for that year, no additional FICA tax is paid as a result of that amount deferred being taken into account for 1993. In addition, Employer R takes no amounts into account under the plan after 1993 for Employee F. Under paragraphs (e)(1) and (4)(ii)(D)(*2*) of this section, the largest amount that could have been taken into account in 1993 is the present value of a lump sum payment of $500,000, payable in 2000, because that is the maximum amount to which Employee F has a legally binding right as of December 31, 1993. Employee F's highest salary is, in fact, $3 million in 2000 and Employee F receives $1.5 million under the plan on December 31, 2000.

(ii) In accordance with paragraphs (g)(1) and (4)(iii)(A) of this section, the determination of the amount deferred under the plan for any period beginning on or after January 1, 2000, and the time when that amount deferred is required to be taken into account must be determined in accordance with this section. In addition, these determinations must be made without regard to any amount deferred that was taken into account for any period ending before January 1, 2000, that could not be taken into account before January 1, 2000, if paragraphs (a) through (f) of this section had been in effect. Because no FICA tax was actually paid on that $1 million in 1993, no overpayment of tax was caused by the overinclusion of wages in 1993 and, thus, Employer R is not entitled to a refund or credit (even assuming that the period of limitations has been kept open for periods in 1993). In addition, because the difference between the present value of the $1.5 million payment and the present value of a $500,000 payment was not taken into account for periods beginning on or after January 1, 1994, $1 million must be included in FICA wages under the general timing rule when paid.

[64 FR 4547, Jan. 29, 1999; 64 FR 15687, Apr. 1, 1999]

§ 31.3121(v)(2)–2 Effective dates and transition rules.

(a) *General statutory effective date.* Except as otherwise provided in paragraphs (b) through (e) of this section, section 3121(v)(2) and the amendments made to section 3121(a)(2), (a)(3), and (a)(13) by the Social Security Amendments of 1983 (Pub. L. 98–21, 97 Stat. 65), as amended by section 2662(f)(2) of the Deficit Reduction Act of 1984 (Pub. L. 98–369, 98 Stat. 494), apply to amounts deferred and benefits paid after December 31, 1983.

(b) *Definitions.* For purposes of § 31.3121(v)(2)–1 and this section, the following definitions apply:

(1) *FICA. FICA* means the Federal Insurance Contributions Act (26 U.S.C. 3101 *et seq.*).

(2) *457(a) plan. A 457(a) plan* means an eligible deferred compensation plan of a State or local government or of a tax-exempt organization to which section 457(a) applies.

(3) *Gap agreement. Gap agreement* means an agreement adopted after March 24, 1983, and on or before December 31, 1983, between an individual and a nonqualified deferred compensation plan within the meaning of § 31.3121(v)(2)–1(b). Such an agreement does not fail to be a gap agreement merely because the terms of the plan are changed after December 31,1983.

(4) *Individual party to a gap agreement. Individual party to a gap agreement* means an individual who was eligible to participate in a gap agreement on December 31, 1983, under the terms of the agreement on that date. An individual will be treated as an individual party to a gap agreement even if the individual has not accrued any benefits under the plan by December 31, 1983, and regardless of whether the individual has taken any specific action to become a party to the agreement. However, an individual who becomes eligible to participate in a gap agreement after December 31, 1983, is not an individual party to a gap agreement.

(5) *Individual party to a March 24, 1983 agreement. Individual party to a March 24, 1983 agreement* means an individual who was eligible to participate in a March 24, 1983 agreement under the terms of the agreement on March 24, 1983. An individual will be treated as an individual party to a March 24, 1983 agreement even if the individual has not accrued any benefits under the plan by March 24, 1983, and regardless of whether the individual has taken any specific action to become a party to the agreement. However, an individual who becomes eligible to participate in a March 24, 1983 agreement after March 24, 1983, is not an individual party to a March 24, 1983 agreement.

(6) *March 24, 1983 agreement. March 24, 1983 agreement* means an agreement in existence on March 24, 1983, between an individual and a nonqualified deferred compensation plan within the meaning of § 31.3121(v)(2)–1(b). Such an agreement does not fail to be a March 24, 1983 agreement merely because the terms of the plan are changed after March 24, 1983. In addition, for purposes of this paragraph (b)(6) only, any plan (or agreement) that provides for payments that qualify for one of the retirement payment exclusions is treated as a nonqualified deferred compensation plan. For example, § 31.3121(v)(2)–1(b)(4)(v) provides that certain benefits established in connection with impending termination do not result from the deferral of compensation and thus are not considered deferred under a nonqualified deferred compensation plan. However, a plan that provides such benefits and that was in existence on March 24, 1983, is treated as a nonqualified deferred compensation plan for purposes of this paragraph (b) to the extent it provides benefits that would have satisfied one of the retirement payment exclusions.

(7) *Retirement payment exclusions. Retirement payment exclusions* are the exclusions from wages (for FICA tax purposes) for retirement payments under section 3121(a)(2)(A), (a)(3), and (a)(13)(A)(iii), as in effect on April 19,

1983 (the day before enactment of the Social Security Amendments of 1983).

(8) *Transition benefits. Transition benefits* are payments made after December 31, 1983, attributable to services rendered before January 1, 1984. For this purpose, transition benefits are determined without regard to any changes made in the terms of the plan after March 24, 1983, in the case of a March 24, 1983 agreement or after December 31, 1983, in the case of a gap agreement.

(c) *Transition rules*—(1) *In general.* Except as provided in paragraph (c)(2) or (3) of this section, the general statutory effective date described in paragraph (a) of this section applies to benefit payments after December 31, 1983. Thus, except as provided in paragraph (c)(2) or (3) of this section, section 3121(v)(2) applies, and the retirement payment exclusions do not apply, to benefit payments made after December 31, 1983, even if the benefit payments are made under a March 24, 1983 agreement or a gap agreement.

(2) *Transition benefits under a March 24, 1983 agreement.* With respect to an individual party to a March 24, 1983 agreement, transition benefits paid under that March 24, 1983 agreement (except for those paid under a 457(a) plan) are not subject to the special timing rule of section 3121(v)(2) and are subject to section 3121(a) as in effect on April 19, 1983. Thus, transition benefits under a March 24, 1983 agreement (except for those under a 457(a) plan) to an individual party to a March 24, 1983 agreement are excluded from wages (for FICA tax purposes) only if they qualify for any of the retirement payment exclusions (or any other exclusion provided under section 3121(a) as in effect on April 19, 1983).

(3) *Transition benefits under a gap agreement.* With respect to an individual party to a gap agreement, the payor of transition benefits under the gap agreement must choose to either—

(i) Take the transition benefits into account as wages when paid; or

(ii) Take the amount deferred (within the meaning of §31.3121(v)(2)–1(c)) with respect to the transition benefits into account as wages under section 3121(v)(2) (as if section 3121(v)(2) had applied before its general statutory effective date).

(d) *Determining transition benefit portion.* For purposes of determining the portion of total benefits under a nonqualified deferred compensation plan that represents transition benefits, if, under the terms of the plan, benefit payments are not attributed to specific years of service, the employer may use any reasonable method. For example, if a plan provides that the employee will receive benefits equal to 2 percent of high 3-year average compensation multiplied by years of service, and the employee retires after 25 years of service, 9 of which are before 1984, the employer may determine that 9/25 of the total benefit payments to be received beginning in 2000 are transition benefits attributable to services performed before 1984.

(e) *Order of payment.* If an employer determines, in accordance with paragraph (d) of this section, that a portion of the total benefits under a nonqualified deferred compensation plan constitutes transition benefits, then, for purposes of determining the portion of each benefit payment that constitutes transition benefits, the employer must treat each benefit payment as consisting of transition benefits in the same proportion as the transition benefits that have not been paid (as of January 1, 2000) bear to total benefits that have not been paid (as of January 1, 2000), unless such allocation is inconsistent with the terms of the plan. However, for a benefit payment made before January 1, 2000, the employer may use any reasonable allocation method to determine the portion of a payment that consists of transition benefits, provided that the allocation method is consistent with the terms of the plan.

[64 FR 4567, Jan. 29, 1999]

§ 31.3123–1 Deductions by an employer from remuneration of an employee.

Any amount deducted by an employer from the remuneration of an employee is considered to be part of the employee's remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial that any act of Congress or the law of any State requires or permits such deductions and the payment of the amount thereof to the United States, a State, or any political subdivision thereof.

Subpart C—Railroad Retirement Tax Act (Chapter 22, Internal Revenue Code of 1954)

TAX ON EMPLOYEES

§ 31.3201–1 Measure of employee tax.

The employee tax is measured by the amount of compensation received for services rendered as an employee. For provisions relating to compensation, see § 31.3231(e)–1. For provisions relating to the circumstances under which certain compensation is to be disregarded for the purpose of determining the employee tax, see paragraphs (b)(1) and (2) of § 31.3231(e)–1.

[T.D. 8582, 59 FR 66189, Dec. 23, 1994]

§ 31.3201–2 Rates and computation of employee tax.

(a) *Rates*—(1)(i) *Tier 1 tax.* The Tier 1 employee tax rate equals the sum of the tax rates in effect under section 3101(a), relating to old-age, survivors, and disability insurance, and section 3101(b), relating to hospital insurance. The Tier 1 employee tax rate is applied to compensation up to the contribution base described in section 3231(e)(2)(B)(i). The contribution base is determined under section 230 of the Social Security Act and is identical to the old-age, survivors, and disability insurance wage base and the hospital insurance wage base, respectively, under the Federal Insurance Contributions Act.

(ii) *Example.* The rule in paragraph (a)(1)(i) of this section is illustrated by the following example.

Example. A received compensation of $60,000 in 1992. The section 3101(a) rate of 6.2 percent would be applied to *A*'s compensation up to $55,500, the applicable contribution base for 1992. The section 3101(b) rate of 1.45 percent would be applied to the entire $60,000 of *A*'s compensation because the applicable contribution base for 1992 is $130,200.

(2)(i) *Tier 2 tax.* The Tier 2 employee tax rate equals the percentage set forth in section 3201(b) of the Code. This rate is applied to compensation up to the contribution base described in section 3231(e)(2)(B)(ii).

(ii) *Example.* The rule in paragraph (a)(2)(i) of this section is illustrated by the following example.

Example. A received compensation of $60,000 in 1992. The section 3201(b) rate of 4.90 percent would be applied to *A*'s compensation up to $41,400, the applicable contribution base for 1992.

(b)(1) *Computation.* The employee tax is computed by multiplying the amount of the employee's compensation with respect to which the employee tax is imposed by the rate applicable to such compensation, as determined under paragraph (a) of this section. The applicable rate is the rate in effect when the compensation is received by the employee. For rules relating to the time of receipt, see § 31.3121(a)–2 (a) and (b).

(2) *Example.* The rule in paragraph (b)(1) of this section is illustrated by the following example.

Example. In 1990, employee *A* received compensation of $1,000 as remuneration for services performed for employer *R* in 1989. The employee tax is payable at the rate of 12.55 percent (7.65 percent plus 4.90 percent) in effect for 1990 (the year the compensation was received), and not the 12.41 percent rate (7.51 percent plus 4.90 percent) in effect for 1989 (the year the services were performed).

[T.D. 8582, 59 FR 66189, Dec. 23, 1994]

§ 31.3202–1 Collection of, and liability for, employee tax.

(a) *Collection; general rule.* The employer shall collect from each of his employees the employee tax imposed with respect to the compensation of the employee by deducting or causing to be deducted the amount of such tax from the compensation subject to the tax as and when such compensation is paid. As to the measure of the employee tax, see § 31.3201–1.

(b) *Collection; payments by two or more employers in excess of annual compensation limitation.* For rules relating to payments by two or more employers in excess of the annual compensation limitation see § 31.3121(a)(1)–1.

(c) *Undercollections or overcollections.* Any undercollection or overcollection of employee tax resulting from the employer's inability to determine, at the time compensation is paid, the correct amount of compensation with respect to which the deduction should be made shall be corrected in accordance with the provisions of Subpart G of the regulations in this part relating to adjustments, credits, refunds, and abatements.

(d) *When fractional part of cent may be disregarded.* In collecting the employee tax, the employer shall disregard any fractional part of a cent of such tax unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(e) *Employer's liability.* The employer is liable for the employee tax with respect to compensation paid by him, whether or not collected from the employee. If the employer deducts less than the correct amount of employee tax or fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. Until collected from him, the employee is also liable for the employee tax. Any employee tax collected by or on behalf of an employer is a special fund in trust for the United States. See section 7501. An employer is not liable to any person for the amount of the employee tax deducted by him and paid to the district director.

(f) *Concurrent employment.* If two or more related corporations who are rail employers concurrently employ the same individual and compensate that individual through a common paymaster, which is one of the related corporations employing the individual, see § 31.3121(s)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6541, 26 FR 553, Jan 20, 1961; T.D. 6727, 29 FR 5866, May 5, 1964; T.D. 8582, 59 FR 66189, Dec. 23, 1994]

TAX ON EMPLOYEE REPRESENTATIVES

§ 31.3211–1 Measure of employee representative tax.

The employee representative tax is measured by the amount of compensation received for services rendered as an employee representative. For provisions relating to compensation, see § 31.3231(e)–1.

[T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3211–2 Rates and computation of employee representative tax.

(a) *Rates*—(1)(i) *Tier 1 tax.* The Tier 1 employee representative tax rate equals the sum of the tax rates in effect under sections 3101(a) and 3111(a), relating to the employee and the employer tax for old-age, survivors, and disability insurance, and sections 3101(b) and 3111(b), relating to the employee and the employer tax for hospital insurance. The Tier 1 employee representative tax rate is applied to compensation up to the contribution base described in section 3231(e)(2)(B)(i). The contribution base is determined under section 230 of the Social Security Act, and is identical to the old-age, survivors, and disability insurance wage base and the hospital insurance wage base, respectively, under the Federal Insurance Contributions Act.

(ii) *Example.* The rule in paragraph (a)(1)(i) of this section is illustrated by the following example.

Example. B, an employee representative, received compensation of $60,000 in 1992. The sections 3101(a) and 3111(a) rates of 12.4 percent (6.2 percent plus 6.2 percent) would be applied to *B*'s compensation up to $55,500, the applicable contribution base for 1992. The sections 3101(b) and 3111(b) rates of 2.9 percent (1.45 percent plus 1.45 percent) would be applied to the entire $60,000 of *B*'s compensation because the applicable contribution base for 1992 is $130,200.

(2) (i) *Tier 2 tax.* The Tier 2 employee representative tax rate equals the percentage set forth in section 3211(a)(2) of the Code. This rate is applied up to the contribution base described in section 3231(e)(2)(B)(ii).

(ii) *Example.* The rule in paragraph (a)(2)(i) of this section is illustrated by the following example.

Example. B received compensation of $60,000 in 1992. The section 3211(a)(2) rate of 14.75 percent would be applied to *B*'s compensation up to $41,400, the applicable contribution base for 1992.

(3) *Supplemental Annuity Tax.* The supplemental annuity tax for each work-hour for which compensation is paid to an employee representative for services rendered as an employee representative is imposed at the same rate

as the excise tax imposed on every employer under section 3221(c). See also § 31.3211–3.

(b) (1) *Computation.* The employee representative tax is computed by multiplying the amount of the employee representative's compensation with respect to which the employee representative tax is imposed by the rate applicable to such compensation, as determined under paragraph (a) of this section. The applicable rate is the rate in effect when the compensation is received by the employee representative. For rules relating to the time of receipt, see § 31.3121(a)–2 (a) and (b).

(2) *Example.* The rule in paragraph (b)(1) of this section is illustrated by the following example.

Example. In 1990, employee representative *B* received $1,000 as remuneration for services performed for employer *R* in 1989. The employee representative tax is payable at the rate of 30.05 percent (15.30 percent plus 14.75 percent) in effect for 1990 (the year the compensation was received), and not the 29.77 percent rate (15.02 percent plus 14.75 percent) in effect for 1989 (the year the services were performed).

(c) (1) *Rule where compensation is received both as an employee representative and employee.* The following rule applies to an individual who renders service both as an employee representative and as an employee. The employee representative tax is imposed on compensation received as an employee representative under the rules described in § 31.3211–2. The employee tax is imposed on compensation received as an employee under the rules described in § 31.3201–2. However, if the total compensation received is greater than the applicable contribution base, the employee representative tax is imposed on the amount equal to the contribution base less the amount received for services rendered as an employee.

(2) *Example.* The rule in paragraph (c)(1) of this section is illustrated by the following example.

Example. C performed services both as an employee and an employee representative in 1992. *C* received compensation of $40,000 as an employee and $20,000 as an employee representative. *C*'s entire compensation of $40,000 is subject to tax under the rules described in § 31.3201–2. The amount of employee representative compensation subject to the section 3101(a) and the section 3111(a) rate is $15,500 ($55,500 − $40,000). The entire $20,000 is subject to the sections 3101(b) and 3111(b) rates since the combined compensation is less than $130,200, the applicable contribution base for 1992. The amount of the employee representative compensation subject to the section 3211(a)(2) rate is $1,400 ($41,400 − $40,000).

[T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3211–3 Employee representative supplemental tax.

See paragraphs (a), (b), and (c) of § 31.3221–3 for rules applicable to the supplemental tax for each work-hour for which compensation is paid to an employee representative for services rendered as an employee representative.

[T.D. 8525, 59 FR 9666, Mar. 1, 1994]

§ 31.3212–1 Determination of compensation.

See § 31.3231(e)–1 for regulations applicable to compensation.

TAX ON EMPLOYERS

§ 31.3221–1 Measure of employer tax.

(a) *General Rule*—The employer tax is measured by the amount of compensation paid by an employer to its employees. For provisions relating to compensation, see § 31.3231(e)-1. For provisions relating to the circumstances under which certain compensation is to be disregarded for purposes of determining the employer tax, see paragraphs (b) (1) and (2) of § 31.3231(e)–1.

(b) *Payments by two or more employers in excess of annual compensation limitation.* For rules relating to payments by two or more employers in excess of the annual compensation limitation, see § 31.3121(a)(1)–1.

(c) *Underpayments or overpayments.* Any underpayment or overpayment of employer tax resulting from the employer's inability to determine, at the time such tax is paid, the correct amount of compensation with respect to which the tax should be paid shall be corrected in accordance with the provisions of Subpart G of the regulations in this part relating to adjustments, credits, refunds, and abatements.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6541, 26 FR 555, Jan. 20, 1961; T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3221–2 Rates and computation of employer tax.

(a) *Rates*—(1)(i) *Tier 1 tax.* The Tier 1 employer tax rate equals the sum of the tax rates in effect under section 3111(a), relating to old-age, survivors, and disability insurance, and section 3111(b), relating to hospital insurance. The Tier 1 employer tax rate is applied to compensation up to the contribution base described in section 3231(e)(2)(B)(i). The contribution base is determined under section 230 of the Social Security Act and is identical to the old-age, survivors, and disability insurance wage base and the hospital insurance wage base, respectively, under the Federal Insurance Contributions Act.

(ii) *Example.* The rule in paragraph (a)(1)(i) of this section is illustrated by the following example.

Example. R's employee, *A*, received compensation of $60,000 in 1992. The section 3111(a) rate of 6.2 percent would be applied to *A*'s compensation up to $55,500, the applicable contribution base for 1992. The section 3111(b) rate of 1.45 percent would be applied to the entire $60,000 of *A*'s compensation because the applicable contribution base for 1992 is $130,200.

(2)(i) *Tier 2 tax.* The Tier 2 employer tax rate equals the percentage set forth in section 3221(b) of the Internal Revenue Code. This rate is applied up to the contribution base described in section 3231(e)(2)(B)(ii).

(ii) *Example.* The rule in paragraph (a)(2)(i) of this section is illustrated by the following example.

Example. R's employee, *A*, received compensation of $60,000 in 1992. The section 3221(b) rate of 16.10 percent would be applied to *A*'s compensation up to $41,400, the applicable contribution base for 1992.

(3) *Supplemental Annuity Tax.* The supplemental annuity tax for each work-hour for which compensation is paid by an employer for services rendered during any calendar quarter by employees is imposed at the tax rate determined each calendar quarter by the Railroad Retirement Board. See also § 31.3221–3.

(b)(1) *Computation.* The employer tax is computed by multiplying the amount of the compensation with respect to which the employer tax is imposed by the rate applicable to such compensation, as determined under paragraph (a) of this section. The applicable rate is the rate in effect at the time the compensation is paid. For rules relating to the time of payment, see § 31.3121(a)–2(a) and (b).

(2) *Example.* The rule in paragraph (b)(1) of this section is illustrated by the following example.

Example. In 1990, *R*'s employee *A* received $1,000 as remuneration for services performed for *R* in 1989. The employer tax is payable at the rate of 23.75 percent (7.65 percent plus 16.10 percent) in effect for 1990 (the year the compensation was received) and not the 23.61 percent rate (7.51 percent plus 16.10 percent) in effect for 1989 (the year the services were performed).

[T.D. 8582, 59 FR 66190, Dec. 23, 1994]

§ 31.3221–3 Supplemental tax.

(a) *Introduction*—(1) *In general.* Section 3221(c) imposes an excise tax on every employer, as defined in section 3231(a) and § 31.3231(a)–1, with respect to individuals employed by the employer. The tax is imposed for each work-hour for which the employer pays compensation, as defined in section 3231(e) and § 31.3231(e)–1, for services rendered to the employer during a calendar quarter. This § 31.3221–3 provides rules for determining the number of taxable work-hours.

(2) *Overview.* Paragraph (b) of this section defines *work-hours.* Paragraph (c) of this section demonstrates the calculation of work-hours. Paragraph (d) of this section offers a safe harbor calculation of work-hours for use by any employer in lieu of calculating the number of work-hours for each employee.

(b) *Definition of work-hours*—(1) *In general.* For purposes of section 3221(c) and this section, *work-hours* are hours for which the employee is compensated, whether or not the employee performs services.

(i) *Payments included in work-hours.* Work-hours include regular time worked; overtime; time paid for vacations and holidays; time allowed for meals; away-from-home terminal time; called and not used, runaround, and deadheading time; time for attending court, participating in investigations, and attending claim and safety meetings; and guaranteed time not worked. Work-hours also include conversion hours, that is, compensation converted into work-hours. Conversion hours may be derived from payment by the mile or by the piece. Work-hours also include time for which the employee is paid for periods of absence not due to sickness or accident disability, such as for routine medical and dental examinations or for time lost.

(ii) *Payments excluded from work-hours.* Certain kinds of payments are not subject to conversion into work-hours. These include those payments that are specifically excluded from *compensation* within the meaning of section 3231(e), such as certain sick pay payments (section 3231(e)(1)(i)); tips (section 3231(e)(1)(ii)); and amounts paid specifically (either as an advance, as reimbursement, or allowance) for traveling expenses (section 3231(e)(1)(iii)). Traveling expenses paid under a nonaccountable plan are excluded from work-hours even though they are includible in compensation. See § 31.3231(e)–1(a)(5). Also excluded from work-hours are amounts representing bonuses, amounts received pursuant to the exercise of an employee stock option, and all separation payments or severance allowances.

(2) *Hourly compensation.* Because the tax under section 3221(c) is calculated on the basis of work-hours, the number of hours for which an employee receives compensation is the figure used to determine work-hours. In the case of an hourly-rated employee, each hour for which the employee receives compensation is one work-hour.

(3) *Daily, weekly, monthly compensation.* (i) If an employee is paid by the day, week, month, or other period of time, the tax is imposed on the number of hours comprehended in the rate and, if any, the number of overtime hours for which additional compensation is paid. Thus, in the case of an office worker who receives an annual salary based on an 8-hour, 5-day-a-week work schedule that includes paid holidays, vacations, and sick time, the number of work-hours for one month is 174 (2088 hours/year ÷12 months).

(ii) The rule in paragraph (b)(3)(i) of this section is illustrated by the following examples.

Example 1. A, an office worker, receives an annual salary that is paid monthly. The salary is based on an 8-hour, Monday through Friday work schedule. *A* is not paid for overtime hours. *A* is not expected to work on holidays, during *A*'s annual vacation, or during periods that *A* is ill. The number of work-hours for one month is 174 (2088 hours/year ÷12 months). This figure remains constant, even though some months have more workdays than others.

Example 2. B is paid a stated amount for each day *B* works, regardless of the number of hours worked. However, if *B* works more than 8 hours during any day, *B* is paid overtime for each additional hour worked that day. *B* is not paid for holidays, vacations, or sick time. During May, *B* worked 6 hours on 4 days, 7 hours on 6 days, 8 hours on 6 days, and 9 hours on 5 days. Because *B* is paid a daily rate for up to 8 hours, 8 hours are comprehended in the daily rate. Therefore, the number of work-hours for May is 173 (21 days×8 hours/day+5 overtime hours), even though *B* actually worked 159 hours.

(4) *Conversion hours*—(i) Compensation not based on time (hour, day, month, etc.), such as compensation paid by the mile or by the piece, must be converted into the number of hours represented by the compensation paid. Thus, if an employee is paid by the mile, 1 work-hour equals the number of miles constituting a workday, divided by 8 hours. However, in the case of a collective bargaining agreement that specifies a number of hours as constituting a workday, the number of hours specified under the agreement may be used instead of 8.

(ii) The rule in paragraph (b)(4)(i) of this section is illustrated by the following example.

Example. C's normal workday consists of 2 150-mile round trips that together take 6 hours. *C* is paid by the mile. The collective bargaining agreement does not specify the number of hours in a workday. Thus, the number of work-hours for each day *C* works is 8, or 1 work-hour for each 37.5 miles (300 miles/day ÷ 8 hours/day). If the applicable collective bargaining agreement specifies that 6 hours constitute a workday, the number of work-hours for each day *C* works would be 6.

(c) *Calculation of work-hours*—(1) An employer may calculate the work-hours separately for each employee, as described in the examples in this paragraph. If the employer chooses to calculate work-hours separately for each employee, the employer must calculate the number of regular hours, overtime hours, and conversion hours for each employee for each month. In lieu of separate calculations, the employer may calculate the work-hours for all the employer's employees using the safe harbor formula described in paragraph (d) of this section.

(2) The rules in paragraph (c) of this section are illustrated by the following examples.

Example 1. D worked 8 hours a day, Monday through Friday, during the months of February and March 1992. *D* did not work on President's Day, but was paid for the holiday. *D*'s work-hours for February were 160 (19 days × 8 hours a day + 8 holiday hours). *D*'s work-hours for March were 176 (22 days × 8 hours a day).

Example 2. E worked 7-hour shifts every Tuesday through Saturday during the months of February and March 1992. *E* also worked 7 overtime hours during February and 21 overtime hours during March. Also, *E* was paid for 7 hours on President's Day, even though *E* did not work on that day. The number of work-hours for February was 161 (21 days × 7 hours a day + 7 overtime hours + 7 holiday hours). The number of work-hours for March was 168 (21 days × 7 hours a day + 21 overtime hours). Because *E* receives an hourly wage and was paid for the President's Day holiday, the number of hours (7) for which *E* was paid are added to the hours *E* actually worked. If *E* had worked on President's Day and had received extra pay for working on a holiday and holiday pay for 7 hours, the employer would include 14 hours in *E*'s work-hours for that day, the 7 hours *E* actually worked and the 7 holiday hours for which *E* was paid.

Example 3. Employment beginning during month. F began employment on March 16, a Monday, and worked 8 hours a day, Monday through Friday. The employer calculates that *F*'s hours for the month were 96, because *F* worked 12 8-hour days during the month. If March 16 were on a Friday, the employer would calculate 11 days, or 88 hours.

Example 4. Employment ending during month. G's last day of employment was Friday, March 13. *G* worked 8 hours a day, Monday through Friday, except for March 3, when *G* was ill. *G* was paid for 8 hours for March 3. The employer calculates that *G*'s work-hours for March were 80, because *G* worked 9 8-hour days and was paid for an additional 8 hours.

(d) *Safe harbor*—(1) *In general.* In lieu of calculating work-hours separately for each employee, an employer may use the safe harbor for all employees. If the employer elects to use the safe harbor for a calendar year, the employer must use the safe harbor for all employees for the entire calendar year. If an employer uses the safe harbor for a calendar year, the employer need not elect the safe harbor for the following calendar year. An employer that elects the safe harbor for a calendar year may not subsequently elect to separately calculate employee work-hours for that calendar year.

(2) *Method of calculation.* The safe harbor treats each employee of the employer as receiving monthly compensation for a number of hours equal to the safe harbor number. To determine the number of work-hours for a month, the employer multiplies the safe harbor number by the number that equals the total number of employees to whom the employer paid compensation during the month.

(i) *Safe harbor number defined.* The safe harbor number is the number established in guidance of general applicability promulgated by the Commissioner.

(ii) *Employee defined.* Solely for purposes of this paragraph, an employee is any individual who is paid compensation, within the meaning of §31.3231(e)–1, regardless of the amount, during the month. Thus, for example, a part-time, temporary, or seasonal employee is counted as an employee. A terminated employee is counted in the month of termination (provided the terminated employee received compensation in the month of termination), but not in any subsequent month in which the employee does not perform service for the employer as an employee, even if the terminated employee is paid compensation in a subsequent month. Thus, for example, an employee who terminates employment during the month, receives compensation during the month of termination, and receives a final paycheck the following month is counted as an employee of the employer for the month of termination but not for the following month.

(3) *Method of election.* An employer makes the safe harbor election for a

calendar year on the employment tax return filed for the previous calendar year.

(4) *Additional rules.* The Commissioner may, in revenue procedures, revenue rulings, notices, or other guidance of general applicability, revise the safe harbor number or provide additional safe harbors that satisfy section 3221(c).

(e) *Effective dates.* This § 31.3221–3 is effective for calendar years beginning after December 31, 1992, except that paragraph (d) is effective for calendar years beginning after December 31, 1993. Taxpayers may apply the rules in paragraphs (a), (b), and (c) of this section before January 1, 1993.

[T.D. 8525, 59 FR 9666, Mar. 1, 1994]

GENERAL PROVISIONS

§ 31.3231(a)–1 Who are employers.

(a) Each of the following persons is an employer within the meaning of the act:

(1) Any carrier, that is, any express carrier, sleeping car carrier, or rail carrier providing transportation subject to subchapter I of chapter 105 of title 49;

(2) Any company—

(i) Which is directly or indirectly owned or controlled by one or more employers as defined in paragraph (a)(1) of this section, or under common control therewith, and

(ii) Which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with—

(*a*) The transportation of passengers or property by railroad, or

(*b*) The receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad;

(3) Any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any employer as defined in paragraph (a)(1) or (2) of this section;

(4) Any railroad association, traffic association, tariff bureau, demurrage bureau, weighing and inspection bureau, collection agency, and any other association, bureau, agency, or organization controlled and maintained wholly or principally by two or more employers as defined in paragraph (a)(1), (2) or (3) of this section and engaged in the performance of services in connection with or incidental to railroad transportation;

(5) Any railway labor organization, national in scope, which has been or may be organized in accordance with the provisions of the Railway Labor Act; and

(6) Any subordinate unit of a national railway-labor-organization employer, that is, any State or National legislative committee, general committee, insurance department, or local lodge or division, of an employer as defined in paragraph (a)(5) of this section, established pursuant to the constitution and bylaws of such employer.

(b) As used in paragraph (a)(2) of this section, the term ‘‘controlled’’ includes direct or indirect control, whether legally enforceable and however exercisable or exercised. The control may be by means of stock ownership, or by agreements, licenses, or any other devices which insure that the operation of the company is in the interest of one or more carriers. It is the reality of the control, however, which is decisive, not its form nor the mode of its exercise.

(c) As used in paragraph (a)(2) of this section, the term *casual* applies when the service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial.

(d) The term ‘‘employer’’ does not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation which is operated by any other motive power.

(e) The term ‘‘employer’’ does not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple and the operation of equipment or facilities for such mining or supplying of coal, or in any of such activities.

(f) Any company that is described in paragraph (a)(2) of this section is an employer under section 3231. In certain cases, based on all the facts and circumstances, it may be appropriate to segregate those businesses engaged in rail services and therefore subject to the Railroad Retirement Tax Act from those businesses engaged exclusively in nonrail services and therefore not subject to the Railroad Retirement Tax Act. The factors considered are set forth in guidance published by the Internal Revenue Service.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960; T.D. 8582, 59 FR 66191, Dec. 23, 1994]

§31.3231(b)–1 Who are employees.

(a) *In general.* (1) An individual who is in the service of one or more employers for compensation is an employee within the meaning of the act. (For definitions of the terms ''employer'', ''service'', and ''compensation'', see subsections (a), (d), and (e), respectively, of section 3231.) An individual is in the service of an employer, with respect to services rendered for compensation, if—

(i) He is subject to the continuing authority of the employer to supervise and direct the manner in which he renders such services; or

(ii) He is rendering professional or technical services and is integrated into the staff of the employer; or

(iii) He is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations.

(2) In order that an individual may be in the service of an employer within the meaning of paragraph (a)(1)(i) of this section, it is not necessary that the employer actually direct or control the manner in which the services are rendered; it is sufficient if the employer has the right to do so. The right of an employer to discharge an individual is also an important factor indicating that the individual is subject to the continuing authority of the employer to supervise and direct the manner of rendition of the services. Other factors indicating that an individual is subject to the continuing authority of the employer to supervise and direct the manner of rendition of the services are the furnishing of tools and the furnishing of a place to work by the employer to the individual who renders the services.

(3) In general, if an individual is subject to the control or direction of an employer merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. On individual performing services as an independent contractor is not, as to such services, in the service of an employer within the meaning of paragraph (a)(1)(i) of this section. However, an individual performing services as an independent contractor may be, as to such services, in the service of an employer within the meaning of paragraph (a)(1) (ii) or (iii) of this section.

(4) Whether or not an individual is an employee will be determined upon an examination of the particular facts of the case.

(5) If an individual is an employee, it is of no consequence that he is designated as a partner, coadventurer, agent, independent contractor, or otherwise, or that he performs services on a part-time basis.

(6) No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other supervisory personnel are employees within the meaning of the act. An officer of an employer is an employee, but a director as such is not.

(7) In determining whether an individual is an employee with respect to services rendered within the United States, the citizenship or residence of the individual, or the place where the contract of service was entered into is immaterial.

(8) If an individual performs services for an employer (other than a local lodge or division or a general committee of a railway-labor-organization employer) which does not conduct the principal part of its business within the United States, such individual shall be

deemed to be in the service of such employer only to the extent that he performs services for it in the United States. Thus, with respect to services rendered for such employer outside the United States, such individual is not in the service of an employer.

(9) If an individual performs services for an employer (other than a local lodge or division or a general committee of a railway-labor-organization employer) which conducts the principal part of its business within the United States, he is in the service of such employer whether his services are rendered within or without the United States. In the case of an individual, not a citizen or resident of the United States, rendering services in a place outside the United States to an employer which is required under the laws applicable in such place to employ, in whole or in part, citizens or residents thereof, such individual shall not be deemed to be in the service of an employer with respect to services so rendered.

(10) The term ''employee'' does not include any individual while he is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

(b) *Employees of local lodges or divisions of railway-labor-organization employers.* (1) An individual is in the service of a local lodge or division of a railway-labor-organization employer (see paragraph (a)(6) of § 31.3231(a)–1) only if—

(i) All, or substantially all, the individuals constituting the membership of such local lodge or division are employees of an employer conducting the principal part of its business in the United States; or

(ii) The headquarters of such local lodge or division is located in the United States.

(2) (i) An individual in the service of a local lodge or division is not an employee within the meaning of the act unless he was, on or after August 29, 1935, in the service of a carrier (see § 31.3231(g) for definition of carrier) or he was, on August 29, 1935, in the ''employment relation'' to a carrier.

(ii) An individual shall be deemed to have been in the employment relation to a carrier on August 29, 1935, if *(a)* he was on that date on leave of absence from his employment expressly granted to him by the carrier by whom he was employed, or by a duly authorized representative or such carrier, and the grant of such leave of absence was established to the satisfaction of the Railroad Retirement Board before July 1947; or *(b)* he was in the service of a carrier after August 29, 1935, and before January 1946 in each of six calendar months whether or not consecutive; or *(c)* before August 29, 1935, he did not retire and was not retired or discharged from the service of the last carrier by whom he was employed or its corporate or operating successor, but *(1)* solely by reason of his physical or mental disability he ceased before August 29, 1935, to be in the service of such carrier and thereafter remained continuously disabled until he attained age sixty-five or until August 1945, or *(2)* solely for such last stated reason a carrier by whom he was employed before August 29, 1935, or a carrier who is its successor did not on or after August 29, 1935, and before August 1945 call him to return to service, or *(3)* if he was so called he was solely for such reason unable to render service in six calendar months as provided in *(b)* of this subdivision; or *(d)* he was on August 29, 1935, absent from the service of a carrier by reason of a discharge which, within one year after the effective date thereof, was protested, to an appropriate labor representative or to the carrier, as wrongful, and which was followed within 10 years of the effective date thereof by his reinstatement in good faith to his former service with all his seniority rights. However, an individual shall not be deemed to have been in the employment relation to a carrier on August 29, 1935, if before that date he was granted a pension or gratuity on the basis of which a pension was awarded to him pursuant to section 6 of the Railroad Retirement Act of 1937 (45 U.S.C. 228f), or if during the last payroll period before August 29, 1935, in which he rendered service to a carrier he was not, with respect to any service in such payroll period, in the service of an employer (see paragraph (a) of this section).

(c) *Employees of general committees of railway-labor-organization employers.* An individual is in the service of a general committee of a railway-labor-organization employer (see paragraph (a)(6) of § 31.3231(a)–1) only if—

(1) He is representing a local lodge or division described in paragraph (b)(1) of this section; or

(2) All, or substantially all, the individuals represented by such general committee are employees of an employer conducting the principal part of its business in the United States; or

(3) He acts in the capacity of a general chairman or an assistant general chairman of a general committee which represents individuals rendering service in the United States to an employer. In such case, if his office or headquarters is not located in the United States and the individuals represented by such general committee are employees of an employer not conducting the principal part of its business in the United States, only a part of his remuneration for such service shall be regarded as compensation. The part of his remuneration regarded as compensation shall be in the same proportion to his total remuneration as the mileage in the United States under the jurisdiction of such general committee bears to the total mileage under its jurisdiction, unless such mileage formula is inapplicable, in which case such other formula as the Railroad Retirement Board may have prescribed pursuant to section 1(c) of the Railroad Retirement Act of 1937 (45 U.S.C. 228a) shall be applicable. However, no part of his remuneration for such service shall be regarded as compensation if the application of such mileage formula, or such other formula as the Railroad Retirement Board may have prescribed, would result in his compensation for the service being less than 10 percent of his remuneration for such service.

§ 31.3231(c)–1 Who are employee representatives.

(a) An employee representative within the meaning of the act is—

(1) Any officer or official representative of a railway labor organization which is not included as an employer under section 3231(a) who—

(i) Was in the service of an employer either before or after June 29, 1937, and

(ii) Is duly authorized and designated to represent employees in accordance with the Railway Labor Act.

For railway labor organizations which are employers under section 3231(a), see paragraph (a) (5) and (6) of § 31.3231(a)–1.

(2) Any individual who is regularly assigned to or regularly employed by an employee representative, as defined in paragraph (a)(1) of this section, in connection with the duties of such employee representative's office.

(b) In determining whether an individual is an employee representative, his citizenship or residence is material only insofar as those factors may affect the determination of whether he was ''in the service of an employer'' (see paragraph (a) of § 31.3231(b)–1).

§ 31.3231(d)–1 Service.

See § 31.3231(b)–1 for regulations relating to the term ''in the service of an employer.''

§ 31.3231(e)–1 Compensation.

(a) *Definition*—(1) The term *compensation* has the same meaning as the term *wages* in section 3121(a), determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation. The Commissioner may provide any additional guidance that may be necessary or appropriate in applying the definitions of sections 3121(a) and 3231(e).

(2) A payment made by an employer to an individual through the employer's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered as an employee of the employer. Likewise, a payment made by an employee organization to an employee representative through the organization's payroll is presumed, in the absence of evidence to the contrary, to be compensation for services rendered by the employee representative as such. For rules regarding the treatment of deductions by an employer from remuneration of an employee, see § 31.3123–1.

(3) The term *compensation* is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer and, in the case of an employee representative, amounts paid for an identifiable period during which the employee representative is absent from the active service of the employee organization.

(4) Compensation includes amounts paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position or occupation as well as pay for time lost.

(5) For rules regarding the treatment of reimbursement and other expense allowance amounts, see § 31.3121(a)–3. For rules regarding the inclusion of fringe benefits in compensation, see § 31.3121(a)–1T.

(b) *Special Rules.* (1) If the amount of compensation earned in any calendar month by an individual as an employee in the service of a local lodge or division of a railway-labor-organization employer is less than $25, the amount is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221.

(2) Compensation for service as a delegate to a national or international convention of a railway-labor-organization employer is disregarded for purposes of determining the employee tax under section 3201 and the employer tax under section 3221 if the individual rendering the service has not previously rendered service, other than as a delegate, which may be included in the individual's years of service for purposes of the Railroad Retirement Act.

(3) For special provisions relating to the compensation of certain general chairs or assistant general chairs of a general committee of a railway-labor-organization employer, see paragraph (c)(3) of § 31.3231(b)–1.

[T.D. 8582, 59 FR 66191, Dec. 23, 1994]

§ 31.3231(e)–2 Contribution base.

The term *compensation* does not include any remuneration paid during any calendar year by an employer to an employee for services rendered in excess of the applicable contribution base. For rules applying this provision, see § 31.3121(a)(1)–1.

[T.D. 8582, 59 FR 66191, Dec. 23, 1994]

Subpart D—Federal Unemployment Tax Act (Chapter 23, Internal Revenue Code of 1954)

§ 31.3301–1 Persons liable for tax.

Every person who is an employer as defined in section 3306(a) (see § 31.3306(a)–1) is liable for the tax. Even if an employer is not subject to any State unemployment compensation law, he is nevertheless liable for the tax. However, if he is subject to such a State law, he may be entitled to certain credits against the tax (see §§ 31.3302(a)1 to 31.3302(c)–1, inclusive). For provisions relating to payment of the tax, see Subpart G of the regulations in this part.

§ 31.3301–2 Measure of tax.

The tax for any calendar year is measured by the amount of wages paid by the employer during such year with respect to employment after December 31, 1938. (See § 31.3306(b)–1, relating to wages, and §§ 31.3306(c)–1 to 31.3306(c)–3, inclusive, relating to employment.)

[T.D. 6658, 28 FR 6632, June 27, 1963]

§ 31.3301–3 Rate and computation of tax.

(a) The rates of tax with respect to wages paid in calendar years after 1954 are as follows:

	Percent
In the calendar years 1955 to 1960, both inclusive	3
In the calendar year 1961	3.1
In the calendar year 1962	3.5
In the calendar year 1963	3.35
In the calendar year 1964 and subsequent calendar years	3.1

(b) The tax is computed by applying to the wages paid in a calendar year, with respect to employment after December 31, 1938, the rate in effect at the time the wages are paid.

[T.D. 6658, 28 FR 6632, June 27, 1963]

§31.3301–4 When wages are paid.

Wages are paid when actually or constructively paid. Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition. See §31.6011(a)–3, relating to the return on which wages are to be reported.

§31.3302(a)–1 Credit against tax for contributions paid.

(a) *In general.* Subject to the provision of paragraphs (b) and (c) of this section and to the provisions of §31.3302(c)–1, the taxpayer may credit against the tax for any taxable year the total amount of contributions paid by him into an unemployment fund maintained during such year under a State law which has been found by the Secretary of Labor to contain the provisions specified in section 3304(a); *Provided, however,* That no credit may be taken for contributions under a State law if such State has not been duly certified for the calendar year to the Secretary of the Treasury by the Secretary of Labor. The contributions may be credited against the tax whether or not they are paid with respect to employment as defined in section 3306(c). For provisions relating to additional credit against the tax, see §31.3302(b)–1.

(b) *Limitation on the taxable year with respect to which contributions are allowable.* In order to be allowable as credit against the tax for any taxable year, the contributions must have been paid with respect to such year.

Example 1. Under the unemployment compensation law of State X, employer M is required to report in his contribution return for the quarter ending December 31, 1955, all remuneration payable for services rendered in such quarter. A portion of such remuneration is not paid to his employees until February 1, 1956. On January 20, 1956, M pays to the State the total amount of contributions due with respect to all remuneration so required to be reported. Such contributions, including those with respect to the remuneration paid on February 1, 1956, may be included in computing the credit against the tax for the calendar year 1955. This is true even though the remuneration paid on February 1, 1956 (if it constitutes ''wages'') is required to be reported in the Federal return for 1956 and not in the Federal return for 1955.

Example 2. Under the unemployment compensation law of State Y, employer N is required to include in his contribution return for the quarter ending December 31, 1955, certain remuneration paid on December 30, to 1955, to an employee for services to be rendered after December 31. On January 20, 1956, N pays to the State the total amount of contributions due with respect to all remuneration required to be reported on the contribution return. Such contributions, including those with respect to the remuneration paid on December 30, 1955, may be included in computing the credit against the tax for the calendar year 1955.

(c) *Limitation on amount of credit allowable based on time when contributions are paid*—(1) *In general.* The amount of credit allowable for contributions paid into a State unemployment fund depends in part on the time of payment of such contributions. Although contributions paid at any time may be credited against the tax (subject to the limitations referred to in paragraphs (c)(2) and (3) of this section), no refund or credit of the tax based on credit for contributions paid will be allowed unless the contributions are paid prior to the expiration of the period of limitations applicable to refund or credit of the tax. For general provisions relating to the limitation period and to refunds, credits and abatements of the tax, see respectively §§301.6511(a)–1, 301.6402–2 and 301.6404–1 of this chapter (Regulations on Procedure and Administration).

(2) *Amount of credit allowable when contributions are paid on or before last day for filing return.* Contributions paid into a State unemployment fund on or before the last day upon which the Federal return for the taxable year is required to be filed may be credited against the tax in an amount equal to such contributions, but not, however, to exceed the total credits, determined pursuant to §31.3302(c)–1. For provisions relating to the time for filing the

return, see § 31.6071(a)–1 in Subpart G of this part.

(3) *Amount of credit allowable when contributions are paid after last day for filing return.* Contributions paid into a State unemployment fund after the last day upon which the Federal return for the taxable year is required to be filed may be credited against the tax in an amount not to exceed 90 percent of the amount which would have been allowable as credit on account of such contributions had they been paid into a State unemployment fund on or before such last day. However, see paragraph (c)(4) of this section relating to the payment of contributions to the wrong State. For general provisions relating to refunds, credits, and abatements of the tax, see §§ 301.6402–2 and 301.6404–1 of this chapter (Regulations on Procedure and Administration).

Example 1. The Federal return of the M Company for the calendar year 1961 discloses total wages of $400,000. The Federal tax, imposed at the rate of 3.1 percent, is $12,400. The company is liable for total State contributions of $8,000 for 1961. The due date of the Federal return is January 31, 1962, no extension of time for filing the return having been granted. The contributions are not paid until February 1, 1962. If the contributions had been paid on or before January 31, 1962, the entire amount of $8,000 could have been credited against the tax. (Credits could not exceed 2.7 percent of the wages, or $10,800. See § 31.3302(c)–1.) Since the contributions were paid after January 31, 1962, the M Company is entitled to a credit of 90 percent of the amount which would have been allowable as credit had the contributions been paid on time (90 percent of $8,000, or $7,200), the net liability for Federal tax being $5,200 ($12,400 minus $7,200).

Example 2. The facts are the same as in example 1, except that the M Company is liable for and pays total State contributions of $12,000, instead of $8,000. If the contributions had been paid on or before January 31, 1962, the amount allowable as credit would have been $10,800 (2.7 percent of wages of $400,000). Since the contributions were paid after January 31, 1962, the M Company is entitled to a credit of 90 percent of $10,800, or $9,720, the net liability for Federal tax being $2,680 ($12,400 minus $9,720).

Example 3. The Federal return of the R Company for the calendar year 1961 discloses a total tax of $3,100. The company is liable for total State contributions of $2,700 for such year. The due date of the Federal return is January 31, 1962, no extension of time for filing the return having been granted. The R Company pays $1,700 of the total State contributions on or before such date, and the remaining $1,000 on February 1, 1962. If the $1,000 had been paid on or before January 31, 1962, that amount could have been credited against the tax (such amount plus the $1,700 paid on or before January 31, 1962, not exceeding the aggregate credit allowable). Since the $1,000 was paid after January 31, 1962, the R Company is entitled to a credit of 90 percent of this amount or $900, plus the credit of $1,700 allowable for the contributions paid on or before January 31, 1962. The net liability for Federal tax is thus $500 ($3,100 minus $2,600).

(4) *Amount of credit allowable when contributions are paid to wrong State.* Contributions for the taxable year paid into a State unemployment fund which are required under the unemployment compensation law of that State, but which are paid with respect to remuneration on the basis of which the taxpayer had, prior to such payment, erroneously paid an amount as contributions under another unemployment compensation law, shall be deemed for purposes of the credit to have been paid at the time of the erroneous payment. If, by reason of such other law, the taxpayer was entitled to cease paying contributions for such taxable year with respect to services subject to such other law, the payment into the proper fund shall be deemed for purposes of credit to have been made on the date the Federal return for such year was actually filed by the taxpayer under § 31.6011(a)–3.

Example. Employee N, whose Federal return for the calendar year 1961 discloses a total tax of $3,100, employs individuals in State X and State Y during the calendar year 1961. N assumes in good faith that the services of his employees are covered by the unemployment compensation law of State Y, and pays as contributions to State Y the amount of $2,700 based upon the remuneration of the employees. All of the services were in fact covered by the unemployment compensation law of State X, and none by the law of State Y. The payment to State Y was made on January 31, 1962. When the error was discovered thereafter, N paid to State X contributions in the amount of $2,700 based upon such remuneration. Since the contributions were paid to State Y on January 31, 1962, the contributions to State X are, for purposes of the credit, deemed to have been paid on such date. N is entitled to a credit of $2,700 against the Federal tax of

$3,100, the net liability for Federal tax being $400 ($3,100 minus $2,700).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6632, June 27, 1963]

§ 31.3302(a)–2 Refund of State contributions.

If, subsequent to the filing of the return, a refund is made by a State to the taxpayer of any part of his contribution credited against the tax, the taxpayer is required to advise the district director of the date and amount of such refund and the reason therefor, and to pay the tax, if any, due as a result of such refund, together with interest from the date when the tax was due.

§ 31.3302(a)–3 Proof of credit under section 3302(a).

Credit against the tax for any calendar year for contributions paid into State unemployment funds shall not be allowed unless there is submitted to the district director:

(a) A certificate of the proper officer of each State (the laws of which required the contributions to be paid) showing, for the taxpayer:

(1) The total amount of contributions required to be paid under the State law with respect to such calendar year (exclusive of penalties and interest) which was actually paid on or before the date the Federal return is required to be filed; and

(2) The amounts and dates of such required payments (exclusive of penalties and interest) actually paid after the date the Federal return is required to be filed.

(b) A statement by the taxpayer that no part of any payment made by him into a State unemployment fund for such calendar year, which is claimed as a credit against the tax, was deducted or is to be deducted from the remuneration of individuals in his employ. Such statement shall contain or be verified by a written declaration that it is made under the penalties of perjury.

(c) Such other or additional proof as the Commissioner or the district director may deem necessary to establish the right to the credit provided for under section 3302(a).

§ 31.3302(b)–1 Additional credit against tax.

(a) *In general.* In addition to the credit against the tax allowable for contributions actually paid to State unemployment funds (see § 31.3302(a)–1), the taxpayer may be entitled to a credit under section 3302(b). This additional credit is allowable to the taxpayer with respect to the amount of contributions which he is relieved from paying to an unemployment fund under the provisions of a State law which have been certified for the taxable year as provided in section 3303. Generally, an additional credit is available to an employer, if under the provisions of a State law which have been so certified he is permitted to pay contributions to such State for the taxable year, or portion thereof, at a rate which is both lower than the highest rate applied under such law in such year and lower than 2.7 percent. No additional credit is allowable except with respect to a State law certified by the Secretary of Labor for the taxable year as provided in section 3303 (or with respect to any provisions thereof so certified).

(b) *Method of computing amount of additional credit allowable with respect to a State law*—(1) *Certification of a State law as a whole.* In ascertaining the additional credit for any taxable year with respect to a particular State law which the Secretary of Labor certifies as a whole to the Secretary of the Treasury in accordance with the provisions of section 3303, the taxpayer must first compute the following amounts:

(i) The amount of contributions (whether or not with respect to employment as defined in section 3306(c)) which the taxpayer would have been required to pay under the State law for such year if throughout the year he had been subject to the highest rate applied under such law in such year, or to a rate of 2.7 percent, whichever rate is lower.

(ii) The amount of contributions (whether or not with respect to employment as defined in section 3306 (c)) he was required to pay under the State law with respect to such year, whether or not paid.

The amount computed under paragraph (b)(1)(ii) of this section should then be subtracted from the amount computed under paragraph (b)(1)(i) of this section and the result will be the additional credit for the taxable year with respect to the law of that State.

Example. A employs individuals only in State X during the calendar year 1955. The unemployment compensation law of State X has been certified in its entirety to the Secretary of the Treasury by the Secretary of Labor for such year. The highest rate applied in such year under such State law to any taxpayer is 3 percent. However, A has obtained a rate of 1 percent under the law of such State and is required to pay his entire year's contribution at that rate. The amount of remuneration of A's employees subject to contributions under such State law is $25,000. A's additional credit under section 3302(b) is $425, computed as follows:

Remuneration subject to contributions	$25,000
Contributions at 2.7 percent rate	675
Less:	
Contributions required to be paid at 1 percent rate	250
Additional credit to A	425

Since the 2.7 percent rate is less than the highest rate applied (3 percent), the 2.7 percent rate is used in computing the amount ($675) from which the amount of contributions required to be paid at the 1 percent rate ($250) is deducted in order to ascertain the additional credit ($425).

(2) *Certification with respect to particular provisions of a State law.* If the Secretary of Labor makes a certification to the Secretary of the Treasury with respect to particular provisions of a State law for any taxable year pursuant to section 3303, the additional credit of the taxpayer for such year with respect to such law shall be computed in such manner as the Commissioner shall determine.

(c) *Amount of additional credit allowable to taxpayer with respect to more than one State law.* If the taxpayer is entitled to additional credit with respect to more than one State law in any taxable year, the additional credit allowable with respect to each State law shall be computed separately (in accordance with paragraph (b) of this section) and the total additional credit allowable against the tax for such year shall be the aggregate of the additional credits allowable with respect to such State laws. For limitation on total credits, see § 31.3302(c)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6632, June 27, 1963]

§ 31.3302(b)–2 Proof of additional credit under section 3302(b).

Additional credit under section 3302(b) shall not be allowed against the tax for any calendar year unless there is submitted—

(a) To the Commissioner a certificate of the proper officer of each State (with respect to the law of which the additional credit is claimed) showing the highest rate of contributions applied under the State law in such calendar year to any person having individuals in his employ; and

(b) To the district director a certificate of the proper officer of each State (with respect to the law of which the additional credit is claimed) showing for the taxpayer—

(1) The total remuneration with respect to which contributions were required to be paid by the taxpayer under the State law with respect to such calendar year; and

(2) The rate of contributions applied to the taxpayer under the State law with respect to such calendar year.

If under the law of such State different rates of contributions were applied to the taxpayer during particular periods of such calendar year, the certificate shall set forth the information called for in paragraphs (b)(1) and (2) of this section with respect to each such period.

(c) Such other or additional proof as the Commissioner or the district director may deem necessary to establish the right to the additional credit provided for under section 3302(b).

§ 31.3302(c)–1 Limit on total credits.

(a) *In general.* Paragraph (b) of this section relates to the limitation on the aggregate of the credits allowable under section 3302 (a) and (b). Paragraph (c) of this section relates to reductions, under certain circumstances, of the total credits allowable after applying section 3302 (a), (b), and (c)(1). In paragraphs (c)(1), (2), and (3) of this section, relate, respectively, to reductions of credits in respect of advances under title XII of the Social Security Act before September 13, 1960, advances under title XII of the Social Security Act after September 12, 1960, and payments under the Temporary Unemployment Compensation Act of 1958. A reduction of credit under paragraph (c)(1), (2), or (3) of this section applies separately from, and in addition to, a reduction under any other such subparagraph. See section 3302(d) and § 31.3302(d)–1 for definitions and special rules relating to section 3302(c), and for a provision that, in applying section 3302(c), the Federal tax shall be computed at the rate of 3 percent.

(b) *Limitation on aggregate credit.* The aggregate of the credit under section 3302(a) and the additional credit under section 3302(b) shall not exceed 90 percent of the tax against which credit is taken, computed as if the tax were imposed at the rate of 3 percent. Thus, the aggregate of the credit which is allowable to an employer for any taxable year shall not exceed 2.7 percent of the wages paid by the employer during the year.

(c) *Reductions of amount of credit otherwise allowable*—(1) *Advances before September 13, 1960, under title XII of Social Security Act*—(i) *Credit reductions for 1961 and 1962.* Pursuant to section 3302(c)(2), as applicable to credit allowable for any year ended before 1963, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State of—

(a) Alaska shall be reduced for the taxable year 1961 by an amount equal to 0.15 percent of the wages paid by the taxpayer during 1961 which are attributable to Alaska, and shall be reduced for the taxable year 1962 by an amount equal to 0.3 percent of the wages paid by the taxpayer during 1962 which are attributable to Alaska; or

(b) Michigan shall be reduced for the taxable year 1962 by an amount equal to 0.15 percent of the wages paid by the taxpayer during 1962 which are attributable to Michigan.

(ii) *Credit reductions for 1963 and subsequent years.* If any balance of an advance or advances under title XII of the Social Security Act, made before September 13, 1960, to the unemployment account of a State, remains unpaid on January 1, 1963, or on January 1 of any succeeding taxable year, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be reduced for the taxable year unless—

(a) No balance of such advance or advances exists as of the beginning of November 10 of the taxable year, or

(b) The State pays into the Federal unemployment account, before November 10 of the taxable year, the amount certified by the Secretary of Labor pursuant to section 3302(c)(2), and designates such payment as being made for purposes of the last sentence of section 3302(c)(2).

The credit reduction for a taxable year shall be a percentage of the wages paid by the taxpayer during that taxable year which are attributable to the State. The percentage for the taxable year 1963, or for any succeeding taxable year beginning before January 1, 1968, is 0.15 percent (that is, 5 percent of the Federal tax, computed as if imposed at the rate of 3 percent of the wages). The percentage for any taxable year beginning on or after January 1, 1968, is the percentage reduction for the immediately preceding taxable year plus 0.15 percent. Thus, for 1968 the percentage is 0.3 percent, for 1969 the percentage is 0.45 percent, and for 1970 the percentage is 0.6 percent.

(2) *Advances after September 12, 1960, under title XII of Social Security Act*—(i) *In general.* If any balance of an advance or advances under title XII of the Social Security Act, made after September 12, 1960, to the unemployment account of a State, remains unpaid on January 1 of two consecutive taxable years, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be reduced for the taxable year beginning with the second consecutive January 1, unless prior to November 10 of that taxable year the total amount of any such advance or advances made to the account of the State has been fully repaid. The reduction made pursuant to this subdivision in the total credits otherwise allowable for the taxable year beginning with the second consecutive January 1 shall be 0.3 percent

of the wages paid by the taxpayer during the taxable year which are attributable to the State (that is, 10 percent of the Federal tax, computed as if imposed at the rate of 3 percent of the wages). In the case of any succeeding taxable year beginning with a consecutive January 1 on which there exists such a balance of an unreturned advance or advances made after September 12, 1960, the total credits otherwise allowable shall be further reduced unless prior to November 10 of that succeeding taxable year the total amount of any such advance or advances made to the account of the State has been fully repaid. The reduction for each such succeeding taxable year beginning with a consecutive January 1 on which such a balance exists shall be a percentage of the wages paid by the taxpayer during that succeeding taxable year which are attributable to the State. The percentage reduction for any such succeeding taxable year shall be the aggregate of *(a)* the percentage reduction (without regard to paragraph (c)(2)(ii) or (iii) of this section) for the immediately preceding taxable year, *(b)* 0.3 percent of the wages paid by the taxpayer during the taxable year which are attributable to the State, and *(c)* the percentage, if any, described in paragraph (c)(2)(ii) or (iii) of this section.

(ii) *Additional reduction if a balance of advances exists after third or fourth consecutive January 1.* If the credit reduction described in subdivision (i) of this subparagraph is made for the third or fourth consecutive taxable year, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be further reduced for the taxable year unless the average employer contribution rate (see section 3302(d)(4)) for such State for the calendar year preceding such taxable year is at least 2.7 percent. The percentage of reduction, if any, under this subdivision shall be the percentage referred to in section 3302(c)(3)(B) which is certified by the Secretary of Labor pursuant to section 3302(d)(7).

(iii) *Additional reduction if a balance of advances exists after fifth or any succeeding consecutive January 1.* If the credit reduction described in subdivision (i) of this subparagraph is made for the fifth or any succeeding taxable year, the total credits otherwise allowable under section 3302 to a taxpayer subject to the unemployment compensation law of the State shall be further reduced for the taxable year unless the average employer contribution rate (see section 3302(d)(4)) for the State for the calendar year preceding such taxable year equals or exceeds the 5-year benefit cost rate (see section 3302(d)(5)) applicable to the State for the taxable year or 2.7 percent, whichever is higher. The percentage of reduction, if any, under this subdivision for a taxable year shall be the percentage referred to in section 3302(c)(3)(C) which is certified by the Secretary of Labor pursuant to section 3302(d)(7).

(3) *Payments under the Temporary Unemployment Compensation Act of 1958.* If any amount of temporary unemployment compensation was paid in a State under the Temporary Unemployment Compensation Act of 1958, the total credits otherwise allowable under section 3302 to a taxpayer with respect to wages attributable to the State for the taxable year beginning January 1, 1963, and for each taxable year thereafter, shall be reduced unless prior to November 10 of the taxable year—

(i) There have been restored to the Treasury the amounts of temporary unemployment compensation paid in the State (except amounts paid to individuals who exhausted their unemployment compensation under title XV of the Social Security Act and title IV of the Veterans' Readjustment Assistance Act of 1952 prior to their making their first claims under the Temporary Unemployment Compensation Act of 1958), the amount of costs incurred in the administration of the Temporary Unemployment Compensation Act of 1958); with respect to the State, and the amount estimated by the Secretary of Labor as the State's proportionate share of other costs incurred in the administration of such Act, or

(ii) The State restores to the general fund of the Treasury the amount certified by the Secretary of Labor pursuant to section 104 of the Temporary Unemployment Compensation Act of 1958, and designates such restoration as being made for purposes of the last sentence of such section.

The credit reduction for a taxable year shall be a percentage of the wages paid by the taxpayer during that year which are attributable to the State. The percentage for the taxable year 1963 is 0.15 percent (that is, 5 percent of the Federal tax, computed as if imposed at the rate of 3 percent). The percentage for any succeeding year is 0.3 percent (that is, 10 percent of the Federal tax, computed as if imposed at the rate of 3 percent).

(4) *Example.* The cumulative effect of the credit reductions described in this paragraph may be illustrated by the following example:

Example. Advances to the unemployment account of State X were made in 1957 and in 1961 under title XII of the Social Security Act. Payments under the Temporary Unemployment Compensation Act of 1958 were made in State X in 1958. No portion of the advances or payments is returned before November 10, 1964. As a consequence:

(a) The credit reduction applicable under subparagraph (1) of this paragraph is made for 1964 at the rate of 0.15 percent;

(b) The credit reduction described in subparagraph (2) of this paragraph has been made for 1963 (the second successive year after 1961) at the rate of 0.3 percent. The rate of credit reduction under subparagraph (2) for 1964 is 1 percent (the aggregate of 0.6 percent under section 3302(c)(3)(A) and 0.4 percent (assumed for purposes of this example to be the percentage referred to in section 3302(c)(3)(B) which is certified by the Secretary of Labor), and

(c) The credit reduction described in subparagraph (3) of this paragraph has been made for 1963 at the rate of 0.15 percent. The rate of credit reduction for 1964 is 0.3 percent.

The cumulative rate of credit reduction applicable for 1964 to wages attributable to State X is 1.45 percent, representing the aggregate of the percentage reductions applicable under subparagraphs (1), (2), and (3) of this paragraph (0.15 percent, 1 percent, and 0.3 percent, respectively). In 1964 Employer A paid wages of $100,000, all of which are subject to the unemployment compensation law of State X. The credit which would be allowable (under section 3302 (a), (b), and (c)(1)) if there were no credit reduction is $2,700. Employer A's tax is computed as follows for 1964:

Total taxable wages (attributable to State X)	$100,000
Gross Federal tax (3.1 percent of wages)	3,100
Less credit:	
Gross credit	$2,700
Credit reduction (1.45 percent of wages)	1,450
Net credit	1,250
Amount of Federal tax due	1,850

[T.D. 6658, 28 FR 6633, June 27, 1963, as amended by T.D. 6708, 29 FR 3198, Mar. 10, 1964]

§ 31.3302(d)–1 Definitions and special rules relating to limit on total credits.

(a) *Rate of tax deemed to be 3 percent.* In applying the provisions of section 3302(c) relating to the limitation on total credits, and to reductions of credits otherwise allowable, the tax imposed by section 3301 shall be computed at the rate of 3 percent in lieu of any other rate prescribed in section 3301 (see § 31.3301–3).

(b) *Wages attributable to a particular State.* For purposes of section 3302(c) (2) or (3), wages are attributable to a particular State if they are subject to the unemployment compensation law of the State. If wages are not subject to the unemployment compensation law of any State, the determination as to whether such wages, or any portion thereof, are attributable to the particular State with respect to which the reduction in total credits is imposed shall be made in accordance with rules prescribed by the Commissioner.

(c) *Employment Security Act of 1960.* The Employment Security Act of 1960, referred to in section 3302(c)(2), means title V of the Social Security Amendments of 1960.

[T.D. 6658, 28 FR 6635, June 27, 1963]

§ 31.3302(e)–1 Successor employer.

(a) *In general.* In addition to the credits against the tax allowable under section 3302(a) and (b) for any taxable year after 1960, the taxpayer may be entitled to an amount of credit under section 3302(e). Credit under section 3302(e) is provided in the case of a taxpayer who (1) acquires substantially all of the property used in a trade or business, or in a separate unit of a trade or business, of another person (referred to in this section as a predecessor) who is not an employer (see § 31.3306(a)–1) for the calendar year in which the acquisition takes place, and (2) immediately after the acquisition employs in his trade or business one or more individuals who immediately prior to the acquisition were employed in the trade or business of the predecessor.

(b) *Method of computing credit under section 3302(e).* (1) Except as provided in paragraph (b)(2) of this section, the amount of credit to which the taxpayer may be entitled under section 3302(e) is the amount of credit to which the predecessor would be entitled under section 3302 (a), (b), and (e), without regard to the limits in section 3302(c), if the predecessor were an employer.

(2) If, during the calendar year in which the acquisition takes place, the predecessor pays remuneration, subject to contributions under the unemployment compensation law of a State, to any employee other than the individuals referred to in paragraph (a) of this section, the taxpayer will be entitled only to a portion of the amount of credit described in paragraph (b)(1) of this section. The portion is determined by multiplying such amount by a fraction. The numerator of the fraction is the total amount of remuneration, subject to such contributions, paid by the predecessor during such year to the individuals referred to in paragraph (a) of this section. The denominator of the fraction is the total amount of remuneration, subject to such contributions, paid by the predecessor during such year to all employees for services performed by them in the trade or business, or unit thereof, acquired by the taxpayer.

Example. In April 1961 the X Partnership terminated after selling all of its property to the Y Corporation. During 1961, the X Partnership paid its employees and former employees a total of $1,000,000 as remuneration subject to contributions under the employment compensation law of a State. (Note that the X Partnership did not qualify as an employer for 1961 for purposes of the Federal unemployment tax, because it had employees during less than 20 weeks in 1961.) When the Y Corporation acquired the property it concurrently employed all individuals who were then in the employ of the X Partnership. Assume that the X Partnership, if it had qualified as an employer for 1961, would have been entitled to a total credit against the Federal tax of $30,000 under section 3302 (a) and (b), without regard to the limits in section 3302(c). Of the $1,000,000 remuneration paid by the X Partnership in 1961, one-fifth (or $200,000) was paid to individuals who were employed by the Y Corporation at the time it acquired the property of the X Partnership. Under section 3302(e), therefore, the Y Corporation is entitled to credit of $6,000, which is one-fifth of the credit ($30,000) which would have been available to the X Partnership.

(3) The aggregate amount of credit allowable to the taxpayer under section 3302 (a), (b), and (e) is subject to the limits in section 3302(c).

(c) *Proof of credit under section 3302(e).* Credit under section 3302(e) shall not be allowed against the tax for any taxable year unless there is submitted to the district director (1) such information or proof as may be called for in the return on which the credit is reported, or in the instructions relating to the return, and (2) such other or additional proof as the Commissioner or the district director may deem necessary to establish the right to the credit provided for under section 3302(e).

(d) *Cross-references.* See paragraph (b) of § 31.3306(b)(1)–1 for examples of the acquisition of property used in a trade or business, or in a separate unit thereof.

[T.D. 6658, 28 FR 6635, June 27, 1963]

§ 31.3306(a)–1 Who are employers.

(a) *Definition*—(1) *For calendar years 1956 through 1969, inclusive.* Every person who employs 4 or more employees in employment (within the meaning of section 3306 (c) and (d)) on a total of 20 or more calendar days during any calendar year after 1955 and before 1970, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

(1a) *For 1970 and subsequent calendar years.* Every person who employs 4 or more employees in employment (within the meaning of section 3306 (c) and (d)) on a total of 20 or more calendar days during a calendar year after 1969, or during the calendar year immediately preceding such a calendar year, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

(2) *For calendar year 1955.* Every person who employs 8 or more employees in employment (within the meaning of section 3306 (c) and (d)) on a total of 20

or more calendar days during the calendar year 1955, each such day being in a different calendar week, is with respect to such year an employer subject to the tax.

(3) *General agents of the Secretary of Commerce.* For provisions relating to the circumstances under which an employee who performs services as an officer or member of the crew of an American vessel (i) which is owned by or bareboat chartered to the United States and (ii) whose business is conducted by a general agent of the Secretary of Commerce shall be deemed to be performing services for such general agent rather than for the United States, see § 31.3306 (N)–1.

(b) The several weeks in each of which occurs a day on which the prescribed number of employees are employed need not be consecutive weeks. It is not necessary that the employees so employed be the same individuals; they may be different individuals on each day. Neither is it necessary that the prescribed number of employees be employed at the same moment of time or for any particular length of time or on any particular basis of compensation. It is sufficient if the total number of employees employed during the 24 hours of a calendar day is 4 or more (8 or more for the calendar year 1955).

(c) In determining whether a person employs a sufficient number of employees to be an employer subject to the tax, each employee is counted with respect to services which constitute employment as defined in section 3306(c) (see § 31.3306(c)–2). No employee is counted with respect to services which do not constitute employment as so defined. See, however, paragraph (d) of this section.

(d) The provisions of paragraph (c) of this section are subject to the provisions of section 3306(d), relating to services which do not constitute employment but which are deemed to be employment, and relating to services which constitute employment but which are deemed not to be employment (see § 31.3306(d)–1). For example, if the services of an employee during a pay period are deemed to be employment under section 3306(d), even though a portion thereof does not constitute employment under section 3306(c), the employee is counted with respect to all services during the pay period. On the other hand, if the services of an employee during a pay period are deemed not to be employment, even though a portion thereof constitutes employment, the employee is not counted with respect to any services during the pay period.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7037, 35 FR 6709, Apr. 28, 1970]

§ 31.3306(b)–1 Wages.

(a) *Applicable law and regulations*—(1) *Remuneration paid after 1954.* Whether remuneration paid after 1954 for employment performed after 1938 constitutes wages is determined under section 3306(b). Accordingly, only remuneration paid after 1954 for employment performed after 1938 is covered by this section of the regulations and by the sections relating to the statutory exclusions from wages (§§ 31.3306(b)(1)–1 to 31.3306(b)(10)–1).

(2) *Remuneration paid after 1939 and before 1955.* Whether remuneration paid after 1939 and before 1955 for employment performed after 1938 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 403 (Regulations 107).

(3) *Remuneration paid in 1939.* Whether remuneration paid in 1939 for employment performed after 1938 constitutes wages shall be determined in accordance with the applicable provisions of law and of 26 CFR (1939) Part 400 (Regulations 90).

(b) The term ''wages'' means all remuneration for employment unless specifically excepted under section 3306(b) (see §§ 31.3306(b)(1)–1 to 31.3306(b)(10)–1, inclusive) or paragraph (j) of this section.

(c) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions are wages if paid as compensation for employment.

(d) The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually.

(e) Except in the case of remuneration paid for services not in the course of the employer's trade or business (see § 31.3306(b)(7)–1), the medium in which the remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, goods, lodging, food, or clothing. Remuneration paid in items other than cash shall be computed on the basis of the fair value of such items at the time of payments.

(f) Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called ''courtesy'' discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as remuneration for employment if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees. The term ''facilities or privileges'', however, does not ordinarily include the value of meals or lodging furnished, for example, to restaurant or hotel employees, or to seamen or other employees aboard vessels, since generally these items constitute an appreciable part of the total remuneration of such employees.

(g) Amounts of so-called ''vacation allowances'' paid to an employee constitute wages. Thus, the salary of an employee on vacation, paid notwithstanding his absence from work, constitutes wages.

(h) Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment. For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see § 31.3306(b)–2.

(i) Remuneration paid by an employer to an individual for employment, unless such remuneration is specifically excepted under section 3306(b), constitutes wages even though at the time paid the individual is no longer an employee.

Example. A is employed by B, an employer, during the month of June 1955 in employment and is entitled to receive remuneration of $100 for the services performed for B during the month. A leaves the employ of B at the close of business on June 30, 1955. On July 15, 1955 (when A is no longer an employee of B), B pays A the remuneration of $100 which was earned for the services performed in June. The $100 is wages, and the tax is payable with respect thereto.

(j) In addition to the exclusions specified in §§ 31.3306(b)(1)–1 to 31.3306(b)(10)–1, inclusive, the following types of payments are excluded from wages:

(1) Remuneration for services which do not constitute employment under section 3306(c).

(2) Remuneration for services which are deemed not to be employment under section 3306(d) (§ 31.3306(d)–1).

(3) Tips or gratuities paid directly to an employee by a customer of an employer, and not accounted for by the employee to the employer.

(k) For provisions relating to the treatment of deductions from remuneration as payments of remuneration, see § 31.3307–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6636, June 27, 1963; T.D. 7375, 40 FR 42350, Sept. 12, 1975; T.D. 8276, 54 FR 51028, Dec. 12, 1989; T.D. 8324, 55 FR 51697, Dec. 17, 1990]

§ 31.3306(b)–1T Question and answer relating to the definition of wages in section 3306(b) (Temporary).

The following question and answer relates to the definition of wages in section 3306(b) of the Internal Revenue Code of 1954, as amended by section 531(d)(3) of the Tax Reform Act of 1984 (98 Stat. 885):

Q–1: Are fringe benefits included in the definition of wages under section 3306(b)?

A–1: Yes, unless specifically excluded from the definition of ''wages'' pursuant to section 3306(b) (1) through (16). For example, a fringe benefit provided to or on behalf of an employee is excluded from the definition of ''wages'' if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 117 or 132.

[T.D. 8004, 50 FR 755, Jan. 7, 1985]

§31.3306(b)–2 Reimbursement and other expense allowance amounts.

(a) *When excluded from wages.* If a reimbursement or other expense allowance arrangement meets the requirements of section 62(c) of the Code and §1.62–2 and the expenses are substantiated within a reasonable period of time, payments made under the arrangement that do not exceed the substantiated expenses are treated as paid under an accountable plan and are not wages. In addition, if both wages and the reimbursement or other expense allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

(b) *When included in wages*—(1) *Accountable plans*—(i) *General rule.* Except as provided in paragraph (b)(1)(ii) of this section, if a reimbursement or other expense allowance arrangement satisfied the requirements of section 62(c) and §1.62–2, but the expenses are not substantiated within a reasonable period of time or amounts in excess of the substantiated expenses are not returned within a reasonable period of time, the amount paid under the arrangement in excess of the substantiated expenses is treated as paid under a nonaccountable plan, is included in wages, and is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period.

(ii) *Per diem or mileage allowances.* If a reimbursement or other expense allowance arrangement providing a per diem or mileage allowance satisfies the requirements of section 62(c) and §1.62–2, but the allowance is paid at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion is treated as paid under a nonaccountable plan and is included in wages. In the case of a per diem or mileage allowance paid as a reimbursement, the excess portion is subject to withholding and payment of employment taxes when paid. In the case of a per diem or mileage allowance paid as an advance, the excess portion is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (i.e., the days or miles of travel) are substantiated. The Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

(2) *Nonaccountable plans.* If a reimbursement or other expense allowance arrangement does not satisfy the requirements of section 62(c) and §1.62–2 (e.g., the arrangement does not require expenses to be substantiated or require amounts in excess of the substantiated expenses to be returned), all amounts paid under the arrangement are treated as paid under a nonaccountable plan, are included in wages, and are subject to withholding and payment of employment taxes when paid.

(c) *Effective dates.* This section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990. Paragraph (b)(1)(ii) of this section applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1991, with respect to expenses paid or incurred on or after January 1, 1991.

[T.D. 8324, 55 FR 51697, Dec. 17, 1990]

§31.3306(b)(1)–1 $3,000 limitation.

(a) *In general.* (1) the term ''wages'' does not include that part of the remuneration paid within any calendar year by an employer to an employee which exceeds the first $3,000 of remuneration (exclusive of remuneration excepted from wages in accordance with paragraph (j) of §31.3306(b)–1 or §§31.3306(b)(2)–1 to 31.3306(b)(8)–1, inclusive), paid within such calendar year by such employer to such employee for employment performed for him at any time after 1938.

(2) The $3,000 limitation applies only if the remuneration paid during any one calendar year by an employer to the same employee for employment performed after 1938 exceeds $3,000. The limitation in such case relates to the amount of remuneration paid during any one calendar year for employment after 1938 and not to the amount of remuneration for employment performed in any one calendar year.

Example. Employer B, in 1955, pays employee A $2,500 on account of $3,000 due him for employment performed in 1955. In 1956 employer B pays employee A the balance of $500 due him for employment performed in the prior year (1955), and thereafter in 1956 also pays A $3,000 for employment performed in 1956. The $2,500 paid in 1955 is subject to tax in 1955. The balance of $500 paid in 1956 for employment during 1955 is subject to tax in 1956, as is also the first $2,500 paid of the $3,000 for employment during 1956 (this $500 for 1955 employment added to the first $2,500 paid for 1956 employment constitutes the maximum wages subject to the tax which could be paid in 1956 by B to A). The final $500 paid by B to A in 1956 is not included as wages and is not subject to the tax.

(3) If during a calendar year an employee is paid remuneration by more than one employer, the limitation of wages to the first $3,000 of remuneration paid applies, not to the aggregate remuneration paid by all employers with respect to employment performed after 1938, but instead to the remuneration paid during such calendar year by each employer with respect to employment performed after 1938. In such case the first $3,000 paid during the calendar year by each employer constitutes wages and is subject to the tax. In connection with the application of the $3,000 limitation, see also paragraph (b) of this section relating to the circumstances under which wages paid by a predecessor employer are deemed to be paid by his successor. In connection with the annual wage limitation in the case of remuneration after December 31, 1978 from two or more related corporations that compensate an employee through a common paymaster, see § 31.3306(p)–1.

Example 1. During 1955 employer D pays to employee C a salary of $600 a month for employment performed for D during the first seven months of 1955, or total remuneration of $4,200. At the end of the fifth month C has been paid $3,000 by employer D, and only that part of his total remuneration from D constitutes wages subject to the tax. The $600 paid to employee C by employer D in the sixth month, and the like amount paid in the seventh month, are not included as wages and are not subject to the tax. At the end of the seventh month C leaves the employ of D and enters the employ of E. Employer E pays to C remuneration of $600 a month in each of the remaining five months of 1955, or total remuneration of $3,000. The entire $3,000 paid by E to employee C constitutes wages and is subject to the tax. Thus, the first $3,000 paid by employer D and the entire $3,000 paid by employer E constitute wages.

Example 2. During the calendar year 1955 F is simultaneously an officer (an employee) of the X Corporation, the Y Corporation, and the Z Corporation, each such corporation being an employer for such year. During such year F is paid a salary of $3,000 by each Corporation. Each $3,000 paid to F by each of the corporations, X, Y, and Z (whether or not such corporations are related), constitutes wages and is subject to the tax.

(b) *Wages paid by predecessor attributed to successor.* (1) If an employer (hereinafter referred to as a successor) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and if immediately after the acquisition the successor employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for purposes of the application of the $3,000 limitation set forth in paragraph (a) of this section, any remuneration (exclusive of remuneration excepted from wages in accordance with paragraph (j) of § 31.3306(b)–1 or §§ 31.3306(b)(2)–1 to 31.3306(b)(8)–1, inclusive), with respect to employment paid (or considered under this provision as having been paid to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor. Wages paid by a predecessor shall not be considered as having been paid by the successor unless both the predecessor and the successor are employers as defined in section 3306(a) for the calendar year in which the acquisition occurs (see § 31.3306(a)–1, relating to who are employers).

(2) The wages paid, or considered as having been paid, by a predecessor to an employee shall, for purposes of the $3,000 limitation, be treated as having been paid to such employee by a successor, if:

(i) The successor during a calendar year acquired substantially all the property used in a trade or business, or used in a separate unit of a trade or business, of the predecessor;

(ii) Such employee was employed in the trade or business of the predecessor immediately prior to the acquisition and is employed by the successor in his trade or business immediately after the acquisition; and

(iii) Such wages were paid during the calendar year in which the acquisition occurred and prior to such acquisition.

(3) The method of acquisition by an employer of the property of another employer is immaterial. The acquisition may occur as a consequence of the incorporation of a business by a sole proprietor of a partnership, the continuance without interruption of the business of a previously existing partnership by a new partnership or by a sole proprietor, or a purchase or any other transaction whereby substantially all the property used in a trade or business, or used in a separate unit of a trade or business, of one employer is acquired by another employer.

(4) Substantially all the property used in a separate unit of a trade or business may consist of substantially all the property used in the performance of an essential operation of the trade or business, or it may consist of substantially all the property used in a relatively self-sustaining entity which forms a part of the trade or business.

Example 1. The M Corporation which is engaged in the manufacture of automobiles, including the manufacture of automobile engines, discontinues the manufacture of the engines and transfers all the property used in such manufacturing operations to the N Company. The N Company is considered to have acquired a separate unit of the trade or business of the M Corporation, namely, its engine manufacturing unit.

Example 2. The R Corporation which is engaged in the operation of a chain of grocery stores transfers one of such stores to the S Company. The S Company is considered to have acquired a separate unit of the trade or business of the R Corporation.

(5) A successor may receive credit for wages paid to an employee by a predecessor only if immediately prior to the acquisition the employee was employed by the predecessor in his trade or business which was acquired by the successor and if immediately after the acquisition such employee is employed by the successor in his trade or business (whether or not in the same trade or business in which the acquired property is used). If the acquisition involves only a separate unit of a trade or business of the predecessor, the employee need not have been employed by the predecessor in that unit provided he was employed in the trade or business of which the acquired unit was a part.

Example. The Y Corporation in 1955 acquires all the property of the X Manufacturing Company and immediately after the acquisition employs in its trade or business employee A, who, immediately prior to the acquisition, was employed by the X Company. Both the Y Corporation and the X Company are employers, as defined in the Act, for the calendar year 1955. The X Company has in 1955 (the calendar year in which the acquisition occurs) and prior to the acquisition paid $2,000 of wages to A. The Y Corporation in 1955 pays to A remuneration with respect to employment of $2,000. Only $1,000 of such remuneration is considered to be wages. For purposes of the $3,000 limitation, the Y Corporation is credited with the $2,000 paid to A by the X Company. If, in the same calendar year, the property is acquired from the Y Corporation by the Z Company, an employer for such year, and A immediately after the acquisition is employed by the Z Company in its trade or business, no part of the remuneration paid to A by the Z Company in the year of the acquisition will be considered to be wages. The Z Company will be credited with the remuneration paid to A by the Y Corporation and also with the wages paid to A by the X Company (considered for purposes of the application of the $3,000 limitation as having also been paid by the Y Corporation).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6636, June 27, 1963; T.D. 7660, 44 FR 75142, Dec. 19, 1979]

§ 31.3306(b)(2)–1 Payments under employers' plans on account of retirement, sickness or accident disability, medical or hospitalization expenses, or death.

(a) The term ''wages'' does not include the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of:

(1) An employee's retirement,

(2) Sickness or accident disability of an employee or any of his dependents,

(3) Medical or hospitalization expenses in connection with sickness or accident disability of an employee or any of his dependents, or

(4) Death of an employee or any of his dependents.

(b) The plan or system established by an employer need not provide for payments on account of all of the specified items, but such plan or system may provide for any one or more of such items. Payments for any one or more of such items under a plan or system established by an employer solely for the dependents of his employees are not within this exclusion from wages.

(c) Dependents of an employee include the employee's husband or wife, children, and any other members of the employee's immediate family.

(d) It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required, expressly or impliedly, by the contract of service.

§ 31.3306(b)(3)–1 Retirement payments.

The term ''wages'' does not include any payment made by an employer to an employee (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) on account of the employee's retirement. Thus payments made to an employee on account of his retirement are excluded from wages under this exception even though not made under a plan or system.

§ 31.3306(b)(4)–1 Payments on account of sickness or accident disability, or medical or hospitalization expenses.

The term ''wages'' does not include any payment made by an employer to, or on behalf of, an employee on account of the employee's sickness or accident disability or the medical or hospitalization expenses in connection with the employee's sickness or accident disability, if such payment is made after the expiration of 6 calendar months following the last calendar month in which such employee worked for such employer. Such payments are excluded from wages under this exception even though not made under a plan or system. If the employee does not actually perform services for the employer during the requisite period, the existence of the employer-employee relationship during that period is immaterial.

§ 31.3306(b)(5)–1 Payments from or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans.

(a) *Payments from or to certain tax-exempt trusts.* The term ''wages'' does not include any payment made—

(1) By an employer, on behalf of an employee or his beneficiary, into a trust, or

(2) To, or on behalf of an employee or his beneficiary from a trust,

if at the time of such payment the trust is exempt from tax under section 501(a) as an organization described in section 401(a). A payment made to an employee of such a trust for services rendered as an employee of the trust and not as a beneficiary thereof is not within this exclusion from wages.

(b) *Payments under or to certain annuity plans.* (1) The term ''wages'' does not include any payment made after December 31, 1962—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan is a plan described in section 403(a).

(2) The term ''wages'' does not include any payment made before January 1, 1963—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan meets the requirements of section 401(a) (3), (4), (5), and (6).

(c) *Payments under or to certain bond purchase plans.* The term ''wages'' does not include any payment made after December 31, 1962—

(1) By an employer, on behalf of an employee or his beneficiary, into a bond purchase plan, or

(2) To, or on behalf of, an employee or his beneficiary under a bond purchase plan,

if at the time of such payment the plan is a qualified bond purchase plan described in section 405(a).

[T.D. 6658, 28 FR 6636, June 27, 1963]

§31.3306(b)(6)–1 Payment by an employer of employee tax under section 3101 or employee contributions under a State law.

The term ''wages'' does not include any payment by an employer (without deduction from the remuneration of, or other reimbursement from, the employee) of either (a) the employee tax imposed by section 3101 or the corresponding section of prior law, or (b) any payment required from an employee under a State unemployment compensation law.

§31.3306(b)(7)–1 Payments other than in cash for service not in the course of employer's trade or business.

The term ''wages'' does not include remuneration paid in any medium other than cash for service not in the course of the employer's trade or business. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any medium other than cash, such as lodging, food, or other goods or commodities, for service not in the course of the employer's trade or business does not constitute wages. Remuneration paid in any medium other than cash for other types of services does not come within this exclusion from wages. For provisions relating to the circumstances under which service not in the course of the employer's trade or business does not constitute employment, see §31.3306(c)(3)–1.

§31.3306(b)(8)–1 Payments to employees for non-work periods.

The term ''wages'' does not include any payment (other than vacation or sick pay) made by an employer to an employee after the calendar month in which the employee attains age 65, if—

(a) Such employee does no work (other than being subject to call for the performance of work) for such employer in the period for which such payment is made; and

(b) The employer-employee relationship exists between the employer and employee throughout the period for which such payment is made.

Vacation or sick pay is not within this exclusion from wages. If the employee does any work for the employer in the period for which the payment is made, no remuneration paid by such employer to such employee with respect to such period is within this exclusion from wages. For example, if employee A, who attained the age of 65 in January 1955, is employed by the X Company on a stand-by basis and is paid $200 by the X Company for being subject to call during the month of February 1955 and an additional $25 for work performed for the X Company on one day in February 1955, then none of the $225 is excluded from wages under this exception.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6708, 29 FR 3199, Mar. 10, 1964]

§31.3306(b)(9)–1 Moving expenses.

(a) The term ''wages'' does not include remuneration paid on or after November 1, 1964, to or on behalf of an employee, either as an advance or a reimbursement, specifically for moving expenses incurred or expected to be incurred, if (and to the extent that) at the time of payment it is reasonable to believe that a corresponding deduction is or will be allowable to the employee under section 217. The reasonable belief contemplated by the statute may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that a deduction is allowable under section 217. The reasonable belief shall be based upon the application of section 217 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations). When used in this section, the term ''moving expenses'' has the same meaning as when used in section 217 and the regulations thereunder.

(b) Except as otherwise provided in paragraph (a) of this section, or in a numbered paragraph of section 3306(b), amounts paid to or on behalf of an employee for moving expenses are wages for purposes of section 3306(b).

[T.D. 7375, 40 FR 42351, Sept. 12, 1975]

§ 31.3306(b)(10)–1 Payments under certain employers' plans after retirement, disability, or death.

(a) *In general.* The term ''wages'' does not include the amount of any payment or series of payments made after January 2, 1968, by an employer to, or on behalf of, an employee or any of his dependents under a plan established by the employer which makes provisions for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), which is paid or commences to be paid upon or within a reasonable time after the termination of an employee's employment relationship because of the employee's—

(1) Death,

(2) Retirement for disability, or

(3) Retirement after attaining an age specified in the plan established by the employer or in a pension plan of the employer as the age at which a person in the employee's circumstances is eligible for retirement.

A payment or series of payments made under the circumstances described in the preceding sentence is excluded from ''wages'' even if made pursuant to an incentive compensation plan which also provides for the making of other types of payments. However, any payment or series of payments which would have been paid if the employee's relationship had not been terminated is not excluded from ''wages'' under this section and section 3306(b)(10). For example, lump-sum payments for unused vacation time or a final paycheck received after retirement are payments which the employee would have received whether or not he retired and therefore are not excluded from ''wages.'' Further, if any payment is made upon or after termination of employment for any reason other than those set out in paragraphs (a)(1), (2), and (3) of this section such payment is not excludable from ''wages'' by this section. For example, if a pension plan provides for retirement upon disability, completion of 30 years of service, or attainment of age 65, and if an employee who is not disabled retires at age 61 after 30 years of service, none of the retirement payments made to the employee under the pension plan (including any made after he is 65) is excludable from ''wages'' under this section. However, if the pension plan had conditioned retirement after 30 years of service upon attainment of age 60, all of the retirement payments would have been excludable.

(b) *Plan.* The plan or system established by an employer need not provide for payments because of termination of employment for all the reasons set out in paragraphs (a)(1), (2), and (3) of this section, but such plan or system may provide for payments because of termination for any one or more of such reasons. Payments because of termination of employment for any one or more of such reasons under a plan or system established by an employer solely for the dependents of his employees are not within this exclusion from wages.

(c) *Dependents.* Dependents of an employee include the employee's husband or wife, children, and any other members of the employee's immediate family.

(d) *Benefit payments.* It is immaterial for purposes of this exclusion whether the amount or possibility of such benefit payments is paid on account of services rendered or taken into consideration in fixing the amount of an employee's remuneration or whether such payments are required expressly or impliedly, by the contract of service.

(e) *Example.* The application of this section may be illustrated by the following example:

Example. A, an employee, receives a salary of $1,500 a month, payable on the 5th day of the month following the month for which the salary is earned. A's employer has established an incentive compensation plan for a class of his employees, including A, providing for the payment of deferred compensation on termination of employment, including termination upon an employee's death, retirement at age 65 (the retirement age specified in the plan), or retirement for disability. On March 1, 1973, A attains the age of 65 and retires. On March 5, 1973, A receives $5,500 from his employer of which $1,500 represents A's salary for services he performed in February 1973, and $4,000 represents incentive compensation paid under the employer's plan. The amount of $4,000 is excluded from ''wages'' under this section. The amount of $1,500 is not excluded from ''wages'' under this section.

[T.D. 7374, 40 FR 30951, July 24, 1975]

§31.3306(b)(13)–1 Payments or benefits under a qualified educational assistance program.

The term ''wages'' does not include any payment made, or benefit furnished, to or for the benefit of an employee in a taxable year beginning after December 31, 1978, if at the time of such payment or furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[T.D. 7898, 48 FR 31019, July 6, 1983]

§31.3306(c)–1 Employment; services performed before 1955.

(a) Services performed after 1938 and before 1955 constitute employment under section 3306(c) if such services were employment under the law applicable to the period in which they were performed.

(b) The tax applies with respect to remuneration paid by an employer after 1954 for services performed after 1938 and before 1955, as well as for services performed after 1954, to the extent that the remuneration and services constitute wages and employment. See §§31.3306(b)–1 to 31.3306(b)(8)–1, inclusive, relating to wages.

(c) Determination of whether services performed after 1938 and before 1955 constitute employment shall be made in accordance with the provisions of law applicable to the period in which they were performed and of the regulations thereunder. The regulations applicable in determining whether services performed after 1938 and before 1955 constitute employment are as follows:

(1) Services performed in 1939—26 CFR (1939) Part 400 (Regulations 90).

(2) Services performed after 1939 and before 1955—26 CFR (1939) Part 403 (Regulations 107).

§31.3306(c)–2 Employment; services performed after 1954.

(a) *In general.* Whether services performed after 1954 constitute employment is determined under subsections (c) and (n) of section 3306.

(b) *Services performed within the United States.* Services performed after 1954 within the United States (see §31.3306(j)–1) by an employee for the person employing him, unless specifically excepted under section 3306(c), constitute employment. With respect to services performed within the United States, the place where the contract of service is entered into is immaterial. The citizenship or residence of the employee or of the person employing him also is immaterial except to the extent provided in any specific exception from employment. Thus, the employee and the person employing him may be citizens and residents of a foreign country and the contract of service may be entered into in a foreign country, and yet, if the employee under such contract performs services within the United States, there may be to that extent employment.

(c) *Services performed outside the United States*—(1) *In general.* Except as provided in subparagraph (2) of this paragraph, services performed outside the United States (see §31.3306(j)–1) do not constitute employment.

(2) *On or in connection with an American vessel or American aircraft.* (i) This subparagraph relates to services performed after 1954 ''on or in connection

with'' an American vessel, and to services performed after 1961 ''on or in connection with'' an American aircraft to the extent that the remuneration for the latter services is paid after 1961. Such services performed outside the United States by an employee for the person employing him constitute employment if:

(a) The employee is also employed ''on and in connection with'' such vessel or aircraft when outside the United States; and

(b) The services are performed under a contract of service, between the employee and the person employing him, which is entered into within the United States, or during the performance of the contract under which the services are performed and while the employee is employed on the vessel or aircraft it touches at a port within the United States; and

(c) The services are not excepted under section 3306(c). (See particularly § 31.3306(c)(17)–1, relating to fishing.)

(ii) An employee performs services on and in connection with the vessel or aircraft if he performs services on the vessel or aircraft which are also in connection with the vessel or aircraft. Services performed on the vessel by employees as officers or members of the crew, or as employees of concessionaires, of the vessel, for example, are performed under such circumstances, since the services are also connected with the vessel. Similarly, services performed on the aircraft by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while he is a passenger on a vessel are not in connection with the vessel.

(iii) If services are performed by an employee ''on and in connection with'' an American vessel or American aircraft when outside the United States and the conditions in *(b)* and *(c)* of paragraph (c)(2)(i) of this section are met, then the services of that employee performed on or in connection with the vessel or aircraft constitute employment. The expression ''on or in connection with'' refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).

(iv) Services performed by a member of the crew or other employee whose contract of service is not entered into within the United States, and during the performance of which and while the employee is employed on the vessel or aircraft it does not touch at a port within the United States, do not constitute employment, notwithstanding that service performed by other members of the crew or other employees on or in connection with the vessel or aircraft may constitute employment.

(v) A vessel includes every description of watercraft, or other contrivance, used as a means of transportation on water. An aircraft includes every description of craft, or other contrivance, used as a means of transportation through the air. In the case of an aircraft, the term ''port'' means an airport. An airport means an area on land or water used regularly by aircraft for receiving or discharging passengers or cargo. For definitions of ''American vessel'' and ''American aircraft'', see § 31.3306(m)–1.

(vi) With respect to services performed outside the United States on or in connection with an American vessel or American aircraft, the citizenship or residence of the employee is immaterial, and the citizenship or residence of the employer is material only in case it has a bearing in determining whether a vessel is an American vessel.

[T.D. 6658, 28 FR 6636, June 27, 1963]

§ 31.3306(c)–3 Employment; excepted services in general.

(a) Services performed by an employee for the person employing him do not constitute employment for purposes of the tax if they are specifically excepted from employment under any of the numbered paragraphs of section 3306(c). Services so excepted do not constitute employment for purposes of the tax even though they are performed within the United States, or are performed outside the United States on or in connection with an American vessel or American aircraft. If not otherwise provided in the regulations relating to the numbered paragraphs of section 3306(c), such regulations apply with respect to services performed after 1954.

(b) The exception attaches to the services performed by the employee and not to the employee as an individual; that is, the exception applies only to the services rendered by the employee in an excepted class.

Example. A is an individual who is employed part time by B to perform services which constitutes ''agricultural labor'' (see § 31.3306 (k)–1). A is also employed by C part time to perform services as a grocery clerk in a store owned by him. While A's services which constitute ''agricultural labor'' are expected, the exception does not embrace the services performed by A as a grocery clerk in the employ of C and the latter services are not excepted from employment.

(c) For provisions relating to the circumstances under which services which are excepted are nevertheless deemed to be employment, and relating to the circumstances under which services which are not excepted are nevertheless deemed not to be employment, see § 31.3306(d)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6637, June 27, 1963]

§ 31.3306(c)(1)–1 Agricultural labor.

Services performed by an employee for the person employing him which constitute ''agricultural labor'' as defined in section 3306(k) are excepted from employment. For provisions relating to the definition of the term ''agricultural labor'', see § 31.3306(k)–1.

§ 31.3306(c)(2)–1 Domestic service.

(a) *In a private home.* (1) Services of a household nature performed by an employee in or about a private home of the person by whom he is employed are excepted from employment. A private home is a fixed place of abode of an individual or family. A separate and distinct dwelling unit maintained by an individual in an apartment house, hotel, or other similar establishment may constitute a private home. If a dwelling house is used primarily as a boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home and the services performed therein are not excepted.

(2) In general, services of a household nature in or about a private home include services performed by cooks, waiters, butlers, housekeepers, governesses, maids, valets, baby sitters, janitors, laundresses, furnacemen, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobile for family use.

(b) *In a local college club or local chapter of a college fraternity or sorority.* (1) Services of a household nature performed by an employee in or about the club rooms or house of a local college club or of a local chapter of a college fraternity or sorority by which he is employed are excepted from employment. A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter. If the club rooms or house of a local college club or local chapter of a college fraternity or sorority is used primarily for the purpose of supplying board or lodging to students or the public as a business enterprise, the services performed therein are not within the exception.

(2) In general, services of a household nature in or about the club rooms or house of a local college club or local chapter of a college fraternity or sorority include services rendered by cooks, waiters, butlers, maids, janitors, laundresses, furnacemen, handymen, gardeners, housekeepers, and housemothers.

(c) *Services not excepted.* Services not of a household nature, such as services performed as a private secretary, tutor, or librarian, even though performed in the employer's private home or in a local college club or local chapter of a college fraternity or sorority, are not within the exception. Services of a household nature are not within the exception if performed in or about rooming or lodging houses, boarding houses, clubs (except local college clubs), hotels, hospitals, eleemosynary institutions, or commercial offices or establishments.

§ 31.3306(c)(3)–1 Services not in the course of employer's trade or business.

(a) Services not in the course of the employer's trade or business performed by an employe for an employer in a calendar quarter are excepted from employment unless—

(1) The cash remuneration paid for such services performed by the employee for the employer in the calendar quarter is $50 or more; and

(2) Such employee is regularly employed in the calendar quarter by such employer to perform such services.

Unless the tests set forth in both paragraphs (a)(1) and (2) of this section are met, the services are excepted from employment.

(b) The term ''services not in the course of the employer's trade or business'' includes services that do not promote or advance the trade or business of the employer. Services performed for a corporation do not come within the exception.

(c) The test relating to cash remuneration of $50 or more is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. However, for purposes of determining whether the test is met, it is also required that the remuneration be paid, although it is immaterial when the remuneration is paid. Furthermore, in determining whether $50 or more has been paid for services not in the course of the employer's trade or business, only cash remuneration for such services shall be taken into account. The term ''cash remuneration'' includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, or other goods or commodities, is disregarded in determining whether the cash-remuneration test is met.

(d) For purposes of this exception, an individual is deemed to be regularly employed by an employer during a calendar quarter only if—

(1) Such individual performs services not in the course of the employer's trade or business for such employer for some portion of the day on at least 24 days (whether or not consecutive) during such calendar quarter; or

(2) Such individual was regularly employed (as determined under paragraph (d)(1) of this section) by such employer in the performance of services not in the course of the employer's trade or business during the preceding calender quarter (including the last calendar quarter of 1954).

(e) In determining whether an employee has performed services not in the course of the employer's trade or business on at least 24 days during a calendar quarter, there shall be counted as one day—

(1) Any day or portion thereof on which the employee actually performs such services; and

(2) Any day or portion thereof on which the employee does not perform services of the prescribed character but with respect to which cash remuneration is paid or payable to the employee for such services, such as a day on which the employee is sick or on vacation.

An employee who on a particular day reports for work and, at the direction of his employer, holds himself in readiness to perform services not in the course of the employer's trade or business shall be considered to be engaged in the actual performance of such services on that day. For purposes of this exception, a day is a period of 24 hours commencing at midnight and ending at midnight.

(f) For provisions relating to the exclusion from wages of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business, see § 31.3306(b) (7)–1.

§ 31.3306(c)(4)–1 Services on or in connection with a non-American vessel or aircraft.

(a) Services performed within the United States by an employee for an employer ''on or in connection with'' a vessel not an American vessel, or ''on or in connection with'' an aircraft not an American aircraft, are excepted from employment if the employee is employed by the employer ''on and in connection with'' the vessel or aircraft when outside the United States.

(b) An employee performs services on and in connection with the vessel or aircraft if he performs services on the vessel or aircraft when outside the United States which are also in connection with the vessel or aircraft. Services performed on the vessel outside the United States by employees as officers or members of the crew, or by employees of concessionaires, of the vessel, for example, are performed under such circumstances, since such services are also connected with the vessel. Similarly, services performed on the aircraft outside the United States by employees as officers or members of the crew of the aircraft are performed on and in connection with such aircraft. Services may be performed on the vessel or aircraft, however, which have no connection with it, as in the case of services performed by an employee while on the vessel or aircraft merely as a passenger in the general sense. For example, the services of a buyer in the employ of a department store while he is a passenger on a vessel are not in connection with the vessel.

(c) The expression ''on or in connection with'' refers not only to services performed on the vessel or aircraft but also to services connected with the vessel or aircraft which are not actually performed on it (for example, shore services performed as officers or members of the crew, or as employees of concessionaires, of the vessel).

(d) The citizenship or residence of the employee and the place where the contract of service is entered into are immaterial for purposes of this exception, and the citizenship or residence of the person employing him is material only in case it has a bearing in determining whether the vessel is an American vessel. For definitions of the terms ''vessel'' and ''aircraft'', see paragraph (c)(2)(v) of § 31.3306(c)–2. For definitions of the terms ''American vessel'' and ''American aircraft'', see § 31.3306(m)–1.

(e) Since the only services performed outside the United States which constitute employment are those described in section 3306(c) and paragraph (c) of § 31.3306(c)–2 (relating to services performed outside the United States on or in connection with an American vessel or American aircraft), services performed outside the United States on or in connection with a vessel not an American vessel, or an aircraft not an American aircraft, do not constitute employment in any event.

(f) The provisions of section 3306(c)(4) and of this section, insofar as they relate to services performed on or in connection with an aircraft not an American aircraft, apply only to services performed after 1961 for which remuneration is paid after 1961.

[T.D. 6658, 28 FR 6637, June 27, 1963]

§ 31.3306(c)(5)–1 Family employment.

(a) Certain services are excepted from employment because of the existence of a family relationship between the employee and the individual employing him. The exceptions are as follows:

(1) Services performed by an individual in the employ of his or her spouse;

(2) Services performed by a father or mother in the employ of his or her son or daughter; and

(3) Services performed by a son or daughter under the age of 21 in the employ of his or her father or mother.

(b) Under paragraph (a) (1) and (2) of this section, the exception is conditioned solely upon the family relationship between the employee and the individual employing him. Under paragraph (a)(3) of this section, in addition to the family relationship, there is a further requirement that the son or daughter shall be under the age of 21, and the exception continues only during the time that such son or daughter is under the age of 21.

(c) Services performed in the employ of a corporation are not within the exception. Services performed in the employ of a partnership are not within the exception unless the requisite family relationship exists between the employee and each of the partners comprising the partnership.

§ 31.3306(c)(6)–1 Services in employ of United States or instrumentality thereof.

(a) *Services in employ of United States or wholly-owned instrumentality thereof.* Services performed in the employ of the United States Government, except as provided in section 3306(n) (see

§ 31.3306(n)–1), are excepted from employment. Services performed in the employ of an instrumentality of the United States which is wholly owned by the United States also are excepted from employment.

(b) *Services in employ of instrumentality not wholly owned by United States*—(1) *Services performed after 1961.* Services performed after 1961 in the employ of an instrumentality of the United States which is partially owned by the United States are excepted from employment, if the remuneration for such service is paid after 1961. Services performed after 1961 in the employ of an instrumentality of the United States which is neither wholly owned nor partially owned by the United States are excepted from employment if (i) the instrumentality is exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to section 3301 or the corresponding section of prior law in granting exemption from such tax, and (ii) the remuneration for such service is paid after 1961. For provisions which make general exemptions from Federal taxation ineffectual as to the tax imposed by section 3301, see § 31.3308–1.

(2) *Services performed before 1962.* Services performed in the employ of an instrumentality of the United States which is not wholly owned by the United States are excepted from employment if the instrumentality is exempt from the tax imposed by section 3301 by virtue of any other provision of law, and (i) the services are performed before 1962 or (ii) remuneration for the services is paid before 1962.

[T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(7)–1 Services in employ of States or their political subdivisions or instrumentalities.

(a) Services performed in the employ of any State, or of any political subdivision thereof, are excepted from employment. Services performed in the employ of an instrumentality of one or more States or political subdivisions thereof are excepted if the instrumentality is wholly owned by one or more of the foregoing. Services performed in the employ of an instrumentality of one or more of the several States or political subdivisions thereof which is not wholly owned by one or more of the foregoing are excepted only to the extent that the instrumentality is with respect to such services immune under the Constitution of the United States from the tax imposed by section 3301.

(b) For provisions relating to the term ‘‘State’’ see § 31.3306(j)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(8)–1 Services in employ of religious, charitable, educational, or certain other organizations exempt from income tax.

(a) *Services performed after 1961.* Services performed by an employee after 1961 in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a) are excepted from employment, if the remuneration for such service is paid after 1961. For provisions relating to exemption from income tax of an organization described in section 501(c) (3), see Part 1 of this chapter (Income Tax Regulations).

(b) *Services performed before 1962.* (1) Services performed by an employee in the employ of an organization described in section 3306(c)(8) as in effect before 1962, that is, a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, are excepted from employment if (i) the services are performed before 1962, or (ii) remuneration for the services is paid before 1962.

(2) Any organization which is an organization of a type described in section 501(c)(3) and which—

(i) Is exempt from income tax under section 501(a), or

(ii) Has been denied exemption from income tax under section 501(a) by reason of the provisions of section 503 or 504, relating to prohibited transactions and to accumulations out of income, respectively,

is an organization of a type described in section 3306(c)(8) as in effect before 1962. An organization which would be an organization of a type described in section 501(c)(3) except for those provisions of section 501(c)(3) which are not contained in section 3306(c)(8) as in effect before 1962 (provisions relating to participation or intervention in a political campaign on behalf of a candidate for public office) is also an organization of a type described in section 3306(c)(8) as in effect before 1962.

[T.D. 6658, 28 FR 6638, June 27, 1963]

§ 31.3306(c)(9)–1 Railroad industry; services performed by an employee or an employee representative under the Railroad Unemployment Insurance Act.

(a) Services performed by an individual as an ''employee'' or as an ''employee representative'', as those terms are defined in section 1 of the Railroad Unemployment Insurance Act, as amended, are excepted from employment.

(b) Section 1 of the Railroad Unemployment Insurance Act (45 U.S.C. 351), as amended, provides, in part, as follows:

For the purposes of this Act, except when used in amending the provisions of other Acts—

(a) The term ''employer'' means any carrier (as defined in subsection (b) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term ''employer'' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term ''employer'' shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies, and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations. The term ''employer'' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

(b) The term ''carrier'' means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

(c) The term ''company'' includes corporations, associations, and joint-stock companies.

(d) The term ''employee'' (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, or (ii) an employee representative. The term ''employee'' shall include an employee of a local lodge or division defined as an employer in section 1 (a) only if he was in the service of a carrier on or after August 29, 1935. The term ''employee'' includes an officer of an employer.

The term ''employee'' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

(e) An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation: *Provided, however,* That an individual shall be deemed to be in the service of an employer, other than a local lodge or division or a general committee of a railway-labor-organization employer, not conducting the principal part of its business in the United States only when he is rendering service to it in the United States; and an individual shall be deemed to be in the service of such a local lodge or division only if (1) all, or substantially all, the individuals constituting its membership are employees of an employer conducting the principal part of its business in the United States; or (2) the headquarters of such local lodge or division is located in the United States; and an individual shall be deemed to be in the service of such a general committee only if (1) he is representing a local lodge or division described in clauses (1) or (2) immediately above; or (2) all, or substantially all, the individuals represented by it are employees of an employer conducting the principal part of its business in the United States; or (3) he acts in the capacity of a general chairman or an assistant general chairman of a general committee which represents individuals rendering service in the United States to an employer, but in such case if his office or headquarters is not located in the United States and the individuals represented by such general committee are employees of an employer not conducting the principal part of its business in the United States, only such proportion of the remuneration for such service shall be regarded as compensation as the proportion which the mileage in the United States under the jurisdiction of such general committee bears to the total mileage under its jurisdiction, unless such mileage formula is inapplicable, in which case the Board may prescribe such other formula as it finds to be equitable, and if the application of such mileage formula, or such other formula as the Board may prescribe, would result in the compensation of the individual being less than 10 per centum of his remuneration for such service no part of such remuneration shall be regarded as compensation: *Provided further,* That an individual not a citizen or resident of the United States shall not be deemed to be in the service of an employer when rendering service outside the United States to an employer who is required under the laws applicable in the place where the service is rendered to employ therein, in whole or in part, citizens or residents thereof.

(f) The term ''employee representative'' means any officer or official representative of a railway labor organization other than a labor organization included in the term employer as defined in section 1(a) who before or after August 29, 1935, was in the service of an employer as defined in section 1(a) and who is duly authorized and designated to represent employees in accordance with the Railway Labor Act, and any individual who is regularly assigned to or regularly employed by such officer or official representative in connection with the duties of his office.

* * * * *

(i) The term ''compensation'' means any form of money remuneration, including pay for time lost but excluding tips, paid for services rendered as an employee to one or more employers, or as an employee representative: *Provided, however,* That in computing the compensation paid to any employee, no part of any month's compensation in excess of $300 for any month before July 1, 1954, or in excess of $350 for any month after June 30, 1954, and before the calendar month next following the month [May] in which this Act was amended in 1959, or in excess of $400 for any month after the month [May] in which this Act was so amended, shall be recognized. A payment made by an employer to an individual through the employer's pay roll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. An employee shall be deemed to be paid, ''for time lost'' the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, including absence on account of personal injury, and the amount he is paid by the employer for loss of earnings resulting from his displacement to a less remunerative position or occupation. If a payment is made by an employer with respect to a personal injury and includes pay for time lost, the total payment shall be deemed to be paid for time lost unless, at the time of payment, a part of such payment is specifically apportioned to factors other than time lost, in which event only such part of the payment as is not so apportioned shall be deemed to be paid for time lost. Compensation earned in any calendar month before 1947 shall be deemed paid in such month regardless of whether or when payment will have been in fact made, and compensation earned in any calendar year after 1946 but paid after the end of such calendar year shall be deemed to be compensation paid in the calendar year in which it will have been earned if it is so reported by the employer before February 1 of the next succeeding calendar year or, if the employee establishes, subject to the provisions of section 8, the period during which such compensation will have been earned.

* * * * *

(r) The term ''Board'' means the Railroad Retirement Board.

(s) The term ''United States'', when used in a geographical sense, means the States, Alaska, Hawaii, and the District of Columbia.

* * * * *

[Sec. 1, Railroad Unemployment Insurance Act, as amended by secs. 1 and 2, Act of June 20, 1939, 53 Stat. 845; secs. 1 and 3, Act of Aug. 13, 1940, 54 Stat. 785, 786; sec. 15, Act of Apr. 8, 1942, 56 Stat. 210; secs. 1 and 2, Act of July 31, 1946, 60 Stat. 722; sec. 302, Act of Aug. 31, 1954, 68 Stat. 1040; sec. 301, Act of May 19, 1959, Pub. L. 86–28, 73 Stat. 30]

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6638, June 27, 1963]

§31.3306(c)(10)–1 Services in the employ of certain organizations exempt from income tax.

(a) *In general.* (1) This section deals with the exception from employment of certain services performed in the employ of any organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521. (See the provisions of §§1.401–1, 1.501(a)–1, and 1.521–1 of this chapter (Income Tax Regulations).) If the services meet the tests set forth in paragraphs (b), (c), (d), or (e) of this section, the services are excepted.

(2) See also §31.3306(c)(8)–1 for provisions relating to the exception of services performed in the employ of religious, charitable, educational, or certain other organizations exempt from income tax; §31.3306(c)(10)–2 for provisions relating to the exception of services performed by certain students in the employ of a school, college, or university; and §31.3306(c)(10)–3 for provisions relating to the exception of services performed before 1962 in the employ of certain employees' beneficiary associations.

(b) *Remuneration less than $50 for calendar quarter.* Services performed by an employee in a calendar quarter in the employ of an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 are excepted from employment, if the remuneration for the service is less than $50. The test relating to remuneration of $50 is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. The exception applies separately with respect to each organization for which the employee renders services in a calendar quarter. The type of services performed by the employee and the place where the services are performed are immaterial; the statutory tests are the character of the organization in the employ of which the services are performed and the amount of the remuneration for services performed by the employee in the calendar quarter.

Example 1. X is a local lodge of a fraternal organization and is exempt from income tax under section 501(a) as an organization of the character described in section 501 (c)(8). X has a number of paid employees, among them being A who serves exclusively as recording secretary for the lodge, and B who performs services for the lodge as janitor of its clubhouse. For services performed during the first calendar quarter of 1955 (that is, January 1, 1955, through March 31, 1955, both dates inclusive) A earns a total of $30. For services performed during the same calendar quarter B earns $180. Since the remuneration for the services performed by A during such quarter is less than $50, all of such services are excepted. Thus, A is not counted as an employee in employment on any of the days during such quarter for purposes of determining whether the X organization is an employer (see §31.3306(a)–1). Even though it is subsequently determined that X is an employer, A's remuneration of $30 for services performed during the first calendar quarter of such year is not subject to tax. B's services, however, are not excepted during such quarter since the remuneration therefor is not less than $50. Thus, B is counted as an employee in employment during all of such quarter for purposes of determining whether the X organization is an employer. If it is determined that the X organization is an employer, B's remuneration of $180 for services performed during the first calendar quarter is included in computing the tax.

Example 2. The facts are the same as in example 1, above, except that on April 1, 1955, A's salary is increased and, for services performed during the calendar quarter beginning on that date (that is, April 1, 1955, through June 30, 1955, both dates inclusive), A earns $60. Although all of the services performed by A during the first quarter were excepted, none of A's services performed during the second quarter are excepted since the remuneration for such services is not less than $50. A, therefore, is counted as an employee in employment during all of the second quarter for the purpose of determining whether the X organization is an employer. If it is determined that the X organization is an employer, A's remuneration of $60 for services performed during the second calendar quarter is included in computing the tax.

Example 3. The facts are the same as in example 1, above, except that A earns $120 for services performed during the year 1955, and such amount is paid to him in a lump sum at the end of the year. The services performed by A in any calendar quarter during the year are excepted if the portion of the $120 attributable to services performed in that quarter is less than $50. In such case, A is not counted as an employee in employment on any of the days during such quarter for purposes of determining whether the X organization is an employer. If, however, the portion of the $120 attributable to services performed in any calendar quarter during the year is not less than $50, the services during that quarter are not excepted. In the latter case, A is counted as an employee in employment during all of such quarter and, if it is determined that the X organization is an employer, that portion of the $120 attributable to services performed in such quarter is included in computing the tax.

(c) *Collection of dues or premiums for fraternal beneficiary societies, and ritualistic services in connection with such societies, before 1962.* The following services performed by an employee in the employ of a fraternal beneficiary society, order, or association exempt from income tax under section 501(a) are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962:

(1) Services performed away from the home office of such a society, order, or association in connection with the collection of dues or premiums for such society, order, or association; and

(2) Ritualistic services (wherever performed) in connection with such a society, order, or association.

For purposes of the paragraph the amount of the remuneration for services performed by the employee in the calendar quarter is immaterial; the tests are the character of the organization in whose employ the services are performed, the type of services, and, in the case of collection of dues or premiums, the place where the services are performed.

(d) *Students employed before 1962.* (1) Services performed in the employ of an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 by a student who is enrolled and is regularly attending classes at a school, college, or university, are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962. For purposes of this paragraph, the amount of remuneration for services performed by the employee in the calendar quarter, the type of services, and the place where the services are performed are immaterial; the tests are the character of the organization in whose employ the services are performed and the status of the employee as a student enrolled and regularly attending classes at a school, college, or university.

(2) The term ''school, college, or university'' as used in this paragraph is to be taken in its commonly or generally accepted sense. For provisions relating to services performed before 1962 by a student enrolled and regularly attending classes at a school, college, or university not exempt from income tax in the employ of such school, college, or university, see paragraph (b) of § 31.3306(c)(10)–2. For provisions relating to services performed after 1961 by a student enrolled and regularly attending classes at a school, college, or university in the employ of such school, college, or university, see paragraph (a) or § 31.3306(c)(10)–2.

(e) *Services performed before 1962 in employ of agricultural or horticultural organization exempt from income tax.* (1) Services performed by an employee in the employ of an agricultural or horticultural organization which is described in section 501(c)(5) and the regulations thereunder and which is exempt from income tax under section 501(a) are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962.

(2) For purposes of this paragraph, the type of services performed by the employee, the amount of remuneration for the services, and the place where

the services are performed are immaterial; the test is the character of the organization in whose employ the services are performed.

[T.D. 6658, 28 FR 6639, June 27, 1963]

§ 31.3306(c)(10)–2 Services of student in employ of school, college, or university.

(a) *Services performed after 1961.* Services performed after 1961 in the employ of a school, college, or university, by a student who is enrolled and is regularly attending classes at the school, college, or university, are excepted from employment (whether or not the school, college, or university is exempt from income tax), if remuneration for the services is paid after 1961.

(b) *Services performed before 1962.* Services performed in the employ of a school, college, or university not exempt from income tax under section 501(a), by a student who is enrolled and is regularly attending classes at the school, college, or university, are excepted from employment if the services are performed before 1962 or if remuneration for the services is paid before 1962.

(c) *Application of section.* (1) For purposes of this section, the type of services performed by the employee, the place where the services are performed, and the amount of remuneration for services performed by the employee are immaterial; the tests are the character of the organization in the employ of which the services are performed and the status of the employee as a student enrolled and regularly attending classes at the school, college, or university, in the employ of which he performs the services.

(2) The status of the employee as a student performing the services shall be determined on the basis of the relationship of such employee with the organization for which the services are performed. An employee who performs services in the employ of a school, college, or university as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services.

(3) The term ‘‘school, college, or university’’ as used in this section is to be taken in its commonly or generally accepted sense.

(4) For provisions relating to services performed before 1962 by a student in the employ of an organization exempt from income tax, see paragraph (d) of § 31.3306(c)(10)–1.

[T.D. 6658, 28 FR 6640, June 27, 1963]

§ 31.3306(c)(10)–3 Services before 1962 in employ of certain employees' beneficiary associations.

(a) *Voluntary employees' beneficiary associations.* Services performed by an employee in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents are excepted from employment if—

(1) No part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual,

(2) 85 percent or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses, and

(3) The services are performed before 1962, or remuneration for the services is paid before 1962.

(b) *Federal employees' beneficiary associations.* Services performed by an employee in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries are excepted from employment if—

(1) Admission to membership in the association is limited to individuals who are officers or employees of the United States Government,

(2) No part of the net earnings of the association inures (other than through such payments) to the benefit of any private shareholder or individual, and

(3) The services are performed before 1962, or remuneration for the services is paid before 1962.

(c) *Application of tests.* For purposes of this section, the type of services performed by the employee, the amount of remuneration for the services, and the place where the services are performed are immaterial; the test is the character of the organization in whose employ the services are performed.

[T.D. 6658, 28 FR 6640, June 27, 1963]

§ 31.3306(c)(11)–1 Services in employ of foreign government.

(a) Services performed by an employee in the employ of a foreign government are excepted from employment. The exception includes not only services performed by ambassadors, ministers, and other diplomatic officers and employees but also services performed as a consular or other officer or employee of a foreign government, or as a nondiplomatic representative thereof.

(b) For purposes of this exception, the citizenship or residence of the employee is immaterial. It is also immaterial whether the foreign government grants an equivalent exemption with respect to similar services performed in the foreign country by citizens of the United States.

§ 31.3306(c)(12)–1 Services in employ of wholly owned instrumentality of foreign government.

(a) Services performed by an employee in the employ of certain instrumentalities of a foreign government are excepted from employment. The exception includes all services performed in the employ of an instrumentality of the government of a foreign country, if—

(1) The instrumentality is wholly owned by the foreign government;

(2) The services are of a character similar to those performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(3) The Secretary of State certifies to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to services performed in the foreign country by employees of the United States Government and of instrumentalities thereof.

(b) For purposes of this exception, the citizenship or residence of the employee is immaterial.

§ 31.3306(c)(13)–1 Services of student nurse or hospital intern.

(a) Services performed as a student nurse in the employ of a hospital or a nurses' training school are excepted from employment, if the student nurse is enrolled and regularly attending classes in a nurses' training school and such nurses' training school is chartered or approved pursuant to State law.

(b) Services performed as an intern (as distinguished from a resident doctor) in the employ of a hospital are excepted from employment, if the intern has completed a 4 years' course in a medical school chartered or approved pursuant to State law.

§ 31.3306(c)(14)–1 Services of insurance agent or solicitor.

(a) Services performed for a person by an employee as an insurance agent or insurance solicitor are excepted from employment, if all such services performed for such person by such individual are performed for remuneration solely by way of commission.

(b) If all or any part of the remuneration of an employee for services performed as an insurance agent or insurance solicitor for a person is a salary, none of his services performed as an insurance agent or insurance solicitor for such person are excepted from employment, and his total remuneration (for example, salary, or salary and commissions) for such services is included for purposes of computing the tax.

§ 31.3306(c)(15)–1 Services in delivery or distribution of newspapers, shopping news, or magazines.

(a) *Services of individuals under age 18.* Services performed by an employee under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution (as, for example, by a regional distributor) to any point for subsequent delivery or distribution, are excepted from employment. Thus, the services performed by an employee under the age of 18 in making house-to-house delivery or sale of newspapers or shopping news, including handbills and other similar types of advertising material, are excepted. The services are excepted irrespective of the form or method of compensation. Incidental services by the employee who makes the house-to-house delivery, such as services in assembling newspapers, are considered to be within the exception. The exception continues only during the time that the employee is under the age of 18.

(b) *Services of individuals of any age.* Services performed by an employee in, and at the time of, the sale of newspapers or magazines to ultimate consumers under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, are excepted from employment. The services are excepted whether or not the employee is guaranteed a minimum amount of compensation for such services, or is entitled to be credited with the unsold newspapers or magazines turned back. Moreover, the services are excepted without regard to the age of the employee. Services performed other than at the time of sale to the ultimate consumer are not within the exception. Thus, the services of a regional distributor which are antecedent to but not immediately part of the sale to the ultimate consumer are not within the exception. However, incidental services by the employee who makes the sale to the ultimate consumer, such as services in assembling newspapers or in taking newspapers or magazines to the place of sale, are considered to be within the exception.

§ 31.3306(c)(16)–1 Services in employ of international organization.

(a) Subject to the provisions of section 1 of the International Organizations Immunities Act (22 U.S.C. 228), services performed in the employ of an international organization as defined in section 7701(a)(18) are excepted from employment.

(b) (1) Section 701(a)(18) provides as follows:

SEC. 7701. *Definitions.* (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(18) *International organization.* The term ''international organization'' means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f).

(2) Section 1 of the International Organizations Immunities Act provides as follows:

SEC. 1. *[International Organizations Immunities Act.]* For the purposes of this title [International Organizations Immunities Act], the term ''international organization'' means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this title.

§ 31.3306(c)(17)–1 Fishing services.

(a) *In general.* Subject to the limitations prescribed in paragraphs (b) and (c) of this section, services described in this paragraph are excepted from employment. Services performed by an individual in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shell-fish (for example, oysters, clams, and mussels), crustacea (for example, lobsters, crabs, and shrimps), sponges, seaweeds, or other aquatic forms of animal and vegetable life are excepted. The exception extends to services performed as an officer or member of the crew of a vessel while the vessel is engaged in any such activity whether or not the officer or member of the crew is himself so engaged. In the case of an individual who is engaged in any such activity in the employ of any person, the services performed, by such individual in the employ of such person, as an ordinary incident to any such activity are also excepted. Similarly, for example, the shore services of an officer or member of the crew of a vessel engaged in any such activity are excepted if such services are an ordinary incident to any such activity. Services performed as an ordinary incident to any such activity may include, for example, services performed in such cleaning, icing, and packing of fish as are necessary for the immediate preservation of the catch.

(b) *Salmon and halibut fishing.* Services performed in connection with the catching or taking of salmon or halibut, for commercial purposes, are not within the exception. Thus, neither the services of an officer or member of the crew of a vessel (irrespective of its tonnage) which is engaged in the catching or taking of salmon or halibut, for commercial purposes, nor the services of any other individual in connection with such activity, are within the exception.

(c) *Vessels of more than 10 net tons.* Services described in paragraph (a) of this section performed on or in connection with a vessel of more than 10 net tons are not within the exception. For purposes of the exception, the tonnage of the vessel shall be determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States.

§ 31.3306(c)(18)–1 Services of certain nonresident aliens.

(a) (1) Services performed after 1961 by a nonresident alien individual who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, are excepted from employment if the services are performed to carry out a purpose for which the individual was admitted. For purposes of this section an alien individual who is temporarily present in the United States as a nonimmigrant under such subparagraph (F) or (J) is deemed to be a nonresident alien individual. The preceding sentence does not apply to the extent it is inconsistent with section 7701(b) and the regulations under that section. A nonresident alien individual who is temporarily present in the United States as a nonimmigrant under such subparagraph (J) includes an alien individual admitted to the United States as an ‘‘exchange visitor’’ under section 201 of the United States Information and Educational Exchange Act of 1948 (22 U.S.C. 1446).

(2) If services are performed by a nonresident alien individual’s alien spouse or minor child, who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act, as amended, the services are not deemed for purposes of this section to be performed to carry out a purpose for which such individual was admitted. The services of such spouse or child are excepted from employment under this section only if the spouse or child was admitted for a purpose specified in such subparagraph (F) or (J) and if the services are performed to carry out such purpose.

(b) Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, provides, in part, as follows:

SEC. 101. *Definitions.* [Immigration and Nationality Act (66 Stat. 166)]

(a) As used in this chapter—* * *

(15) The term *immigrant* means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

(F) (i) An alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

* * * * *

(J) An alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

* * * * *

[Sec. 101, Immigration and Nationality Act, as amended by sec. 101, Act of June 27, 1952, 66 Stat. 166; sec. 109, Act of Sept. 21, 1961, 75 Stat. 534]

[T.D. 6658, 28 FR 6640, June 27, 1963, as amended by T.D. 8411, 57 FR 15241, Apr. 27, 1992]

§ 31.3306(d)–1 Included and excluded service.

(a) If a portion of the services performed by an employee for the person employing him during a pay period constitutes employment, and the remainder does not constitute employment, all the services of the employee during the period shall for purposes of the tax be treated alike, that is, either all as included or all as excluded. The time during which the employee performs services which under section 3306(c) constitute employment, and the time during which he performs services which under such section do not constitute employment, within the pay period, determine whether all the services during the pay period shall be deemed to be included or excluded.

(b) If one-half or more of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then all the services of that employee for that person in that pay period shall be deemed to be employment.

(c) If less than one-half of the employee's time in the employ of a particular person in a pay period is spent in performing services which constitute employment, then none of the services of that employee for that person in that pay period shall be deemed to be employment.

(d) The application of the provisions of paragraphs (a), (b), and (c) of this section may be illustrated by the following examples:

Example 1. Employer B, who operates a farm and a store, employs A to perform services in connection with both operations. A's services on the farm are such that they are excepted as agricultural labor and do not constitute employment, and his services in the store constitute employment. He is paid at the end of each month. During a particular month A works 120 hours on the farm and 80 hours in the store. None of A's services during the month are deemed to be employment, since less than one-half of his services during the month constitutes employment. During another month A works 75 hours on the farm and 120 hours in the store. All of A's services during the month are deemed to be employment, since one-half or more of his services during the month constitutes employment.

Example 2. Employee C is employed as a maid by D, a medical doctor, whose home and office are located in the same building. C's services in the home are excepted as domestic service and do not constitute employment, and her services in the office constitute employment. She is paid each week. During a particular week C works 20 hours in the home and 20 hours in the office. All of C's services during that week are deemed to be employment, since one-half or more of her services during the week constitutes employment. During another week C works 22 hours in the home and 15 hours in the office. None of C's services during that week are deemed to be employment, since less than one-half of her services during the week constitutes employment.

(e) For purposes of this section, a ''pay period'' is the period (of not more than 31 consecutive calendar days) for which a payment of remuneration is ordinarily made to the employee by the person employing him. Thus, if the periods for which payments of remuneration are made to the employee by such person are of uniform duration, each such period constitutes a ''pay period''. If, however, the periods occasionally vary in duration, the ''pay period'' is the period for which a payment of remuneration is ordinarily made to the employee by such person, even though that period does not coincide with the actual period for which a particular payment of remuneration is made. For example, if a person ordinarily pays a particular employee for each calendar week at the end of the week, but the employee receives a payment in the middle of the week for the portion of the week already elapsed and receives the remainder at the end of the week, the ''pay period'' is still the calendar week; or if, instead, that employee is sent on a trip by such person and receives at the end of the third week a single remuneration payment for 3 weeks' services, the ''pay period'' is still the calendar week.

(f) If there is only one period (and such period does not exceed 31 consecutive calendar days) for which a payment of remuneration is made to the employee by the person employing him, such period is deemed to be a ''pay period'' for purposes of this section.

(g) The rules set forth in this section do not apply (1) with respect to any services performed by the employee for the person employing him if the periods for which such person makes payments of remuneration to the employee vary to the extent that there is no period ''for which a payment of remuneration is ordinarily made to the employee,'' or (2) with respect to any services performed by the employee for the person employing him if the period for which a payment of remuneration is ordinarily made to the employee by such person exceeds 31 consecutive calendar days, or (3) with respect to any service performed by the employee for the person employing him during a pay period if any of such service is excepted by section 3306(c) (9) (see § 31.3306(c) (9)–1).

(h) If during any period for which a person makes a payment of remuneration to an employee only a portion of the employee's services constitutes employment, but the rules prescribed in this section are not applicable, the tax attaches with respect to such services as constitute employment as defined in section 3306(c) (provided such person is an employer as defined in section 3306(a) and § 31.3306(a)–1).

§ 31.3306(i)–1 Who are employees.

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word ''employer'' as used in this section only, notwithstanding the provisions of § 31.3306(a)–1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(f) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment (see § 31.3306(c)–2).

§ 31.3306(j)–1 State, United States, and citizen.

(a) When used in the regulations in this subpart, the term ''State'' includes the District of Columbia, the Territories of Alaska and Hawaii before their admission as States, and (when used with respect to remuneration paid after 1960 for services performed after 1960) the Commonwealth of Puerto Rico.

(b) When used in the regulations in this subpart, the term ''United States'', when used in a geographical sense, means the several States (including the Territories of Alaska and Hawaii before their admission as States), and the District of Columbia. When used in the regulations in this subpart with respect to remuneration paid after 1960 for services performed after 1960, the term ''United States'' also includes the Commonwealth of Puerto Rico when the term is used in a geographical sense, and the term ''citizen of the United States'' includes a citizen of the Commonwealth of Puerto Rico.

[T.D. 6658, 28 FR 6641, June 27, 1963]

§ 31.3306(k)–1 Agricultural labor.

(a) *In general.* (1) Services performed by an employee for the person employing him which constitute ''agricultural labor'' as defined in section 3306(k) are excepted from employment by reason of section 3306(c)(1). See § 31.3306(c)(1)–1. The term ''agricultural labor'' as defined in section 3306(k) includes services of the character described in paragraphs (b), (c), (d), and (e) of this section. In general, however, the term does not include services performed in connection with forestry, lumbering, or landscaping.

(2) The term ''farm'' as used in this subpart includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, orchards, and such greenhouses and other similar structures as are used primarily for the raising of agricultural or horticultural commodities. Greenhouses and other similar structures used primarily for other purposes (for example, display, storage, and fabrication of wreaths, corsages, and bouquets) do not constitute ''farms''.

(b) *Services described in section 3306(k)(1).* Services performed on a farm by an employee of any person in connection with any of the following activities constitute agricultural labor:

(1) The cultivation of the soil;

(2) The raising, shearing, feeding, caring for, training, or management of livestock, bees, poultry, fur-bearing animals, or wildlife; or

(3) The raising or harvesting of any other agricultural or horticultural commodity.

(c) *Services described in section 3306(k)(2).* (1) The following services performed by an employee in the employ of the owner or tenant or other operator of one or more farms constitute agricultural labor, if the major part of such services is performed on a farm:

(i) Services performed in connection with the operation, management, conservation, improvement, or maintenance of any such farms or its tools or equipment; or

(ii) Services performed in salvaging timber, or clearing land of brush and other debris, left by a hurricane.

(2) The services described in paragraph (c)(1)(i) of this section may include, for example, services performed by carpenters, painters, mechanics, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semiskilled workers, which contribute in any way to the conduct of the farm or farms, as such, operated by the person employing them, as distinguished from any other enterprise in which such person may be engaged.

(3) Since the services described in this paragraph must be performed in the employ of the owner or tenant or other operator of the farm, services performed by employees of a commercial painting concern, for example, which contracts with a farmer to renovate his farm properties, do not constitute agricultural labor.

(d) *Services described in section 3306(k)(3).* Services performed by an employee in the employ of any person in connection with any of the following operations constitute agricultural labor without regard to the place where such services are performed:

(1) The ginning of cotton;

(2) The hatching of poultry;

(3) The raising or harvesting of mushrooms;

(4) The operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying or storing water for farming purposes;

(5) The production or harvesting of maple sap or the processing of maple sap into maple sirup or maple sugar (but not the subsequent blending or other processing of such sirup or sugar with other products); or

(6) The production or harvesting of crude gum (oleoresin) from a living tree or the processing of such crude gum into gum spirits of turpentine and gum rosin provided such processing is carried on by the original producer of such crude gum.

(e) *Services described in section 3306(k)(4).* (1)(i) Services performed by an employee in the employ of a farmer or a farmers' cooperative organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of any agricultural or horticultural commodity, other than fruits and vegetables (see paragraph (e)(2) of this section), produced by such farmer or farmer-members of such organization or group of farmers constitute agricultural labor, if such services are performed as an incident to ordinary farming operations.

(ii) Generally services are performed ''as an incident to ordinary farming operations'' within the meaning of this paragraph if they are services of the character ordinarily performed by the employees of a farmer or of a farmers' cooperative organization or group as a prerequisite to the marketing, in its unmanufactured state, of any agricultural or horticultural commodity produced by such farmer or by the members of such farmers' organization or group. Services performed by employees of such farmer or farmers' organization or group in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of commodities produced by persons other than such farmer or members of such farmers' organization or group are not performed ''as an incident to ordinary farming operations''.

(2) Services performed by an employee in the employ of any person in the handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of fruits and vegetables, whether or not of a perishable nature, constitute agricultural labor, if such services are performed as an incident to the preparation of such fruits and vegetables for market. For example, if services in the sorting, grading, or storing of fruits, or in the cleaning of beans, are performed as an incident to their preparation for market, such services may constitute agricultural labor, whether performed in

the employ of a farmer, a farmers' cooperative, or a commercial handler of such commodities.

(3) The services described in paragraphs (e)(1) and (2) of this section do not include services performed in connection with commercial canning or commercial freezing or in connection with any commodity after its delivery to a terminal market for distribution for consumption. Moreover, since the services described in such subparagraphs must be rendered in the actual handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, of the commodity, such services do not, for example, include services performed as stenographers, bookkeepers, clerks, and other office employees, even though such services may be in connection with such activities. However, to the extent that the services of such individuals are performed in the employ of the owner or tenant or other operator of a farm and are rendered in major part on a farm, they may be within the provisions of paragraph (c) of this section.

§31.3306(m)–1 American vessel and aircraft.

(a) The term ''American vessel'' means any vessel which is documented (that is, registered, enrolled, or licensed) or numbered in conformity with the laws of the United States. It also includes any vessel which is neither documented nor numbered under the laws of the United States, nor documented under the laws of any foreign country, if the crew of such vessel is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State. (For provisions relating to the terms ''State'' and ''citizen'', see §31.3306(j)–1.)

(b) The term ''American aircraft'' means any aircraft registered under the laws of the United States.

(c) For provisions relating to services performed outside the United States on or in connection with an American vessel or American aircraft, see paragraph (c) of §31.3306(c)–2.

[T.D. 6658, 28 FR 6641, June 27, 1963]

§31.3306(n)–1 Services on American vessel whose business is conducted by general agent of Secretary of Commerce.

(a) Section 3306(n) and this section of the regulations apply with respect only to services performed by an officer or member of the crew of an American vessel (1) which is owned by or bareboat chartered to the United States, and (2) whose business is conducted by a general agent of the Secretary of Commerce. Whether services performed by such an officer or member of a crew under the above conditions constitute employment is determined under section 3306(c) and (n), but without regard to section 3306(c)(6). See §31.3306(c)(6)–1, relating to services performed in the employ of the United States and instrumentalities thereof. If, without regard to section 3306(c)(6), such services constitute employment, they are not excepted from employment by reason of the fact that they are performed on or in connection with an American vessel which is owned by or bareboat chartered to the United States and whose business is conducted by a general agent of the Secretary of Commerce, that is, such services are not excepted from employment by section 3306(c)(6). For provisions relating to services performed within the United States and services performed outside the United States which constitute employment, see §31.3306(c)–2.

(b) The expression ''officer or member of the crew'' includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. Thus, the expression includes, for example, the master, mates, pilots, pursers, surgeons, stewards, engineers, firemen, cooks, clerks, carpenters, and deck hands.

(c) An employee of the United States who performs services as an officer or member of the crew of an American vessel which is owned by or bareboat chartered to the United States and whose business is conducted by a general agent of the Secretary of Commerce shall be deemed, under section 3306(n), to be performing services for such general agent rather than for the

United States. Any such general agent of the Secretary of Commerce is considered a legal entity in his capacity as such general agent, separate and distinct from his identity as a person employing individuals on his own account. Each such general agent who in his capacity as such qualifies as an employer under section 3306(a) is with respect to each calendar year for which he so qualifies subject to the tax imposed by section 3301, and to all the requirements imposed upon an employer as defined in section 3306(a) by the regulations in this part, with respect to services which constitute employment by reason of section 3306(n) and this section of the regulations.

§ 31.3306(p)–1 Employees of related corporations.

(a) *In general.* For purposes of sections 3301, 3302, and 3306(b)(1), when two or more related corporations concurrently employ the same individual and compensate that individual through a common paymaster which is one of the related corporations for which the individual performs services, each of the corporations is considered to have paid only the remuneration it actually disburses to that individual (unless the disbursing corporation fails to remit the taxes due). Paragraphs (b) and (c) of § 31.3121(s)–1 contain rules defining related corporations, common paymasters, and concurrent employment, and rules for determining the liability of the other related corporations for employment taxes if the common paymaster fails to remit the taxes pursuant to sections 3102 and 3111, and for allocating these taxes among the related corporations. Those rules also apply to the tax under section 3301. For purposes of applying those rules to this section, references in those rules to section 3111 are considered references to sections 3301 and 3302, and references to section 3121 are considered references to section 3306.

(b) *Allocation of credit for contributions to State unemployment funds.* A special rule for applying the rules of § 31.3121(s)–1 to this section applies if it is necessary to determine the ultimate liability of each related corporation for which services are performed in the event the common paymaster fails to remit the tax to the Internal Revenue Service. In determining the ultimate liability of a corporation, the credit for contributions to State unemployment funds that the corporation may claim under section 3302 is calculated as if each corporation were a separate employer.

(c) *Effective date.* This section is effective with respect to wages paid after December 31, 1978.

[T.D. 7660, 44 FR 75142, Dec. 19, 1979]

§ 31.3306(r)(2)–1 Treatment of amounts deferred under certain nonqualified deferred compensation plans.

(a) *In general.* Section 3306(r)(2) provides a special timing rule for the tax imposed by section 3301 with respect to any amount deferred under a nonqualified deferred compensation plan. Section 31.3121(v)(2)–1 contains rules relating to when amounts deferred under certain nonqualified deferred compensation plans are wages for purposes of sections 3121(v)(2), 3101, and 3111. The rules in § 31.3121(v)(2)–1 also apply to the special timing rule of section 3306(r)(2). For purposes of applying the rules in § 31.3121(v)(2)–1 to section 3306(r)(2) and this paragraph (a), references to the Federal Insurance Contributions Act are considered references to the Federal Unemployment Tax Act (26 U.S.C. 3301 et seq.), references to FICA are considered references to FUTA, references to section 3101 or 3111 are considered references to section 3301, references to section 3121(v)(2) are considered references to section 3306(r)(2), references to section 3121(a), (a)(5), and (a)(13) are considered references to section 3306(b), (b)(5), and (b)(10), respectively, and references to § 31.3121(a)–2(a) are considered references to § 31.3301–4.

(b) *Effective dates and transition rules.* Except as otherwise provided, section 3306(r)(2) applies to remuneration paid after December 31, 1984. Section 31.3121(v)(2)–2 contains effective date rules for certain remuneration paid after December 31, 1983, for purposes of section 3121(v)(2). The rules in § 31.3121(v)(2)–2 also apply to section 3306(r)(2). For purposes of applying the rules in § 31.3121(v)(2)–2 to section

3306(r)(2) and this paragraph (b), references to section 3121(v)(2) are considered references to section 3306(r)(2), and references to section 3121(a)(2), (a)(3), or (a)(13) are considered references to section 3306(b)(2), (b)(3), or (b)(10), respectively. In addition, references to § 31.3121(v)(2)–1 are considered references to paragraph (a) of this section. For purposes of applying the rules of § 31.3121(v)(2)–2 to this paragraph (b)—

(1) References to ''December 31, 1983'' are considered references to ''December 31, 1984'';

(2) References to ''before 1984'' are considered references to ''before 1985'';

(3) References to ''Federal Insurance Contributions Act'' are considered references to ''Federal Unemployment Tax Act''; and

(4) References to ''FICA'' are considered references to ''FUTA''.

[64 FR 4541, Jan. 29, 1999]

§ 31.3307–1 Deductions by an employer from remuneration of an employee.

Any amount deducted by an employer from the remuneration of an employee is considered to be a part of the employee's remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial that any act of Congress or the law of any State requires or permits such deductions and the payment of the amount thereof to the United States, a State, or any political subdivision thereof.

§ 31.3308–1 Instrumentalities of the United States specifically exempted from tax imposed by section 3301.

Section 3308 makes ineffectual as to the tax imposed by section 3301 (with respect to remuneration paid after 1961 for services performed after 1961) those provisions of law which grant to an instrumentality of the United States an exemption from taxation, unless such provisions grant a specific exemption from the tax imposed by section 3301 by an express reference to such section or the corresponding section of prior law. Thus, the general exceptions from Federal taxation granted by various statutes to certain instrumentalities of the United States without specific reference to the tax imposed by section 3301 or the corresponding section of prior law are rendered inoperative insofar as such exemptions relate to the tax imposed by section 3301. For provisions relating to the exception from employment of services performed in the employ of an instrumentality of the United States specifically exempted from the tax imposed by section 3301, see § 31.3306(c)(6)–1.

[T.D. 6658, 28 FR 6641, June 27, 1963]

Subpart E—Collection of Income Tax at Source

§ 31.3401(a)–1 Wages.

(a) *In general.* (1) The term ''wages'' means all remuneration for services performed by an employee for his employer unless specifically excepted under section 3401(a) or excepted under section 3402(e).

(2) The name by which the remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, pensions, and retired pay are wages within the meaning of the statute if paid as compensation for services performed by the employee for his employer.

(3) The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and may be paid hourly, daily, weekly, monthly, or annually.

(4) Generally the medium in which remuneration is paid is also immaterial. It may be paid in cash or in something other than cash, as for example, stocks, bonds, or other forms of property. (See, however, § 31.3401(a)(11)–1, relating to the exclusion from wages of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business, and § 31.3401(a)(16)–1, relating to the exclusion from wages of tips paid in any medium other than cash.) If services are paid for in a medium other than cash, the fair market value of the thing taken in payment is the amount to be included as wages. If the services were rendered at a stipulated price, in the absence of evidence to the contrary, such price will be presumed to be

the fair value of the remuneration received. If a corporation transfers to its employees its own stock as remuneration for services rendered by the employee, the amount of such remuneration is the fair market value of the stock at the time of the transfer.

(5) Remuneration for services, unless such remuneration is specifically excepted by the statute, constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.

Example. A is employed by R during the month of January 1955 and is entitled to receive remuneration of $100 for the services performed for R, the employer, during the month. A leaves the employ of R at the close of business on January 31, 1955. On February 15, 1955 (when A is no longer an employee of R), R pays A the remuneration of $100 which was earned for the services performed in January. The $100 is wages within the meaning of the statute.

(b) *Certain specific items*—(1) *Pensions and retirement pay.* (i) In general, pensions and retired pay are wages subject to withholding. However, no withholding is required with respect to amounts paid to an employee upon retirement which are taxable as annuities under the provisions of section 72 or 403. So-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and do not constitute wages. Those payments of pensions or other benefits by the Federal Government under Title 38 of the United States Code which are excluded from gross income are not wages subject to withholding.

(ii) Amounts received as retirement pay for service in the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service or as a disability annuity paid under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22) U.S.C. 1081; 60 Stat. 1021), are subject to withholding unless such pay or disability annuity is excluded from gross income under section 104(a)(4), or is taxable as an annuity under the provisions of section 72. Where such retirement pay or disability annuity (not excluded from gross income under section 104(a)(4) and not taxable as an annuity under the provisions of section 72) is paid to a nonresident alien individual, withholding is required only in the case of such amounts paid to a nonresident alien individual who is a resident of Puerto Rico.

(2) *Traveling and other expenses.* Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment. For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see § 31.3401 (a)–4.

(3) *Vacation allowances.* Amounts of so-called ''vacation allowances'' paid to an employee constitute wages. Thus, the salary of an employee on vacation, paid notwithstanding his absence from work, constitutes wages.

(4) *Dismissal payments.* Any payments made by an employer to an employee on account of dismissal, that is, involuntary separation from the service of the employer, constitute wages regardless of whether the employer is legally bound by contract, statute, or otherwise to make such payments.

(5) *Deductions by employer from remuneration of an employee.* Any amount deducted by an employer from the remuneration of an employee is considered to be a part of the employee's remuneration and is considered to be paid to the employee as remuneration at the time that the deduction is made. It is immaterial that any act of Congress, or the law of any State or of Puerto Rico, requires or permits such deductions and the payment of the amounts thereof to the United States, a State, a Territory, Puerto Rico, or the District of Columbia, or any political subdivision of any one or more of the foregoing.

(6) *Payment by an employer of employee's tax, or employee's contributions under a State law.* The term ''wages'' includes the amount paid by an employer on behalf of an employee (without deduction from the remuneration of, or other reimbursement from, the employee) on account of any payment required from an employee under a State unemployment compensation law, or on account of any tax imposed upon the employee by any taxing authority, including the taxes imposed by sections 3101 and 3201.

(7) *Remuneration for services as employee of nonresident alien individual or foreign entity.* The term ''wages'' includes remuneration for services performed by a citizen or resident (including, in regard to wages paid after February 28, 1979, an individual treated as a resident under section 6013 (g) or (h)) of the United States as an employee of a nonresident alien individual, foreign partnership, or foreign corporation whether or not such alien individual or foreign entity is engaged in trade or business within the United States. Any person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States (including Puerto Rico as if a part of the United States), is subject to all the provisions of law and regulations applicable with respect to an employer. See §31.3401(d)–1, relating to the term ''employer'', and §31.3401(a)(8)(C)–1, relating to remuneration paid for services performed by a citizen of the United States in Puerto Rico.

(8) *Amounts paid under accident or health plans*—(i) *Amounts paid in taxable years beginning on or after January 1, 1977—(a) In general.* Withholding is required on all payments of amounts includible in gross income under section 105(a) and §1.105–1 (relating to amounts attributable to employer contributions), made in taxable years beginning on or after January 1, 1977, to an employee under an accident or health plan for a period of absence from work on account of personal injuries or sickness. Payments on which withholding is required by this subdivision are wages as defined in section 3401(a), and the employer shall deduct and withhold in accordance with the requirements of chapter 24 of subtitle C of the Code. Third party payments of sick pay, as defined in section 3402(o) and the regulations thereunder, are not wages for purposes of this section.

(*b*) *Payments made by an agent of the employer. (1)* Payments are considered made by the employer if a third party makes the payments as an agent of the employer. The determining factor as to whether a third party is an agent of the employer is whether the third party bears any insurance risk. If the third party bears no insurance risk and is reimbursed on a cost plus fee basis, the third party is an agent of the employer even if the third party is responsible for making determinations of the eligibility of individual employees of the employer for sick pay payments. If the third party is paid an insurance premium and not reimbursed on a cost plus fee basis, the third party is not an agent of the employer, but the third party is a payor of third party sick pay for purposes of voluntary withholding from sick pay under sections 3402(o) and 6051(f) and the regulations thereunder. If a third party and an employer enter into an agency agreement as provided in paragraph (c) of §31.6051–3 (relating to statements required in case of sick pay paid by third parties), that agency agreement does not make the third party an agent of the employer for purposes of this paragraph.

(*2*) Payments made by agents subject to this paragraph are supplemental wages as defined in §31.3402(g)–1. Unless the agent is also an agent for purposes of withholding tax from the employee's regular wages, the agent may deem tax to have been withheld from the employee's regular wages. Consequently, the agent may determine the tax to be withheld from supplemental wages by using a flat percentage rate of 20 percent as provided in §31.3402 (g)–1.

(*3*) This paragraph is only applicable to amounts paid on or after May 25, 1983 unless the agent actually withheld taxes before that date.

(*c*) *Exceptions to withholding. (1)* Withholding is not required on payments that are specifically excepted under the numbered paragraphs of section 3401(a) (relating to the definition of wages), under section 3402(e) (relating to included and excluded wages), or under section 3402(n) (relating to employees incurring no income tax liability).

(*2*) Withholding is not required on disability payments to the extent that the payments are excludable from gross income under section 105(d). In determining the excludable portion of the disability payments, the employer may assume that payments that the employer makes to the employee are the employee's sole source of income. This exception applies only if the employee furnishes the employer with adequate verification of disability. A certificate from a qualified physician attesting that the employee is permanently and totally disabled (within the meaning of section 105(d)) shall be deemed to constitute adequate verification. This exception does not affect the requirement that a statement (which includes any amount paid under section 105(d)) be furnished under either section 6041 (relating to information at source) or section 6051 (relating to receipts for employees) and the regulations thereunder.

(ii) *Amounts paid after December 31, 1955 and before January 1, 1977—(a) In general.* The term ''wage continuation payment'', as used in this subdivision, means any payment to an employee which is made after December 31, 1955, and before January 1, 1977 under a wage continuation plan (as defined in paragraph (a)(2)(i) of § 1.105–4 and § 1.105–5 of Part 1 of this chapter (Income Tax Regulations)) for a period of absence from work on account of personal injuries or sickness, to the extent such payment is attributable to contributions made by the employer which were not includable in the employee's gross income or is paid by the employer. Any such payment, whether or not excluded from the gross income of the employee under section 105(d), constitutes ''wages'' (unless specifically excepted under any of the numbered paragraphs of section 3401(a) or under section 3402(e) and withholding thereon is required except as provided in paragraphs (b)(8)(ii) *(b), (c),* and *(d)* of this section.

(b) Amounts paid before January 1, 1977, by employer for whom services are performed for period of absence beginning after December 31, 1963. (*1*) Withholding is not required upon the amount of any wage continuation payment for a period of absence beginning after December 31, 1963, paid before January 1, 1977, to an employee directly by the employer for whom he performs services to the extent that such payment is excludable from the gross income of the employee under the provisions of section 105(d) in effect with respect to such payments, provided the records maintained by the employer—

(i) Separately show the amount of each such payment and the excludable portion thereof, and

(ii) Contain data substantiating the employee's entitlement to the exclusion provided in section 105(d) with respect to such amount, either by a written statement from the employee specifying whether his absence from work during the period for which the payment was made was due to a personal injury or to sickness and whether he was hospitalized for at least one day during this period; or by any other information which the employer reasonably believes establishes the employee's entitlement to the exclusion under section 105(d). Employers shall not be required to ascertain the accuracy of any written statement submitted by an employee in accordance with this subdivision *(b)(1)(ii).*

For purposes of this subdivision *(b)(1),* wage continuation payments reasonably expected by the employer to be made on behalf of the employer by another person shall be taken into account in determining whether the 75 percent test contained in section 105(d) is met and in computing the amount of any wage continuation payment made directly by the employer for whom services are performed by the employee which is within the $75 or $100 weekly rate of exclusion from the gross income of the employee provided in section 105(d). In making this latter computation, the amount excludable under section 105(d) shall be applied first against payments reasonably expected to be made on behalf of the employer by the other person and then, to the extent any part of the exclusion remains, against the payments made directly by the employer. In a case in which wage continuation payments are not paid at a constant rate for the first 30 calendar days of the period of absence, the determination of whether the 75 percent test contained in section 105(d) is met shall be based upon the length of the employee's absence as of the end of the period for which the payment by the employer is made, without regard to the effect which any further extension of such absence may have upon the excludability of the payment.

(2) The computation of the amount of any wage continuation payment with repect to which the employer may refrain from withholding may be illustrated by the following examples:

Example 1. A, an employee of B, normally works Monday through Friday and has a regular weekly rate of wages of $100. On Monday, November 5, 1974, A becomes ill, and as a result is absent from work for two weeks, returing to work on Monday, November 19, 1974. A is not hospitalized. Under B's noncontributory wage continuation plan, A receives no benefits for the first three working days of absence and is paid benefits directly by B at the rate of $85 a week thereafter ($34 for the last two days of the first week of absence and $85 for the second week of absence). No wage continuation payment is made by any other person. Since the benefits are entirely attributable to contributions to the plan by B, such benefits are wage continuation payments in their entirety. The wage continuation payments for the first seven calender days of absence are not excludable from A's gross income because A was not hospitalized for at least one day during his period of absence, and therefore B must withhold with respect to such payments. Under section 105(a), the wage continuation payments attributable to absence after the first seven calendar days of absence are excludable to the extent that they do not exceed a rate of $75 a week. Under the principles stated in paragraph (e)(6)(iv) of § 1.105–4 of this chapter (Income Tax Regulations), the wage continuation payments in this case are at a rate not in excess of 75 percent ($^{119}/_{200}$ or 59.5 percent) of A's regular weekly rate of wages. Accordingly, B may refrain from withholding with respect to $75 of the wage continuation payment attributable to the second week of absence.

Example 2. Assume the facts in example 1 except that A is unable to return to work until Monday, February 11, 1975, and that, of the $85 a week of wage continuation payments $35 is paid directly by B and $50 is reasonably expected by B to be paid by C, an insurance company, on behalf of B. In such a case, both the $50 and the $35 payments constitute wage continuation payments and the amount of such payments which is attributable to the first 30 calendar days of absence is at a rate not in excess of 75 percent ($^{323}/_{440}$ or 73.4 percent) of A's regular weekly rate of wages. Therefore, under section 105(d), the portion of such payments which is attributable to absence after the first seven calendar days of absence is excludable to the extent that it does not exceed a rate of $75 a week for the eighth through the thirtieth calendar day of absence and does not exceed a rate of $100 a week thereafter. B may refrain from withholding with repect to $25 a week (the amount by which the $75 maximum excludable amount exceeds the $50 reasonably expected by B to be paid by C) of his direct payments for the eighth through the thirtieth calendar day of absence. Thereafter, B may refrain from withholding with respect to the entire $35 paid directly by him since the maximum excludable amount ($100 a week) exceeds the total of payments made by B and payments which B reasonably expects will be made by C.

(c) Amounts paid by employer for whom services are performed for period of absence beginning before January 1, 1964. Withholding is not required upon the amount of any wage continuation payment for a period of absence beginning before January 1, 1964, made to an employee directly by the employer for whom he performs services to the extent that such payment is excludable from the gross income of the employee under the provisions of section 105(d) in effect with respect to such payments, provided the records maintained by the employer—

(1) Separately show the amount of each such payment and the excludable portion thereof, and

(2) Contain data substantiating the employee's entitlement to the exclusion provided in section 105(d) with respect to such amount, either by a written statement from the employee specifying whether his absence from work during the period for which the payment was made was due to a personal injury or whether such absence was due to sickness, and, if the latter, whether he was hospitalized for at least one day during this period; or by any other information which the employer reasonably believes establishes the employee's entitlement to the exclusion under section 105(d). Employers shall not be required to ascertain the accuracy of the information contained in any written statement submitted by an employee in accordance with this paragraph (b)(8)(ii) *(c)(2).* For purposes

of this paragraph (b)(8) (ii)(*c*), the computation of the amount excludable form the gross income of the employee under section 105(d) may be made either on the basis of the wage continuation payments which are made directly by the employer for whom the employee performs services, or on the basis of such payments in conjunction with any wage continuation payments made on behalf of the employer by a person who is regarded as an employer under section 3401(d)(1).

(d) Amounts paid before January 1, 1977 by person other than the employer for whom services are performed. No tax shall be withheld upon any wage continuation payment made to an employee by or on behalf of a person who is not the employer for whom the employee performs services but who is regarded as an employer under section 3401(d)(1). For example, no tax shall be withheld with respect to wage continuation payments made on behalf of an employer by an insurance company under an accident or health policy, by a separate trust under an accident or health plan, or by a State agency from a sickness and disability fund maintained under State law.

(e) Cross references. See sections 6001 and 6051 and the regulations thereunder for rules with respect to the records which must be maintained in connection with wage continuation payments and for rules with respect to the statements which must be furnished an employee in connection with wage continuation payments, respectively. See also section 105 and § 1.105–4 of this chapter (Income Tax Regulations).

(9) *Value of meals and lodging.* The value of any meals or lodging furnished to an employee by his employer is not subject to withholding if the value of the meals or lodging is excludable from the gross income of the employee. See § 1.119–1 of this chapter (Income Tax Regulations).

(10) *Facilities or privileges.* Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called ‘‘courtesy’’ discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as wages subject to withholding if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees.

(11) *Tips or gratuities.* Tips or gratuities paid, prior to January 1, 1966, directly to an employee by a customer of an employer, and not accounted for by the employee to the employer are not subject to withholding. For provisions relating to the treatment of tips received by an employee after December 31, 1965, as wages, see §§ 31.3401(f)–1 and 31.3402(k)–1.

(12) *Remuneration for services performed by permanent resident of Virgin Islands*—(i) *Exemption from withholding.* No tax shall be withheld for the United States under chapter 24 from a payment of wages by an employer, including the United States or any agency thereof, to an employee if at the time of payment it is reasonable to believe that the employee will be required to satisfy his income tax obligations with respect to such wages under section 28(a) of the Revised Organic Act of the Virgin Islands (68 Stat. 508). That section provides that all persons whose permanent residence is in the Virgin Islands ‘‘shall satisfy their income tax obligations under applicable taxing statutes of the United States by paying their tax on income derived from all sources both within and outside the Virgin Islands into the treasury of the Virgin Islands’’.

(ii) *Claiming exemption.* If the employee furnishes to the employer a statement in duplicate that he expects to satisfy his income tax obligations under section 28(a) of the Revised Organic Act of the Virgin Islands with respect to all wages subsequently to be paid to him by the employer during the taxable year to which the statement relates, the employer may, in the absence of information to the contrary, rely on such statement as establishing reasonable belief that the employee will so satisfy his income tax obligations. The employee’s statement shall identify the taxable year to which it relates, and both the original and the duplicate copy thereof shall be signed and dated by the employee.

(iii) *Disposition of statement.* The original of the statement shall be retained by the employer. The duplicate copy of the statement shall be sent by the employer to the Director of International Operations, Washington, D.C. 20225, on or before the last day of the calendar year in which the employer receives the statement from the employee.

(iv) *Applicability of subparagraph.* This subparagraph has no application with respect to any payment of remuneration which is not subject to withholding by reason of any other provision of the regulations in this subpart.

(13) *Federal employees resident in Puerto Rico.* Except as provided in paragraph (d) of § 31.3401(a)(6)–1, the term ''wages'' includes remuneration for services performed by a nonresident alien individual who is a resident of Puerto Rico if such services are performed as an employee of the United States or any agency thereof. The place where the services are performed is immaterial for purposes of this subparagraph.

(14) *Supplemental unemployment compensation benefits.* (i) Supplemental unemployment compensation benefits paid to an individual after December 31, 1970, shall be treated (for purposes of the provisions of Subparts E, F, and G of this part which relate to withholding of income tax) as if they were wages, to the extent such benefits are includible in the gross income of such individual.

(ii) For purposes of this subparagraph, the term ''supplemental unemployment compensation benefits'' means amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of the employee's involuntary separation from the employment of the employer, whether or not such separation is temporary, but only when such separation is one resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions.

(iii) For the meanings of the terms ''involuntary separation from the employment of the employer'' and ''other similar conditions'', see subparagraphs (3) and (4) of § 1.501(c)(17)–1(b) of this chapter (Income Tax Regulations).

(iv) As used in this subparagraph, the term ''employee'' means an employee within the meaning of paragraph (a) of § 31.3401(c)–1, the term ''employer'' means an employer within the meaning of paragraph (a) of § 31.3401(d)–1, and the term ''employment'' means employment as defined under the usual common law rules.

(v) References in this chapter to wages as defined in section 3401(a) shall be deemed to refer also to supplemental unemployment compensation benefits which are treated under this subparagraph as if they were wages.

(c) *Geographical definitions.* For definition of the term ''United States'' and for other geographical definitions relating to the Continental Shelf see section 638 and § 1.638–1 of this chapter.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5251, May 28, 1963; T.D. 6908, 31 FR 16775, Dec. 31, 1966; T.D. 7001, 34 FR 1000, Jan. 23, 1969; T.D. 7068, 35 FR 17328, Nov. 11, 1970; T.D. 7277, 38 FR 12742, May 15, 1973; T.D. 7493, 42 FR 33728, July 1, 1977; T.D. 7670, 45 FR 6932, Jan. 31, 1980; T.D. 7888, 48 FR 17587, Apr. 25, 1983; T.D. 8276, 54 FR 51028, Dec. 12, 1989; T.D. 8324, 55 FR 51697, Dec. 17, 1990]

§ 31.3401(a)–1T Question and answer relating to the definition of wages in section 3401(a) (Temporary).

The following question and answer relates to the definition of wages in section 3401(a) of the Internal Revenue Code of 1954, as amended by section 531(d)(4) of the Tax Reform Act of 1984 (98 Stat. 886):

Q–1: Are fringe benefits included in the definition of ''wages'' under section 3401(a)?

A–1: Yes, unless specifically excluded from the definition of ''wages'' pursuant to section 3401(a) (1) through (20). For example, a fringe benefit provided to or on behalf of an employee is excluded from the definition of ''wages'' if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 117 or 132.

[T.D. 8004, 50 FR 756, Jan. 7, 1985]

§ 31.3401(a)–2 Exclusions from wages.

(a) *In general.* (1) The term ''wages'' does not include any remuneration for services performed by an employee for his employer which is specifically excepted from wages under section 3401(a).

(2) The exception attaches to the remuneration for services performed by an employee and not to the employee as an individual; that is, the exception applies only to the remuneration in an excepted category.

Example. A is an individual who is employed part time by B to perform domestic service in his home (see § 31.3401(a)(3)–1). A is also employed by C part time to perform services as a clerk in a department store owned by him. While no withholding is required with respect to A's remuneration for services performed in the employ of B (the remuneration being excluded from wages), the exception does not embrace the remuneration for services performed by A in the employ of C and withholding is required with respect to the wages for such services.

(3) For provisions relating to the circumstances under which remuneration which is excepted is nevertheless deemed to be wages, and relating to the circumstances under which remuneration which is not excepted is nevertheless deemed not to be wages, see § 31.3402(e)–1.

(4) For provisions relating to payments with respect to which a voluntary withholding agreement is in effect, which are not defined as wages in section 3401(a) but which are nevertheless deemed to be wages, see §§ 31.3401(a)–3 and 31.3402(p)–1.

(b) *Fees paid a public official.* (1) Authorized fees paid to public officials such as notaries public, clerks of courts, sheriffs, etc., for services rendered in the performance of their official duties are excepted from wages and hence are not subject to withholding. However, salaries paid such officials by the Government, or by a Government agency or instrumentality, are subject to withholding.

(2) Amounts paid to precinct workers for services performed at election booths in State, county, and municipal elections and fees paid to jurors and witnesses are in the nature of fees paid to public officials and therefore are not subject to withholding.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5251, May 28, 1963; T.D. 7096, 36 FR 5216, Mar. 18, 1971]

§ 31.3401(a)–3 Amounts deemed wages under voluntary withholding agreements.

(a) *In general.* Notwithstanding the exceptions to the definition of wages specified in section 3401(a) and the regulations thereunder, the term ''wages'' includes the amounts described in paragraph (b)(1) of this section with respect to which there is a voluntary withholding agreement in effect under section 3402(p). References in this chapter to the definition of wages contained in section 3401(a) shall be deemed to refer also to this section (§ 31.3401(a)–3).

(b) *Remuneration for services.* (1) Except as provided in subparagraph (2) of this paragraph, the amounts referred to in paragraph (a) of this section include any remuneration for services performed by an employee for an employer which, without regard to this section, does not constitute wages under section 3401(a). For example, remuneration for services performed by an agricultural worker or a domestic worker in a private home (amounts which are specifically excluded from the definition of wages by section 3401(a) (2) and (3), respectively) are amounts with respect to which a voluntary withholding agreement may be entered into under section 3402(p). See §§ 31.3401(c)–1 and 31.3401(d)–1 for the definitions of ''employee'' and ''employer''.

(2) For purposes of this paragraph, remuneration for services shall not include amounts not subject to withholding under § 31.3401(a)–1(b)(12) (relating to remuneration for services performed by a permanent resident of the Virgin Islands), § 31.3401(a)–2(b) (relating to fees paid to a public official), section 3401(a)(5) (relating to remuneration for services for foreign government or international organization), section 3401(a)(8)(B) (relating to remuneration for services performed in a possession of the United States (other than Puerto Rico) by citizens of the United States), section 3401(a)(8)(C) (relating to remuneration for services performed in Puerto Rico by citizens of the United States), section 3401(a)(11) (relating to remuneration other than in cash for service not in the course of employer's trade or business), section 3401(a)(12) (relating to payments from

or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans), section 3401(a)(14) (relating to group-term life insurance), section 3401(a)(15) (relating to moving expenses), or section 3401(a)(16)(A) (relating to tips paid in any medium other than cash).

[T.D. 7096, 36 FR 5216, Mar. 18, 1971]

§ 31.3401(a)–4 Reimbursements and other expense allowance amounts.

(a) *When excluded from wages.* If a reimbursement or other expense allowance arrangement meets the requirements of section 62(c) of the Code and § 1.62–2 and the expenses are substantiated within a reasonable period of time, payments made under the arrangement that do not exceed the substantiated expenses are treated as paid under an accountable plan and are not wages. In addition, if both wages and the reimbursement or other expense allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

(b) *When included in wages*—(1) *Accountable plans*—(i) *General rule.* Except as provided in paragraph (b)(1)(ii) of this section, if a reimbursement or other expense allowance arrangement satisfies the requirements of section 62(c) and § 1.62–2, but the expenses are not substantiated within a reasonable period of time or amounts in excess of the substantiated expenses are not returned within a reasonable period of time, the amount paid under the arrangement in excess of the substantiated expenses is treated as paid under a nonaccountable plan, is included in wages, and is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period.

(ii) *Per diem or mileage allowances.* If a reimbursement or other expense allowance arrangement providing a per diem or mileage allowance satisfies the requirements of section 62(c) and § 1.62–2, but the allowance is paid at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion is treated as paid under a nonaccountable plan and is included in wages. In the case of a per diem or mileage allowance paid as a reimbursement, the excess portion is subject to withholding and payment of employment taxes when paid. In the case of a per diem or mileage allowance paid as an advance, the excess portion is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (i.e., the days or miles of travel) are substantiated. The Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

(2) *Nonaccountable plans.* If a reimbursement or other expense allowance arrangement does not satisfy the requirements of section 62(c) and § 1.62–2 (e.g., the arrangement does not require expenses to be substantiated or require amounts in excess of the substantiated expenses to be returned), all amounts paid under the arrangement are treated as paid under a nonaccountable plan, are included in wages, and are subject to withholding and payment of employment taxes when paid.

(c) *Withholding rate.* Employers may add any payments made under reimbursement or other expense allowance arrangements that are subject to income tax withholding to the employee's regular wages for a payroll period and compute withholding taxes on the total. Alternatively, the employer may withhold income tax from the reimbursement or other expense allowance at the flat 20-percent rate applicable to supplemental wages, provided the employer withholds income tax from the employee's regular wages and provided the reimbursement or allowance is paid separately (or separately identified if wages and reimbursement amounts are combined in a single payment). See § 31.3401 (g)–1 regarding supplemental wage payments.

(d) *Effective dates.* This section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990. Paragraph (b)(1)(ii) of this section applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1991, with respect to expenses paid or incurred on or after January 1, 1991.

[T.D. 8324, 55 FR 51698, Dec. 17, 1990]

§ 31.3401(a)(1)–1 Remuneration of members of the Armed Forces of the United States for active service in combat zone or while hospitalized as a result of such service.

Remuneration paid for active service as a member of the Armed Forces of the United States performed in a month during any part of which such member served in a combat zone (as determined under section 112) or is hospitalized at any place as a result of wounds, disease, or injury incurred while serving in such a combat zone is excepted from wages and is, therefore, not subject to withholding. The exception with respect to hospitalization is applicable, however, only if during all of such month there are combatant activities in some combat zone (as determined under section 112). See § 1.112–1 of this chapter (Income Tax Regulations).

§ 31.3401(a)(2)–1 Agricultural labor.

The term ''wages'' does not include remuneration for services which constitute agricultural labor as defined in section 3121(g). For regulations relating to the definition of the term ''agricultural labor'', see § 31.3121(g)–1.

§ 31.3401(a)(3)–1 Remuneration for domestic service.

(a) *In a private home.* (1) Remuneration paid for services of a household nature performed by an employee in or about a private home of the person by whom he is employed is excepted from wages and hence is not subject to withholding. A private home is a fixed place of abode of an individual or family. A separate and distinct dwelling unit maintained by an individual in an apartment house, hotel, or other similar establishment may constitute a private home. If a dwelling house is used primarily as a boarding or lodging house for the purpose of supplying board or lodging to the public as a business enterprise, it is not a private home, and the remuneration paid for services performed therein is not within the exception.

(2) In general, services of a household nature in or about a private home include services performed by cooks, waiters, butlers, housekeepers, governesses, maids, valets, baby sitters, janitors, laundresses, furnacemen, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use.

(b) *In a local college club or local chapter of a college fraternity or sorority.* (1) Remuneration paid for services of a household nature performed by an employee in or about the club rooms or house of a local college club or of a local chapter of a college fraternity or sorority by which he is employed is excepted from wages and hence is not subject to withholding. A local college club or local chapter of a college fraternity or sorority does not include an alumni club or chapter. If the club rooms or house of a local college club or local chapter of a college fraternity or sorority is used primarily for the purpose of supplying board or lodging to students or the public as a business enterprise, the remuneration paid for services performed therein is not within the exception.

(2) In general, services of a household nature in or about the club rooms or house of a local college club or local chapter of a college fraternity or sorority include services rendered by cooks, waiters, butlers, maids, janitors, laundresses, furnacemen, handymen, gardeners, housekeepers, and housemothers.

(c) *Remuneration not excepted.* Remuneration paid for services not of a household nature, such as services performed as a private secretary, tutor, or librarian, even though performed in the employer's private home or in a local college club or local chapter of a college fraternity or sorority, is not within the exception. Remuneration paid for services of a household nature is not within the exception if performed in or about rooming, or lodging houses, boarding houses, clubs (except local college clubs), hotels, hospitals, eleemosynary institutions, or commercial offices or establishments.

§31.3401(a)(4)–1 Cash remuneration for service not in the course of employer's trade or business.

(a) Cash remuneration paid for services not in the course of the employer's trade or business performed by an employee for an employer in a calendar quarter is excepted from wages and hence is not subject to withholding unless—

(1) The cash remuneration paid for such services performed by the employee for the employer in the calendar quarter is $50 or more; and

(2) Such employee is regularly employed in the calendar quarter by such employer to perform such services.

Unless the tests set forth in both paragraphs (a)(1) and (2) of this section are met, cash remuneration for service not in the course of the employer's trade or business is excluded from wages. (For provisions relating to the exclusion from wages of remuneration paid in any medium other than cash for services not in the course of the employer's trade or business, see §31.3401(a)(11)–1.)

(b) The term ''services not in the course of the employer's trade or business'' includes services that do not promote or advance the trade or business of the employer. As used in this section, the term does not include service not in the course of the employer's trade or business performed on a farm operated for profit or domestic service in a private home, local college club, or local chapter of a college fraternity or sorority. Accordingly, this exception does not apply with respect to remuneration which is excepted from wages under section 3401(a)(2) or section 3401(a)(3) (see §§31.3401(a)(2)–1 and 31.3401(a)(3)–1, respectively). Remuneration paid for service performed for a corporation does not come within the exception.

(c) The test relating to cash remuneration of $50 or more is based on the remuneration earned during a calendar quarter rather than on the remuneration paid in a calendar quarter. However, for purposes of determining whether the test is met, it is also required that the remuneration be paid, although it is immaterial when the remuneration is paid. Furthemore, in determining whether $50 or more has been paid for service not in the course of the employer's trade or business, only cash remuneration for such service shall be taken into account. The term ''cash remuneration'' includes checks and other monetary media of exchange. Remuneration paid in any other medium, such as lodging, food, or other goods or commodities, is disregarded in determining whether the cash-remuneration test is met.

(d) For purposes of this exception, an individual is deemed to be regularly employed by an employer during a calendar quarter only if—

(1) Such individual performs service not in the course of the employer's trade or business for such employer for some portion of the day on at least 24 days (whether or not consecutive) during such calendar quarter; or

(2) Such individual was regularly employed (as determined under paragraph (d)(1) of this section) by such employer in the performance of service not in the course of the employer's trade or business during the preceding calendar quarter.

(e) In determining whether an employee has performed service not in the course of the employer's trade or business on at least 24 days during a calendar quarter, there shall be counted as one day—

(1) Any day or portion thereof on which the employee actually performs such service; and

(2) Any day or portion thereof on which the employee does not perform service of the prescribed character but with respect to which cash remuneration is paid or payable to the employee for such service, such as a day on which the employee is sick or on vacation.

An employee who on a particular day reports for work and, at the direction of his employer, holds himself in readiness to perform service not in the course of the employer's trade or business shall be considered to be engaged in the actual performance of such service on that day. For purposes of this exception, a day is a continuous period of 24 hours commencing at midnight and ending at midnight.

§ 31.3401(a)(5)–1 Remuneration for services for foreign government or international organization.

(a) *Services for foreign government.* (1) Remuneration paid for services performed as an employee of a foreign government is excepted from wages and hence is not subject to withholding. The exception includes not only remuneration paid for services performed by ambassadors, ministers, and other diplomatic officers and employees but also remuneration paid for services performed as a consular or other officer or employee of a foreign government or as a nondiplomatic representative of such a government. However, the exception does not include remuneration for services performed for a corporation created or organized in the United States or under the laws of the United States or any State (including the District of Columbia or the Territory of Alaska or Hawaii) or of Puerto Rico even though such corporation is wholly owned by such a government.

(2) The citizenship or residence of the employee and the place where the services are performed are immaterial for purposes of the exception.

(b) *Services for international organization.* (1) Subject to the provisions of section 1 of the International Organizations Immunities Act (22 U.S.C. 288), remuneration paid for services performed within or without the United States by an employee for an international organization as defined in section 7701(a)(18) is excepted from wages and hence is not subject to withholding. The term ''employee'' as used in the preceding sentence includes not only an employee who is a citizen or resident of the United States but also an employee who is a nonresident alien individual. The term ''employee'' also includes an officer. An organization designated by the President through appropriate Executive order as entitled to enjoy the privileges, exemptions, and immunities provided in the International Organizations Immunities Act may enjoy the benefits of the exclusion from wages with respect to remuneration paid for services performed for such organization prior to the date of the issuance of such Executive order, if (i) the Executive order does not provide otherwise and (ii) the organization is a public international organization in which the United States participates, pursuant to a treaty or under the authority of an act of Congress authorizing such participation or making an appropriation for such participation, at the time such services are performed.

(2) Section 7701(a)(18) provides as follows:

SEC. 7701. *Definitions.* (a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(18) *International organization.* The term ''international organization'' means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f).

(3) Section 1 of the International Organizations Immunities Act provides as follows:

SECTION 1. *[International Organizations Immunities Act.]* For the purposes of this title [International Organizations Immunities Act], the term ''international organization'' means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemption, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this title.

§ 31.3401(a)(6)–1 Remuneration for services of nonresident alien individuals.

(a) *In general.* All remuneration paid after December 31, 1966, for services performed by a nonresident alien individual, if such remuneration otherwise constitutes wages within the meaning of § 31.3401(a)–1 and if such remuneration is effectively connected with the conduct of a trade or business within the United States, is subject to withholding under section 3402 unless excepted from wages under this section. In regard to wages paid under this section after February 28, 1979, the term ''nonresident alien individual'' does not include a nonresident alien individual treated as a resident under section 6013 (g) or (h).

(b) *Remuneration for services performed outside the United States.* Remuneration paid to a nonresident alien individual (other than a resident of Puerto Rico) for services performed outside the United States is excepted from wages and hence is not subject to withholding.

(c) *Remuneration for services of residents of Canada or Mexico who enter and leave the United States at frequent intervals*—(1) *Transportation service.* Remuneration paid to a nonresident alien individual who is a resident of Canada or Mexico and who, in the performance of his duties in transportation service between points in the United States and points in such foreign country, enters and leaves the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. This exception applies to personnel engaged in railroad, bus, truck, ferry, steamboat, aircraft, or other transportation services and applies whether the employer is a domestic or foreign entity. Thus, the remuneration of a nonresident alien individual who is a resident of Canada and an employee of a domestic railroad, for services as a member of the crew of a train operating between points in Canada and points in the United States, is not subject to withholding under section 3402.

(2) *Service on international projects.* Remuneration paid to a nonresident alien individual who is a resident of Canada or Mexico and who, in the performance of his duties in connection with the construction, maintenance, or operation of a waterway, viaduct, dam, or bridge traversed by, or traversing, the boundary between the United States and Canada or the boundary between the United States and Mexico, as the case may be, enters and leaves the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. Thus, the remuneration of a nonresident alien individual who is a resident of Canada, for services as an employee in connection with the construction, maintenance, or operation of the Saint Lawrence Seaway and who, in the performance of such services, enters and leaves the United States at frequent intervals, is not subject to withholding under section 3402.

(3) *Limitation.* The exceptions provided by this paragraph do not apply to the remuneration of a resident of Canada or of Mexico who is employed wholly within the United States as, for example, where such a resident is employed to perform service at a fixed point or points in the United States, such as a factory, store, office, or designated area or areas within the United States, and who commutes from his home in Canada or Mexico, in the pursuit of his employment within the United States.

(4) *Certificate required.* In order for an exception provided by this paragraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement in duplicate for the taxable year setting forth the employee's name, address, and taxpayer identifying number, and certifying (i) that he is not a citizen or resident of the United States, (ii) that he is a resident of Canada or Mexico, as the case may be, and (iii) that he expects to meet the requirements of paragraph (c)(1) or (2) of this section with respect to remuneration to be paid during the taxable year in respect of which the statement is filed. The statement shall be dated, shall identify the taxable year to which it relates, shall be

signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement. The duplicate copy of each statement filed during any calendar year pursuant to this paragraph shall be forwarded by the employer with, and attached to, the Form 1042S required by paragraph (c) of § 1.1461–2 with respect to such remuneration for such calendar year.

(d) *Remuneration for services performed by residents of Puerto Rico.* (1) Remuneration paid for services performed in Puerto Rico by a nonresident alien individual who is a resident of Puerto Rico for an employer (other than the United States or any agency thereof) is excepted from wages and hence is not subject to withholding.

(2) Remuneration paid for services performed outside the United States but not in Puerto Rico by a nonresident alien individual who is a resident of Puerto Rico for an employer (other than the United States or any agency thereof) is excepted from wages and hence is not subject to withholding if such individual does not expect to be a resident of Puerto Rico during the entire taxable year. In order for the exception provided by this subparagraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement for the taxable year setting forth the employee's name and address and certifying (i) that he is not a citizen or resident of the United States and (ii) that he is a resident of Puerto Rico but does not expect to be a resident of Puerto Rico during the entire taxable year. The statement shall be dated, shall identify the taxable year to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement.

(3) Remuneration paid for services performed outside the United States by a nonresident alien individual who is a resident of Puerto Rico as an employee of the United States or any agency thereof is excepted from wages and hence is not subject to withholding if such individual does not expect to be a resident of Puerto Rico during the entire taxable year. In order for the exception provided by this subparagraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement for the taxable year setting forth the employee's name and address and certifying (i) that he is not a citizen or resident of the United States and (ii) that he is a resident of Puerto Rico but does not expect to be a resident of Puerto Rico during the entire taxable year. This statement shall be dated, shall identify the taxable year to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement.

(e) *Exemption from income tax for remuneration paid for services performed before January 1, 2000.* Remuneration paid for services performed within the United States by a nonresident alien individual before January 1, 2000, is excepted from wages and hence is not subject to withholding if such remuneration is, or will be, exempt from income tax imposed by chapter 1 of the Internal Revenue Code by reason of a provision of the Internal Revenue Code or an income tax convention to which the United States is a party. In order for the exception provided by this paragraph to apply for any taxable year, the nonresident alien employee must furnish his employer a statement in duplicate for the taxable year setting forth the employee's name, address, and taxpayer identifying number, and certifying (1) that he is not a citizen or resident of the United States, (2) that the remuneration to be paid to him during the taxable year is, or will be, exempt from the tax imposed by chapter 1 of the Code, and (3) the reason why such remuneration is so exempt from tax. If the remuneration is claimed to be exempt from tax by reason of a provision of an income tax convention to which the United States is a party, the statement shall also indicate the provision and tax convention under which the exemption is claimed, the country of which the employee is a resident, and sufficient facts to justify the claim to exemption. The statement shall be dated, shall identify the taxable year for which it is to apply and the remuneration to which it relates, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement. The duplicate copy of each statement filed during any calendar year pursuant to this paragraph shall be forwarded by the employer with, and attached to, the Form 1042S required by paragraph (c) of §1.1461–2 with respect to such remuneration for such calendar year.

(f) *Exemption from income tax for remuneration paid for services performed after December 31, 1999.* Remuneration paid for services performed within the United States by a nonresident alien individual after December 31, 1999, is excepted from wages and hence is not subject to withholding if such remuneration is, or will be, exempt from the income tax imposed by chapter 1 of the Internal Revenue Code by reason of a provision of the Internal Revenue Code or an income tax convention to which the United States is a party. An employer may rely on a claim that the employee is entitled to an exemption from tax if it complies with the requirements of §1.1441–1(e)(1)(ii) of this chapter (for a claim based on a provision of the Internal Revenue Code) or §1.1441–4(b)(2) of this chapter (for a claim based on an income tax convention).

[T.D. 6908, 31 FR 16775, Dec. 31, 1966, as amended by T.D. 7670, 45 FR 6932, Jan. 31, 1980; T.D. 7977, 49 FR 36836, Sept. 20, 1984; T.D. 8734, 62 FR 53493, Oct. 14, 1997; T.D. 8804, 63 FR 72189, Dec. 31, 1998]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53493, Oct. 14, 1997, §31.3401(a)(6)–1 was amended by revising the section heading; revising the paragraph heading and first sentence of paragraph (e); adding paragraph (f); and removing the authority citation at the end of the section, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000, and paragraph (e) heading and first sentence were amended by removing ''January 1, 1999'' and adding ''January 1, 2000'', and in paragraph (f) heading and first sentence, by removing ''December 31, 1998'' and adding ''December 31, 1999'', effective Jan. 1, 2000. For the convenience of the user, the superseded text is set forth as follows:

§31.3401(a)(6)–1 Remuneration for services of nonresident alien individuals paid after December 31, 1966.

* * * * *

(e) *Income exempt from income tax.* Remuneration paid for services performed within the United States by a nonresident alien individual is excepted from wages and hence is not subject to withholding if such remuneration is, or will be, exempt from the income tax imposed by chapter 1 of the Code by reason of a provision of the Internal Revenue Code or an income tax convention to which the United States is a party. * * *

* * * * *

(Secs. 1441(c)(4) (80 Stat. 1553; 26 U.S.C. 1441(c)(4)), 3401(a)(6) (80 Stat. 1554; 26 U.S.C. 3401(a)(6)), and 7805 (68A Stat. 917; 26 U.S.C. 7805) of the Internal Revenue Code of 1954)

§31.3401(a)(6)–1A Remuneration for services of certain nonresident alien individuals paid before January 1, 1967.

(a) Except in the case of certain nonresident alien individuals who are residents of Canada, Mexico, or Puerto Rico or individuals who are temporarily present in the United States as nonimmigrants under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, remuneration for services performed by nonresident alien individuals does not constitute wages subject to withholding under section 3402. For withholding of income tax on remuneration paid for services performed within the United States in the case of nonresident alien individuals generally, see §1.1441–1 and following of this chapter (Income Tax Regulations).

(b) Remuneration paid to nonresident aliens who are residents of a contiguous country (Canada or Mexico) and who enter and leave the United States at frequent intervals is not excepted from wages under section 3401(a)(6). See, however, §31.3401(a)(7)–1, relating to remuneration paid to such nonresident alien individuals when engaged in transportation service.

(c) Remuneration paid to a nonresident alien individual for services performed in Puerto Rico for an employer (other than the United States or any agency thereof) is excepted from wages and hence is not subject to withholding, even though such alien individual is a resident of Puerto Rico at the time when such services are performed. Wages paid for services performed by a nonresident alien individual who is a resident of Puerto Rico are subject to withholding if such services are performed as an employee of the United States or any agency thereof. The place of performance of such services is immaterial, provided such alien individual is a resident of Puerto Rico at the time of performance of the services. Wages representing retirement pay for services in the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service, or a disability annuity paid under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22 U.S.C. 1081; 60 Stat. 1021), are subject to withholding, under the limitations specified in paragraph (b)(1)(ii) of § 31.3401(a)–1, in the case of an alien resident of Puerto Rico.

(d) (1) Remuneration paid after 1961 to a nonresident alien individual who is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, is not excepted from wages under section 3401(a)(6) if the remuneration is exempt from withholding under section 1441(a) by reason of section 1441(c)(4)(B) and is not exempt from taxation under section 872(b)(3). See §§ 1.872–2 and 1.1441–4 of this chapter (Income Tax Regulations). A nonresident alien individual who is temporarily present in the United States as a nonimmigrant under subparagraph (J) includes an alien individual admitted to the United States as an ''exchange visitor'' under section 201 of the United States Information and Educational Exchange Act of 1948 (22 U.S.C. 1446).

(2) Section 101 of the Immigration and Nationality Act (8 U.S.C. 1101), as amended, provides in part, as follows:

SEC. 101. *Definitions.* [Immigration and Nationality Act (66 Stat. 166)]

(a) As used in this chapter—* * *

(15) The term ''immigrant'' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * * *

(F) (i) An alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

* * * * *

(J) An alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

(e) This section shall not apply with respect to remuneration paid after December 31, 1966. For rules with respect to such remuneration see § 31.3401(a)(6)–1.

[Sec. 101. Immigration and Nationality Act, as amended by sec. 101, Act of June 27, 1952, 66 Stat. 166; sec. 109, Act of Sept. 21, 1961, 75 Stat. 534]

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5251, May 28, 1963; T.D. 6727, 29 FR 5869, May 5, 1964; T.D. 6908, 31 FR 16775, Dec. 31, 1966]

§31.3401(a)(7)–1 Remuneration paid before January 1, 1967, for services performed by nonresident alien individuals who are residents of a contiguous country and who enter and leave the United States at frequent intervals.

(a) *Transportation service.* Remuneration paid to nonresident aliens who are residents of a contiguous country (Canada or Mexico) and who, in the performance of their duties in transportation service between points in the United States and points in a contiguous country, enter and leave the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. This exception applies to personnel engaged in railroad, bus, ferry, steamboat, and aircraft services and applies whether the employer is a domestic or foreign entity. Thus, the remuneration of a nonresident alien individual who is a resident of Canada and an employee of a domestic railroad, for services as a member of the crew of a train operating between points in Canada and points in the United States, is not subject to withholding under section 3402.

(b) *Service on international projects.* Remuneration paid to nonresident aliens who are residents of a contiguous country (Canada or Mexico) and who, in the performance of their duties in connection with the construction, maintenance or operation of a waterway, viaduct, dam, or bridge traversed by or traversing the boundary between the United States and Canada or the boundary between the United States and Mexico, as the case may be, enter and leave the United States at frequent intervals, is excepted from wages and hence is not subject to withholding. Thus, the remuneration of a nonresident alien individual who is a resident of Canada, for services as an employee in connection with the construction, maintenance, or operation of the Saint Lawrence Seaway and who, in the performance of such services, enters and leaves the United States at frequent intervals, is not subject to withholding under section 3402.

(c) *Limitation on application of section.* The exception provided by this section has no application to the remuneration of a resident of Canada or of Mexico who is employed wholly within the United States as, for example, where such a resident is employed to perform service at a fixed point or points in the United States, such as a factory, store, office, or designated area or areas within the United States, and who commutes from his home in Canada or Mexico in the pursuit of his employment within the United States.

(d) *Certificate required.* In order for the exception to apply, the nonresident alien employee must furnish his employer a statement setting forth the employee's name and address and certifying (1) that he is not a citizen of the United States, (2) that he is a resident of Canada or Mexico, as the case may be, and (3) the approximate period of time during which he has had such status. Such statement shall be dated, shall be signed by the employee, and shall contain, or be verified by, a written declaration that it is made under the penalties of perjury. No particular form is prescribed for this statement.

(e) *Effective date.* This section shall not apply with respect to remuneration paid after December 31, 1966. For rules with respect to such remuneration see §31.3401(a)(6)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6908, 31 FR 16776, Dec. 31, 1966]

§31.3401(a)(8)(A)–1 Remuneration for services performed outside the United States by citizens of the United States.

(a) *Remuneration excluded from gross income under section 911.* (1) (i) Remuneration paid for services performed outside the United States for an employer (other than the United States or any agency thereof) by a citizen of the United States does not constitute wages and hence is not subject to withholding, if at the time of payment it is reasonable to believe that such remuneration will be excluded from gross income under the provisions of section 911. The reasonable belief contemplated by the statute may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that the remuneration is excludable from gross income under the provisions of section 911. The reasonable belief shall be based upon the application of section 911 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations).

(ii) Remuneration paid by an employer to an employee constitutes wages, and hence is subject to withholding only to the extent that the remuneration is expected to exceed the aggregate amount which is excludable from the employee's gross income under section 911(a). For amounts paid after December 31, 1984, the determination of the amount subject to withholding shall be made by applying the excludable amount, on a pro rata basis, to each payment of remuneration to the employee. For this purpose, an employer is not required to ascertain information with respect to amounts received by his employee from any other source; but, if the employer has such information, he shall take it into account in determining whether the earned income of the employee is in excess of the applicable limitation. For purposes of section 911(d)(5) and § 1.911–2(c), relating to an employee who states to the authorities of a foreign country that he is not a resident of that country, the employer is not required to ascertain whether such a statement has been made; but if an employer knows that such a statement has been made, he shall presume that the employee is not a bona fide resident of that country, unless the employer also knows that the authorities of the foreign country have determined, notwithstanding the statement that the employee is a resident of that country. For purposes of section 911(d)(1) or § 1.911–2(a) relating to the definition of a qualified individual, the reasonable belief contemplated by the statute may be based on a presumption as set forth in subparagraph (2) or (3) of this paragraph. For purposes of sections 911(a)(2) and 911(c)(2) and § 1.911–4(b) and (d)(1), relating to the housing cost amount exclusion and the definition of housing expenses, the reasonable belief contemplated by the statute may be based on the presumption set forth in subparagraph (4) of this paragraph.

(2)(i) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee will maintain a tax home in a foreign country or countries and be a bona fide resident of a foreign country or countries, within the meaning of section 911(d)(1), for an uninterrupted period which includes each taxable year of the employee, or applicable portion thereof, in respect of which the employee properly executes and delivers to the employer a statement that the employee meets or will meet the requirement of § 1.911–2(a) relating to maintaining a tax home and a bona fide residence in a foreign country for the taxable year. This statement must set forth the facts alleged as the basis for this determination and contain a declaration by the employee that the statement is made under the penalties of perjury. Sample forms of acceptable statements may be obtained by writing to the Foreign Operations District, Internal Revenue Service, Washington, D.C. 20225 (Form IO–673).

(ii) If the employer was entitled to presume for the two consecutive taxable years immediately preceding an employee's current taxable year that such employee was a bona fide resident of a foreign country or countries for an uninterrupted period which includes such preceding taxable years, he may, if such employee is residing in a foreign country on the first day of such current taxable year, presume, in the absence of cause for a reasonable belief to the contrary, and without obtaining from the employee the statement prescribed in subdivision (i) of this subparagraph, that the employee will be a bona fide resident of a foreign country or countries in such current taxable year.

(3) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee will maintain a tax home in a foreign country or countries and be present in a foreign country or countries during at least 330 full days during any period of twelve consecutive months, within the meaning of section 911(d)(1), and that such period includes each taxable year of the employee, or applicable portion thereof, in respect of which the

employee properly executes and delivers to the employer a statement that the employee meets or will meet the requirements of § 1.911–2(a) relating to maintaining a tax home and being physically present in a foreign country for the taxable year. This statement must set forth the facts alleged as the basis for this determination and contain a declaration by the employee that the statement is made under the penalties of perjury. Sample forms of acceptable statements may be obtained by writing to the Foreign Operations District, Internal Revenue Service, Washington, D.C. 20225 (Form IO–673).

(4) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee's housing cost amount will be the amount shown on a statement properly executed and delivered to the employer. This statement must set forth the employee's estimation of the following items: housing expenses (as defined in § 1.911–4(b)), the housing cost amount exclusion (as defined in § 1.911–4(d)(1)), and the qualifying period (as defined in § 1.911–2(a)). The statement must contain a declaration by the employee that it is made under the penalties of perjury. Sample forms of acceptable statements may be obtained by writing to the Foreign Operations District, Internal Revenue Service, Washington, D.C. 20225 (IO–673). The employer may not rely on a statement from an employee if the employer, based on his or her knowledge of housing costs in the vicinity of the employee's tax home (as defined in § 1.911–2(b)), believes the employee's housing expenses are lavish or extravagant under the circumstances.

(b) *Remuneration subject to withholding of income tax under law of a foreign country or a possession of the United States.* (1) Remuneration paid for services performed in a foreign country or in a possession of the United States for an employer (other than the United States or any agency thereof) by a citizen of the United States does not constitute wages and hence is not subject to withholding, if at the time of the payment of such remuneration the employer is required by the law of any foreign country or of any possession of the United States to withhold income tax upon such remuneration. This paragraph, insofar as it relates to remuneration paid for services performed in a possession of the United States, applies only with respect to remuneration paid on or after August 9, 1955.

(2) Remuneration is not exempt from withholding under this paragraph if the employer is not required by the law of a foreign country or of a possession of the United States to withhold income tax upon such remuneration. Mere agreements between the employer and the employee whereby the estimated income tax of a foreign country or of a possession of the United States is withheld from the remuneration in anticipation of actual liability under the law of such country or possession will not suffice.

(3) The exemption from withholding provided by this paragraph does not apply by reason of withholding of income tax pursuant to the law of a territory of the United States, of a political subdivision of a possession of the United States, or of a political subdivision of a foreign state.

(4) For provisions relating to remuneration for services performed by a permanent resident of the Virgin Islands, see paragraph (b)(12) of § 31.3401(a)–1.

(c) *Limitation on application of section.* This section has no application to the remuneration paid to a citizen of the United States for services performed outside the United States as an employee of the United States or any agency thereof.

(Approved by the Office of Management and Budget under control number 1545—0067)

(Sec. 911, 95 Stat. 194; 26 U.S.C. 911), sec. 7805 (68A Stat. 917; 26 U.S.C. 7805) of the Internal Revenue Code of 1954)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6697, 28 FR 13745, Dec. 17, 1963; T.D. 8006, 50 FR 2977, Jan. 23, 1985]

§ 31.3401(a)(8)(B)–1 Remuneration for services performed in possession of the United States (other than Puerto Rico) by citizen of the United States.

(a) Remuneration paid for services for an employer (other than the United States or any agency thereof) performed by a citizen of the United States within a possession of the

United States (other than Puerto Rico) does not constitute wages and hence is not subject to withholding, if it is reasonable to believe that at least 80 percent of the remuneration to be paid to the employee by such employer during the calendar year will be for such services. The reasonable belief contemplated by section 3401(a)(8)(B) may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that at least 80 percent of the remuneration paid by the employer to the employee during the calendar year was for services performed within such a possession of the United States.

(b) This section has no application to remuneration paid to a citizen of the United States for services performed in any possession of the United States as an employee of the United States or any agency thereof.

(c) For provisions relating to remuneration for services performed by a permanent resident of the Virgin Islands, see paragraph (b)(12) of § 31.3401(a)–1.

§ 31.3401(a)(8)(C)–1 Remuneration for services performed in Puerto Rico by citizen of the United States.

(a) Remuneration paid for services performed within Puerto Rico for an employer (other than the United States or any agency thereof) by a citizen of the United States does not constitute wages and hence is not subject to withholding, if it is reasonable to believe that during the entire calendar year the employee will be a bona fide resident of Puerto Rico. The reasonable belief contemplated by section 3401(a)(8)(C) may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that the employee was a bona fide resident of Puerto Rico for the entire calendar year.

(b) The employer may, in the absence of cause for a reasonable belief to the contrary, presume that an employee will be a bona fide resident of Puerto Rico during the entire calendar year.

(1) Unless the employee is known by the employer to have maintained his abode at a place outside Puerto Rico at some time during the current or the preceding calendar year; or

(2) In any case where the employee files with the employer a statement (containing a declaration under the penalties of perjury that such statement is true to the best of the employee's knowledge and belief) that such employee has at all times during the current calendar year been a bona fide resident of Puerto Rico and that he intends to remain a bona fide resident of Puerto Rico during the entire remaining portion of such current calendar year.

(c) This section has no application to remuneration paid to a citizen of the United States for services performed in Puerto Rico as an employee of the United States or any agency thereof.

§ 31.3401(a)(9)–1 Remuneration for services performed by a minister of a church or a member of a religious order.

(a) *In general.* Remuneration paid for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, or by a member of a religious order in the exercise of duties required by such order, is excepted from wages and hence is not subject to withholding.

(b) *Service by a minister in the exercise of his ministry.* Except as provided in paragraph (c)(3) of this section, service performed by a minister in the exercise of his ministry includes the ministration of sacerdotal functions and the conduct of religious worship, and the control, conduct, and maintenance of religious organizations (including the religious boards, societies, and other integral agencies of such organizations), under the authority of a religious body constituting a church or church denomination. The following rules are applicable in determining whether services performed by a minister are performed in the exercise of his ministry:

(1) Whether service performed by a minister constitutes the conduct of religious worship or the ministration of sacerdotal functions depends on the tenents and practices of the particular

religious body constituting his church or church denomination.

(2) Service performed by a minister in the control, conduct, and maintenance of a religious organization relates to directing, managing, or promoting the activities of such organization. Any religious organization is deemed to be under the authority of a religious body constituting a church or church denomination if it is organized and dedicated to carrying out the tenents and principles of a faith in accordance with either the requirements or sanctions governing the creation of institutions of the faith. The term ''religious organization'' has the same meaning and application as is given to the term for income tax purposes.

(3) (i) If a minister is performing service in the conduct of religious worship or the ministration of sacerdotal functions, such service is in the exercise of his ministry whether or not it is performed for a religious organization.

(ii) The rule in paragraph (b)(3)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged to perform service as chaplain at N University. M devotes his entire time to performing his duties as chaplain which include the conduct of religious worship, offering spiritual counsel to the university students, and teaching a class in religion. M is performing service in the exercise of his ministry.

(4) (i) If a minister is performing service for an organization which is operated as an integral agency of a religious organization under the authority of a religious body constituting a church or church denomination, all service performed by the minister in the conduct of religious worship, in the ministration of sacerdotal functions, or in the control, conduct, and maintenance of such organization (see paragraph (b)(2) of this section) is in the exercise of his ministry.

(ii) The rule in paragraph (b)(4)(i) of this section may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by the N Religious Board to serve as director of one of its departments. He performs no other service. The N Religious Board is an integral agency of O, a religious organization operating under the authority of a religious body constituting a church denomination. M is performing service in the exercise of his ministry.

(5) (i) If a minister, pursuant to an assignment or designation by a religious body constituting his church, performs service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization, all service performed by him, even though such service may not involve the conduct of religious worship or the ministration of sacerdotal functions, is in the exercise of his ministry.

(ii) The rule in subdivision (i) of this subparagraph may be illustrated by the following example:

Example. M, a duly ordained minister, is assigned by X, the religious body constituting his church, to perform advisory service to Y Company in connection with the publication of a book dealing with the history of M's church denomination. Y is neither a religious organization nor operated as an integral agency of a religious organization. M performs no other service for X or Y. M is performing service in the exercise of his ministry.

(c) *Service by a minister not in the exercise of his ministry.* (1) Section 3401(a)(9) does not except from wages remuneration for service performed by a duly ordained, commissioned, or licensed minister of a church which is not in the exercise of his ministry.

(2) (i) If a minister is performing service for an organization which is neither a religious organization nor operated as an integral agency of a religious organization and the service is not performed pursuant to an assignment or designation by his ecclesiastical superiors, then only the service performed by him in the conduct of religious worship or the ministration of sacerdotal functions is in the exercise of his ministry. See, however, paragraph (b)(3) of this section.

(ii) The rule in subdivision (i) of this subparagraph may be illustrated by the following example:

Example. M, a duly ordained minister, is engaged by N University to teach history and mathematics. He performs no other service for N although from time to time he performs marriages and conducts funerals for relatives and friends. N University is neither a religious organization nor operated as an integral agency of a religious organization.

M is not performing the service for N pursuant to an assignment or designation by his ecclesiastical superiors. The service performed by M for N University is not in the exercise of his ministry. However, service performed by M in performing marriages and conducting funerals is in the exercise of his ministry.

(3) Service performed by a duly ordained, commissioned, or licensed minister of a church as an employee of the United States, or a State, Territory, or possession of the United States, or the District of Columbia, or a foreign government, or a political subdivision of any of the foregoing, is not considered to be in the exercise of his ministry for purposes of the collection of income tax at source on wages, even though such service may involve the ministration of sacerdotal functions or the conduct of religious worship. Thus, for example, service performed by an individual as a chaplain in the Armed Forces of the United States is considered to be performed by a commissioned officer in his capacity as such, and not by a minister in the exercise of his ministry. Similarly, service performed by an employee of a State as a chaplain in a State prison is considered to be performed by a civil servant of the State and not by a minister in the exercise of his ministry.

(d) *Service in the exercise of duties required by a religious order.* Service performed by a member of a religious order in the exercise of duties required by such order includes all duties required of the member by the order. The nature or extent of such service is immaterial so long as it is a service which he is directed or required to perform by his ecclesiastical superiors.

§31.3401(a)(10)–1 Remuneration for services in delivery or distribution of newspapers, shopping news, or magazines.

(a) *Services of individuals under age 18.* Remuneration for services performed by an employee under the age of 18 in the delivery or distribution of newspapers, or shopping news, not including delivery or distribution (as, for example, by a regional distributor) to any point for subsequent delivery or distribution, is excepted from wages and hence is not subject to withholding. Thus, remuneration for services performed by an employee under the age of 18 in making house-to-house delivery or sale of newspapers or shopping news, including handbills and other similar types of advertising material, is excepted from wages. The remuneration is excepted irrespective of the form or method thereof. Remuneration for incidental services by the employee who makes the house-to-house delivery, such as services in assembling newspapers, is considered to be within the exception. The exception continues only during the time that the employee is under the age of 18.

(b) *Services of individuals of any age.* Remuneration for services performed by an employee in, and at the time of, the sale of newspapers or magazines to ultimate consumers under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his remuneration being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, is excepted from wages and hence is not subject to withholding. The remuneration is excepted whether or not the employee is guaranteed a minimum amount or remuneration, or is entitled to be credited with the unsold newspapers or magazines turned back. Moreover, the remuneration is excepted without regard to the age of the employee. Remuneration for services performed other than at the time of sale to the ultimate consumer is not within the exception. Thus, remuneration for services of a regional distributor which are antecedent to but not immediately part of the sale to the ultimate consumer is not within the exception. However, remuneration for incidental services by the employee who makes the sale to the ultimate consumer, such as services in assembling newspapers or in taking newspapers or magazines to the place of sale, is considered to be within the exception.

§31.3401(a)(11)–1 Remuneration other than in cash for service not in the course of employer's trade or business.

(a) Remuneration paid in any medium other than cash for services not in the course of the employer's trade or business is excepted from wages and hence is not subject to withholding. Cash remuneration includes checks and other monetary media of exchange. Remuneration paid in any medium other than cash, such as lodging, food, or other goods or commodities, for services not in the course of the employer's trade or business does not constitute wages. Remuneration paid in any medium other than cash for other types of services does not come within this exception from wages. For provisions relating to cash remuneration for service not in the course of employer's trade or business, see § 31.3401(a)(4)–1.

(b) As used in this section, the term ''services not in the course of the employer's trade or business'' has the same meaning as when used in § 31.3401(a)(4)–1.

§ 31.3401(a)(12)–1 Payments from or to certain tax-exempt trusts, or under or to certain annuity plans or bond purchase plans, or to individual retirement plans.

(a) *Payments from or to certain taxexempt trusts.* The term ''wages'' does not include any payment made—

(1) By an employer, on behalf of an employee or his beneficiary, into a trust, or

(2) To, or on behalf of, an employee or his beneficiary from a trust,

if at the time of such payment the trust is exempt from tax under section 501(a) as an organization described in section 401(a). A payment made to an employee of such a trust for services rendered as an employee of the trust and not as a beneficiary thereof is not within this exclusion from wages. Also, since supplemental unemployment compensation benefits are treated under paragraph (b) (14) of § 31.3401 (a)–1 as if they were wages for purposes of this chapter, this section does not apply to such benefits.

(b) *Payments under or to certain annuity plans.* (1) The term ''wages'' does not include any payment made after December 31, 1962—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan is a plan described in section 403(a).

(2) The term ''wages'' does not include any payment made before January 1, 1963—

(i) By an employer, on behalf of an employee or his beneficiary, into an annuity plan, or

(ii) To, or on behalf of, an employee or his beneficiary under an annuity plan, if at the time of such payment the annuity plan meets the requirements of section 401 (a) (3), (4), (5), and (6).

(c) *Payments under or to certain bond purchase plans.* The term ''wages'' does not include any payment made after December 31, 1962—

(1) By an employer, on behalf of an employee or his beneficiary, into a bond purchase plan, or

(2) To, or on behalf of, an employee or his beneficiary under a bond purchase plan,

if at the time of such payment the plan is a qualified bond purchase plan described in section 405(a).

(d) *Payment to individual retirement plans.* (1) The term ''wages'' does not include any payment to an individual retirement plan described in section 7701(a)(37) by an employer after December 31, 1974, on behalf of an employee, if, at the time of such payment, it is reasonable for the employer to believe that the employee will be entitled to a deduction for such payment under section 219(a).

(2) The term ''wages'' does not include any payment to an individual retirement plan described in section 7701(a)(37) by an employer after December 31, 1976, on behalf of an employee, if, at the time of such payment, it is reasonable for the employer to believe that the employee on whose behalf the payment is made will be entitled to a deduction for such payment under section 220(a).

(3) The term ''wages'' does not include any payment to a simplified employee pension arrangement described in section 408(k) by an employer after December 31, 1978, on behalf of an employee, if, at the time of such payment,

it is reasonable for the employer to believe that the employee on whose behalf the payment is made will be entitled to a deduction for such payment under section 219(a).

[T.D. 6654, 28 FR 5252, May 28, 1963, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970; T.D. 7730, 45 FR 72652, Nov. 3, 1980]

§ 31.3401(a)(13)–1 Remuneration for services performed by Peace Corps volunteers.

(a) Remuneration paid after September 22, 1961, for services performed as a volunteer or volunteer leader within the meaning of the Peace Corps Act (22 U.S.C. 2501) is excepted from wages, and hence is not subject to withholding, unless the remuneration is paid pursuant to section 5(c) or section 6(1) of the Peace Corps Act.

(b) Sections 5 and 6 of the Peace Corps Act (22 U.S.C. 2504, 2505) provide, in part, as follows:

Sec. 5 *Peace Corps Volunteers* [Peace Corps Act (75 Stat. 613); as amended by sec. 2(b), Act of December 13, 1963 (P.L. 88–200, 77 Stat. 359); sec. 2(a), Act of August 24, 1965, (P.L. 89–134, 79 Stat. 549); sec. 3(a), Act of July 24, 1970 (P.L. 91–352, 84 Stat. 464)]

* * * * *

(c) *Readjustment allowances.* Volunteers shall be entitled to receive a readjustment allowance at a rate not to exceed $75 for each month of satisfactory service as determined by the President; except that, in the cases of volunteers who have one or more minor children at the time of their entering a period of pre-enrollment training, one parent shall be entitled to receive a readjustment allowance at a rate not to exceed $125 for each month of satisfactory service as determined by the President. The readjustment allowance of each volunteer shall be payable on his return to the United States: *Provided, however,* That, under such circumstances as the President may determine, the accrued readjustment allowance, or any part thereof, may be paid to the volunteer, members of his family or others, during the period of his service, or prior to his return to the United States. In the event of the volunteer's death during the period of his service, the amount of any unpaid readjustment allowance shall be paid in accordance with the provisions of section 5582(b) of Title 5. For purposes of the Internal Revenue Code of 1954, a volunteer shall be deemed to be paid and to receive each amount of a readjustment allowance to which he is entitled after December 31, 1964, when such amount is transferred from funds made available under this chapter to the fund from which such readjustment allowance is payable.

* * * * *

Sec. 6 Peace Corps Volunteer Leaders; number; applicability of chapter; benefits [Peace Corps Act (75 Stat. 615), as amended by sec. 3, Act of December 13, 1963 (P.L. 88–200, 77 Stat. 360)] The President may enroll in the Peace Corps qualified citizens or nationals of the United States whose services are required for supervisory or other special duties or responsibilities in connection with programs under this chapter (referred to in this Act as ''volunteer leaders''). The ratio of the total number of volunteer leaders to the total number of volunteers in service at any one time shall not exceed one to twenty-five. Except as otherwise provided in this Act, all of the provisions of this Act applicable to volunteers shall be applicable to volunteer leaders, and the term ''volunteers'' shall include ''volunteer leaders'': *Provided, however,* That—

(1) Volunteer leaders shall be entitled to receive a readjustment allowance at a rate not to exceed $125 for each month of satisfactory service as determined by the President;

[T.D. 6654, 28 FR 5252, May 28, 1963, as amended by T.D. 7493, 42 FR 33729, July 1, 1977]

§ 31.3401(a)(14)–1 Group-term life insurance.

(a) The cost of group-term life insurance on the life of an employee is excepted from wages, and hence is not subject to withholding. For provisions relating generally to such remuneration, and for reporting requirements with respect to such remuneration, see sections 79 and 6052, respectively, and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations).

(b) The cost of group-term life insurance on the life of an employee's spouse or children is not subject to withholding if it is excludable from the employee's gross income because it is merely incidental. See paragraph (d)(2)(ii)(*b*) of § 1.61–2 in Part 1 of this chapter (Income Tax Regulations).

[T.D. 7493, 42 FR 33730, July 1, 1977]

§ 31.3401(a)(15)–1 Moving expenses.

(a) An amount paid to or on behalf of an employee after March 4, 1964, either as an advance or a reimbusement, specifically for moving expenses incurred or expected to be incurred is excepted from wages, and hence is not subject to withholding, if (and to the extent that) at the time of payment it is reasonable to believe that a corresponding deduction is or will be allowable to the employee under section 217. The reasonable belief contemplated by the statute may be based upon any evidence reasonably sufficient to induce such belief, even though such evidence may be insufficient upon closer examination by the district director or the courts finally to establish that a deduction is allowable under section 217. The reasonable belief shall be based upon the application of section 217 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations). When used in this section, the term ''moving expenses'' has the same meaning as when used in section 217. See §1.6041–2(a) in Part 1 of this chapter (Income Tax Regulations), relating to return of information as to payments to employees, and §31.6051–1(e), relating to the reporting of reimbursements of or payments of certain moving expenses.

(b) Except as otherwise provided in paragraph (a) of this section, or in a numbered paragraph of section 3401(a), amounts paid to or on behalf of an employee for moving expenses constitute wages subject to withholding.

[T.D. 7493, 42 FR 33730, July 1, 1977]

§31.3401(a)(16)–1 Tips.

Tips paid to an employee are excepted from wages and hence not subject to withholding if—

(a) The tips are paid in any medium other than cash, or

(b) The cash tips received by an employee in any calendar month in the course of his employment by an employer are less than $20.

However, if the cash tips received by an employee in a calendar month in the course of his employment by an employer amount to $20 or more, none of the cash tips received by the employee in such calendar month are excepted from wages under this section. The cash tips to which this section applies include checks and other monetary media of exchange. Tips received by an employee in any medium other than cash, such as passes, tickets, or other goods or commodities do not constitute wages. If an employee in any calendar month performs services for two or more employers and receives tips in the course of his employment by each employer, the $20 test is to be applied separately with respect to the cash tips received by the employee in respect of his services for each employer and not to the total cash tips received by the employee during the month. As to the time tips are deemed paid, see §31.3401(f)–1. For provisions relating to the treatment of tips received by an employee prior to 1966, see paragraph (b)(11) of §31.3401(a)–1.

[T.D. 7001, 34 FR 1001, Jan. 23, 1969]

§31.3401(a)(17)–1 Remuneration for services performed on a boat engaged in catching fish.

(a) Remuneration for services performed on or after December 31, 1954, by an individual on a boat engaged in catching fish or other forms of aquatic animal life (hereinafter ''fish'') is excepted from wages and hence is not subject to withholding if—

(1) The individual receives a share of the boat's (or boats' for a fishing operation involved more than one boat) catch of fish or a share of the proceeds from the sale of the catch,

(2) The amount of the individual's share depends solely on the amount of the boat's (or boats' for a fishing operation involving more than one boat) catch of fish,

(3) The individual does not receive, and is not entitled to receive, any cash remuneration, other than remuneration that is described in subparagraph (1) of this paragraph, and

(4) The crew of the boat (or of each boat from which the individual receives a share of the catch) normally is made up of fewer than 10 individuals.

(b) The requirement of paragraph (a)(2) of this section is not satisfied if there exists an agreement with the boat's (or boats') owner or operator by which the individual's remuneration is determined partially or fully by a factor not dependent on the size of the catch. For example, if a boat is operated under a remuneration arrangement, *e.g.*, a union contract, which specifies that crew members, in addition to receiving a share of the catch, are entitled to an hourly wage for repairing nets, regardless of whether this wage is actually paid, then all the crew members covered by the arrangement are entitled to receive cash remuneration other than as a share of the catch and are not excepted from employment by section 3121(b)(20).

(c) The operating crew of a boat includes all persons on the boat (including the captain) who receive any form of remuneration in exchange for services rendered while on a boat engaged in catching fish. See § 1.6050A–1 for reporting requirements for the operator of a boat engaged in catching fish with respect to individuals performing services described in this section.

(d) During the same return period, service performed by a crew member may be excepted from employment by section 3121(b)(20) and this section for one voyage and not so excepted on a subsequent voyage on the same or on a different boat.

[T.D. 7716, 45 FR 57124, Aug. 27, 1980]

§ 31.3401(a)(18)–1 Payments or benefits under a qualified educational assistance program.

A payment made, or benefit furnished, to or for the benefit of an employee in a taxable year beginning after December 31, 1978, does not constitute wages and hence is not subject to withholding if, at the time of such payment or furnishing, it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[T.D. 7898, 48 FR 31019, July 6, 1983]

§ 31.3401(a)(19)–1 Reimbursements under a self-insured medical reimbursement plan.

Amounts reimbursed to or on behalf of an employee after December 31, 1979, as a medical care reimbursement under a self-insured medical reimbursement plan (within the meaning of section 105(h)(6)) do not constitute wages and hence are not subject to withholding even though such reimbursement is includible in the gross income of an employee. For rules with respect to self-insured medical reimbursement plans, see section 105(h) and § 1.105–11 of this Chapter (Income Tax Regulations).

(Secs. 105(h) and 7805 Internal Revenue Code of 1954; 94 Stat. 2855, 68A Stat. 917 (26 U.S.C. 105(h) and 7805))

[T.D. 7754, 46 FR 3509, Jan. 15, 1981. Redesignated by T.D. 7898, 48 FR 31019, July 6, 1983]

§ 31.3401(b)–1 Payroll period.

(a) The term *payroll period* means the period of service for which a payment of wages is ordinarily made to an employee by his employer. It is immaterial that the wages are not always paid at regular intervals. For example, if an employer ordinarily pays a particular employee for each calendar week at the end of the week, but if for some reason the employee in a given week receives a payment in the middle of the week for the portion of the week already elapsed and receives the remainder at the end of the week, the payroll period is still the calendar week; or if, instead, that employee is sent on a 3-week trip by his employer and receives at the end of the trip a single wage payment for three weeks' services, the payroll period is still the calendar week, and the wage payment shall be treated as though it were three separate weekly wage payments.

(b) For the purpose of section 3402, an employee can have but one payroll period with respect to wages paid by any one employer. Thus, if an employee is paid a regular wage for a weekly payroll period and in addition thereto is paid supplemental wages (for example, bonuses) determined with respect to a different period, the payroll period is the weekly payroll period. For computation of tax on supplemental wage payments, see § 31.3402(g)–1.

(c) The term *payroll period* also means the period of accrual of supplemental unemployment compensation benefits for which a payment of such benefits is ordinarily made. Thus if benefits are ordinarily accrued and paid on a monthly basis, the payroll period is deemed to be monthly.

(d) The term *miscellaneous payroll period* means a payroll period other than a daily, weekly, biweekly, semi-monthly, monthly, quarterly, semiannual, or annual payroll period.

[T.D. 6516, 25 FR 13096, Dec. 20, 1960, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970]

§31.3401(c)–1 Employee.

(a) The term *employee* includes every individual performing services if the relationship between him and the person for whom he performs such services is the legal relationship of employer and employee. The term includes officers and employees, whether elected or appointed, of the United States, a State, Territory, Puerto Rico, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing.

(b) Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

(c) Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are not employees.

(d) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(e) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(f) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is not considered to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(g) The term *employee* includes every individual who receives a supplemental unemployment compensation benefit which is treated under paragraph (b)(14) of §31.3401(a)–1 as if it were wages.

(h) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, that the remuneration paid for such services does not constitute wages within the meaning of section 3401(a).

[T.D. 6516, 25 FR 13096, Dec. 20, 1960, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970]

§31.3401(d)–1 Employer.

(a) The term *employer* means any person for whom an individual performs or performed any service, of whatever nature, as the employee of such person.

(b) It is not necessary that the services be continuing at the time the wages are paid in order that the status of employer exist. Thus, for purposes of withholding, a person for whom an individual has performed past services for which he is still receiving wages from such person is an *employer*.

(c) An employer may be an individual, a corporation, a partnership, a trust, an estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group or entity. A trust or estate, rather than the fiduciary acting for or on behalf of the trust or estate, is generally the employer.

(d) The term *employer* embraces not only individuals and organizations engaged in trade or business, but organizations exempt from income tax, such as religious and charitable organizations, educational institutions, clubs, social organizations and societies, as well as the governments of the United States, the States, Territories, Puerto Rico, and the District of Columbia, including their agencies, instrumentalities, and political subdivisions.

(e) The term *employer* also means (except for the purpose of the definition of *wages*) any person paying wages on behalf of a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States (including Puerto Rico as if a part of the United States).

(f) If the person for whom the services are or were performed does not have legal control of the payment of the wages for such services, the term *employer* means (except for the purpose of the definition of *wages*) the person having such control. For example, where wages, such as certain types of pensions or retired pay, are paid by a trust and the person for whom the services were performed has no legal control over the payment of such wages, the trust is the *employer*.

(g) The term *employer* also means a person making a payment of a supplemental unemployment compensation benefit which is treated under paragraph (b)(14) of § 31.3401(a)–1 as if it were wages. For example, if supplemental unemployment compensation benefits are paid from a trust which was created under the terms of a collective bargaining agreement, the trust shall generally be deemed to be the employer. However, if the person making such payment is acting solely as an agent for another person, the term *employer* shall mean such other person and not the person actually making the payment.

(h) It is a basic purpose to centralize in the employer the responsibility for withholding, returning, and paying the tax, and for furnishing the statements required under section 6051 and § 31.6051–1. The special definitions of the term *employer* in paragraphs (e), (f), and (g) of this section are designed solely to meet special or unusual situations. They are not intended as a departure from the basic purpose.

[T.D. 6516, 25 FR 13096, Dec. 20, 1960, as amended by T.D. 7068, 35 FR 17329, Nov. 11, 1970]

§ 31.3401(e)–1 Number of withholding exemptions claimed.

(a) The term *number of withholding exemptions claimed* means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402(f) of the Internal Revenue Code of 1954 or in effect under section 1622(h) of the Internal Revenue Code of 1939. If no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero. The number of withholding exemptions claimed must be taken into account in determining the amount of tax to be deducted and withheld under section 3402, whether the employer computes the tax in accordance with the provisions of subsection (a) or subsection (c) of section 3402.

(b) The employer is not required to ascertain whether or not the number of withholding exemptions claimed is greater than the number of withholding exemptions to which the employee is entitled. For rules relating to invalid withholding exemption certificates, see § 31.3402(f)(2)–1(e), and for rules relating to required submission of copies of certain withholding exemption certificates to the Internal Revenue Service, see § 31.3402(f)(2)–1(g).

(c) As to the number of withholding exemptions to which an employee is entitled, see § 31.3402(f)(1)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7423, 41 FR 26217, June 23, 1976; T.D. 7682, 45 FR 15526, Mar. 11, 1980; T.D. 7803, 47 FR 3547, Jan. 26, 1982]

§31.3401(f)–1 Tips.

(a) *Tips considered wages.* Tips received after 1965 by an employee in the course of his employment are considered to be wages, and thus subject to withholding of income tax at source. For an exception to the rule that tips constitute wages, see §§31.3401(a)(16) and 31.3401(a)(16)–1, relating to tips paid in a medium other than cash and cash tips of less than $20. For definition of the term "employee," see §§31.3401(c) and 31.3401(c)–1.

(b) *When tips deemed paid.* Tips reported by an employee to his employer in a written statement furnished to the employer pursuant to section 6053(a) (see §31.6053–1) shall be deemed to be paid to the employee at the time the written statement is furnished to the employer. Tips received by an employee which are not reported to his employer in a written statement furnished pursuant to section 6053(a) shall be deemed to be paid to the employee at the time the tips are actually received by the employee.

[T.D. 7001, 34 FR 1001, Jan. 23, 1969]

§31.3402(a)–1 Requirement of withholding.

(a) Section 3402 provides alternative methods, at the election of the employer, for use in computing the amount of income tax to be collected at source on wages. Under the percentage method of withholding (see §31.3402(b)–1), the employer is required to deduct and withhold a tax computed in accordance with the provisions of section 3402(a). Under the wage bracket method of withholding (see §31.3402(c)–1), the employer is required to deduct and withhold a tax determined in accordance with the provisions of section 3402(c). The employer may elect to use the percentage method, the wage bracket method, or certain other methods (see §31.3402(h) (4)–1). Different methods may be used by the employer with respect to different groups of employees.

(b) The employer is required to collect the tax by deducting and withholding the amount thereof from the employee's wages as and when paid, either actually or constructively. Wages are constructively paid when they are credited to the account of or set apart for an employee so that they may be drawn upon by him at any time although not then actually reduced to possession. To constitute payment in such a case, the wages must be credited to or set apart for the employee without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that they may be drawn upon at any time, and their payment brought within his own control and disposition.

(c) Except as provided in sections 3402 (j) and (k) (see §§31.3402(j)–1 and 31.3402(k)–1, relating to noncash remuneration paid to retail commission salesman and to tips received by an employee in the course of his employment, respectively), an employer is required to deduct and withhold the tax notwithstanding the wages are paid in something other than money (for example, wages paid in stocks or bonds; see §31.3401 (a)–1) and to pay over the tax in money. If wages are paid in property other than money, the employer should make necessary arrangements to insure that the amount of the tax required to be withheld is available for payment in money.

(d) For provisions relating to the circumstances under which tax is required to be deducted and withheld from certain amounts received under accident and health plans, see paragraph (b)(8) of §31.3401(a)–1.

(e) As a matter of business administration, certain of the mechanical details of the withholding process may be handled by representatives of the employer. Thus, in the case of an employer having branch offices, the branch manager or other representative may actually, as a matter of internal administration, withhold the tax or prepare the statements required under section 6051. Nevertheless, the legal responsibility for withholding, paying, and returning the tax and furnishing such statements rests with the employer. For provisions relating to statements under section 6051, see §31.6051–1.

(f) The amount of any tax withheld and collected by the employer is a special fund in trust for the United States. See section 7501.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7001, 34 FR 1001, Jan. 23, 1969; T.D. 7115, 36 FR 9209, May 21, 1971; T.D. 7888, 48 FR 17588, Apr. 25, 1983]

§ 31.3402(b)–1 Percentage method of withholding.

With respect to wages paid after April 30, 1975, the amount of tax to be deducted and withheld under the percentage method of withholding shall be determined under the applicable percentage method withholding table contained in Circular E (Employer's Tax Guide) according to the instructions contained therein.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(c)–1 Wage bracket withholding.

(a) *In general.* (1) The employer may elect to use the wage bracket method provided in section 3402(c) instead of the percentage method with respect to any employee. The tax computed under the wage bracket method shall be in lieu of the tax required to be deducted and withheld under section 3402(a). With respect to wages paid after July 13, 1968, the correct amount of withholding shall be determined under the applicable wage bracket withholding table contained in the Circular E (Employer's Tax Guide) issued for use with respect to the period in which such wages are paid.

(2) For provisions relating to the treatment of wages paid under accident and health plans and wages paid other than in cash to retail commission salesmen, see paragraph (b)(8) of § 31.3401(a)–1 and § 31.3402(j)–1, respectively.

(b) *Established payroll periods, other than daily or miscellaneous, covered by wage bracket withholding tables.* The wage bracket withholding tables contained in Circular E for established periods other than daily or miscellaneous should be used in determining the tax to be withheld for any such period without reference to the time the employee is actually engaged in the performance of services during such payroll period.

Example 1. On June 30, 1971, employee A is paid wages for a semimonthly payroll period. A has in effect a withholding exemption certificate indicating that he claims two withholding exemptions and that he is married. A's wages are determined at the rate of $2 per hour. During a certain payroll period he works only 24 hours and earns $48. Although A worked only 24 hours during the semimonthly payroll period, the applicable wage bracket withholding table contained in Circular E for a semimonthly payroll period for an employee who is married should be used in determining the tax to be withheld. Under this table it will be found that no tax is required to be withheld from a wage payment of $48 when two withholding exemptions are claimed.

Example 2. On May 14, 1971, employee B is paid wages for a weekly payroll period. B has in effect a withholding exemption certification indicating that he claims one withholding exemption and that he is single. B's wages are determined at the rate of $2 per hour. During a certain payroll period B works 18 hours and earns $36. Although B worked only 18 hours during the weekly payroll period the applicable wage bracket withholding table for a weekly payroll period for an employee who is single should be used in determining the tax to be withheld. Under this table it will be found that $0.50 is the amount of tax to be withheld from a wage payment of $36 when one withholding exemption is claimed.

(c) *Periods to which the tables for a daily or miscellaneous payroll period are applicable*—(1) *In general.* The tables applicable to a daily or miscellaneous payroll period show the tax for employees who are to be withheld from as single persons and for employees who are to be withheld from as married persons on the amount of wages for one day. Where the withholding is computed under the rules applicable to a miscellaneous payroll period, the wages and the amounts shown in the applicable table must be placed on a comparable basis. This may be accomplished by reducing the wages paid for the period to a daily basis by dividing the total wages by the number of days (including Sundays and holidays) in the period. The amount of the tax shown in the applicable table as the tax required to be withheld from the wages, as so reduced to a daily basis, should then be multiplied by the number of days (including Sundays and holidays) in the period.

(2) *Period not a payroll period.* If wages are paid for a period which is not a payroll period, the amount to be deducted and withheld under the wage bracket method shall be the amount applicable in the case of a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days (including Sundays and holidays) in the period with respect to which such wages are paid.

Example. An individual performs services for a contractor in connection with a construction project. He has in effect a withholding exemption certificate indicating that he claims two withholding exemptions and that he is married. Wages have been fixed at the rate of $36 per day, to be paid upon completion of the project. The project is completed before July 1, 1971, in 12 consecutive days, at the end of which period the individual is paid wages of $360 for 10 days' services performed during the period. Under the wage bracket method the amount to be deducted and withheld from such wages is determined by dividing the amount of the wages ($360) by the number of days in the period (12), the result being $30. The amount of tax required to be withheld is determined under the appropriate table applicable to a miscellaneous payroll period for an employee who is married. Under this table the tax required to be withheld is $47.40 (12 × $3.95).

(3) *Wages paid without regard to any period.* If wages are paid to an employee without regard to any particular period, as, for example, commissions paid to a salesman upon consummation of a sale, the amount of tax to be deducted and withheld shall be determined in the same manner as in the case of a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days (including Sundays and holidays) which have elapsed, beginning with the latest of the following days:

(i) The first day after the last payment of wages to such employee by such employer in the calendar year, or

(ii) The date on which such individual's employment with such employer began in the calendar year, or

(iii) January 1 of such calendar year, and ending with (and including) the date on which such wages are paid.

Example. On April 2, 1971, C is employed by the X Real Estate Company to sell real estate on a commission basis, commissions to be paid only upon consummation of sales. C has in effect a withholding exemption certificate indicating that he claims one withholding exemption and that he is not married. On May 22, 1971, C receives a commission of $300, his first commission since April 2, 1971. Again on June 19, 1971, C receives a commission of $420. Under the wage bracket method, the amount of tax to be deducted and withheld in respect of the commission paid on May 22, is $10, which amount is obtained by multiplying $0.20 (tax per day under the appropriate wage bracket table applicable to a daily or miscellaneous payroll period for an employee who is not married where wages are at least $6 but less than $6.25 a day) by 50 (number of days elapsed); and the amount of tax to be withheld with respect to the commission paid on June 19 is $54.60, which amount is obtained by multiplying $1.95 (tax under the appropriate wage bracket table for a daily or miscellaneous payroll period where wages are at least $15 but less than $15.50 a day) by 28 (number of days elapsed).

(d) *Period or elapsed time less than 1 week.* (1) It is the general rule that if wages are paid for a payroll period or other period of less than 1 week, the tax to be deducted and withheld under the wage bracket method shall be the amount computed for a daily payroll period, or for a miscellaneous payroll period containing the same number of days (including Sundays and holidays) as the payroll period, or other period, for which such wages are paid. In the case of wages paid without regard to any period, if the elapsed time computed as provided in paragraph (c) of this section is less than 1 week, the same rule is applicable.

Example 1. On May 14, 1971, an employee who has a daily payroll period is paid wages of $15 per day. The employee has in effect a withholding exemption certificate indicating that he claims one withholding exemption and that he is not married. Under the applicable table for a daily payroll period for an employee who is not married, the amount of tax to be deducted and withheld from each such payment of wages is $1.95.

Example 2. An employee works for a certain employer on 4 consecutive days for which he is paid wages totalling $60 on July 25, 1971.

The employee has in effect a withholding exemption certificate claiming two withholding exemptions and indicating that he is married. The amount of tax to be deducted and withheld under the wage bracket method is $5.60 (4×$1.40).

(2) If the payroll period, other period or elapsed time where wages are paid without regard to any period, is less than one week, the employer may, under certain conditions, elect to deduct and withhold the tax determined by the application of the wage table for a weekly payroll period to the aggregate of the wages paid to the employee during the calendar week. The election to use the weekly wage table in such cases is subject to the limitations and conditions prescribed in Circular E with respect to employers using the percentage method in similar cases.

(3) As used in this paragraph the term ''calendar week'' means a period of seven consecutive days beginning with Sunday and ending with Saturday.

(e) *Rounding off of wage payment.* In determining the amount to be deducted and withheld under the wage bracket method the wages may, at the election of the employer, be computed to the nearest dollar, provided such wages are in excess of the highest wage bracket of the applicable table. For the purpose of the computation to the nearest dollar, the payment of a fractional part of a dollar shall be disregarded unless it amounts to one-half dollar or more, in which case it shall be increased to $1.00. Thus, if the payroll period of an employee is weekly and the wage payment of such employee is $255.49, the employer may compute the tax on the excess over $200 as if the excess were $55 instead of $55.49. If the weekly wage payment is $255.50, the employer may, in computing the tax, consider the excess over $200 to be $56 instead of $55.50.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6860, 30 FR 13942, Nov. 4, 1965; T.D. 7115, 36 FR 9215, May 21, 1971; T.D. 7888, 48 FR 17588, Apr. 25, 1983; T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(d)–1 Failure to withhold.

If the employer in violation of the provisions of section 3402 fails to deduct and withhold the tax, and thereafter the income tax against which the tax under section 3402 may be credited is paid, the tax under section 3402 shall not be collected from the employer. Such payment does not, however, operate to relieve the employer from liability for penalties or additions to the tax applicable in respect of such failure to deduct and withhold. The employer will not be relieved of his liability for payment of the tax required to be withheld unless he can show that the tax against which the tax under section 3402 may be credited has been paid. See §31.3403–1, relating to liability for tax.

§ 31.3402(e)–1 Included and excluded wages.

(a) If a portion of the remuneration paid by an employer to his employee for services performed during a payroll period of not more than 31 consecutive days constitutes wages, and the remainder does not constitute wages, all the remuneration paid the employee for services performed during such period shall for purposes of withholding be treated alike, that is, either all included as wages or all excluded. The time during which the employee performs services, the remuneration for which under section 3401(a) constitutes wages, and the time during which he performs services, the remuneration for which under such section does not constitute wages, determine whether all the remuneration for services performed during the payroll period shall be deemed to be included or excluded.

(b) If one-half or more of the employee's time in the employ of a particular employer in a payroll period is spent in performing services the remuneration for which consititutes wages, then all the remuneration paid the employee for services performed in that payroll period shall be deemed to be wages.

(c) If less than one-half of the employee's time in the employ of a particular employer in a payroll period is spent in performing services the remuneration for which constitutes wages, then none of the remuneration paid the employee for services performed in that payroll period shall be deemed to be wages.

(d) The application of the provisions of paragraphs (a), (b), and (c) of this section may be illustrated by the following examples:

Example 1. Employer B, who operates a store and a farm, employs A to perform services in connection with both operations. The remuneration paid A for services on the farm is excepted as remuneration for agricultural labor, and the remuneration for services performed in the store constitutes wages. Employee A is paid on a monthly basis. During a particular month, A works 120 hours on the farm and 80 hours in the store. None of the remuneration paid by B to A for services performed during the month is deemed to be wages, since the remuneration paid for less than one-half of the services performed during the month constitutes wages. During another month A works 75 hours on the farm and 120 hours in the store. All of the remuneration paid by B to A for services performed during the month is deemed to be wages since the remuneration paid for one-half or more of the services performed during the month constitutes wages.

Example 2. Employee C is employed as a maid by D, a physician, whose home and office are located in the same building. The remuneration paid C for services in the home is excepted as remuneration for domestic service, and the remuneration paid for her services in the office constitutes wages. C is paid on a weekly basis. During a particular week C works 20 hours in the home and 20 hours in the office. All of the remuneration paid by D to C for services performed during that week is deemed to be wages, since the remuneration paid for one-half or more of the services performed during the week constitutes wages. During another week C works 22 hours in the home and 15 hours in the office. None of the remuneration paid by D to C for services performed during that week is deemed to be wages, since the remuneration paid for less than one-half of the services performed during the week constitutes wages.

(e) The rules set forth in this section do not apply (1) with respect to any remuneration paid for services performed by an employee for his employer if the periods for which remuneration is paid by the employer vary to the extent that there is no period which constitutes a payroll period within the meaning of section 3401(b) (see § 31.3401(b)–1), or (2) with respect to any remuneration paid for services performed by an employee for his employer if the payroll period for which remuneration is paid exceeds 31 consecutive days. In any such case withholding is required with respect to that portion of such remuneration which constitutes wages.

§ 31.3402(f)(1)–1 Withholding exemptions.

(a) *In general.* (1) Except as otherwise provided in section 3402(f)(6) (see § 31.3402(f)(6)–1), an employee receiving wages shall on any day be entitled to withholding exemptions as provided in section 3402(f)(1). In order to receive the benefit of such exemptions, the employee must file with his employer a withholding exemption certificate as provided in section 3402(f)(2). See § 31.3402(f)(2)–1.

(2) The number of exemptions to which an employee is entitled on any day depends upon his status as single or married, upon his status as to old age and blindness, upon the number of his dependents, upon the number of exemptions claimed by his spouse (if he is married), and upon the number of withholding allowances to which he is entitled under section 3402(m).

(b) *Withholding exemptions to which an employee is entitled in respect of himself.* An employee is entitled to one withholding exemption for himself. An employee shall on any day be entitled to an additional withholding exemption for himself if he will have attained the age of 65 before the close of his taxable year which begins in, or with, the calendar year in which such day falls. If the employee is blind, he may claim an additional withholding exemption for blindness. For purposes of claiming a withholding exemption for blindness, an individual shall be considered blind only if his central visual acuity does not exceed 20/200 in the better eye with correcting lenses or if his visual acuity is greater than 20/200 but is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees. For definition of the term ''blindness'', see section 151(d)(3). An employee may also be entitled under section 3402(m) to withholding exemptions with respect to withholding allowances (see § 31.3402(m)–1).

(c) *Withholding exemptions to which an employee is entitled in respect to his spouse.* (1) A married employee, whose spouse is an employee receiving wages, is entitled to claim any withholding exemption to which his spouse is entitled under paragraph (b) of this section, unless the spouse has in effect a withholding exemption certificate claiming such withholding exemption. A married employee, whose spouse is not an employee receiving wages, is entitled to claim any withholding exemption to which his spouse would be entitled under paragraph (b) of this section if the spouse were an employee receiving wages.

Example 1. Assume that both the husband and wife have attained the age of 65 and are employees receiving wages. Each spouse is entitled under paragraph (b) of this section to claim 2 withholding exemptions in respect of himself or herself. Either spouse may claim, in addition to the withholding exemptions to which he or she is entitled in respect of himself or herself, any withholding exemption to which the other spouse is entitled under such paragraph (b) of this section but does not claim on a withholding exemption certificate.

Example 2. Assume the same facts as in Example 1 except that only the husband is an employee receiving wages. The husband is entitled to claim 4 withholding exemptions, that is, the 2 withholding exemptions to which he is entitled in respect of himself and the 2 withholding exemptions to which his spouse would be entitled under paragraph (b) of this section if she were an employee receiving wages.

(2) In determining the number of withholding exemptions to which an employee is entitled for himself and his spouse on any day, the employee's status as a single person or a married person and, if married, whether a withholding exemption is claimed by his spouse, shall be determined as of such day. However, in the case of an employee whose spouse dies in the taxable year of the employee which begins in, or with, the calendar year in which the spouse dies, any withholding exemption which would be allowable to the employee in respect of such spouse, if living and not an employee receiving wages, may be claimed by the employee for that portion of the calendar year which occurs after his spouse's death. For provisions applicable in the case of an employee whose taxable year is not a calendar year, and whose spouse dies in that portion of the calendar year which precedes the first day of the taxable year of the employee which begins in the calendar year, see paragraph (b) of § 31.3402(f)(2)–1. An employee legally separated from his spouse under a decree of divorce or of separate maintenance or an employee who is a surviving spouse (as defined in section 2 and the regulations thereunder) shall not be entitled to any withholding exemptions in respect of his spouse.

(d) *Withholding exemptions to which an employee is entitled in respect of dependents.* Subject to the limitations stated in this paragraph, an employee shall be entitled on any day to a withholding exemption for each individual who may reasonably be expected to be his dependent for his taxable year beginning in, or with, the calendar year in which such day falls. For purposes of the withholding exemption for an individual who may reasonably be expected to be a dependent, the following rules shall apply:

(1) The determination that an individual may or may not reasonably be expected to be a dependent shall be made on the basis of facts existing at the beginning of the day for which a withholding exemption for such individual is to be claimed. The individual in respect of whom an exemption is claimed by an employee must, on the day in question, be in existence and be within one of the categories listed in section 152(a), which defines the term ''dependent''. However, a withholding exemption for a dependent who dies continues for the portion of the calendar year which occurs after the dependent's death, except that, in the case of an employee whose taxable year is not a calendar year, the withholding exemption does not continue for a dependent, within the meaning of section 152(a) (9) or (10), whose death occurs before the first day of the employee's taxable year beginning in the calendar year of death.

(2) The determination that an individual may or may not reasonably be expected to be a dependent shall be

made for the taxable year of the employee in respect of which amounts deducted and withheld in the calendar year in which the day in question falls are allowed as a credit. In general, amounts deducted and withheld during any calendar year are allowed as a credit against the tax imposed by chapter 1 of the Code for the taxable year which begins in, or with, such calendar year. Thus, in order for an employee to be able to claim for a calendar year a withholding exemption with respect to a particular individual as a dependent there must be a reasonable expectation that the employee will be allowed an exemption with respect to such individual under section 151(e) for his taxable year which begins in, or with, such calendar year.

(3) For the employee to be entitled on any day of the calendar year to a withholding exemption for an individual as a dependent, such individual must on such day—

(i) Be an individual referred to in one of the numbered paragraphs in section 152(a),

(ii) Reasonably be expected to receive over one-half of his support, within the meaning of section 152, from the employee in the calendar year, and

(iii) Either *(a)* reasonably be expected to have gross income of less than the amount determined pursuant to § 1.151–2 of this chapter (Income Tax Regulations) applicable to the calendar year in which the taxable year of the taxpayer begins, or *(b)* be a child (son, stepson, daughter, stepdaughter, adopted son, or adopted daughter) of the employee who *(1)* will not have attained the age of 19 at the close of the calendar year or *(2)* is a student as defined in section 151.

(4) An employee is not entitled to claim a withholding exemption for an individual otherwise reasonably expected to be a dependent of the employee if such individual is not a citizen of the United States, unless such individual (i) is at any time during the calendar year a resident of the United States (including, in regard to wages paid after February 28, 1979, and individual treated as a resident under section 6013 (g) or (h)) Canada, Mexico, the Canal Zone, or the Republic of Panama, or (ii) is a child of the employee born to him, or legally adopted by him, in the Philippine Islands before January 1, 1956, and the child is a resident of the Republic of the Philippines, and the employee was a member of the Armed Forces of the United States at the time the child was born to him or legally adopted by him.

(e) *Additional withholding exemption to which an employee is entitled in respect of the standard deduction.* After November 30, 1986, an employee is entitled to one additional withholding exemption unless:

(1) The employee is married (as determined under section 143) and the employee's spouse is an employee receiving wages subject to withholding, or

(2) The employee has withholding exemption certificates in effect with respect to more than one employer.

These restrictions do not apply if the combined wages of the employee and the spouse (if any) from other than one employer is less than the amount specified in the instructions to Form W–4 or W–4A (Employee's Withholding Allowance Certificate).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5252, May 28, 1963; T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7114, 36 FR 9020, May 18, 1971; T.D. 7115, 36 FR 9234, May 21, 1971; T.D. 7670, 45 FR 6932, Jan. 31, 1980; T.D. 7915, 48 FR 44073, Sept. 27, 1983; T.D. 8164, 52 FR 45633, Dec. 1, 1987]

§ 31.3402(f)(2)–1 Withholding exemption certificates.

(a) *On commencement of employment.* On or before the date on which an individual commences employment with an employer, the individual shall furnish the employer with a signed withholding exemption certificate relating to his marital status and the number of withholding exemptions which he claims, which number shall in no event exceed the number to which he is entitled, or, if the statements described in § 31.3402(n)–1 are true with respect to an individual, he may furnish his employer with a signed withholding exemption certificate which contains such statements. For form and contents of such certificates, see § 31.3402(f)(5)–1. The employer is required to request a withholding exemption certificate from each employee, but if the employee fails to furnish such certificate, such employee shall be considered as a single person claiming no withholding exemptions.

(b) *Change in status which affects calendar year.* (1) If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is less than the number of withholding exemptions claimed by him on the withholding exemption certificate then in effect, the employee must within 10 days after the change occurs furnish the employer with a new withholding exemption certificate relating to the number of withholding exemptions which the employee then claims, which must in no event exceed the number to which he is entitled on such day. The number of withholding exemptions to which an employee is entitled decreases, for example, for any one of the following reasons:

(i) The employee's wife (or husband) for whom the employee has been claiming a withholding exemption *(a)* is divorced or legally separated from the employee, or *(b)* claims her (or his) own withholding exemption on a separate certificate.

(ii) In the case of an employee whose taxable year is not a calendar year, the employee's wife (or husband) for whom the employee has been claiming a withholding exemption dies in that portion of the calendar year which precedes the first day of the taxable year of the employee which begins in the calendar year in which the spouse dies.

(iii) The employee finds that no exemption for his taxable year which begins in, or with, the current calendar year will be allowable to him under section 151(e) in respect of an individual claimed as a dependent on the employee's withholding exemption certificate.

(iv) It becomes unreasonable for the employee to believe that his wages for an estimation year will not be more, or that the determinable additional amounts for each item under § 31.3402(m)–1 for an estimation year will not be less, than the corresponding figure used in connection with a claim by him under section 3402 (m) of a withholding allowance to such an extent that the employee would no longer be entitled to such withholding allowance.

(v) It becomes unreasonable for an employee who has in effect a withholding exemption certificate on which he claims a withholding allowance under section 3402(m), computed on the basis of the preceding taxable year, to believe that his wages and the determinable additional amounts for each item under § 31.3402(m)–1 in such preceding taxable year or in his present taxable year will entitle him to such withholding allowance in the present taxable year.

(2) If, on any day during the calendar year, the number of withholding exemptions to which the employee is entitled is more than the number of withholding exemptions claimed by him on the withholding exemption certificate then in effect, the employee may furnish the employer with a new withholding exemption certificate on which the employee must in no event claim more than the number of withholding exemptions to which he is entitled on such day.

(3) If, on any day during the calendar year, the statements described in § 31.3402(n)–1 are true with respect to an employee, such employee may furnish his employer with a withholding exemption certificate which contains such statements.

(4) If, on any day during the calendar year, it is not reasonable for an employee, who has furnished his employer with a withholding exemption certificate which contains the statements described in § 31.3402(n)–1, to anticipate that he will incur no liability for income tax imposed under subtitle A (as defined in § 31.3402(n)–1) for his current taxable year, the employee must within 10 days after such day furnish the employer with a new withholding exemption certificate which does not contain such statements. If, on any day during the calendar year, it is not reasonable for such an employee whose liability for income tax imposed under subtitle A is determined on a basis other than the calendar year to so anticipate with respect to his taxable year following his current taxable year, the employee must furnish the employer with a new withholding exemption certificate which does not

contain such statements within 10 days after such day or on or before the first day of the last month of his current taxable year, whichever is later.

(c) *Change in status which affects next calendar year.* (1) If, on any day during the calendar year, the number of exemptions to which the employee will be, or may reasonably be expected to be, entitled under sections 151 and 3402(m) for his taxable year which begins in, or with, the next calendar year is different from the number to which the employee is entitled on such day, the following rules shall be applicable:

(i) If such number is less than the number of withholding exemptions claimed by the employee on a withholding exemption certificate in effect in such day, the employee must, on or before December 1 of the year in which the change occurs, unless such change occurs in December, furnish his employer with a new withholding exemption certificate reflecting the decrease in the number of withholding exemptions. If the change occurs in December, the new certificate must be furnished within 10 days after the change occurs. The number of exemptions to which an employee is entitled for his taxable year which begins in, or with, the next calendar year decreases, for example, for any of the following reasons:

(a) The spouse or a dependent of the employee dies.

(b) The employee finds that is not reasonable to expect that an individual claimed as a dependent on the employee's withholding exemption certificate will qualify as a dependent of the employee for such taxable year.

(c) It becomes unreasonable for an employee who has in effect a withholding exemption certificate on which he claims a withholding allowance under section 3402(m) to believe that his wages and the determinable additional amounts for each item under §31.3402(m)–1 for his taxable year which begins in, or with, the next calendar year will entitle him to such withholding allowance for such taxable year.

(ii) If such number is greater than the number of withholding exemptions claimed by the employee on a withholding exemption certificate in effect on such day, the employee may, on or before December 1 of the year in which such change occurs, unless such change occurs in December, furnish his employer with a new withholding exemption certificate reflecting the increase in the number of withholding exemptions. If the change occurs in December, the certificate may be furnished on or after the date on which the change occurs.

(2) If, on any day during the calendar year, it is not reasonable for an employee, who has furnished his employer with a withholding exemption certificate which contains the statements described in §31.3402(n)–1 and whose liability for such tax is determined on a calendar-year basis, to anticipate that he will incur no liability for income tax imposed under subtitle A (as defined in §3l.3402(n)–1) for his taxable year which begins with the next calendar year, the employee must furnish his employer with a new withholding exemption certificate which does not contain such statements, on or before December 1 of the first-mentioned calendar year. If it first becomes unreasonable for the employee to so anticipate in December, the new certificate must be furnished within 10 days after the day on which it first becomes unreasonable for the employee to so anticipate.

(3) Before December 1 of each year, every employer should request each of his employees to file a new withholding exemption certificate for the ensuing calendar year, in the event of change in the employee's exemption status since the filing of his latest certificate.

(d) *Inclusion of account number on withholding exemption certificate.* Every individual to whom an account number has been assigned shall include such number of any withholding exemption certificate filed with an employer. For provisions relating to the obtaining of an account number, see §31.6011 (b)–2.

(e) *Invalid withholding exemption certificates.* Any alteration of or unauthorized addition to a withholding exemption certificate shall cause such certificate to be invalid; see paragraph (b) of §31.3402(f)(5)–1 for the definitions of alteration and unauthorized addition. Any withholding exemption certificate which the employee clearly indicates to be false by an oral statement or by a written statement (other than one made on the withholding exemption certificate itself) made by him to the employer on or before the date on which the employee furnishes such certificate is also invalid. For purposes of the preceding sentence, the term ''employer'' includes any individual authorized by the employer either to receive withholding exemption certificates, to make withholding computations, or to make payroll distributions. If an employer receives an invalid withholding exemption certificate, he shall consider it a nullity for purposes of computing withholding; he shall inform the employee who submitted the certificate that it is invalid, and shall request another withholding exemption certificate from the employee. If the employee who submitted the invalid certificate fails to comply with the employer's request, the employer shall withhold from the employee as from a single person claiming no exemptions (see § 31.3402 (f)(2)–1(a)); if, however, a prior certificate is in effect with respect to the employee, the employer shall continue to withhold in accordance with the prior certificate.

(f) *Applicability of withholding exemption certificate to qualified State individual income taxes.* The withholding exemption certificate shall be use for purposes of withholding with respect to qualified State individual income taxes as well as Federal tax. For provisions relating to the withholding exemption certificate with respect to such State taxes, see paragraph (d)(3)(i) of § 301.6361–1 of this chapter (Regulation on Procedure and Administration).

(g) *Submission of certain withholding certificates*—(1) *General rule.* With respect to withholding exemption certificates received after November 30, 1986, an employer shall submit, in accordance with paragraph (g)(3) of this section, a copy of any withholding exemption certificate, together with a copy of any written statement received from the employee in support of the claims made on the certificate, which is received from the employee during the reporting period (even if the certificate is not in effect at the end of the quarter) if the employee is employed by that employer on the last day of the reporting period and if—

(i) The total number of withholding exemptions (within the meaning of section 3402(f)(1) and the regulations thereunder) claimed on the certificate exceeds 10, or

(ii) The certificate indicates that the employee claims a status exempting the employee from withholding, and the exception provided by paragraph (g)(2) of this section does not apply.

(2) *Exception.* A copy of the certificate shall not be submitted under paragraph (g)(1)(ii) of this section if the employer reasonably expects, at the time the certificate is received, that the employee's wages (under chapter 24 of the Code) from that employer shall not then usually exceed $200 per week.

(3) *Rules for submission*—(i) *In general.* The reporting period is a calendar quarter. Copies required to be submitted under paragraph (g)(1) of this section shall be submitted at the time and place of filing Form 941 or 941E for the reporting period, or Form 941–M for the last month of the reporting period. Form 941, 941E or 941–M shall be used, in accordance with the instructions for the form, to transmit the copies.

(ii) *Option.* At the choice of the employer, copies required to be submitted under paragraph (g)(1) of this section may be submitted earlier and for shorter reporting periods than a calendar quarter. In such case, the employer shall submit the copies to the service center where the employer would file a Form 941 or 941E and shall include with the submission a statement showing the employer's name, address, employer identification number, and the number of copies of withholding exemption certificates submitted. However, in no event shall a copy be submitted later than the time for filing the report required to be submitted for the calendar quarter reporting period under subdivision (i) of this paragraph (g)(3).

(iii) *First report.* The first submission of copies shall include a copy of any certificate required to be submitted under paragraph (g)(1) of this section which is received by the employer on or after April 1, 1980.

(4) *Other withholding exemption certificates.* An employer shall also submit a

copy of any currently effective withholding exemption certificate (or make the original certificate available for inspection), together with a copy of any written statement received from the employee in support of the claims made on the certificate, upon written request of the Internal Revenue Service. This request of the Service may relate either to one or more named employees or to one or more reasonably segregable units of the employer. In this regard, the Service may, by written notice, advise the employer that a copy of each new withholding exemption certificate received from one or more named employees, or from one or more reasonably segregable units of the employer, which is required, under this paragraph (g) to be submitted to the Service is to be submitted to the District Director. The employer shall then submit to the District Director a copy of each such new certificate of each such employee immediately after the employer receives the new certificate from the named employee.

(5) *Computation of withholding.* (i) Until receipt of written notice from the Internal Revenue Service that a certificate, a copy of which was submitted under this section, is defective, that certificate is effective and the employer shall withhold on the basis of the statements made in that certificate, unless that certificate must be disregarded under the provisions of paragraph (g)(5)(vi) of this section.

(ii) The Internal Revenue Service may find that a copy of a withholding exemption certificate submitted contains a materially incorrect statement or it may determine, after written request to the employee for verification of the statements on the certificate, that it lacks sufficient information to determine if the certificate is correct. If the Internal Revenue Service so finds or determines and notifies the employer in writing that the certificate is defective, the employer shall then consider the certificate to be defective for purposes of computing amounts of withholding.

(iii) If the Internal Revenue Service notifies the employer that the certificate is defective, the Internal Revenue Service will, based upon its findings, advise the employer that the employee either is not entitled to claim a status exempting the employee from withholding or is not entitled to claim a total number of withholding exemptions in excess of a number specified by the Internal Revenue Service in the notice, or both. The Internal Revenue Service will also specify the Internal Revenue Service office to be contacted for further information.

(iv) The Internal Revenue Service will provide the employer with a copy for the employee of each notice it furnishes to the employer under this paragraph (g)(5) in addition to the notice furnished to the employer for his own use. The Internal Revenue Service will also mail a similar notice to the employee at the address of the employee as shown on the certificate under review.

(v) The employer shall promptly furnish the employee who filed the defective certificate, if still in his employ, with a copy of the written notice of the Internal Revenue Service with respect to the certificate and may request another withholding exemption certificate from the employee. The employer shall withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service.

(vi) If and when the employee does file any new certificate (after an earlier certificate of the employee was considered to be defective), the employer shall withhold on the basis of that new certificate (whenever filed) as currently effective only if the new certificate does not make a claim of exempt status or of a number of withholding exemptions which claim is inconsistent with the advice earlier furnished by the Internal Revenue Service in its written notice to the employer. If any new certificate does make a claim which is inconsistent with the advice contained in the Service's written notice to the employer, then the employer shall disregard the new certificate, shall not submit that new certificate to the Service, and shall continue to withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service.

(vii) If the employee makes a claim on any new certificate that is inconsistent with the advice in the Service's written notice to the employer, the employee may specify on such new certificate, or by a written statement attached to that certificate, any circumstances of the employee which have changed since the date of the Service's earlier written notice, or any other circumstances or reasons, as justification or support for the claims made by the employee on the new certificate. The employee may then submit that new certificate and written statement either to (A) the Internal Revenue Service office specified in the notice earlier furnished to the employer under this paragraph (g)(5), or to (B) the employer, who must then submit a copy of that new certificate and the employee's written statement (if any) to the Internal Revenue Service office specified in the notice earlier furnished to the employer. The employer shall continue to disregard that new certificate and shall continue to withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service unless and until the Internal Revenue Service by written notice (under paragraph (g)(5)(iii) of this section) advises the employer to withhold on the basis of that new certificate and revokes its earlier written notice.

(6) *Definition of employer.* For purposes of this paragraph (g), the term ''employer'' includes any individual authorized by the employer to receive withholding exemption certificates, to make withholding computations, or to make payroll distributions.

(68A Stat. 731 (26 U.S.C. 6001); 68A Stat. 732 (26 U.S.C. 6011); 68A Stat. 917 (26 U.S.C. 7805))

[T.D. 6516, 25 FR 13105, Dec. 20, 1960, as amended by T.D. 6654, 28 FR 5252, May 28, 1963; T.D. 7048, 35 FR 10291, June 24, 1970; T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7577, 43 FR 59359, Dec. 20, 1978; T.D. 7598, 44 FR 14552, Mar. 13, 1979; T.D. 7682, 45 FR 15526, Mar. 11, 1980; T.D. 7772, 46 FR 17548, Mar. 19, 1981; T.D. 7803, 47 FR 3547, Jan. 26, 1982; T.D. 7915, 48 FR 44073, Sept. 27, 1983; T.D. 8164, 52 FR 45633, Dec. 1, 1987]

§ 31.3402(f)(3)–1 When withholding exemption certificate takes effect.

(a) A withholding exemption certificate furnished the employer in any case in which no previous withholding exemption certificate is in effect with such employer, shall take effect as of the beginning of the first payroll period ending, or the first payment of wages made without regard to a payroll period, on or after the date on which such certificate is so furnished.

(b) A withholding exemption certificate furnished the employer in any case in which a previous withholding exemption certificate is in effect with such employer shall, except as hereinafter provided, take effect with respect to the first payment of wages made on or after the first status determination date which occurs at least 30 days after the date on which such certificate is so furnished. However, at the election of the employer, except as hereinafter provided, such certificate may be made effective with respect to any payment of wages made on or after the date on which such certificate is so furnished and before such status determination date.

(c) A withholding exemption certificate furnished the employer pursuant to section 3402(f)(2)(C) (see paragraph (c) of § 31.3402(f)(2)–1 or paragraph (b)(2)(ii) of § 31.3402(1)–1) which effects a change for the next calendar year, shall not take effect, and may not be made effective, with respect to the calendar year in which the certificate is furnished. A withholding exemption certificate furnished the employer by an employee who determines his income tax liability on a basis other than a calendar- year basis, as required by paragraph (b)(4) of § 31.3402(f)(2)–1, which effects a change for the employee's next taxable year, shall not take effect, and may not be made effective, with respect to the taxable year of the employee in which the certificate is furnished.

(d) For purposes of this section, the term ''status determination date'' means January 1, May 1, July 1, and October 1 of each year.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 6516, 25 FR 13106, Dec. 20, 1960, as amended by T.D. 7048, 35 FR 10291, June 24, 1970; T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7115, 36 FR 9234, May 21, 1971; T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§31.3402(f)(4)–1 Period during which withholding exemption certificate remains in effect.

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, a withholding exemption certificate which takes effect under section 3402(f) of the Internal Revenue Code of 1954, or which on December 31, 1954, was in effect under section 1622(h) of the Internal Revenue Code of 1939, shall continue in effect with respect to the employee until another withholding exemption certificate takes effect under section 3402(f). Paragraphs (b) and (c) of this section are applicable only for withholding exemption certificates furnished by the employee to the employer before January 1, 1982. See §31.3402(f)(4)–2 for the rules applicable to withholding exemption certificates furnished by the employee to the employer after December 31, 1981.

(b) *Withholding allowances under section 3402(m) for itemized deductions.* In no case shall the portion of a withholding exemption certificate relating to withholding allowances under section 3402(m) for itemized deductions be effective with respect to any payment of wages made to an employee—

(1) In the case of an employee whose liability for tax under subtitle A of the Code is determined on a calendar-year basis, after April 30 of the calendar year immediately following the calendar year which was his estimation year for purposes of determining the withholding allowance or allowances claimed on such exemption certificate, or

(2) In the case of an employee to whom paragraph (c)(1) of this section does not apply, after the last day of the fourth month immediately following his taxable year which was his estimation year for purposes of determining the withholding allowance or allowances claimed on such exemption certificate.

(c) *Statements under section 3402(n) eliminating requirement of withholding.* The statements described in §31.3402(n)–1 made by an employee with respect to his preceding taxable year and current taxable year shall be deemed to have been made also with respect to his current taxable year and his taxable year immediately thereafter, respectively, until either a new withholding exemption certificate furnished by the employee takes effect or the existing certificate which contains such statements expires. In no case shall a withholding exemption certificate which contains such statements be effective with respect to any payment of wages made to an employee—

(1) In the case of an employee whose liability for tax under subtitle A is determined on a calendar-year basis, after April 30 of the calendar year immediately following the calendar year which was his original current taxable year for purposes of such statements, or

(2) In the case of an employee to whom paragraph (c)(1) of this section does not apply, after the last day of the fourth month immediately following his original current taxable year for purposes of such statements.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7048, 35 FR 10291, June 24, 1970, as amended by T.D. 7065, 35 FR 16539, Oct. 23, 1970; T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§31.3402(f)(4)–2 Effective period of withholding exemption certificate.

(a) *In general.* Except as provided in paragraphs (b) and (c) of this section, a withholding exemption certificate that takes effect under section 3402(f) of the Internal Revenue Code of 1954, or that on December 31, 1954, was in effect under section 1622(h) of the Internal Revenue Code of 1939, shall continue in effect with respect to the employee until another withholding exemption certificate takes effect under section 3402(f). Paragraphs (b) and (c) of this section are applicable only for withholding exemption certificates furnished by the employee to the employer after December 31, 1981. See §31.3402(f)(4)–1 for the rules applicable to withholding exemption certificates furnished by the employee to the employer before January 1, 1982.

(b) *Withholding allowances under section 3402(m).* See paragraphs (b) and (c) of § 31.3402(f)(2)–1 (relating to withholding exemption certificates) for information as to when an employee claiming withholding allowances under section 3402(m) and the regulations thereunder must file a new withholding exemption certificate with his employer.

(c) *Statements under section 3402(n) eliminating requirement of withholding.* The statements described in § 31.3402(n)–1 made by an employee with respect to his preceding taxable year and current taxable year shall be effective until either a new withholding exemption certificate furnished by the employee takes effect or the existing certificate that contains such statements expires. In no case shall a withholding exemption certificate that contains such statements be effective with respect to any payment of wages made to an employee:

(1) In the case of an employee whose liability for tax under subtitle A is determined on a calendar year basis, after February 15 of the calendar year following the estimation year, or

(2) In the case of an employee to whom paragraph (c)(1) of this section does not apply, after the 15th day of the 2nd calendar month following the last day of the estimation year.

(d) *Estimation year.* The estimation year is the taxable year including the day on which the employee files the withholding exemption certificate with his employer, except that if the employee files the withholding exemption certificate with his employer and specifies on the certificate that the certificate is not to take effect until a specified future date, the estimation year shall be the taxable year including that specified future date.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44073, Sept. 27, 1983]

§ 31.3402(f)(5)–1 Form and contents of withholding exemption certificates.

(a) *Form W–4.* Form W–4 is the form prescribed for the withholding exemption certificate required to be filed under section 3402(f)(2). A withholding exemption certificate shall be prepared in accordance with the instructions and regulations applicable thereto, and shall set forth fully and clearly the data therein called for. A withholding exemption certificate that does not set forth fully and clearly the data therein called for is an invalid withholding exemption certificate under § 31.3402(f)(2)–1(e) (relating to withhholding exemption certificates). Blank copies of paper Forms W–4 will be supplied to employers upon request to the Internal Revenue Service. In lieu of the prescribed form, employers may prepare and use a form the provisions of which are identical with those of the prescribed form, but only if employers also provide employees with all the tables and instructions contained in the Form W–4 in effect at that time and only if employers comply with all revenue procedures relating to substitute forms in effect at that time.

(b) *Invalid Form W–4.* A Form W–4 does not meet the requirements of section 3402(f)(5) or this section and is invalid if it contains an alteration or unauthorized addition. For purposes of § 31.3402(f)(2)–1(e) and this paragraph—

(1) An alteration of a withholding exemption certificate is any deletion of the language of the jurat or other similar provision of such certificate by which the employee certifies or affirms the correctness of the completed certificate, or any material defacing of such certificate;

(2) An unauthorized addition to a withholding exemption certificate is any writing on such certificate other than the entries requested (e.g., name, address, and number of exemptions claimed).

(c) *Electronic Form W–4*—(1) *In general.* An employer may establish a system for its employees to file withholding exemption certificates electronically.

(2) *Requirements*—(i) *In general.* The electronic system must ensure that the information received is the information sent, and must document all occasions of employee access that result in

the filing of a Form W–4. In addition, the design and operation of the electronic system, including access procedures, must make it reasonably certain that the person accessing the system and filing the Form W–4 is the employee identified in the form.

(ii) *Same information as paper Form W–4.* The electronic filing must provide the employer with exactly the same information as the paper Form W–4.

(iii) *Jurat and signature requirements.* The electronic filing must be signed by the employee under penalties of perjury.

(A) *Jurat.* The jurat (perjury statement) must contain the language that appears on the paper Form W–4. The electronic program must inform the employee that he or she must make the declaration contained in the jurat and that the declaration is made by signing the Form W–4. The instructions and the language of the jurat must immediately follow the employee's income tax withholding selections and immediately precede the employee's electronic signature.

(B) *Electronic signature.* The electronic signature must identify the employee filing the electronic Form W–4 and authenticate and verify the filing. For this purpose, the terms ''authenticate'' and ''verify'' have the same meanings as they do when applied to a written signature on a paper Form W–4. An electronic signature can be in any form that satisfies the foregoing requirements. The electronic signature must be the final entry in the employee's Form W–4 submission.

(iv) *Copies of electronic Forms W–4.* Upon request by the Internal Revenue Service, the employer must supply a hardcopy of the electronic Form W–4 and a statement that, to the best of the employer's knowledge, the electronic Form W–4 was filed by the named employee. The hardcopy of the electronic Form W–4 must provide exactly the same information as, but need not be a facsimile of, the paper Form W–4.

(3) *Effective date*—(i) *In general.* This paragraph applies to all withholding exemption certificates filed electronically by employees on or after January 2, 1997.

(ii) *Special rule for certain Forms W–4.* In the case of an electronic system that precludes the filing of Forms W–4 required on commencement of employment and Forms W–4 claiming more than 10 withholding exemptions or exemption from withholding, the requirements of paragraph (c)(2)(iii) of this section will be treated as satisfied if the Form W–4 is filed electronically before January 1, 1999.

[T.D. 7423, 41 FR 26217, June 25, 1976, as amended by T.D. 7915, 48 FR 44074, Sept. 27, 1983; T.D. 8706, 62 FR 24, Jan. 2, 1997]

§31.3402(f)(6)–1 Withholding exemptions for nonresident alien individuals.

A nonresident alien individual (other than, in regard to wages paid after February 28, 1979, a nonresident alien individual treated as a resident under section 6013(g) or (h)) subject to withholding under section 3402 is on any 1 day entitled under section 3402(f)(1) and §31.3402(f)(1)–1 to the number of withholding exemptions corresponding to the number of personal exemptions to which he is entitled on such day by reason of the application of section 873(b)(3) or section 876, whichever applies. Thus, a nonresident alien individual who is not a resident of Canada or Mexico and who is not a resident of Puerto Rico during the entire taxable year, is allowed under section 3402(f)(1) only one withholding exemption.

[T.D. 6908, 31 FR 16776, Dec. 31, 1966, as amended by T.D. 7670, 45 FR 6932, Jan. 31, 1980]

§31.3402(g)–1 Supplemental wage payments.

(a) *In general.* (1) An employee's remuneration may consist of wages paid for a payroll period and supplemental wages, such as bonuses, commissions, and overtime pay, paid for the same or a different period, or without regard to a particular period. When such supplemental wages are paid (whether or not at the same time as the regular wages) the amount of the tax required to be withheld under section 3402(a) (the percentage method) or under section 3402(c) (the wage bracket method) shall be determined in accordance with this paragraph or paragraph (b) of this section.

(2) The supplemental wages, if paid concurrently with wages for a payroll

period, shall be aggregated with the wages paid for such payroll period. If not paid concurrently, the supplemental wages shall be aggregated with the wages paid or to be paid within the same calendar year for the last preceding payroll period or for the current payroll period. The amount of tax to be withheld shall be determined as if the aggregate of the supplemental wages and the regular wages constituted a single wage payment for the regular payroll period.

Example 1. A, a single person, is employed as a salesman at a monthly salary of $130 plus commissions on sales made during the month. The number of withholding exemptions claimed is one. During May 1966 A earns $300 in commissions, which together with the salary of $130 is paid on June 10, 1966. Under the wage bracket method the amount of the tax required to be withheld is shown in the table applicable to a monthly payroll period with respect to an employee who is not married. Under this table it will be found that the amount of tax required to be withheld is $58.40.

Example 2. B, a married person, is employed at a salary of $3,600 per annum paid semimonthly on the 15th day and the last day of each month, plus a bonus and commission determined at the end of each 3-month period. The bonus and commission for the 3-month period ending on September 30, 1966, amount to $250, which is paid on October 10, 1966. B has in effect a withholding exemption certificate on which he claimed four withholding exemptions and disclosed that he is married. Under the wage bracket method, the amount of tax required to be withheld on the aggregate of the bonus of $250 and the last preceding semimonthly wage payment of $150, or $400, is shown in the table applicable to a married person with a semimonthly payroll period to be $44.50. However, since tax in the amount of $3.50 was withheld on the semimonthly wage payment of $150, the amount to be withheld on October 10, 1966, is $41.00.

If, however, supplemental wages are paid and tax has been withheld from the employee's regular wages, the employer may determine the tax to be withheld—

(i) From supplemental wages paid prior to May 1, 1966, by using the rate in effect under section 3402(a) at the time the wages are paid, and

(ii) From supplemental wages paid after April 30, 1966, by using a flat percentage rate of 20 percent, without allowance for exemption and without reference to any regular payment of wages.

(3) For provisions relating to the treatment of wages paid other than in cash to retail commission salesmen, see § 31.3402(j)–1.

(b) *Special rule where aggregate withholding exemption exceeds wages paid.* (1) If supplemental wages are paid to an employee during a calendar year for a period which involves two or more consecutive payroll periods, for which other wages also are paid during such calendar year, and the aggregate of such other wages is less than the aggregate of the amounts determined under the table provided in section 3402(b) (1) as the withholding exemptions applicable for such payroll periods, the amount of the tax required to be withheld on the supplemental wages shall be computed as follows:

Step 1. Determine an average wage for each of such payroll periods by dividing the sum of the supplemental wages and the wages paid for such payroll periods by the number of such payroll periods.

Step 2. Determine a tax for each payroll period as if the amount of the average wage constituted the wages paid for such payroll period.

Step 3. From the sum of the amounts of tax determined in Step 2 subtract the total amount of tax withheld, or to be withheld, from the wages, other than the supplemental wages, for such payroll periods. The remainder, if any shall constitute the amount of the tax to be withheld upon the supplemental wages.

Example. An employee has a weekly payroll period ending on Saturday of each week, the wages for which are paid on Friday of the succeeding week. On the 10th day of each month he is paid a bonus based upon production during the payroll periods for which wages were paid in the preceding month. The employee is paid a weekly wage of $64 on each of the five Fridays occurring in July 1966. On August 10, 1966, the employee is paid a bonus of $125 based upon production during the five payroll periods covered by the wages paid in July. On the date of payment of the bonus, the employee, who is married and has three children, has a withholding exemption certificate in effect indicating that he is married and claiming five withholding exemptions. The amount of the tax to be withheld from the bonus paid on August 10, 1966, is computed as follows:

Wages paid in July 1966 for 5 payroll periods (5×$64)	$320.00
Bonus paid August 10, 1966	125.00

Aggregate of wages and bonus	445.00
Average wage per payroll period ($445÷5)	89.00
Computation of tax under percentage method:	
Withholding exemptions (5×$13.50)	67.50
Remainder subject to tax	21.50
Tax on average wage for 1 week under percentage method of withholding (married person with weekly payroll period) 14 percent of $17.50 (excess over $4))	2.45
Tax on average wage for 5 weeks	12.25
Less: Tax previously withheld on weekly wage payments of $64	None
Tax to be withheld on supplemental wages	12.25
Computation of tax under wage bracket method:	
Tax on $89 wage under weekly wage table for married person ($2.50 per week for 5 weeks)	12.50
Less: Tax previously withheld on weekly wage payments of $64	None
Tax to be withheld on supplemental wages	12.50

(2) The rules prescribed in this paragraph shall, at the election of the employer, be applied in lieu of the rules prescribed in paragraph (a) of this section except that this paragraph shall not be applicable in any case in which the payroll period of the employee is less than one week.

(c) *Vacation allowances.* Amounts of so-called ''vacation allowances'' shall be subject to withholding as though they were regular wage payments made for the period covered by the vacation. If the vacation allowance is paid in addition to the regular wage payment for such period, the rules applicable with respect to supplemental wage payments shall apply to such vacation allowance.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6860, 30 FR 13947, Nov. 4, 1965; T.D. 6882, 31 FR 5661, Apr. 12, 1966]

§31.3402(g)–2 Wages paid for payroll period of more than one year.

If wages are paid to an employee for a payroll period of more than one year, for the purpose of determining the amount of tax required to be deducted and withheld in respect of such wages—

(a) Under the percentage method, the amount of the tax shall be determined as if such payroll period constituted an annual payroll period, and

(b) Under the wage bracket method, the amount of the tax shall be determined as if such payroll period constituted a miscellaneous payroll period of 365 days.

§31.3402(g)–3 Wages paid through an agent, fiduciary, or other person on behalf of two or more employers.

(a) If a payment of wages is made to an employee by an employer through an agent, fiduciary, or other person who also has the control, receipt, custody, or disposal of, or pays the wages payable by another employer to such employee, the amount of the tax required to be withheld on each wage payment made through such agent, fiduciary, or person shall, whether the wages are paid separately on behalf of each employer or paid in a lump sum on behalf of all such employers, be determined upon the aggregate amount of such wage payment or payments in the same manner as if such aggregate amount had been paid by one employer. Hence, under either the percentage method or the wage bracket method the tax shall be determined upon the aggregate amount of the wage payment.

(b) In any such case, each employer shall be liable for the return and payment of a pro rata portion of the tax so determined, such portion to be determined in the ratio which the amount contributed by the particular employer bears to the aggregate of such wages.

(c) For example, three companies maintain a central management agency which carries on the administrative work of the several companies. The central agency organization consists of a staff of clerks, bookkeepers, stenographers, etc., who are the common employees of the three companies. The expenses of the central agency, including wages paid to the foregoing employees, are borne by the several companies in certain agreed proportions. Company X pays 45 percent, Company Y pays 35 percent and Company Z pays 20 percent of such expenses. The amount of tax required to be withheld on the wages paid to persons employed in the central agency should be determined in accordance with the provisions of this section. In such event, Company X is liable as an employer for the return and payment of 45 percent of the tax required to be withheld, Company Y is liable for the return and payment of 35 percent of the tax and Company Z is liable for the return and payment of 20 percent of the tax. (See § 31.3504–1, relating to acts to be performed by agents.)

§ 31.3402(h)(1)–1 Withholding on basis of average wages.

(a) *In general.* An employer may determine the amount of tax to be deducted and withheld upon a payment of wages to an employee on the basis of the employee's average estimated wages, with necessary adjustments, for any quarter. This paragraph applies only where the method desired to be used includes wages other than tips (whether or not tips are also included).

(b) *Withholding on the basis of average estimated tips*—(1) *In general.* Subject to certain limitations and conditions, an employer may, at his discretion, withhold the tax under section 3402 in respect of tips reported by an employee to the employer on an estimated basis. An employer who elects to make withholding of the tax on an estimated basis shall:

(i) In respect of each employee, make an estimate of the amount of tips that will be reported, pursuant to section 6053, by the employee to the employer in a calendar quarter.

(ii) Determine the amount which must be deducted and withheld upon each payment of wages (exclusive of tips) which are under the control of the employer to be made during the quarter by the employer to the employee. The total amount which must be deducted and withheld shall be determined by assuming that the estimated tips for the quarter represent the amount of wages to be paid to the employee in the form of tips in the quarter and that such tips will be ratably (in terms of pay periods) paid during the quarter.

(iii) Deduct and withhold from any payment of wages (exclusive of tips) which are under the control of the employer, or from funds referred to in section 3402(k) (see §§ 31.3402(k) and 31.3402(k)–1), such amount as may be necessary to adjust the amount of tax withheld on the estimated basis to conform to the amount required to be withheld in respect of tips reported by the employee to the employer during the calendar quarter in written statements furnished to the employer pursuant to section 6053(a). If an adjustment is required, the additional tax required to be withheld may be deducted upon any payment of wages (exclusive of tips) which are under the control of the employer during the quarter and within the first 30 days following the quarter or from funds turned over by the employee to the employer for such purpose within such period. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of tax, see § 31.6413(a)–1.

(2) *Estimating tips employee will report*—(i) *Initial estimate.* The initial estimate of the amount of tips that will be reported by a particular employee in a calendar quarter shall be made on the basis of the facts and circumstances surrounding the employment of that employee. However, if a number of employees are employed under substantially the same circumstances and working conditions, the initial estimate established for one such employee may be used as the initial estimate for other employees in that group.

(ii) *Adjusting estimate.* If the quarterly estimate of tips in respect of a particular employee continues to differ substantially from the amount of tips reported by the employee and there are no unusual factors involved (for example, an extended absence from work due to illness) the employer shall make an appropriate adjustment of his estimate of the amount of tips that will be reported by the employee.

(iii) *Reasonableness of estimate.* The employer must be prepared, upon request of the district director, to disclose the factors upon which he relied in making the estimate, and his reasons for believing that the estimate is reasonable.

[T.D. 7053, 35 FR 11626, July 21, 1970]

§ 31.3402(h)(2)–1 Withholding on basis of annualized wages.

An employer may determine the amount of tax to be deducted and withheld upon a payment of wages to an employee by taking the following steps:

Step 1. Multiply the amount of the employee's wages for the payroll period by the number of such periods in the calendar year.

Step 2. Determine the amount of tax which would be required to be deducted and withheld upon the amount determined in Step 1 if that amount constituted the actual wages for the calendar year and the payroll period of the employee were an annual payroll period.

Step 3. Divide the amount of tax determined in Step 2 by the number of periods by which the employee's wages were multiplied in Step 1.

Example. On July 1, 1970, A, a single person who is on a weekly payroll period and claims one exemption, receives wages of $100 from X Co., his employer. X Co. multiplies the weekly wage of $100 by 52 weeks to determine an annual wage of $5,200. It then subtracts $650 for A's withholding exemption and arrives at a balance of $4,550. The applicable table in section 3402(a) for annual payroll periods indicates that the amount of tax to be withheld thereon is $376 plus $314.50 (17 percent of excess over $2,700), or a total of $690.50. The annual tax of $690.50, when divided by 52 to arrive at the portion thereof attributable to the weekly payroll period, equals $13.28. X Co. may, if it chooses, withhold $13.28 rather than the amount specified in section 3402 (a) or (c) for a weekly payroll period.

[T.D. 7053, 35 FR 11627, July 21, 1970]

§31.3402(h)(3)–1 Withholding on basis of cumulative wages.

(a) *In general.* In the case of an employee who has in effect a request that the amount of tax to be withheld from his wages be computed on the basis of his cumulative wages, and whose wages since the beginning of the current calendar year have been paid with respect to the same category of payroll period (e.g., weekly or semimonthly), the employer may determine the amount of tax to be deducted and withheld upon a payment of wages made to the employee after December 31, 1969, by taking the following steps:

Step 1. Add the amount of the wages to be paid the employee for the payroll period to the total amount of wages paid by the employer to the employee during the calendar year.

Step 2. Divide the aggregate amount of wages computed in Step 1 by the number of payroll periods to which that amount relates.

Step 3. Compute the total amount of tax that would have been required to be deducted and withheld under section 3402(a) if the average amount of wages (as computed in Step 2) had been paid to the employee for the number of payroll periods to which the aggregate amount of wages (computed in Step 1) relates.

Step 4. Determine the excess, if any, of the amount of tax computed in Step 3 over the total amount of tax already deducted and withheld by the employer from wages paid to the employee during the calendar year.

Example. On July 1, 1970, Y Co. employs B, a single person claiming one exemption. Y Co. pays B the following amounts of wages on the basis of a biweekly payroll period on the following pay days:

July 20	$1,000
August 3	300
August 17	300
August 31	300
September 14	300
September 28	300

On October 5, B requests that Y Co. withhold on the basis of his cumulative wages with respect to his wages to be paid on October 12 and thereafter. Y Co. adds the $300 in wages to be paid to B on October 12 to the payments of wages already made to B during the calendar year, and determines that the aggregate amount of wages is $2,800. The average amount of wages for the 7 biweekly payroll periods is $400. The total amount of tax required to be deducted and withheld for payments of $400 for each of 7 biweekly payroll periods is $485.87 under section 3402(a). Since the total amount of tax which has been deducted and withheld by Y Co. through September 28 is $484.86, Y Co. may, if it chooses, deduct and withhold $1.01 (the amount by which $485.87 exceeds the total amount already withheld by Y Co.) from the payment of wages to B on October 12 rather than the amount specified in section 3402 (a) or (c).

(b) *Employee's request and revocation of request.* An employee's request that his employer withhold on the basis of his cumulative wages and a notice of revocation of such request shall be in writing and in such form as the employer may prescribe. An employee's request furnished to his employer pursuant to this section shall be effective, and may be acted upon by his employer, after the furnishing of such request and before a revocation thereof is effective. A revocation of such request may be made at any time by the employee furnishing his employer with a notice of revocation. The employer may give immediate effect to a revocation, but, in any event, a revocation shall be effective with respect to payments of wages made on or after the first ''status determination date'' (see section 3402(f)(3)(B)) which occurs at least 30 days after the date on which such notice is furnished.

(c) *Requests due to increases or decreases in allowances.* An employee may request pursuant to this section that his employer withhold on the basis of the employee's cumulative wages when the employee is entitled to claim an increased or decreased number of withholding allowances under § 31.3402(m)–1 during the estimation year (as defined in § 31.3402(m)–1(c)(1)).

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7053, 35 FR 11627, July 21, 1970, as amended by T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(h)(4)–1 Other methods.

(a) *Maximum permissible deviations.* An employer may use any other method of withholding under which the employer will deduct and withhold upon wages paid to an employee after December 31, 1969, for a payroll period substantially the same amount as would be required to be deducted and withheld by applying section 3402(a) with respect to the payroll period. For purposes of section 3402(h)(4) and this section, an amount is substantially the same as the amount required to be deducted and withheld under section 3402(a) if its deviation from the latter amount is not greater than the maximum permissible deviation prescribed in this paragraph. The maximum permissible deviation under this paragraph is determined by annualizing wages as provided in Step 1 of § 31.3402(h)(2)–1 and applying the following table to the amount of tax required to be deducted and withheld under section 3402(a) with respect to such annualized wages, as determined under Step 2 of § 31.3402(h)(2)–1:

If the tax required to be withheld under the annual percentage rate schedule is—	*The maximum permissible annual deviation is—*
$10 to $100	$10, plus 10 percent of excess over $10.
$100 to $1,000	$19, plus 3 percent of excess over $100.
$1,000 or over	$46, plus 1 percent of excess over $1,000.

In any case, an amount which is less than $10 more or less per year than the amount required to be deducted and withheld under section 3402(a) is substantially the same as the latter amount. If any method produces results which are not greater than the prescribed maximum deviations only with respect to some of his employees, the employer may use such method only with respect to such employees. An employer should thoroughly test any method which he contemplates using to ascertain whether it meets the tolerances prescribed by this paragraph. An employer may not use any method, one of the principal purposes of which is to consistently produce amounts to be deducted and withheld which are less (though substantially the same) than the amount required to be deducted and withheld by applying section 3402(a).

(b) *Combined FICA and income tax withholding.* In addition to the methods authorized by paragraph (a) of this section, an employer may determine the amount of tax to be deducted and withheld under section 3402 upon a payment of wages to an employee by using tables prescribed by the Commissioner which combine the amounts of tax to be deducted under sections 3102 and 3402. Such tables shall provide for the deduction of the sum of such amounts, computed on the basis of the midpoints of the wage brackets in the tables prescribed under section 3402(c). The portion of such sum which is to be treated as the tax deducted and withheld under section 3402 shall be the amount obtained by subtracting from such sum the amount of tax required to be deducted by section 3102. Such tables may be used only with respect to payments which are wages under both sections 3121(a) and 3401(a).

(c) *Part-year employment method of withholding*—(1) *In general.* In addition to the methods authorized by other paragraphs of this section, in the case of part-year employment (as defined in subparagraph (4) of this paragraph) of an employee who determines his liability for tax under subtitle A of the Code on a calendar-year basis and who has in effect a request that the amount of tax to be withheld from his wages be computed according to the part-year employment method described in this paragraph, the employer may determine the amount of tax to be deducted and withheld upon a payment of wages made to the employee on or after January 5, 1973, by taking the following steps:

Step 1. Add the amount of wages to be paid to the employee for the current payroll period to the total amount of wages paid by the employer to the employee for all preceding payroll periods included in the current term of continuous employment (as defined in subparagraph (3) of this paragraph) of the employee by the employer;

Step 2. Divide the aggregate amount of wages computed in Step 1 by the total of the number of payroll periods to which that amount relates plus the equivalent number of payroll periods (as defined in subparagraph (2) of this paragraph) in the employee's term of continuous unemployment immediately preceding the current term of continuous employment, such term of continuous unemployment to be exclusive of any days prior to the beginning of the current calendar year;

Step 3. Determine the total amount of tax that would have been required to be deducted and withheld under section 3402 if the average amount of wages (as computed in Step 2) had been paid to the employee for the number of payroll periods determined in Step 2 (including the equivalent number of payroll periods); and

Step 4. Determine the excess, if any, of the amount of tax computed in Step 3 over the total amount of tax already deducted and withheld by the employer from wages paid to the employee for all payroll periods during the current term of continuous employment.

The use of the method described in this paragraph does not preclude the employee from claiming additional withholding allowances pursuant to section 3402(m) or the standard deduction allowance pursuant to section 3402(f)(1)(G).

(2) *Equivalent number of payroll periods.* For purposes of this paragraph, the equivalent number of payroll periods shall be determined by dividing the number of calendar days contained in the current payroll period into the number of calendar days between the later of (i) the day certified by the employee as his last day of employment prior to his current term of continuous employment during the calendar year in which such term commenced, or (ii) the last day of the calendar year immediately preceding the current calendar year, and the first day of the current term of continuous employment. For purposes of the preceding sentence, the term ''calendar days'' includes holidays, Saturdays, and Sundays. In determining the equivalent number of payroll periods, any fraction obtained in the division described in the first sentence of this subparagraph shall be disregarded. An employee paid for a miscellaneous payroll period shall be considered to have a daily payroll period for purposes of this subparagraph. In a case in which an employee is paid for a daily or miscellaneous payroll period and the employer elects under Circular E to compute the tax to be withheld as if the aggregate of the wages paid to the employee during the calendar week were paid for a weekly period, the employer shall determine the equivalent number of payroll periods for purposes of the computation of the tax to be withheld for the calendar week on the basis of a weekly payroll period (notwithstanding the fact that a determination of the equivalent number of payroll periods for purposes of the computation of the tax to be withheld upon wages paid for daily or miscellaneous payroll periods within such calendar week has been made on the basis of a daily or miscellaneous payroll period).

(3) *Term of continuous employment.* For purposes of this paragraph, a term of employment is continuous if it is either a single term of employment or two or more consecutive terms of employment with the same employer. A term of continuous employment begins on the first day on which any services are performed by the employee for the employer for which compensation is paid or payable. Such term ends on the earlier of (i) the last day during the current term of continuous employment on which any services are performed by the employee for the employer, or (ii) if the employee performs no services for the employer for a period of more than 30 calendar days, the last day preceding such period on which any services are performed by the employee for the employer. For example, a professional athlete who signs

a contract on December 31, 1973, to perform services from July 1 through December 31 for the calendar years 1974, 1975, and 1976 has a new term of employment beginning each July 1 and accordingly may qualify for use of the part-year withholding method in each of such years. Likewise, a term of continuous employment is not broken by a temporary layoff of no more than 30 days. On the other hand, when an employment relationship is actually terminated the term of continuous employment is ended even though a new employment relationship is established with the same employer within 30 days. A ''term of continuous employment'' includes all days on which an employee performs any services for an employer and includes days on which services are not performed because of illness or vacation, or because such days are holidays or are regular days off (such as Saturdays and Sundays, or days off in lieu of Saturdays and Sundays), or other days for which the employee is not scheduled to work. For example, an employee who is employed 2 days a week for the same employer from March 1 through December 31 has a term of continuous employment of 306 days.

(4) *Part-year employment.* For purposes of this paragraph, ''part-year employment'' means one or more terms of continuous employment with all employers which term or terms will not aggregate more than 245 days within a calendar year. For example, A graduates from college in May and was not employed from January through May. A accepts a permanent position with X Co., beginning June 1. Since the total duration of A's term of continuous employment will, during the current calendar year, not exceed 245 days it does qualify as part-year employment for purposes of this section.

If, however, A had also worked for Y Co. from December 15 of the previous year through February 5 of the current calendar year, the total duration of A's terms of continuous employment will, during the current calendar year, exceed 245 days (36 days (January 1 through February 5) plus 214 days (June 1 through December 31) equals 250 days). This year's employment does not therefore qualify as part-year employment for purposes of this section.

(5) *Employee's request.* (i) An employee's request that his employer withhold according to the part-year employment method shall be in writing and in such form as the employer may prescribe. Such request shall be made under the penalties of perjury and shall contain the following information—

(a) The last day of employment (if any) by any employer prior to the current term of continuous employment during the calendar year in which such term commenced.

(*b*) A statement that the employee reasonably anticipates that he will be employed for an aggregate of no more than 245 days in all terms of continuous employment during the current calendar year, and

(c) The employee uses a calendar-year accounting period.

An employee's request furnished to his employer pursuant to this section shall be effective, and may be acted upon by his employer, with respect to wages paid after the furnishing of such request, and shall cease to be effective with respect to any wages paid on or after the beginning of the payroll period during which the current calendar year will end.

(ii) If, on any day during the calendar year, any of the anticipations stated by the employee in his statement provided pursuant to subdivision (i)*(b)* of this subparagraph becomes unreasonable, the employee shall revoke the request described in this subparagraph before the end of the payroll period during which it becomes unreasonable. The revocation shall be effective as of the beginning of the payroll period during which it is made.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7053, 35 FR 11627, July 21, 1970, as amended by T.D. 7251, 38 FR 867, Jan 5, 1973; T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(i)–1 Additional withholding.

(a) In addition to the tax required to be deducted and withheld in accordance with the provisions of section 3402, the employer and employee may agree that an additional amount shall be withheld from the employee's wages. The agreement shall be in writing and shall be in such form as the employer may prescribe. The agreement shall be effective for such period as the employer and employee mutually agree upon. However, unless the agreement provides for an earlier termination, either the employer or the employee, by furnishing a written notice to the other, may terminate the agreement effective with respect to the first payment of wages made on or after the first ''status determination date'' (see paragraph (d) of § 31.3402(f)(3)–1) which occurs at least 30 days after the date on which such notice if furnished.

(b) The amount deducted and withheld pursuant to an agreement between the employer and employee shall be considered as tax required to be deducted and withheld under section 3402. All provisions of law and regulations applicable with respect to the tax required to be deducted and withheld under section 3402 shall be applicable with respect to any amount deducted and withheld pursuant to the agreement.

(c) This section is applicable only to agreements made before October 1, 1981. Any such agreement shall remain in effect in accordance with paragraph (a). See § 31.3402 (i)–2 for rules relating to increases in withholding after September 30, 1981.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 6516, 25 FR 13108, Dec. 20, 1960, as amended by T.D. 7065, 35 FR 16540, Oct. 23, 1970; T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(i)–2 Increases or decreases in withholding.

(a) *Increases in withholding*—(1) *In general.* In addition to the tax required to be deducted and withheld in accordance with the provisions of section 3402, the employee may request, after September 30, 1981, that the employer deduct and withhold an additional amount from the employee's wages. The employer must comply with the employee's request, except that the employer shall comply with the employee's request only to the extent that the amount that the employee requests to be deducted and withheld under this section does not exceed the amount that remains after the employer has deducted and withheld all amounts otherwise required to be deducted and withheld by Federal law (other than by section 3402(i) and this section), State law, and local law (other than by State or local law that provides for voluntary withholding). The employer must comply with the employee's request in accordance with the time limitations of § 31.3402(f)(3)–1 (relating to when withholding exemption certificate takes effect). The employee must make his request on Form W–4 as provided in § 31.3402(f)(5)–1 (relating to form and contents of withholding exemption certificates), and this Form W–4 shall take effect and remain effective in accordance with section 3402(f) and the regulations thereunder.

(2) *Amount deducted considered to be tax.* The amount deducted and withheld pursuant to paragraph (a)(1) of this section shall be considered to be tax required to be deducted and withheld under section 3402. All provisions of law and regulations applicable with respect to the tax required to be deducted and withheld under section 3402 shall be applicable with respect to any amount deducted and withheld under paragraph (a)(1) of this section.

(b) *Decreases in withholding.* [Reserved]

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44074, Sept. 27, 1983]

§ 31.3402(j)–1 Remuneration other than in cash for service performed by retail commission salesman.

(a) *In general.* (1) An employer, in computing the amount to be deducted and withheld as tax in accordance with section 3402, may, at his election, disregard any wages paid, after August 9, 1955, in a medium other than cash for services performed for him by an employee if (i) the noncash remuneration is paid for services performed by the employee as a retail commission salesman and (ii) the employer ordinarily pays the employee remuneration solely by way of cash commissions for services performed by him as a retail commission salesman.

(2) Section 3402(j) and this section are not applicable with respect to noncash wages paid to a retail commission salesman for services performed by him in a capacity other than as such a salesman. Such sections are not applicable with respect to noncash wages paid by an employer to an employee for services performed as a retail commission salesman if the employer ordinarily pays the employee remuneration other than by way of cash commissions for such services. Thus, noncash remuneration may not be disregarded in computing the amount to be deducted and withheld in a case where the employee, for services performed as a retail commission salesman, is paid both a salary and cash commissions on sales, or is ordinarily paid in something other than cash (stocks, bonds, or other forms of property) notwithstanding that the amount of remuneration paid to the employee is measured by sales.

(b) *Retail commission salesman.* For purposes of section 3402(j) and this section, the term ''retail commission salesman'' includes an employee who is engaged in the solicitation of orders at retail, that is, from the ultimate consumer, for merchandise or other products offered for sale by his employer. The term does not include an employee salesman engaged in the solicitation on behalf of his employer of orders from wholesalers, retailers, or others, for merchandise for resale. However, if the salesman solicits orders for more than one principal, he is not excluded from the term solely because he solicits orders from wholesalers or retailers on behalf of one or more principals. In such case the salesman may be a retail commission salesman with respect to services performed for one or more principals and not with respect to services performed for his other principals.

(c) *Noncash remuneration.* The term ''noncash remuneration'' includes remuneration paid in any medium other than cash, such as goods or commodities, stocks, bonds, or other forms of property. The term does not include checks or other monetary media of exchange.

(d) *Cross reference.* For provisions relating to records required to be kept and statements which must be furnished an employee with respect to wage payments, see sections 6001 and 6051 and the regulations thereunder in Subpart G of this part.

§ 31.3402(k)–1 Special rule for tips.

(a) *Withholding of income tax in respect of tips*—(1) *In general.* Subject to the limitations set forth in paragraph (a)(2) of this section, an employer is required to deduct and withhold from each of his employees tax in respect of those tips received by the employee which constitute wages. (For provisions relating to the treatment of tips as wages, see §§ 3401(a)(16) and 3401(f).) The employer shall make the withholding by deducting or causing to be deducted the amount of the tax from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer (see paragraph (a)(3) of this section). For purposes of this section the terms ''wages (exclusive of tips) which are under the control of the employer'' means, with respect to a payment of wages, an amount equal to wages as defined in section 3401(a) except that tips and noncash remuneration which are wages are not included, less the sum of—

(i) The tax under section 3101 required to be collected by the employer in respect of wages as defined in section 3121(a) (exclusive of tips);

(ii) The tax under section 3402 required to be collected by the employer in respect of wages as defined in section 3401(a) (exclusive of tips); and

(iii) The amount of taxes imposed on the remuneration of an employee withheld by the employer pursuant to State and local law (including amounts withheld under an agreement between the employer and the employee pursuant to such law) except that the amount of taxes taken into account in this subdivision shall not include any amount attributable to tips.

(2) *Limitations.* An employer is required to deduct and withhold the tax on tips which constitute wages only in respect of those tips which are reported by the employee to the employer in a

written statement furnished to the employer pursuant to section 6053(a). The employer is responsible for the collection of the tax on tips reported to him only to the extent that the emloyer can, during the period beginning at the time the written statement is submitted to him and ending at the close of the calendar year in which the statement was submitted, collect the tax by deducting it or causing it to be deducted as provided in subparagraph (1) of this paragraph.

(3) *Furnishing of funds to employer.* If the amount of the tax in respect of tips reported by the employee to the employer in a written statement furnished pursuant to section 6053(a) exceeds the wages (exclusive of tips) which are under the control of the employer from which the employer is required to withhold the tax in respect of such tips, the employee may furnish to the employer, within the period specified in subparagraph (2) of this paragraph, an amount of money equal to the amount of such excess.

(b) *Less than $20 of tips.* Notwithstanding the provisions of paragraph (a) of this section, if an employee furnishes to his employer a written statement—

(1) Covering a period of less than 1 month, and

(2) The statement is furnished to the employer prior to the close of the 10th day of the month following the month in which the tips were actually received by the employee, and

(3) The aggregate amount of tips reported in the statement and in all other statements previously furnished by the employee covering periods within the same month is less than $20, and such statements, collectively, do not cover the entire month,

the employer may deduct amounts equivalent to the tax on such tips from wages (exclusive of tips) which are under the control of the employer or other funds turned over by the employee to the employer. For provisions relating to the repayment to an employee, or other disposition, of amounts deducted from an employee's remuneration in excess of the correct amount of tax, see § 31.6413(a)–1. (As to the exclusion from wages of tips of less than $20, see § 31.3401(a)(16)–1.)

(c) *Priority of tax collection*—(1) *In general.* In the case of a payment of wages (exclusive of tips), the employer shall deduct or cause to be deducted in the following order:

(i) The tax under section 3101 and the tax under section 3402 with respect to such payment of wages.

(ii) Any tax under section 3101 which, at the time of payment of the wages, the employer is required to collect—

(a) In respect of tips reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a), or

(b) By reason of the employer's election to make collection of the tax under section 3101 in respect of tips on an estimated basis,

but which has not been collected by the employer and which cannot be deducted from funds turned over by the employee to the employer for such purpose. (See § 31.3102–3, relating to collection of, and liability for, employee tax on tips.)

(iii) Any tax under section 3402 which, at the time of the payment of the wages, the employer is required to collect—

(a) In respect of tips reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a), or

(b) By reason of the employer's election to make collection of the tax under section 3402 in respect of tips on an estimated basis,

but which has not been collected by the employer and which cannot be deducted from funds turned over by the employee to the employer for such purpose. For provisions relating to the witholding of tax on the basis of average estimated tips, see paragraph (b) of § 31.3402(h)(1)–1.

(2) *Examples.* The application of paragraph (b)(1) of this section may be illustrated by the following examples (The amounts used in the following examples are intended for illustrative purposes and do not necessarily reflect currently effective rates or amounts.):

Example 1. W is a waiter employed by R restaurant. W's principal remuneration for his services is in the form of tips received from patrons of R; however, he also receives a salary from R of $40 per week, which is paid to him every Friday. W is a member of a labor union which has a contract with R pursuant to which R is to collect dues for the union by withholding from the wages of its employees at the rate of $1 per week. In addition to the taxes required to be withheld under the Internal Revenue Code, W's wages are subject to withholding of a state income tax imposed upon both his regular wage and his tips received and reported to R.

On Monday of a given week W furnishes a written statement to R pursuant to section 6053(a) in which he reports the receipt of $160 in tips. The $40 wage to be paid to W on Friday of the same week is subject to the following items of withholding:

	Taxes with respect to regular wage	Taxes with respect to tips	Total
Section 3101 (F.I.C.A.)	$1.76	$7.04	$8.80
Section 3402 (income tax at source)	5.65	28.30	33.95
State income tax	1.20	4.80	6.00
Union dues			1.00
Total			49.75

W does not turn over any funds to R. R should satisfy the taxes imposed by sections 3101 and 3402 out of W's $40 wage as follows: The taxes imposed with respect to the regular wage (a total of $74l) should be satisfied first. The taxes imposed with respect to tips are to be withheld only out of ''wages (exclusive of tips) which are under the control of the employer'' as that phrase is defined in §§ 31.3102–3(a)(1) and 31.3402(k)–1(a)(1). The amount of such wages under the control of employer in this example is $31.39, or $40, less the amounts applied in satisfaction of the Federal and State withholding taxes imposed with respect to the regular $40 wage ($8.61). This $31.39 is applied first in satisfaction of the tax under section 3101 with respect to tips ($7.04) in the balance of $24.35 is applied in partial satisfaction of the withholding of income tax at source under section 3402 with respect to tips. The amount of the tax with respect to tips under section 3402 which remains unsatisfied ($3.95) should be withheld from wages under the control of the employer the following week.

Example 2. During the week following the week dealt with in example 1, W furnishes a written statement to R pursuant to withholding:

	Taxes with respect to regular wage	Taxes with respect to tips	Total
Section 3101 (F.I.C.A.)	$1.76	$5.72	$7.48
Section 3402 (Income tax at source):			
Current week	5.65	22.30	27.95
Carryover from prior week		3.95	3.95
State income tax	1.20	3.90	5.10
Union dues			1.00
Garnishment			10.00
Total			55.48

As in example 1, the amount of ''wages (exclusive of tips) which are under the control of the employer'' is $31.39. This amount is applied first in satisfaction of the tax under section 3101 with respect to tips ($5.72) and the balance is applied in partial satisfaction of the withholding of income tax at source under section 3402 with respect to tips (a total of $26.25), including that portion of the amount required to be withheld from the prior week's wages which remained unsatisfied. The amount of the tax with respect to tips under section 3402 which remains unsatisfied ($0.58) should be withheld from wages under the control of the employer the following week.

[T.D. 7001, 34 FR 1002, Jan. 23, 1969, as amended by T.D. 7053, 35 FR 11628, July 21, 1970]

§ 31.3402(l)–1 Determination and disclosure of marital status.

(a) *Determination of status by employer.* An employer in computing the tax to be deducted and withheld from an employee's wages paid after April 30, 1966, shall apply the applicable percentage method or wage bracket method withholding table (see section 3402 (a), (b), and (c) and the regulations thereunder) for the pertinent payroll period which relates to employees who are single persons, unless there is in effect with respect to such payment of wages a withholding exemption certificate furnished to the employer by the employee after March 15, 1966, indicating that the employee is married in which case the employer shall apply the applicable table relating to employees who are married persons.

(b) *Disclosure of status by employee.* (1) An employee shall be entitled to furnish the employer with a withholding exemption certificate indicating he is married only if, on the day of such furnishing, he is married (determined by application of the rules in paragraph (c) of this section). Thus, an employee who is contemplating marriage may not, prior to the actual marriage, furnish the employer with a withholding exemption certificate indicating that he is a married person.

(2) (i) If, on any day during the calendar year, the marital status (as determined by application of the rules in paragraph (c) of this section) of an employee who has in effect a withholding exemption certificate indicating that he is a married person, changes from married to single, the employee must within 10 days after the change occurs furnish the employer with a new withholding exemption certificate indicating that the employee is a single person.

(ii) If an employee who has in effect a withholding exemption certificate indicating that he is a married person, is considered married solely because of the application of subparagraph (2)(ii) of paragraph (c) of this section, and his spouse died during the taxable year which precedes by 2 years the current taxable year, the employee must, on or before December 1 of the current taxable year, furnish the employer with a new withholding exemption certificate indicating that he is a single person. Such certificate shall not, however become effective until the next calendar year (see paragraph (c) of §31.3402(f)(3)–1).

(3) If, on any day during the calendar year, the marital status (as determined by application of the rules in paragraph (c) of this section) of an employee who has in effect a withholding exemption certificate indicating that he is a single person changes from single to married, the employee may furnish the employer with a new withholding exemption certificate indicating that the employee is a married person.

(c) *Determination of marital status.* For the purposes of section 3402(l)(2) and paragraph (b) of this section, the following rules shall be applied in determining whether an employee is a married person or a single person—

(1) An employee shall on any day be considered as a single person if—

(i) He is legally separated from his spouse under a decree of divorce or separate maintenance, or

(ii) Either he or his spouse is, or on any preceding day within the same calendar year was, a nonresident alien.

(2) An employee shall on any day be considered as a married person if—

(i) His spouse (other than a spouse referred to in paragraph (c)(1) of this section) died within the portion of his taxable year which precedes such day, or

(ii) His spouse died during one of the two taxable years immediately preceding the current taxable year and, on the basis of facts existing at the beginning of such day, he reasonably expects, at the close of his taxable year, to be a surviving spouse as defined in section 2 and the regulations thereunder.

[T.D. 7115, 36 FR 9234, May 21, 1971]

§31.3402(m)–1 Withholding allowances.

(a) *General rule.* An employee may claim, with respect to wages paid after December 31, 1981, a number of withholding allowances determined in accordance with this section. In order to receive the benefit of such allowances, the employee must have in effect with his employer a withholding exemption certificate claiming such allowances.

(b) *Items that may be taken into account.* The following items may be taken into account in determining the number of withholding allowances an employee may claim:

(1) Estimated itemized deductions allowable under chapter 1,

(2) The estimated tax credits allowable under Subpart A of Part IV of Subchapter A of Chapter 1, except:

(i) For the credit for tax withheld on wages under section 31(a) (relating to wage withholding),

(ii) For the credit for tax withheld at source on nonresident aliens and foreign corporations and on tax-free covenant bonds under section 32,

(iii) That the employee may claim the credit for certain uses of gasoline and special fuels under section 39 only to the extent the employee has not filed for a quarterly tax refund of the credit on Form 843,

(iv) That the employee may claim the credit for earned income under section 43 only to the extent the employee has not filed for advance payments of the credit on Form W–5, and

(v) For the credit for overpayment of tax under section 45,

(3) The estimated trade and business deductions of employees described in section 62 (2) and allowed by Part VI of Subchapter B of Chapter 1,

(4) The estimated deduction for payments to pension, profit-sharing, annuity, and bond purchase plans of self-employed individuals described in section 62(7) and allowed by section 404 and section 405(c),

(5) The estimated deduction for penalties forfeited because of premature withdrawal of funds from time savings accounts or deposits described in section 62(12) and allowed by section 165,

(6) The estimated direct charitable deduction under section 170(i),

(7) The estimated deduction for net operating loss carryovers under section 172,

(8) The estimated deduction for alimony, etc., payments under section 215,

(9) The estimated deduction for moving expenses under section 217 but only to the extent that the amount of such deduction is not excluded from the definition of wages by section 3401(a)(15),

(10) The estimated deduction for certain retirement savings under section 219 but only to the extent that the amount of such deduction is not excluded from the definition of wages by section 3401(a)(12)(D),

(11) The estimated deduction for two-earner married couples under section 221,

(12) The estimated net losses from schedules C (Profit or (Loss) From Business or Profession), D (Capital Gains and Losses), E (Supplemental Income Schedule), and F (Farm Income and Expenses) of Form 1040 and from the last line of Part II of Form 4797 (Supplemental Schedule of Gains and Losses),

(13) The estimated amount of decrease of tax due attributable to income averaging under sections 1301 through 1305.

The employee must first use these items ((1) through (13) of this paragraph (b)) to eliminate any payment of estimated tax (as defined in section 6015(d)). Only amounts of these items remaining after the employee has done this may be taken into account in determining the number of withholding allowances the employee may claim.

(c) *Definitions*—(1) *Estimated.* The term ‘‘estimated’’ as used in this section to modify the terms ‘‘deduction’’, ‘‘deductions’’, ‘‘credits’’, ‘‘losses’’, and ‘‘amount of decrease’’ means with respect to an employee the aggregate dollar amount of a particular item that the employee reasonably expects will be allowable to him for the estimation year under the section of the Code specified for each item. In no event shall that amount exceed the sum of:

(i) The amount shown for that particular item on the income tax return that the employee has filed for the taxable year preceding the estimation year (or, if such return has not yet been filed, then the income tax return that the employee filed for the taxable year preceding such year), which amount the employee also reasonably expects to show on the income tax return for the estimation year, plus

(ii) The determinable additional amounts for each item for the estimation year.

The determinable additional amounts are amounts that are not included in paragraph (c)(1)(i) of this section and that are demonstrably attributable to indentifiable events during the estimation year or the preceding year. Amounts are demonstrably attributable to identifiable events if they relate to payments already made during the estimation year, to binding obligations to make payments (including the payment of taxes) during the year, and to other transactions or occurrences, the implementation of which has begun and is verifiable at the time the employee files a withholding exemption certificate claiming withholding allowances relating thereto. The estimation year is the taxable year including the day on which the employee files the withholding exemption certificate with his employer, except that if the employee files the withholding exemption certificate with his employer and specifies on the certificate that the certificate is not to take effect until a specified future date, the estimation year shall be the taxable year including that specified future date. It is not reasonable for an employee to include in his or her withholding computation for the estimation year any amount that is shown for a particular item on the income tax return that the employee has filed for the taxable year preceding the estimation year (or, if such return has not yet been filed, then the income tax return that the employee filed for the taxable year preceding such year) and that has been disallowed by the Service as part of a proposed adjustment described in §601.103(b) (relating to examination and determination of tax liability) and §601.105(b) (relating to examination of returns).

(2) *Amount of decrease of tax due.* The term ''amount of decrease of tax due'' as used in paragraph (b)(13) of this section means:

(i) The amount of tax that the taxpayer would owe on his taxable income without using Schedule G (Form 1040), minus

(ii) The amount of tax that the taxpayer would owe on his taxable income using Schedule G (Form 1040).

(3) *Itemized deductions.* The term ''itemized deductions'' as used in paragraph (b)(1) of this section has the same meaning as ascribed thereto by section 63(f) and the regulations thereunder.

(d) *Computing allowances.* (1) The employee shall compute the number of allowances he may claim for the items specified in paragraph (b) of this section in accordance with the tables and instructions on Form W–4.

(2) If the employee:

(i) Pays or accrues amounts demonstrably attributable to identifiable events (as defined in paragraph (c)(1) of this section) that are:

(A) Interest attributable to ownership of real property and deductible under section 163(a), or

(B) Taxes deductible under section 164(a)(1), or

(C) Interest or taxes deductible under section 216(a), and

(ii) Is obligated to pay or accrue such amounts for at least 2 years subsequent to the estimation year,

then the employee may compute the portion of estimated itemized deductions attributable to such amounts for purposes of paragraph (b)(1) of this section by multiplying the total of such amounts to be paid or accrued in the estimation year by 12 and by then dividing that result by the number of months from the 1st month in the estimation year in which the employee pays or accrues such amounts through the last month of the estimation year. If such amounts decrease during the term of obligation, the employee must, at the beginning of each subsequent calendar year, recompute the number of allowances being claimed as required by paragraph (c)(1) of this section. If the employee uses the computation described in this subparagraph (2), the employee may not request that his employer withhold on the basis of the employee's cumulative wages as provided in §31.3402 (h)(3)–1.

(e) *Examples.* The application of this section may be illustrated by the following examples:

Example 1. Employee A has an estimated net loss from a partnership of $2,000 which would be reported on Schedule E. Employee A is not required to make any payments of estimated tax. Employee A may take her $2,000 partnership loss into consideration in determining the number of withholding allowances to which she is entitled in accordance with the tables and instructions on Form W–4.

Example 2. Employee B has an estimated net loss from a business of $3,000 which would be reported on Schedule C. Employee B would also otherwise be required to make payments of estimated tax on income of $3,000. Employee B may not take his business loss into consideration in determining the number of withholding allowances to which he is entitled in accordance with the tables and instructions on Form W–4.

Example 3. Employee C has an estimated net loss from a farm of $5,000 which would be reported on Schedule F. Employee C would also otherwise be required to make payments of estimated tax on income of $4,000. Employee C may only take her farm loss into consideration to the extent of $1,000 ($5,000–4,000) in determining the number of withholding allowances to which she is entitled in accordance with the tables and instructions on Form W–4.

(f) *Special rules*—(1) *Married individuals.* (i) Except as provided in subdivision (ii) of this subparagraph, a husband and wife shall determine the number of withholding allowances to which they are entitled under section 3402(m) on the basis of their combined wages and allowable items. The withholding allowances to which a husband and wife are entitled may be claimed by the husband, by the wife, or they may be allocated between them. However, they may not both have withholding exemption certificates in effect claiming the same withholding allowance.

(ii) If a husband and wife filed separate income tax returns for the taxable year preceding the estimation year and reasonably expect to file separate returns for the estimation year, the husband and wife shall determine the number of withholding exemptions to which they are entitled under section 3402(m) on the basis of their individual wages and allowable items, and they shall be considered to be single for purposes of the tables on Form W–4.

(2) *Only one certificate to be in effect.* An employee who is entitled to one or more withholding allowances under section 3402(m) and who has, at the same time, two or more employers, may claim such withholding allowance or allowances with only one of his employers.

(Secs. 3402(i) and (m) and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 3402 (i) and (m), 95 Stat. 172, 184; 26 U.S.C. 7805, 68A Stat. 917))

[T.D. 7915, 48 FR 44075, Sept. 27, 1983]

§ 31.3402(n)–1 Employees incurring no income tax liability.

Notwithstanding any other provision of this subpart, an employer shall not deduct and withhold any tax under chapter 24 upon a payment of wages made to an employee after April 30, 1970, if there is in effect with respect to the payment a withholding exemption certificate furnished to the employer by the employee which contains statements that—

(a) The employee incurred no liability for income tax imposed under subtitle A of the Code for his preceding taxable year; and

(b) The employee anticipates that he will incur no liability for income tax imposed by subtitle A for his current taxable year.

For purposes of section 3402(n) and this section, an employee is not considered to incur liability for income tax imposed under subtitle A if the amount of such tax is equal to or less than the total amount of credits against such tax which are allowable to him under part iv of subchapter A of chapter 1 of the Code, other than those allowable under section 31 or 39. For purposes of section 3402(n) and this section, ''liability for income tax imposed under subtitle A'' shall include liability for a qualified State individual income tax which is treated pursuant to section 6361(a) as if it were imposed by chapter 1 of the Code. An employee is not considered to incur liability for such a State income tax if the amount of such tax does not exceed the total amount of the credit against such tax which is allowable to him under section 6362(b)(2) (B) or (C) or section 6362(c)(4). For purposes of this section, an employee who files a joint return under section 6013 is considered to incur liability for any tax shown on such return. An employee who is entitled to file a joint return under such section shall not certify that he anticipates that he will incur no liability for income tax imposed by subtitle A for his current taxable year if such statement would not be true in the event that he files a joint return for such year, unless he filed a separate return for his preceding taxable year and anticipates that he will file a separate return for his current taxable year.

For rules relating to invalid withholding exemption certificates, see § 31.3402(f)(2)–1(e), and for rules relating to submission to the Internal Revenue Service of withholding exemption certificates claiming a complete exemption from withholding, see § 31.3402(f)(2)–1(g).

Example 1. Employee A, an unmarried, calendar-year basis taxpayer, files his income tax return for 1970 on April 15, 1971. A has adjusted gross income of $1,200 and is not liable for any tax. He had $180 of income tax withheld during 1970. A anticipates that his gross income for 1971 will be approximately the same amount, and that he will not incur income tax liability for that year. On April 20, 1971, A commences employment and furnishes his employer an exemption certificate stating that he incurred no liability for income tax imposed under subtitle A for 1970, and that he anticipates that he will incur no liability for income tax imposed under subtitle A for 1971. A's employer shall not deduct and withhold on payments of wages made to A on or after April 20, 1971. Under paragraph (c) of § 31.3402(f)(4)–1, unless A files a new exemption certificate with his employer, his employer is required to deduct and withhold upon payments of wages to A made on or after May 1, 1972. (Under §31.3402(f)(3)–1(b), if A had been employed by his employer prior to April 20, 1971, and had furnished his employer a withholding exemption certificate not containing the statements described in §31.3402(n)–1 prior to furnishing the withholding exemption certificate containing such statements on April 20, 1971, his employer would not be required to give effect to the new certificate with respect to payments of wages made by him prior to July 1, 1971 (the first status determination date which occurs at least 30 days after April 20, 1971). However his employer could, if he chose, make the new certificate effective with respect to any payment of wages made on or after April 20 and before July 1, 1971.)

Example 2. Assume the facts are the same as in example 1 except that for 1970 A has taxable income of $8,000, income tax liability of $1,630, and income tax withheld of $1,700. Although A received a refund of $70 due to income tax withholding of $1,700, he may not state on his exemption certificate that he incurred no liability for income tax imposed by subtitle A for 1970.

(86 Stat. 944, 26 U.S.C. 6364; and 68A Stat. 917, 26 U.S.C. 7805, 68A Stat. 731, 26 U.S.C. 6001; 68A Stat. 732, 26 U.S.C. 6011)

[T.D. 7048, 35 FR 10292, June 24, 1970, as amended by T.D. 7577, 43 FR 59359, Dec. 20, 1978; T.D. 7598, 44 FR 14553, Mar. 13, 1979; T.D. 7682, 45 FR 15527, Mar. 11, 1980; T.D. 7803, 47 FR 3547, Jan. 26, 1982]

§31.3402(o)–1 Extension of withholding to supplemental unemployment compensation benefits.

(a) *In general.* Withholding of income tax is required under section 3402(o) with respect to payments of supplemental unemployment compensation benefits made after December 31, 1970, which are treated under paragraph (b)(14) of §31.3401(a)–1 as if they were wages.

(b) *Withholding exemption certificates.* For purposes of section 3402(f) (2) and (3) and the regulations thereunder (relating to withholding exemption certificates), in the case of supplemental unemployment compensation benefits an employment relationship shall be considered to commence with either the date on which such benefits begin to accrue or January 1, 1971, whichever is later, and the withholding exemption certificate furnished the employer with respect to such commencement of employment shall be considered the first certificate furnished the employer. The withholding exemption certificate furnished by the employee to his former employer (with whom his employment has been involuntarily terminated, within the meaning of paragraph (b)(14)(ii) of §31.3401(a)–1) shall be treated as meeting the requirements of section 3402(f)(2)(A) and the regulations thereunder if such former employer furnishes such certificate to the employee's current employer, as defined in paragraph (g) of §31.340(d)–1, or if such former employer is the agent of such current employer with respect to the employee's withholding exemption certificate. However, the preceding sentence shall not be applicable if such employee furnishes a new withholding exemption certificate to such current employer (or his agent), provided that such withholding exemption certificate meets the requirements of section 3402(f)(2)(A) and the regulations thereunder. See the definitions of payroll period in paragraph (c) of §31.3401(b)–1 and of employee in paragraph (g) of §31.3401(c)–1.

[T.D. 7068, 35 FR 17329, Nov. 11, 1970, as amended by T.D. 7803, 47 FR 3546, Jan. 26, 1982]

§31.3402(o)–2 Extension of withholding to annuity payments if requested by payee.

(a) *In general.* Under section 3402(o) of the Internal Revenue Code of 1954 and this section, the payee (as defined in paragraph (g)(2) of this section) of an annuity (as defined in paragraph (g)(1) of this section) may request the payor (as defined in paragraph (g)(3) of this section) of the annuity to withhold income tax with respect to payments of the annuity made after December 31, 1970. If such a request is made, the payor shall deduct and withhold as requested.

(b) *Manner of making request.* A payee who wishes a payor to deduct and withhold income tax from annuity payments shall file a request with the payor to deduct and withhold a specific whole dollar amount from each annuity payment. Such specific dollar amount requested shall be at least $5 per month and shall not reduce the net amount of any annuity payment received by the payee below $10. The request shall be made on Form W–4P (annuitant's withholding exemption certificate and request) in accordance with the instructions applicable thereto, and shall set forth fully and clearly the data therein called for. In lieu of Form W–4P, payors may prepare and use a form the provisions of which are identical with those of Form W–4P.

For the requirements relating to Form W–4P with respect to qualified State individual income taxes, see paragraph (d)(3)(i) of § 301.6361–1 of this chapter (Regulations on Procedure and Administration).

(c) *When request takes effect.* Upon receipt of a request under this section the payor of the annuity with respect to which such request was made shall deduct and withhold the amount specified in such request from each annuity payment commencing with the first annuity payment made on or after the date which occurs—

(1) In a case in which no previous request is in effect, 3 calendar months after the date on which such request is furnished to such payor, and

(2) In a case in which a previous request is in effect, the first status determination date (see section 3402(f)(3)(B) and paragraph (d) of § 31.3402(f)(3)–1 of this chapter) which occurs at least 30 days after the date on which such request is so furnished.

However, the payor may, at his election, commence to deduct and withhold such specified amount with respect to an annuity payment which is made prior to the annuity payment described in the preceding sentence with respect to which the payor must commence to deduct and withhold.

(d) *Duration and termination of request.* A request under this section shall continue in effect until terminated. The payee may terminate the request by furnishing the payor a signed written notice of termination. Such notice of termination shall, except as hereinafter provided, take effect with respect to the first payment of an amount in respect of which the request is in effect which is made on or after the first status determination date (see section 3402(f)(3)(B) and paragraph (d) of § 31.3402(f)(3)–1 of this chapter) which occurs at least 30 days after the date on which such notice is so furnished. However, at the election of such payor, such notice may be made effective with respect to any payment of an amount in respect of which the request is in effect which is made on or after the date on which such notice is so furnished and before such status determination date.

(e) *Special rules.* For purposes of chapter 24 of subtitle C of the Internal Revenue Code of 1954 (relating to collection of income tax at source on wages) and of subtitle F of such Code (relating to procedure and administration), and the regulations thereunder—

(1) An amount which is requested to be withheld pursuant to this section shall be deemed a tax required to be deducted and withheld under section 3402.

(2) An amount deducted and withheld pursuant to this section shall be deemed an amount deducted and withheld under section 3402.

(3) The term ''wages'' includes the gross amount of an annuity payment with respect to which there is in effect a request for withholding under this section. However, references to the definition of wages in section 3401(a) which are made in section 6014 (relating to election by the taxpayor not to compute the tax on his annual return) and section 6015(a) (relating to declaration of estimated tax by individuals) shall not be deemed to include any portion of such an annuity payment.

(4) The term ''employer'' includes a payor with respect to whom a request for withholding is in effect under this section.

(5) The term ''employee'' includes a payee with respect to whom a request for withholding is in effect under this section.

(6) The term ''payroll period'' includes the period of accrual with respect to which payments of an annuity which is subject to withholding under this section are ordinarily made.

(f) *Returns of income tax withheld and statements for payees.* (1) Form W–2P is to be used in lieu of Form W–2, which is required to be furnished by an employer to an employee under § 31.6051–1 of this chapter and to the Social Security Administration under paragraph

(a) of §31.6051–2 of this chapter, with respect to an annuity subject to withholding under this section. If an amount is required to be deducted and withheld under this section from any or all of the payments made to a payee under an annuity contract during a calendar year, all payments with respect to that annuity contract are required to be reported on Form W–2P, in lieu of Form 1099, as prescribed in §§1.6041–1, 1.6041–2, and 1.6047–1 of this chapter; any other annuity payments made by the same payor to the same payee may, at the option of the payor, be reported on Form W–2P.

(2) Each statement on Form W–2P shall show the following:

(i) The gross amount of annuity payments made during the calendar year, whether or not income tax withholding under this section was in effect with respect to all such payments,

(ii) The total amount deducted and withheld as tax under section 3402 of this section, and

(iii) The information required to be shown by Form W–2P and the instructions applicable thereto.

For the requirements relating to Form W–2P with respect to qualified State individual income taxes, see paragraph (d)(3)(ii) of §301.6361–1 of this chapter (Regulations on Procedure and Administration).

(3) The provisions of §1.9101–1 of this chapter (relating to permission to submit information required by certain returns and statements on magnetic tape) shall be applicable to the information required to be furnished on Form W–2P.

(4) The provisions of §31.6109–1 of this chapter (relating to supplying of identifying numbers) shall be applicable to Form W–2P and to any payee of an annuity to whom a statement on Form W–2P is required to be furnished.

(g) *Definitions.* For purposes of this section—

(1) The term ''annuity'' means periodic payments which are payable over a period greater than 1 year and which are treated under section 72 as amounts received as an annuity, whether or not such periodic payments are variable in amount. Also, periodic payments to an individual who is retired before the normal retirement age for reasons of disability, to which the provisions of section 105(d) apply, shall be deemed to be an annuity for purposes of this section. A lump-sum payment (including a total distribution under section 72(n)) is not an annuity.

(2) The term ''payee'' means an individual who is a citizen or resident of the United States and who receives an annuity payment.

(3) The term ''payor'' means a person making an annuity payment except that, if the person making the payment is acting soley as an agent for another person, the term ''payor'' shall mean such other person and not the person actually making the payment. For example, if a bank makes an annuity payment only as agent for an employees' trust, the trust shall be deemed to be the ''payor.'' Notwithstanding the preceding two sentences, any person who, under section 3401(a) (5) or (8), would not be required to deduct and withhold the tax under section 3402 if the annuity payment were remuneration for services shall not be considered a ''payor.''

(Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805; 86 Stat. 944, 26 U.S.C. 6364; 68A Stat. 747, 26 U.S.C. 6051)

[T.D. 7056, 35 FR 13436, Aug. 22, 1970, as amended by T.D. 7577, 43 FR 59360, Dec. 20, 1978: T.D. 7580, 43 FR 60160, Dec. 26, 1978. Redesignated by T.D. 7803, 47 FR 3546, Jan. 26, 1982]

§31.3402(o)–3 Extension of withholding to sick pay.

(a) *In general.* Under section 3402(o) of the Internal Revenue Code of 1954 and this section, the payee (as defined in paragraph (h)(2) of this section) of sick pay (as defined in paragraph (h)(1) of this section) may request the payor (as defined in paragraph (h)(3) of this section) of the sick pay to withhold income tax with respect to payments of sick pay made on or after May 1, 1981. If such a request is made, the payor must deduct and withhold as requested.

(b) *Manner of making request.* A payee who wishes a payor to deduct and withhold income tax from sick pay shall file a written request with the payor to deduct and withhold a specific whole dollar amount (subject to the limitations of paragraph (c) of this section) from each sick pay payment. The request shall be made on Form W–4S in accordance with the instructions applicable thereto, and shall set forth fully and clearly the data therein called for. In lieu of Form W–4S, payors may prepare and use a form the provisions of which are identical to those of Form W–4S. The payee must include his social security account number in the request.

(c) *Amount requested to be withheld.* The payee shall request that the payor withhold a specific whole dollar amount. The specific whole dollar amount shall be at least $20 per weekly payment of sick pay. If the payee is paid sick pay computed on a daily basis, the specific whole dollar amount shall be at least $4 per daily payment of sick pay. If the payee is paid sick pay on a biweekly basis, the specific whole dollar amount shall be at least $40 per 2 week payment of sick pay. If the payee is paid sick pay on a semat least $4 per day, assuming a 5 day work week of 8 hours per day (40 hours total) in each 7 day calendar week. In the case of a payment which is greater or less than a full payment, the amount withheld is to bear the same relation to the specific whole dollar amount requested to be withheld as such payment bears to a full payment. For example, assume an individual receives sick pay of $100 per week and requests that $25 per week be withheld for taxes. After 4 full weeks of absence, the individual returns to work on a Wednesday (having been absent on sick leave Monday and Tuesday). For the week the individual returns to work, the individual would be entitled to $40 of sick pay, $10 of which would be withheld for taxes. The payor may, at his option, permit the payee to request that the payor withhold a specific percentage from each payment. The specific percentage shall be at least 10 percent. If the payor so opts, the payor must also accept requests under the whole dollar method. If the amount requested to be withheld under either the whole dollar method or the optional percentage method reduces the net amount of a sick pay payment received by the payee to below $10, no income tax shall be withheld from that payment by the payor.

(d) *When request takes effect.* The payor must deduct and withhold the amount specified in the request with respect to payments made more than 7 days after the date on which the request is received by the payor. At the election of the payor, the request may take effect before this deadline.

(e) *Duration and termination of request.* A request under this section shall continue in effect until changed or terminated. The payee may change the request by filing a new written request that meets all of the requirements of paragraphs (b) and (c) of this section. The new request shall take effect as specified in paragraph (d) of this section and the old request shall be deemed terminated when the new request takes effect. The payee may terminate the request by furnishing the payor a signed written notice of termination containing both a request to terminate withholding and all the information contained in the request to withhold. This written notice of termination shall take effect with respect to payments made more than 7 days after the date on which the notice of termination is received by the payor. At the election of the payor, the request may take effect before this deadline.

(f) *Special rules.* For purposes of chapter 24 on subtitle C of the Internal Revenue Code of 1954 (relating to collection of income tax at source on wages) and of subtitle F of the Code (relating to procedure and administration), and the regulations thereunder—

(1) An amount which is requested to be withheld pursuant to this section shall be deemed a tax required to be deducted and withheld under section 3402.

(2) An amount deducted and withheld pursuant to this section shall be deemed an amount deducted and withheld under section 3402.

(3) The term ‘‘wages’’ includes the gross amount of a sick pay payment with respect to which there is in effect a request for withholding under this section. However, references to the definition of wages in section 3401(a) which are made in section 6014 (relating to election by the taxpayer not to compute the tax on his annual return) and section 6015(a) (relating to declaration of estimated tax by individuals)

shall not be deemed to include any portion of such a sick pay payment.

(4) The term ''employer'' includes a payor with respect to whom a request for withholding is in effect under this section.

(5) The term ''employee'' includes a payee with respect to whom a request for withholding is in effect under this section.

(6) The term ''payroll period'' includes the period of accrual with respect to which payments of sick pay which are subject to withholding under this section are ordinarily made.

(g) *Statements required to be furnished to payees.* See section 6051(f) and the regulations thereunder for requirements relating to statements required to be furnished to payees.

(h) *Definitions.* (1) (i) The term ''sick pay'' means any payment made to an individual which does not constitute wages (determined without regard to section 3402(o) and this section), which is paid to an employee pursuant to a plan to which the employer is a party, and which constitutes remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of personal injuries or sickness. The term ''personal injuries or sickness'' shall have the same meaning as ascribed thereto by section 105(a) and the regulations thereunder. The term ''sick pay'' does not include any amounts either excludable from gross income under section 104(a) (1), (2), (4) or (5) or section 105(b) or (c) or paid under section 3402(o)(1)(B). The term ''sick pay'' does not include amounts paid under a plan if all amounts paid under the plan are paid to individuals who are described in the first sentence of section 105(d)(4) (relating to the definition of permanent and total disability) and the regulations thereunder. Amounts paid under any other plan shall be deemed to be paid for a period during which the employee is temporarily absent from work. For sick pay paid in 1981 only, however, the payor may opt not to follow the rules of the two preceding sentences but to follow instead the rule that an employee is temporarily absent if his absence is not described in section 105(d)(4) (relating to the definition of permanent and total disability) and the regulations thereunder. An employer is not a party to the plan if the plan is a contract between only employees and a third party payor or the employer makes no contributions to provide sick pay benefits under the plan, even if the employer withholds amounts from the employees' salaries and pays the amounts over to the third party payor.

(ii) This paragraph (h)(1) may be illustrated by the following examples:

Example 1. Employee A works for P Company and Employee B works for Q Company. P Company has contracted with R Insurance Company for R to pay P's employees the equivalent of their normal wages when they are temporarily absent from work because of sickness or personal injury. Q Company has neither entered into such a contract, nor will it make such payments directly from it own funds. B consequently goes to S Insurance Company and purchases directly an insurance policy which will pay him the equivalent of his normal wages when he is unable to work because of sickness or personal injury. Both A and B are subsequently temporarily absent from work on account of sickness or personal injuries. A receives payments from R and B receives payments from S. Neither the payments made by R to A nor the payments made by S to B constitute wages (determined without regard to section 3402(o) and this section). A may request that R withhold income taxes under section 3402(o) and this section from the payments he receives because the payments are sick pay as defined in section 3402(o) and this section. B may not request that S withhold income taxes under section 3402(o) and this section from the payments he receives because the payments are not paid pursuant to a plan to which Q Company is a party and thus are not sick pay as defined in section 3402(o) and this section.

Example 2. Employees C and D both work for T Company , which has contracted with U Insurance Company for U to pay T's employees for all sickness or injury claims Employee C is sick and out from work for a month. U pays C the equivalent of C's regular pay. Employee D loses his arm in an accident and U pays D $10,000. C may request that U withhold income taxes under section 3402(o) and this section from the payments he receives because the payments constitute remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of sickness or personal injuries. D may not request that U withhold income taxes from the payments he receives because the payments do not constitute remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of sickness or personal injuries.

(2) The term ''payee'' means an individual who is a citizen or resident of the United States and who receives a sick pay payment.

(3) (i) The term ''payor'' means any person making a sick pay payment who is not the employer (as defined in section 3401 and in § 31.3401(d)–1 (except paragraph (f) thereof)) of the payee. If however the person making the payment is acting solely as an agent for another person, the term ''payor'' shall mean the other person and not the person actually making the payment.

(ii) This paragraph (h)(3) may be illustrated by the following examples:

Example 1. X Company contracts with Y Insurance Company for Y to pay X's employees the equivalent of their normal wages when they are temporarily absent from work because of sickness or personal injury. Y computes the amount to be paid and determines the date payment is to be made for each of X's employees. Y then instructs Z Bank to issue a check for that amount on that date. Y reimburses Z for the amount of the check plus Z's administrative costs. Under these circumstances, Z is the agent of Y and Y is the payor under section 3402(o) and this section.

Example 2. V Company contracts with W Company for W to pay V's employees the equivalent of their normal wages when they are temporarily absent from work on account of sickness or personal injury. Under the contractual arrangement, V advises W of the wages normally paid to each of V's employees. V tells W when an employee of V is temporarily absent from work on account of sickness or personal injury, and W computes the amount to be paid the employee and makes payments of sick pay to the employee during the period of the employee's absence. V subsequently reimburses W for the amount of those payments and pays W a fee for W's services. Under these circumstances, W is acting solely as the agent of V, and a payee may not request under section 3402(o) and these regulations that W withhold income taxes from his payments. However, see section 3401 and the regulations thereunder for the obligation of V to withhold income taxes from the payments that W makes as the agent of V, which are not excluded from income under section 105 and the regulations thereunder and which are wages under section 3401 and the regulations thereunder. See also § 31.3402(g)–1 (relating to supplemental wage payments) for the conditions under which a flat percentage rate of withholding may be used.

Example 3. Assume the same facts as in Example 2, except that the consideration for W's services is a set insurance premium rather than reimbursement for costs plus a fee. Under these circumstances W is the payor and is not acting solely as the agent of V. An employee of V to whom W makes payments under the agreement may request under section 3402(o) and the regulations thereunder that W withhold income taxes from those payments.

(i) *Special rules for sick pay paid pursuant to certain collective-bargaining agreements.* (1) Special rules (enumerated in subparagraph (2)) apply to sick pay where all of the following tests are met.

(i) The sick pay must be paid pursuant to a collective-bargaining agreement between employee representatives and one or more employers.

(ii) The agreement must contain a provision that section 3402(o)(5) is to apply to sick pay paid pursuant to the agreement.

(iii) The agreement must contain a provision for determining the amount to be deducted and withheld from each payment of sick pay.

(iv) The social security number of the payee must be furnished to the payor. The agreement may provide that the employer will furnish this or the payee may furnish his social security number directly to the payor.

(v) The payor must be furnished with information that is necessary for the payor to determine whether the payment is pursuant to the agreement and to determine the amount to be deducted and withheld. The agreement may provide that the employer will furnish this information directly to the payor.

(2) The following special rules apply to sick pay where all of the tests of subparagraph (1) are met.

(i) The requirement of section 3402(o)(1)(c) and this section that a request for withholding be in effect does not apply.

(ii) The amount to be deducted and withheld from the sick pay shall be determined according to the provisions of the agreement and not according to this section. This rule shall not however apply—

(A) To payments enumerated in section 3402(n) (relating to employees incurring no income tax liability) and the regulations thereunder, or

(B) To payments made to a payee more than 7 days after the date that the payor receives a statement from the payee that the payee expects to claim an exclusion from gross income under section 105(d). Such statement must include adequate verification of disability. A certificate from a qualified physician attesting that the employee is permanently and totally disabled (within the meaning of section 105(d)) shall be deemed to constitute adequate verification. If the payor receives such a statement, the payor shall not withhold any income tax from the payments made to the payee, regardless of the provisions of the collective bargaining agreement. This exception from withholding does not affect the requirements of § 31.6051–3.

(Secs. 3402(o), 7805, Internal Revenue Code of 1954 (94 Stat. 3495, (26 U.S.C. 3402(o)); 68A Stat. 917 (26 U.S.C. 7805)))

[T.D. 7813, 47 FR 11277, Mar. 16, 1982, as amended by T.D. 7915, 48 FR 44076, Sept. 27, 1983]

§ 31.3402(p)–1 Voluntary withholding agreements.

(a) *In general.* An employee and his employer may enter into an agreement under section 3402(b) to provide for the withholding of income tax upon payments of amounts described in paragraph (b)(1) of § 31.3401(a)–3, made after December 31, 1970. An agreement may be entered into under this section only with respect to amounts which are includible in the gross income of the employee under section 61, and must be applicable to all such amounts paid by the employer to the employee. The amount to be withheld pursuant to an agreement under section 3402(p) shall be determined under the rules contained in section 3402 and the regulations thereunder. See § 31.3405(c)–1, Q&A–3 concerning agreements to have more than 20-percent Federal income tax withheld from eligible rollover distributions within the meaning of section 402.

(b) *Form and duration of agreement.* (1)(i) Except as provided in subdivision (ii) of this subparagraph, an employee who desires to enter into an agreement under section 3402(p) shall furnish his employer with Form W–4 (withholding exemption certificate) executed in accordance with the provisions of section 3402(f) and the regulations thereunder. The furnishing of such Form W–4 shall constitute a request for withholding.

(ii) In the case of an employee who desires to enter into an agreement under section 3402(p) with his employer, if the employee performs services (in addition to those to be the subject of the agreement) the remuneration for which is subject to mandatory income tax withholding by such employer, or if the employee wishes to specify that the agreement terminate on a specific date, the employee shall furnish the employer with a request for withholding which shall be signed by the employee, and shall contain—

(a) The name, address, and social security number of the employee making the request,

(b) The name and address of the employer,

(c) A statement that the employee desires withholding of Federal income tax, and applicable, of qualified State individual income tax (see paragraph (d)(3)(i) of § 301.6361–1 of this chapter (Regulations on Procedures and Administration)), and

(d) If the employee desires that the agreement terminate on a specific date, the date of termination of the agreement.

If accepted by the employer as provided in subdivision (iii) of this subparagraph, the request shall be attached to, and constitute part of, the employee's Form W–4. An employee who furnishes his employer a request for withholding under this subdivision shall also furnish such employer with Form W–4 if such employee does not already have a Form W–4 in effect with such employer.

(iii) No request for withholding under section 3402(p) shall be effective as an agreement between an employer and an employee until the employer accepts the request by commencing to withhold from the amounts with respect to which the request was made.

(2) An agreement under section 3402 (p) shall be effective for such period as the employer and employee mutually

agree upon. However, either the employer or the employee may terminate the agreement prior to the end of such period by furnishing a signed written notice to the other. Unless the employer and employee agree to an earlier termination date, the notice shall be effective with respect to the first payment of an amount in respect of which the agreement is in effect which is made on or after the first ''status determination date'' (January 1, May 1, July 1, and October 1 of each year) that occurs at least 30 days after the date on which the notice is furnished. If the employee executes a new Form W–4, the request upon which an agreement under section 3402 (p) is based shall be attached to, and constitute a part of, such new Form W–4.

(86 Stat. 944, 26 U.S.C. 6364; 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 7096, 36 FR 5216, Mar. 18, 1971, as amended by T.D. 7577, 43 FR 59359, Dec. 20, 1978; T.D. 8619, 60 FR 49215, Sept. 22, 1995]

§ 31.3402(q)–1 Extension of withholding to certain gambling winnings.

(a)(1) *General rule.* Every person, including the Government of the United States, a State, or a political subdivision thereof, or any instrumentality of any of the foregoing making any payment of ''winnings subject to withholding'' (defined in paragraph (b) of the section) shall deduct and withhold a tax in an amount equal to 20 percent of the payment. The tax shall be deducted and withheld upon payment of the winnings by the person making such payment (''payer''). See paragraph (c)(5)(ii) of this section for a special rule relating to the time for making deposits of withheld amounts and filing the return with respect to those amounts. Any person receiving a payment of winnings subject to withholding must furnish the payer a statement as required in paragraph (e) of this section. Payers of winnings subject to withholding must file a return as required in paragraph (f) of this section. With respect to reporting requirements for certain payments of gambling winnings not subject to withholding, see section 6041 and the regulations thereunder.

(2) *Exceptions.* The tax imposed under section 3402(q)(1) and this section shall not apply (i) with respect to a payment of winnings which is made to a nonresident alien individual or foreign corporation under the circumstances described in paragraph (c)(4) of this section or (ii) with respect to a payment of winnings from a slot machine play, or a keno or bingo game.

(b) *Winnings subject to withholding.* Winnings subject to withholding means any payment from—

(1) A wager placed in a State-conducted lottery (defined in paragraph (c)(2) of this section) but only if the proceeds from the wager exceed $5,000;

(2) A wager placed in a sweepstakes, wagering pool, or lottery other than a State-conducted lottery but only if the proceeds from the wager exceed $1,000; or

(3) Any other wagering transaction (as defined in paragraph (c)(3) of this section) but only if the proceeds from the wager (i) exceed $1,000 and (ii) are at least 300 times as large as the amount of the wager.

If proceeds from the wager qualify as winnings subject to withholding, then the total proceeds from the wager, and not merely amounts in excess of $1,000 (or $5,000 in the case of winnings from a State-conducted lottery), are subject to withholding.

(c) *Definitions; special rules*—(1) *Rules for determining amount of proceeds from a wager.* (i) The amount of ''proceeds from a wager'' is the amount paid after January 2, 1977, with respect to the wager, less the amount of the wager. However, for any wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai, only amounts paid after April 30, 1977, are taken into account.

(ii) Amounts paid after December 31, 1983, with respect to identical wagers are treated as paid with respect to a single wager for purposes of calculating the amount of proceeds from a wager. For example, amounts paid on two bets placed in a parimutuel pool on a particular horse to win a particular race are treated as paid with respect to the same wager. However, those two bets would not be identical were one ''to win'' and the other ''to place'', or if the bets were placed in different parimutuel pools, *e.g.*, a pool conducted by the racetrack and a separate pool conducted by an off-track betting establishment in which the wagers are not pooled with those placed at the track. Tickets purchased in a lottery generally are not identical wagers, because the designation of each ticket as a winner generally would not be based on the occurrence of the same event, *e.g.*, the drawing of a particular number. If the recipient makes the statement which may be required pursuant to § 1.6011–3, indicating whether or not the recipient (and any other persons entitled to a portion of the winnings) is entitled to winnings from identical wagers and indicating the amount of such winnings, if any, then the payer may rely upon such statement in determining the total amount of proceeds from the wager under paragraph (c)(1) of this section attributable to identical wagers.

(iii) In determining the amount paid with respect to a wager, proceeds which are not money shall be taken into account at the fair market value.

(iv) Periodic payments, including installment payments or payments which are to be made periodically for the life of a person, are aggregated for purposes of determining the proceeds from a wager. The aggregate amount of periodic payments to be made for a person's life shall be based on that person's life expectancy. See §§ 1.72–5 and 1.72–9 for rules used in computing the expected return on annuities. For purposes of determining the amount subject to withholding, the first periodic payment shall be reduced by the amount of the wager.

(2) *Wager placed in a State-conducted lottery*. The term ''wager placed in a State-conducted lottery'' means a wager placed in a lottery conducted by an agency of a State acting under authority of State law provided that the wager is placed with the State agency conducting such lottery or with its authorized employees or agents. This term includes wagers placed in State-conducted lotteries in which the amount of winnings is determined by a parimutuel system.

(3) *Other wagering transaction*. The term ''other wagering transaction'' means any wagering transaction other than one in a lottery, sweepstakes, or wagering pool. This term includes a wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai.

(4) *Certain payments to nonresident aliens or foreign corporations*. A payment of winnings subject to withholding made to a nonresident alien individual or a foreign corporation is not subject to the tax imposed by section 3402(q) and this section if such payment is subject to withholding of tax under section 1441(a) (relating to withholding on nonresident aliens) or 1442(a) (relating to withholding on foreign corporations) and the payer complies with the requirements of those sections. For purposes of this section, a payment is treated as being subject to tax under section 1441(a) or 1442(a) notwithstanding that the rate of such tax is reduced (even to zero) as may be provided by an applicable treaty with another country. However, a reduced or zero rate of withholding of tax shall not be applied by the payer in lieu of the rate imposed by sections 1441 and 1442 unless the person receiving the winnings has completed, signed, and furnished the payer Form 1001 as required by § 1.1441–6. See sections 1441 and 1442 and the regulations thereunder for rules regarding the withholding of tax on nonresident aliens and foreign corporations.

(5) *Gambling winnings treated as payments by employer to employee*. (i) Except as provided in subdivision (ii), for purposes of sections 3403 and 3404 and the regulations thereunder and for purposes of so much of subtitle F (except section 7205) and the regulations thereunder as relate to chapter 24, payments to any person of winnings subject to withholding under this section shall be treated as if they are wages paid by an employer to an employee.

(ii) Solely for purposes of applying the deposit rules under 6302(c) and the return requirement of section 6011, the withholding from winnings shall be deemed to have been made no earlier than at the time the winner's identity is known to the payer. Thus, for example, winnings from a State-conducted lottery are subject to withholding when actually or constructively paid, whichever is earlier; however, the time for depositing the withheld taxes and filing a return with respect thereto shall be determined by reference to the date on which the winner's identity is known to the State, if such date is later than the date on which the winnings are actively or constructively paid. If a payer's obligation to pay winnings terminates other than by payment, all liabilities and requirements resulting from the requirement that the payer deduct and withhold with respect to such winnings shall also terminate.

(d) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. A purchases a lottery ticket for $1 in the State W lottery from an authorized agent of State W. On February 1, 1977, the drawing is held and A wins $5,001. Since the proceeds of the wager ($5,001—$1) are not greater than $5,000, State W is not required to withhold or deduct any amount from A's winnings.

Example 2. Assume the same facts as in example 1 except that A purchases two $1 tickets and that A wins $5,002 when one of the tickets is drawn. State W must deduct and withhold tax at a rate of 20% from $5,001 ($5,002 less the $1 wager), or $1,000.20.

Example 3. On January 1, 1984, B makes two $2 bets in a parimutuel pool for a horse race. Each bet is on the same horse to win a particular race. B wins a total of $1,300 on those bets. B cashes the tickets at different cashier windows indicating on the statement demanded by each cashier the amount of winnings from identical wagers. Although the payment by each cashier ($650) is less than the $1,000 floor for the withholding requirement on payments of winnings from horse race parimutuel pools, each cashier is required to deduct and withhold tax from B's winnings equal to $129.60 (($650 − $2) × 20 percent = $129.60) based on the information B submitted indicating that the aggregated proceeds from the identical wagers ($1,300 − $4=$1,296) exceed $1,000 and the amount is at least 300 times as great as the amount wagered ($4×300=$1,200). Had B refused to make the statements, the payer would have no basis provided by the payee upon which to rely in determining whether the payment is subject to withholding. Under these circumstances, the payer would be required to deduct and withhold tax from the payment.

Example 4. C purchases a lottery ticket for $1. On June 1, 1979, the lottery drawing is held and C wins the grand prize of $50,000, payable $500 monthly. The payer must deduct and withhold tax at a rate of 20% from each payment of winnings. Therefore, $99.80 must be withheld from the first monthly payment to B ($500 − $1)×20%=$99.80) and $100 ($500×20%) must be withheld from each monthly payment thereafter.

Example 5. Assume the same facts as in example 4, except that C wins an automobille rather than the grand prize. The fair market value of the automobile on the date on which it is made available to C is $10,000. the payer must deduct and withhold a tax of $2,000 (($10,001 − $1)×20%). This may be accomplished, for example, if C pays $2,000 to the payer. Alternatively, if the payer, as part of the prize, pays all taxes required to be duducted and withheld, the payer must deduct and withhold tax not only on the fair market value of the automobile less the wager, but also on the taxes it pays that are required to be deducted and withheld. This results in a pyramiding of taxes requiring the use of an algebraic formula. Under this formula, the payer must deduct and withhold a tax of 25 percent of the fair market value of the automobile less the wager ($2,500) and, in addition, the payer must indicate on Form W–2G the amount of such winnings as $12,501 ($10,001+25%($10,001 − $1)).

Example 6. D purchases a ticket for $1 in the State Y lottery from an authorized agent of State Y On January 1, 1976, a drawing is held and D wins $100 a month for the rest of D's life. It is actuarially determined that, on January 3, 1977, D's life expectancy is 5 years. Based on that determination, the proceeds from the wager paid to D on or after January 3, 1977, will exceed $5,000. Therefore, State Y must deduct and withhold $20 from each monthly payment made on or after January 3, 1977. (None of such payments is reduced by the amount of the wager because the amount of the wager was offset by the first payment of winnings which was made before January 3, 1977)).

Example 7. Assume the same facts as in example 6 except that State Y purchases in its own name, as owner, an annuity of $100 a month for D's life from E Corporation, in order to fund its own obligation to make the payments. Although State Y remains liable for the withholding of tax, E Corporation as paying agent for State Y, making payments directly to D, should deduct and withhold from each monthly payment in the manner described in example 6.

Example 8. E purchases a sweepstakes ticket for $1 in a sweepstakes conducted by W. E purchases the ticket on behalf of himself and on behalf of F and G, who have contributed equal amounts toward the purchase of the ticket and who have agreed to share equally in any prizes won. The ticket which E purchases wins $1,002. Since the proceeds of the wager ($1,002—$1) are greater than $1,000 W is required to withhold and deduct 20 percent of such proceeds.

Example 9. On February 1, 1977, a drawing is held in the State X lottery in which a winning ticket is selected. The person holding the winning ticket is entitled to proceeds of $100,000 payable either as a lump sum upon demand or $10,000 a year for 10 years. Under State law, the winning ticket must be presented to an authorized agent of State X before February 1, 1978. Until the ticket is presented, State X does not know the identity of the winner. On December 1, 1977, H, the winner, presents the winning ticket to an authorized agent of the State X lottery. The winnings are constructively paid to H on February 1, 1977. Since H, has the option of receiving the entire proceeds upon demand, State X is required to deduct and withhold $20,000 ($100,000×20%) from the proceeds of H's winnings on February 1, 1977; but for purposes of determining the time at which the deposit and inclusion on Form 941 of these taxes is to be made, the withholding shall be deemed to have beem made on December 1, 1977.

Example 10. J purchases a subscription to N magazine, at the regular subscription price. All new subscribers are automatically eligible for a special drawing. The drawing is held and J wins $50,000. Since J has not paid any more than the regular subscription price, J has not placed a wager or entered a wagering transaction. Therefore, N is not required to deduct and withhold J's winnings.

Example 11. C makes two $2 bets in the same parimutuel pool for a horse race. One bet is an ‘‘exacta’’ in which C bets on horse M to win and horse N to ‘‘place’’. The other bet is a ‘‘trifecta’’. C bets on horse M to win, horse N to ‘‘place’’ and horse O to ‘‘show’’. C wins both bets and is paid $600 with respect to the ‘‘exacta’’ and $900 with respect to the ‘‘trifecta’’. The bets are not identical wagers, however, and on these facts neither payment is subject to withholding.

(e) *Statement by recipient.* Each person who is to receive a payment of winnings subject to withholding shall furnish the payer a statement on Form W–2G or 5754 (whichever is applicable) made under the penalties of perjury containing—

(1) The name, address, and taxpayer identification number of the winner accompanied by a declaration that no other person is entitled to any portion of such payment, or

(2) The name, address, and taxpayer identification number of the recipient and of every person entitled to any portion of such payment.

If more than one payment of winnings subject to withholding is to be made with respect to a single wager, for example in the case of an annuity, the recipient is required by paragraph (e) of this section to furnish the payer a statement with respect to the first such payment only, provided that such other payments are taken into account in a return required by paragraph (f) of this section.

(f) *Return of payer*—(1) *In general.* Every person making payment of winnings for which a statement is required under paragraph (e) of this section shall file a return on Form W–2G with the Internal Revenue Service Center serving the district in which is located the principal place of business of the person making the return on or before February 28 of the calendar year following the calendar year in which the payment of winnings is made. The return required by this paragraph (f) of the section, need not include the statement by the recipient required by paragraph (e) of this section and, therefore, need not be signed by the recipient, provided such statement is retained as long as the contents thereof may become material in the administration of any internal revenue law. For payments to more than one winner, a separate Form W–2G, which in no event need be signed by the winner, shall be filed with respect to each such winner. Each Form W–2G shall contain the following:

(i) The name, address, and employer identification number of the payer;

(ii) The name, address, and social security account number of the winner;

(iii) The date, amount of the payment, and amount withheld;

(iv) The type of wagering transaction;

(v) Except with respect to winnings from a wager placed in a State-conducted lottery, a specific description of two types of identification, *e.g.*, driver's license number and issuing State, social security account number of voter registration number and jurisdiction, furnished the payer for verification of the recipient's name, address, and social security account number; and

(vi) With respect to amounts paid after December 31, 1983, the amount of winnings from identical wagers.

The return of the payer need not contain the information required by subdivision (v) of this paragraph (f)(1) provided such information is obtained with respect to the recipient of such winnings and retained as long as the contents thereof may become material in the administration of any internal revenue law.

(2) *Transmittal form.* Persons making payments of winnings subject to withholding shall use Form W–3G to transmit Forms W–2G to the Internal Revenue Service Centers.

(Secs. 6011 and 7805 of the Internal Revenue Code of 1954 (68A Stat. 732, 917; 26 U.S.C. 6011, 7805)

[T.D. 7787, 46 FR 46908, Sept. 23, 1981, as amended by T.D. 7919, 48 FR 46298, Oct. 12, 1983; 48 FR 55728, Dec. 15, 1983; T.D. 7943, 49 FR 5345, Feb. 13, 1984; 49 FR 8437, Mar. 7, 1984]

§ 31.3402(r)–1 Withholding on distributions of Indian gaming profits to tribal members.

(a) (1) *General rule.* Section 3402(r)(1) requires every person, including an Indian tribe, making a payment to a member of an Indian tribe from the net revenues of any class II or class III gaming activity, as defined in 25 U.S.C. 2703, conducted or licensed by such tribe to deduct and withhold from such payment a tax in an amount equal to such payment's proportionate share of the annualized tax, as that term is defined in section 3402(r)(3).

(2) *Withholding tables.* Except as provided in paragraph (a)(4) of this section, the amount of a payment's proportionate share of the annualized tax shall be determined under the applicable table provided by the Commissioner.

(3) *Annualized amount of payment.* Section 3402(r)(5) provides that payments shall be placed on an annualized basis under regulations prescribed by the Secretary. A payment may be placed on an annualized basis by multiplying the amount of the payment by the total number of payments to be made in a calendar year. For example, a monthly payment may be annualized by multiplying the amount of the payment by 12. Similarly, a quarterly payment may be annualized by multiplying the amount of the payment by 4.

(4) *Alternate withholding procedures*—(i) *In general.* Any procedure for determining the amount to be deducted and withheld under section 3402(r) may be used, provided that the amount of tax deducted and withheld is substantially the same as it would be using the tables provided by the Commissioner under paragraph (a)(2) of this section. At the election of an Indian tribe, the amount to be deducted and withheld under section 3402(r) shall be determined in accordance with this alternate procedure.

(ii) *Method of election.* It is sufficient for purposes of making an election under this paragraph (a)(4) that an Indian tribe evidence the election in any reasonable way, including use of a particular method. Thus, no written election is required.

(5) *Additional withholding permitted.* Consistent with the provisions of section 3402(p), a tribal member and a tribe may enter into an agreement to provide for the deduction and withholding of additional amounts from payments in order to satisfy the anticipated tax liability of the tribal member. The agreement may be made in a manner similar to that described in § 31.3402(p)–1 (with respect to voluntary withholding agreements between employees and employers).

(b) Effective date. This section applies to payments made after December 31, 1994.

[T.D. 8634, 60 FR 65238, Dec. 19, 1995]

§ 31.3403–1 Liability for tax.

Every employer required to deduct and withhold the tax under section 3402 from the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee by the employer. If, for example, the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax. See, however, § 31.3402(d)–1. The employer is relieved of liability to any other person for the amount of any such tax withheld and paid to the district director or deposited with a duly designated depositary of the United States.

§31.3404–1 Return and payment by governmental employer.

If the United States, or a State, Territory, Puerto Rico, or a political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, is an employer required to deduct and withhold tax under Chapter 24, the return of the amount deducted and withheld as such tax may be made by the officer or employee having control of the payment of the wages or other officer or employee appropriately designated for that purpose. (For provisions relating to the execution and filing of returns, see Subpart G of the regulations in this part.)

§31.3405(c)–1 Withholding on eligible rollover distributions; questions and answers.

The following questions and answers relate to withholding on eligible rollover distributions under section 3405(c) of the Internal Revenue Code of 1986, as added by section 522(b) of the Unemployment Compensation Amendments of 1992 (Public Law 102– 318, 106 Stat. 290) (UCA). For additional UCA guidance under sections 401(a)(31), 402(c), 402(f), and 403(b)(8) and (10), see §§1.401(a)(31)–1, 1.402(c)–2, 1.402(f)–1, and 1.403(b)–2 of this chapter, respectively.

LIST OF QUESTIONS

Q–1: What are the withholding requirements under section 3405 for distributions from qualified plans and section 403(b) annuities?

Q–2: May a distributee elect under section 3405(c) not to have Federal income tax withheld from an eligible rollover distribution?

Q–3: May a distributee be permitted to elect to have more than 20-percent Federal income tax withheld from an eligible rollover distribution?

Q–4: Who has responsibility for complying with section 3405(c) relating to the 20-percent income tax withholding on eligible rollover distributions?

Q–5: May the plan administrator shift the withholding responsibility to the payor and, if so, how?

Q–6: How does the 20-percent withholding requirement under section 3405(c) apply if a distributee elects to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to have the remainder of that distribution paid to the distributee?

Q–7: Will the plan administrator be subject to liability for tax, interest, or penalties for failure to withhold 20 percent from an eligible rollover distribution that, because of erroneous information provided by a distributee, is not paid to an eligible retirement plan even though the distributee elected a direct rollover?

Q–8: Is an eligible rollover distribution that is paid to a qualified defined benefit plan subject to 20-percent withholding?

Q–9: If property other than cash, employer securities, or plan loans is distributed, how is the 20-percent income tax withholding required under section 3405(c) accomplished?

Q–10: What assumptions may a plan administrator make regarding whether a benefit is an eligible rollover distribution for purposes of determining the amount of a distribution that is subject to 20-percent mandatory withholding?

Q–11: Are there special rules for applying the 20-percent withholding requirement to employer securities and a plan loan offset amount distributed in an eligible rollover distribution?

Q–12: How does the mandatory withholding rule apply to net unrealized appreciation from employer securities?

Q–13: Does the 20-percent withholding requirement apply to eligible rollover distributions from a qualified plan distributed annuity contract?

Q–14: Must a payor or plan administrator withhold tax from an eligible rollover distribution for which a direct rollover election was not made if the amount of the distribution is less than $200?

Q–15: If eligible rollover distributions are made from a qualified plan, who has responsibility for making the returns and reports required under these regulations?

Q–16: What eligible rollover distributions must be reported on Form 1099–R?

Q–17: Must the plan administrator, trustee or custodian of the eligible retirement plan report amounts received in a direct rollover?

QUESTIONS AND ANSWERS

Q–1: What are the withholding requirements under section 3405 for distributions from qualified plans and section 403(b) annuities?

A–1: (a) *General rule.* Section 3405(c), added by UCA, provides that any designated distribution that is an eligible rollover distribution (as defined in section 402(f)(2)(A)) from a qualified plan or a section 403(b) annuity is subject to income tax withholding at the rate of 20 percent unless the distributee of the eligible rollover distribution elects to have the distribution paid directly to an eligible retirement plan in a direct rollover. See §1.402(c)–2, Q&A–2 of this chapter for the definition of a qualified plan and

§ 1.403(b)–2, Q&A–1 of this chapter for the definition of a section 403(b) annuity. For purposes of section 3405 and this section, with respect to a distribution from a qualified plan, an eligible retirement plan is a trust qualified under section 401(a), an annuity plan described in section 403(a), or an individual retirement plan (as described in § 1.402(c)–2, Q&A–2 of this chapter). For purposes of section 3405 and this section, with respect to a distribution from a section 403(b) annuity, an eligible retirement plan is an annuity contract, a custodial account, a retirement income account described in section 403(b), or an individual retirement plan. If a designated distribution is not an eligible rollover distribution, it is subject to the elective withholding provisions of section 3405(a) and (b) and § 35.3405–1 of this chapter and is not subject to the mandatory withholding provisions of section 3405(c) and this section.

(b) *Application of other statutory provisions.* See § 1.401(a)(31)–1 of this chapter concerning the requirements and the procedures for electing a direct rollover under section 401(a)(31). See section 402(c)(2) and (4), and § 1.402(c)–2, Q&A–3 through Q&A–10 and Q&A–14 of this chapter for rules to determine what constitutes an eligible rollover distribution. See § 1.402(f)–1, Q&A–1 through Q&A–3 and § 1.403(b)–2, Q&A–3 of this chapter concerning the notice that must be provided to a distributee, within a reasonable period of time before making an eligible rollover distribution. See § 1.403(b)–2, Q&A–1 and Q&A–2 of this chapter for guidance concerning the rollover provisions and direct rollover requirements for distributions from annuities described in section 403(b).

(c) *Effective date*—(1) *Statutory effective date*—(i) *General rule.* Section 3405(c), as added by UCA, applies to eligible rollover distributions made on or after January 1, 1993, even if the employee's employment with the employer maintaining the plan terminated before January 1, 1993 and even if the eligible rollover distribution is part of a series of payments that began before January 1, 1993.

(ii) *Special rule for governmental section 403(b) annuities.* Section 522 of UCA provides a special effective date for governmental section 403(b) annuities. This special effective date appears in § 1.403(b)–2T of this chapter (as it appeared in the April 1, 1995 edition of 26 CFR part 1).

(2) *Regulatory effective date.* This section applies to eligible rollover distributions made on or after October 19, 1995. For eligible rollover distributions made on or after January 1, 1993 and before October 19, 1995, § 31.3405(c)–1T (as it appeared in the April 1, 1995 edition of 26 CFR part 1), applies. However, for any distribution made on or after January 1, 1993 but before October 19, 1995, a plan administrator or payor may comply with the withholding requirements of section 3405(c) by substituting any or all provisions of this section for the corresponding provisions of § 31.3405(c)–1T, if any.

Q–2: May a distributee elect under section 3405(c) not to have Federal income tax withheld from an eligible rollover distribution?

A–2: No. The 20-percent income tax withholding imposed under section 3405(c)(1) applies to an eligible rollover distribution unless the distributee elects under section 401(a)(31) to have the eligible rollover distribution paid directly to an eligible retirement plan in a direct rollover. See § 1.401(a)(31)–1 and § 1.403(b)–2, Q&A–2 of this chapter for provisions concerning the requirement that a distributee of an eligible rollover distribution be permitted to elect a distribution in the form of a direct rollover.

Q–3: May a distributee be permitted to elect to have more than 20-percent Federal income tax withheld from an eligible rollover distribution?

A–3: Yes. Under section 3402(p), a distributee of an eligible rollover distribution and the plan administrator or payor are permitted to enter into an agreement to provide for withholding in excess of 20 percent from an eligible rollover distribution. Any agreement must be made in accordance with applicable forms and instructions. However, no request for withholding will be effective between the plan administrator or payor and the distributee until the plan administrator or payor accepts the request by commencing to withhold from the amounts with respect to which the request was made. An agreement under section 3402(p) shall be effective for such period as the plan administrator or payor and the distributee mutually agree upon. However, either party to the agreement may terminate the agreement prior to the end of such period by furnishing a signed written notice to the other.

Q–4: Who has responsibility for complying with section 3405(c) relating to the 20-percent income tax withholding on eligible rollover distributions?

A–4: Section 3405(d) generally requires the plan administrator of a qualified plan and the payor of a section 403(b) annuity to withhold under section 3405(c)(1) an amount equal to 20 percent of the portion of an eligible rollover distribution that the distributee does not elect to have paid in a direct rollover. When an amount is paid under a qualified plan distributed annuity contract as defined in § 1.402(c)–2, Q&A–10 of this chapter, the payor is treated as the plan administrator. See Q&A–13 of this section concerning eligible rollover distributions from a qualified plan distributed annuity contract.

Q–5: May the plan administrator shift the withholding responsibility to the payor and, if so, how?

A–5: Yes. The plan administrator may shift the withholding responsibility to the payor by following the procedures set forth in §35.3405–1, Q&A E–2 through E–5 of this chapter (relating to elective withholding on pensions, annuities and certain other deferred income) with appropriate adjustments, including the plan administrator's identification of amounts that constitute required minimum distributions.

Q–6: How does the 20-percent withholding requirement under section 3405(c) apply if a distributee elects to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to have the remainder of that distribution paid to the distributee?

A–6: If a distributee elects to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to receive the remainder of the distribution, the 20-percent withholding requirement under section 3405(c) applies only to the portion of the eligible rollover distribution that the distributee receives and not to the portion that is paid in a direct rollover.

Q–7: Will the plan administrator be subject to liability for tax, interest, or penalties for failure to withhold 20 percent from an eligible rollover distribution that, because of erroneous information provided by a distributee, is not paid to an eligible retirement plan even though the distributee elected a direct rollover?

A–7: (a) *General rule.* If the plan administrator reasonably relied on adequate information provided by the distributee (as described in paragraph (b) of this Q&A), the plan administrator will not be subject to liability for taxes, interest, or penalties for failure to withhold income tax from an eligible rollover distribution solely because the distribution is paid to an account or plan that is not an eligible retirement plan (as defined, with respect to distributions from qualified plans, in section 402(c)(8)(B) and §1.402(c)–2, Q&A–2 of this chapter and, with respect to a distributions from section 403(b) annuities, in §1.403(b)–2), Q&A–1 of this chapter. Although the plan administrator is not required to verify independently the accuracy of information provided by the distributee, the plan administrator's reliance on the information furnished must be reasonable. For example, it is not reasonable for the plan administrator to rely on information that is clearly erroneous on its face.

(b) *Adequate information.* The plan administrator has obtained from the distributee adequate information on which to rely in making a direct rollover if the distributee furnishes to the plan administrator: the name of the eligible retirement plan; a representation that the recipient plan is an individual retirement plan, a qualified plan, or a section 403(b) annuity, as appropriate; and any other information that is necessary in order to permit the plan administrator to accomplish the direct rollover by the means it has selected. This information must include any information needed to comply with the specific requirements of §1.401(a)(31)–1, Q&A–3 and Q&A–4 of this chapter. For example, if the direct rollover is to be made by mailing a check to the trustee of an individual retirement account, the plan administrator must obtain, in addition to the name of the individual retirement account and the representation described above, the name and address of the trustee of the individual retirement account.

Q–8: Is an eligible rollover distribution that is paid to a qualified defined benefit plan subject to 20-percent withholding?

A–8: No. If an eligible rollover distribution is paid in a direct rollover to an eligible retirement plan within the meaning of section 402(c)(8), including a qualified defined benefit plan, it is reasonable to believe that the distribution is not includible in gross income pursuant to section 402(c)(1). Accordingly, pursuant to section 3405(e)(1)(B), the distribution is not a designated distribution and is not subject to 20-percent withholding.

Q–9: If property other than cash, employer securities, or plan loans is distributed, how is the 20-percent income tax withholding required under section 3405(c) accomplished?

A–9: When all or a portion of an eligible rollover distribution subject to 20-percent income tax withholding under section 3405(c) consists of property other than cash, employer securities, or plan loan offset amounts, the plan administrator or payor must apply §35.3405–1, Q&A F–2 of this chapter and may apply §35.3405–1, Q&A F–3 of this chapter in determining how to satisfy the withholding requirements.

Q–10: What assumptions may a plan administrator make regarding whether a benefit is an eligible rollover distribution for purposes of determining the amount of a distribution that is subject to 20-percent mandatory withholding?

A–10: (a) *In general.* For purposes of determining the amount of a distribution that is subject to 20-percent mandatory withholding, a plan administrator may make the assumptions described in paragraphs (b), (c), and (d) of this Q&A in determining the amount of a distribution that is an eligible rollover distribution and a designated distribution. Q&A–17 of §1.401(a)(31)–1 of this chapter provides assumptions for purposes of complying with section 401(a)(31). See §1.402(c)–2, Q&A–15 of this chapter concerning the effect of these assumptions for purposes of section 402(c).

(b) *$5,000 death benefit.* A plan administrator may assume that a distribution that qualifies for the $5,000 death benefit exclusion under section 101(b) is the only death benefit being paid with respect to a deceased employee that qualifies for that exclusion. Thus, in such a case, the plan administrator may assume that the distribution is not an eligible rollover distribution to the extent that it would be excludible from gross income based on this assumption.

(c) *Required minimum distributions.* The plan administrator is permitted to determine the amount of the minimum distribution required to satisfy section 401(a)(9)(A) for any calendar year by assuming that there is no designated beneficiary.

(d) *Valuation of property.* In the case of a distribution that includes property, in calculating the amount of the distribution for purposes of applying section 3405(c), the value of the property may be determined in accordance with § 35.3405–1, Q&A F–1 of this chapter.

Q–11: Are there special rules for applying the 20-percent withholding requirement to employer securities and a plan loan offset amount distributed in an eligible rollover distribution?

A–11: Yes. The maximum amount to be withheld on any designated distribution (including any eligible rollover distribution) under section 3405(c) must not exceed the sum of the cash and the fair market value of property (excluding employer securities) received in the distribution. The amount of the sum is determined without regard to whether any portion of the cash or property is a designated distribution or an eligible rollover distribution. For purposes of this rule, any plan loan offset amount, as defined in § 1.402(c)–2, Q&A–9 of this chapter, is treated in the same manner as employer securities. Thus, although employer securities and plan loan offset amounts must be included in the amount that is multiplied by 20-percent, the total amount required to be withheld for an eligible rollover distribution is limited to the sum of the cash and the fair market value of property received by the distributee, excluding any amount of the distribution that is a plan loan offset amount or that is distributed in the form of employer securities. For example, if the only portion of an eligible rollover distribution that is not paid in a direct rollover consists of employer securities or a plan loan offset amount, withholding is not required. In addition, if a distribution consists solely of employer securities and cash (not in excess of $200) in lieu of fractional shares, no amount is required to be withheld as income tax from the distribution under section 3405 (including section 3405(c) and this section). For purposes of section 3405 and this section, employer securities means securities of the employer corporation within the meaning of section 402(e)(4)(E)(ii).

Q–12: How does the mandatory withholding rule apply to net unrealized appreciation from employer securities?

A–12: An eligible rollover distribution can include net unrealized appreciation from employer securities, within the meaning of section 402(e)(4), even if the net unrealized appreciation is excluded from gross income under section 402(e)(4). However, to the extent that it is excludable from gross income pursuant to section 402(e)(4), net unrealized appreciation is not a designated distribution pursuant to section 3405(e)(1)(B) because it is reasonable to believe that it is not includable in gross income. Thus, to the extent that net unrealized appreciation is excludable from gross income pursuant to section 402(e)(4), net unrealized appreciation is not included in the amount of an eligible rollover distribution that is subject to 20-percent withholding.

Q–13: Does the 20-percent withholding requirement apply to eligible rollover distributions from a qualified plan distributed annuity contract?

A–13: The 20-percent withholding requirement applies to eligible rollover distributions from a qualified plan distributed annuity contract as defined in Q&A–10 of § 1.402(c)–2 of this chapter. In the case of an eligible rollover distribution from such an annuity contract, the payor is treated as the plan administrator for purposes of section 3405. See § 1.401(a)(31)–1, Q&A–16 of this chapter concerning the direct rollover requirements that apply to distributions from such an annuity contract and see § 1.402(c)–2, Q&A–10 of this chapter concerning the treatment of distributions from such annuity contracts as eligible rollover distributions.

Q–14: Must a payor or plan administrator withhold tax from an eligible rollover distribution for which a direct rollover election was not made if the amount of the distribution is less than $200?

A–14: No. However, all eligible rollover distributions received within one taxable year of the distributee under the same plan must be aggregated for purposes of determining whether the $200 floor is reached. If the plan administrator or payor does not know at the time of the first distribution (that is less than $200) whether there will be additional eligible rollover distributions during the year for which aggregation is required, the plan administrator need not withhold from the first distribution. If distributions are made within one taxable year under more than one plan of an employer, the plan administrator or payor may, but need not, aggregate distributions for purposes of determining whether the $200 floor is reached. However, once the $200 threshold has been reached, the sum of all payments during the year must be used to determine the applicable amount to be withheld from subsequent payments during the year.

Q–15: If eligible rollover distributions are made from a qualified plan, who has responsibility for making the returns and reports required under these regulations?

A–15: Generally, the plan administrator, as defined in section 414(g), is responsible for maintaining the records and making the required reports with respect to eligible rollover distributions from qualified plans. However, if the plan administrator fails to keep the required records and make the required reports, the employer maintaining the plan is responsible for the reports and returns.

Q–16: What eligible rollover distributions must be reported on Form 1099–R?

A–16: Each eligible rollover distribution, including each eligible rollover distribution that is paid directly to an eligible retirement plan in a direct rollover, must be reported on Form 1099–R in accordance with the instructions for Form 1099–R. For purposes of the reporting required under section 6047(e), a direct rollover is treated as a distribution that is immediately rolled over to an eligible retirement plan. Distributions that are not eligible rollover distributions are subject to the reporting requirements set forth in §35.3405–1 of this chapter and applicable forms and instructions.

Q–17: Must the plan administrator, trustee or custodian of the eligible retirement plan report amounts received in a direct rollover?

A–17: (a) *Individual retirement plan.* If a distributee elects to have an eligible rollover distribution paid to an individual retirement plan in a direct rollover, the eligible rollover distribution is reported on Form 5498 as a rollover contribution to the individual retirement plan, in accordance with the instructions for Form 5498.

(b) *Qualified plan or section 403(b) annuity.* If a distributee elects to have an eligible rollover distribution paid to a qualified plan or section 403(b) annuity, the recipient plan or annuity is not required to report the receipt of the rollover contribution.

[T.D. 8619, 60 FR 49215, Sept. 22, 1995]

§31.3406–0 Outline of the backup withholding regulations.

This section lists paragraphs contained in §§31.3406(a)–1 through 31.3406(i)–1.

§31.3406(a)–1 Backup withholding requirement on reportable payments.

(a) Overview.
(b) Conditions that invoke the backup withholding requirement.
(1) Conditions applicable to all reportable payments.
(2) Conditions applicable only to reportable interest or dividend payments.
(c) Exceptions.
(d) Cross references.

§31.3406(a)–2 Definition of payors obligated to backup withhold.

(a) In general.
(b) Middlemen treated as payors.
(c) Persons not treated as payors.

§31.3406(a)–3 Scope and extent of accounts subject to backup withholding.

§31.3406(a)–4 Time when payments are considered to be paid and subject to backup withholding.

(a) Timing.
(1) In general.
(2) Special rules for dividends.
(b) Amounts reportable under section 6045.
(1) In general.
(2) Special rule for interest accrued on bonds.
(c) Middlemen.
(1) In general.
(2) Special rule for common trust funds.
(3) Special rule for certain grantor trusts.

§31.3406(b)(2)–1 Reportable interest payment.

(a) Interest subject to backup withholding.
(1) In general.
(2) Special rule for tax-exempt interest.
(b) Amount subject to backup withholding.
(1) In general.
(2) Special rule to adjust for premature withdrawal penalty.

§31.3406(b)(2)–2 Original issue discount.

(a) Original issue discount subject to backup withholding.
(b) Amount subject to backup withholding and time when backup withholding is imposed with respect to short-term obligations.
(c) Transferred short-term obligations.
(1) Subsequent holder may establish purchase price.
(2) Subsequent holder unable (or not permitted) to establish purchase price.
(3) Transferred obligation.
(d) Amount subject to backup withholding and time when backup withholding is imposed with respect to long-term obligations.
(1) No cash payments prior to maturity.
(2) Registered long-term obligations with cash payments prior to maturity.
(3) Transferred registered long-term obligations with payments prior to maturity.
(e) Bearer long-term obligations.
(1) Payments prior to maturity.
(2) Payments at maturity.

§31.3406(b)(2)–3 Window transactions.

(a) Requirement to backup withhold.
(b) Window transaction defined.
(c) Manner of furnishing taxpayer identification number in the case of a window transaction.

§31.3406(b)(2)–4 Reportable dividend payment.

(a) Dividends subject to backup withholding.
(b) Dividends not subject to backup withholding.
(c) Amount subject to backup withholding.

(1) In general.
(2) Reasonable estimate of amount of dividend subject to backup withholding.
(3) Reinvested dividends.

§ 31.3406(b)(2)–5 Reportable patronage dividend payment.

(a) Patronage dividends subject to backup withholding.
(b) Amount subject to backup withholding.
(1) Failure to provide taxpayer identification number or notification of incorrect taxpayer identification number.
(2) Notified payee underreporting or payee certification failure.

§ 31.3406(b)(3)–1 Reportable payments of rents, commissions, nonemployee compensation, etc.

(a) Section 6041 and 6041A(a) payments subject to backup withholding.
(b) Amount subject to backup withholding.
(1) In general.
(2) Net commissions.
(3) Payments aggregating $600 or more for the calendar year.

§ 31.3406(b)(3)–2 Reportable barter exchanges and gross proceeds of sales of securities or commodities by brokers.

(a) Transactions subject to backup withholding.
(b) Amount subject to backup withholding.
(1) In general.
(2) Forward contracts, including foreign currency contracts, and regulated futures contracts.
(3) Security sales made through a margin account.
(4) Security short sales.
(5) Fractional shares.

§ 31.3406(b)(3)–3 Reportable payments by certain fishing boat operators.

(a) Payments subject to backup withholding.
(b) Amount subject to backup withholding.

§ 31.3406(b)(3)–4 Reportable payments of royalties.

(a) Royalty payments subject to backup withholding.
(b) Amount subject to backup withholding.

§ 31.3406(b)(4)–1 Exemption for certain minimal payments.

(a) In general.
(b) Manner of making the election.
(c) How to annualize.
(1) In general.
(2) Special aggregation rule for reportable interest and dividends.
(d) Exception for window transactions and original issue discount.

§ 31.3406(c)–1 Notified payee underreporting of reportable interest or dividend payments.

(a) Overview.
(b) Definitions.
(1) Notified payee underreporting.
(2) Payee underreporting.
(c) Notice to payors regarding backup withholding due to notified payee underreporting.
(1) In general.
(2) Additional requirements for payors that are also brokers.
(3) Payor identification of accounts of the payee subject to backup withholding due to notified payee underreporting.
(d) Notice from payors of backup withholding due to notified payee underreporting.
(1) In general.
(2) Procedures.
(e) Period during which backup withholding is required.
(1) In general.
(2) Stop withholding.
(3) Dormant accounts.
(f) Notice to payees from the Internal Revenue Service.
(1) Notice period.
(2) Payee subject to backup withholding.
(3) Disclosure of names of payors and brokers.
(4) Backup withholding certification.
(g) Determination by the Internal Revenue Service that backup withholding should not start or should be stopped.
(1) In general.
(2) Date notice to stop backup withholding will be provided.
(3) Grounds for determination.
(4) No underreporting.
(5) Correcting any payee underreporting.
(6) Undue hardship.
(7) Bona fide dispute.
(h) Payees filing a joint return.
(1) In general.
(2) Exceptions.
(i) [Reserved.]
(j) Penalties.

§ 31.3406(d)–1 Manner required for furnishing a taxpayer identification number.

(a) Requirement to backup withhold.
(b) Reportable interest or dividend account.
(1) Manner required for furnishing a taxpayer identification number with respect to a pre-1984 account or instrument.
(2) Determination of pre-1984 account or instrument.
(3) Manner required for furnishing a taxpayer identification number with respect to an account or instrument that is not a pre-1984 account.
(4) Special rule with respect to the acquisition of a readily tradable instrument in a

transaction between certain parties acting without the assistance of a broker.

(c) Brokerage account.

(1) Manner required for furnishing a taxpayer identification number with respect to a brokerage relationship that is not a post-1983 brokerage account.

(2) Manner required for furnishing a taxpayer identification number with respect to a post-1983 brokerage account.

(d) Rents, commissions, nonemployee compensation, and certain fishing boat operators, etc.—Manner required for furnishing a taxpayer identification number.

§31.3406(d)–2 Payee certification failure.

(a) Requirement to backup withhold.

(b) Exceptions.

§31.3406(d)–3 Special 30-day rules for certain reportable payments.

(a) Accounts or readily tradable instruments acquired directly from the payor (including a broker who holds an instrument in street name) by electronic transmission or by mail.

(b) Sale of an instrument for a customer by electronic transmission or by mail.

(c) Application to foreign payees.

§31.3406(d)–4 Special rules for readily tradable instruments acquired through a broker.

(a) Readily tradable instruments acquired through post-1983 brokerage accounts with a broker who is not a payor.

(1) In general.

(2) Additional requirements.

(3) Transactions entered into through a brokerage account that is not a post-1983 brokerage account.

(4) Payor must notify payee.

(b) Notices.

(1) Form of notice by broker to payor.

(2) Form of notice by payor to payee.

(c) Payor's reliance on information from broker.

(1) In general.

(2) Amount subject to backup withholding.

§31.3406(d)–5 Backup withholding when the Service or a broker notifies the payor to withhold because the payee's taxpayer identification number is incorrect.

(a) Overview.

(b) Definitions and special rules.

(1) Definition of an incorrect name/TIN combination.

(2) Definition of account.

(3) Definition of business day.

(4) Certain exceptions.

(c) Notice regarding an incorrect name/TIN combination.

(1) In general.

(2) Additional requirements for payors that are also brokers.

(3) Payor identification of the account or accounts of the payee that have the incorrect taxpayer identification number.

(4) Special rule for joint accounts.

(5) Date of receipt.

(d) Notice from payors of backup withholding due to an incorrect name/TIN combination.

(1) In general.

(2) Procedures.

(e) Period during which backup withholding is required due to notification of an incorrect name/TIN combination.

(1) In general.

(2) Grace periods.

(3) Dormant accounts.

(f) Manner required for payee to furnish certified taxpayer identification number.

(g) Receipt of two notices within a 3-year period.

(1) In general.

(2) Notice to payee who has provided two incorrect name/TIN combinations within 3 calendar years.

(3) Period during which backup withholding is required due to a second notice of an incorrect name/TIN combination within 3 calendar years.

(4) Receipt of two notices in one calendar year.

(5) Notification from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination.

(h) Payors must use newly provided certified number.

(i) Effective date.

(j) Examples.

§31.3406(e)–1 Period during which backup withholding is required.

(a) In general.

(b) Failure to furnish a taxpayer identification number in the manner required.

(1) Start withholding.

(2) Stop withholding.

(c) Notification of an incorrect taxpayer identification number.

(d) Notified payee underreporting.

(e) Payee certification failure.

(1) Start withholding.

(2) Stop withholding.

(f) Rule for determining when the payor receives a taxpayer identification number or certificate from a payee.

§31.3406(f)–1 Confidentiality of information.

(a) Confidentiality and liability for violation.

(b) Permissible use of information.

(1) In general.

(2) Window transactions.

(c) Specific restrictions on the use of information.

§ 31.3406(g)–1 Exception for payments to certain payees and certain other payments.

(a) Exempt recipients.
(1) In general.
(2) Nonexclusive list.
(b) Determination of whether a person is described in paragraph (a)(1) of this section.
(c) Prepaid or advance premium life-insurance contracts.

§ 31.3406(g)–2 Exception for reportable payments for which backup withholding is otherwise required.

(a) In general.
(b) Payment of wages.
(c) Distribution from a pension, annuity, or other plan of deferred compensation.
(d) Gambling winnings.
(1) In general.
(2) Definition of a reportable gambling winning and determination of amount subject to backup withholding.
(3) Special rules.
(e) Certain real estate transactions.
(f) Certain payments after an acquisition of accounts or instruments.
(g) Certain gross proceeds.

§ 31.3406(g)–3 Exemption while payee is waiting for a taxpayer identification number.

(a) In general.
(1) Backup withholding not required for 60 days.
(2) Reserve method.
(3) Alternative rule; 7-day grace period.
(b) Special rule for readily tradable instruments.
(c) Exceptions.
(1) In general.
(2) Special rule for amounts subject to reporting under section 6045 other than proceeds of redemptions of bearer obligations.
(d) Awaiting-TIN certificate.
(e) Form for awaiting-TIN certificate.

§ 31.3406(h)–1 Definitions.

(a) In general.
(b) Taxpayer identification number.
(1) In general.
(2) Obviously incorrect number.
(c) Broker.
(d) Readily tradable instrument.
(e) Day.
(f) Business day.

§ 31.3406(h)–2 Special rules.

(a) Joint accounts.
(1) Relevant name and taxpayer identification number combination.
(2) Optional rule for accounts subject to backup withholding under section 3406(a)(1)(B) or (C) where the names are switched.
(3) Joint foreign payees.
(b) Backup withholding from an alternative source.
(1) In general.
(2) Exceptions for payments made in property.
(c) Trusts.
(d) Adjustment of prior withholding by middleman.
(e) Conversion of amounts paid in foreign currency into United States dollars.
(1) Convertible foreign currency.
(2) Nonconvertible foreign currency. [Reserved]
(f) Coordination with other sections.
(g) Tax liabilities and penalties.
(h) To whom payor is liable for amount withheld.

§ 31.3406(h)–3 Certificates.

(a) Prescribed form to furnish information under penalties of perjury.
(1) In general.
(2) Use of a single or multiple Forms W–9 for accounts of the same payee.
(b) Prescribed form to furnish a noncertified taxpayer identification number.
(c) Forms prepared by payors or brokers.
(1) Substitute forms; in general.
(2) Form for exempt recipient.
(d) Special rule for brokers.
(e) Reasonable reliance on certificate.
(1) In general.
(2) Circumstances establishing reasonable reliance.
(f) Who may sign certificate.
(1) In general.
(2) Notified payee underreporting.
(g) Retention of certificates.
(1) Accounts or instruments that are not pre-1984 accounts and brokerage relationships that are post-1983 brokerage accounts.
(2) Accounts or instruments that are pre-1984 accounts and brokerage relationships that are not post-1983 brokerage accounts.
(h) Cross references.

§ 31.3406(i)–1 Effective date.

[T.D. 8637, 60 FR 66112, Dec. 21, 1995, as amended by T.D. 8734, 62 FR 53493, Oct. 14, 1997]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53493, Oct. 14, 1997, § 31.3406–0 was amended by removing the entries in the table for § 31.3406(h)–2, paragraphs (e)(1) and (e)(2), effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000.

§ 31.3406(a)–1 Backup withholding requirement on reportable payments.

(a) *Overview*. Under section 3406, a payor must deduct and withhold 31 percent of a reportable payment if a condition for withholding exists. *Reportable payments* mean interest and dividend payments (as defined in section

3406(b)(2)) and other reportable payments (as defined in section 3406(b)(3)). The conditions described in paragraph (b)(1) of this section apply to all reportable payments, including reportable interest and dividend payments. The conditions described in paragraph (b)(2) of this section apply only to reportable interest and dividend payments.

(b) *Conditions that invoke the backup withholding requirement*—(1) *Conditions applicable to all reportable payments.* A payor of a reportable payment must deduct and withhold under section 3406 if—

(i) The payee of the reportable payment does not furnish the payee's taxpayer identification number to the payor, as required in section 3406(a)(1)(A) and §31.3406(d)–1; or

(ii) The Internal Revenue Service or a broker notifies the payor that the taxpayer identification number furnished by its payee for a reportable payment is incorrect, as described in section 3406(a)(1)(B) and §31.3406(d)–5.

(2) *Conditions applicable only to reportable interest or dividend payments.* A payor of a reportable interest or dividend payment must deduct and withhold under section 3406 if—

(i) The Internal Revenue Service or a broker notifies the payor that its payee has underreported interest or dividend income, as described in section 3406(a)(1)(C) and §31.3406(c)–1; or

(ii) The payee fails to certify to the payor or broker that the payee is not subject to withholding due to notified payee underreporting, as described in section 3406(a)(1)(D) and §31.3406(d)–2.

(c) *Exceptions.* The requirement to withhold does not apply to certain minimal payments as described in §31.3406(b)(4)–1 or to payments exempt from withholding under §§31.3406(g)–1 through 31.3406(g)–3.

(d) *Cross references.* For the definition of *payor,* see §31.3406(a)–2. For the definition of *taxpayer identification number,* see §31.3406(h)–1(b).

[T.D. 8637, 60 FR 66114, Dec. 21, 1995]

§31.3406(a)–2 Definition of payors obligated to backup withhold.

(a) *In general. Payor* means any person who is required to make an information return with respect to any reportable payment (as described in section 3406(b)) under section 6041, 6041A(a), 6042, 6044, 6045, 6049, 6050A, or 6050N, including any middleman as described in paragraph (b) of this section.

(b) *Middlemen treated as payors.* A person who receives or collects a reportable payment on behalf of or for the account of a payee is a middleman and is treated as the payor of the payment. These persons include, but are not limited to—

(1) A custodian of a payee's account, such as a bank, financial institution, or brokerage firm acting as custodian of an account;

(2) A nominee, including the joint owner of an account or instrument, except if the joint owners are husband and wife or if the payment is actually owned by another person whose name is also shown on the information return filed with respect to the payment;

(3) A broker holding a security (including stock) for a customer in street name;

(4) A grantor trust established after December 31, 1995, all of which is owned by two or more grantors, and for this purpose spouses filing a joint return are considered to be one grantor;

(5) A common trust fund; and

(6) A partnership or an S corporation that makes a reportable payment.

(c) *Persons not treated as payors.* The following persons are not treated as payors for purposes of section 3406 if the person does not have a reporting obligation under the section on information reporting to which the payment relates:

(1) An agent of the payor who is acting on behalf of the payor in making the payment and who has not entered into an agreement with the payor (for further guidance see Rev. Proc. 84–33 (1984–1 C.B. 502), and §601.601(d)(2) of this chapter), such as a bank that acts as a paying agent in making a payment of dividends on behalf of a corporation (although payments made by the agent are considered to be payments made by the payor, and thus are subject to withholding, reporting, and the depositing requirements pertaining to section 3406 as if they were made by the payor itself, and failure by the agent so to withhold, report, or deposit is considered to be failure by the payor);

(2) A trust (other than a grantor trust as described in paragraph (b)(4) of this section) that files a Form 1041 and furnishes each beneficiary a Form K–1 containing information required to be shown on an information return, including amounts withheld under section 3406; or

(3) A partnership making a payment of a distributive share or an S corporation making a similar distribution.

[T.D. 8637, 60 FR 66114, Dec. 21, 1995]

§ 31.3406(a)–3 Scope and extent of accounts subject to backup withholding.

A payor who is required to withhold under § 31.3406(a)–1 must withhold—

(a) On the accounts subject to withholding under § 31.3406(a)–1 (b)(1)(i) or (b)(2)(ii); and

(b) On the accounts subject to withholding under § 31.3406(a)–1(b)(1)(ii) or (b)(2)(i), as described under § 31.3406(d)–5 (relating to notification of incorrect TIN) or § 31.3406(c)–1 (relating to notified payee underreporting), respectively.

[T.D. 8637, 60 FR 66114, Dec. 21, 1995]

§ 31.3406(a)–4 Time when payments are considered to be paid and subject to backup withholding.

(a) *Timing*—(1) *In general.* If backup withholding is required under section 3406 on a reportable payment (as defined in section 3406(b)), the payor must withhold at the time it makes the payment to the payee or to the payee's account that is subject to withholding. Amounts are considered paid when they are credited to the account of, or made available to, the payee. Amounts are not considered paid solely because they are posted (e.g., an informational notation on the payee's passbook) if they are not actually credited to the payee's account or made available to the payee. See paragraph (c) of this section for the timing of withholding by a middleman.

(2) *Special rules for dividends.* For purposes of section 3406 and this section—

(i) *Record date earlier than payment date.* In the case of stock for which the record date is earlier than the payment date, the dividends are considered paid on the payment date.

(ii) *Dividends paid in corporate reorganizations.* In the case of a corporate reorganization, if a payee is required to exchange stock held in the former corporation for stock in the new corporation before the dividends that have been paid with respect to the stock in the new corporation will be provided to the payee, the dividend is considered paid on the date the payee actually exchanges the stock and receives the dividend.

(b) *Amounts reportable under section 6045*—(1) *In general.* Notwithstanding paragraph (a) of this section, in the case of a transaction reportable under section 6045 (except in the case of forward contracts (including foreign currency contracts), regulated futures contracts, and security short sales), the obligation to withhold under section 3406 arises on the date the sale is entered on the books of the broker or the date the exchange occurs as provided in § 1.6045–1(f)(3) of this chapter. A broker (in its capacity as payor) is not required, however, to satisfy its withholding liability until payment is made. See § 31.3406(b)(3)–2(b)(2) for special rules applicable to forward contracts (including foreign currency contracts), regulated futures contracts, and security short sales.

(2) *Special rule for interest accrued on bonds.* For purposes of determining the time that interest is considered paid and subject to withholding under section 3406 when bonds are sold between interest payment dates, the portion of the sales price representing interest accrued to the date of sale is considered a portion of a reportable payment of gross proceeds under section 6045 (provided that the accrued interest is not tax-exempt as described in section 103(a), relating to certain governmental obligations), and is not considered to be a payment of interest for purposes of section 6049.

(c) *Middlemen*—(1) *In general.* Any middleman (as defined in § 31.3406(a)–2(b)) must withhold under section 3406 at the time the reportable payment is received by or credited to the middleman. If the middleman makes or credits the reportable payment to the payee prior to the middleman's receipt of the corresponding payment, the middleman may withhold at the time the reportable payment is made or credited to the payee.

(2) *Special rule for common trust funds.* A common trust fund (as defined in section 584) must withhold either—

(i) At the time the reportable payment is received by or credited to the common trust fund as provided in paragraph (c)(1) of this section;

(ii) On the date on which the assets of the common trust fund are valued; or

(iii) At the time the common trust fund pays or credits the reportable payment to a participant of the common trust fund.

(3) *Special rule for certain grantor trusts.* For grantor trusts described in §31.3406(a)–2(b)(4), reportable payments made to the trust are treated as paid by the trust to each grantor, in an amount equal to the distribution made by the trust to each grantor, on the date that the reportable payment is paid to the trust (except for gross proceeds reportable under section 6045). Paragraph (b)(2) of this section applies to a grantor trust making a payment of gross proceeds under section 6045 subject to withholding under section 3406. For purposes of this paragraph (c)(3) a husband and wife filing a joint return are considered to be one grantor.

[T.D. 8637, 60 FR 66115, Dec. 21, 1995]

§31.3406(b)(2)–1 Reportable interest payment.

(a) *Interest subject to backup withholding*—(1) *In general.* A payment of a kind, and to a payee, that is required to be reported under section 6049 (relating to returns regarding interest and original issue discount) is a reportable payment for purposes of section 3406, subject to the special rules of §31.3406(b)(2)–2 (relating to original issue discount) and §31.3406(b)(2)–3 (relating to window transactions). See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(2) *Special rule for tax-exempt interest.* When an issuer is required to make an information return under §1.6049–4(d)(8) of this chapter because a payee provided a signed written statement on the envelope or shell incorrectly claiming that the interest was exempt from taxation under section 103(a) (as described in §1.6049–5(b)(1)(ii) of this chapter), the issuer is not required to impose withholding under section 3406.

(b) *Amount subject to backup withholding*—(1) *In general.* The amount of interest subject to withholding under section 3406 is the amount subject to reporting under section 6049.

(2) *Special rule to adjust for premature withdrawal penalty.* Solely for purposes of computing the amount subject to withholding under section 3406, the payor may elect not to withhold from the portion of any interest payment that is not received by the payee because a penalty is in fact imposed for premature withdrawal of funds deposited in a time savings account, certificate of deposit, or similar class of deposit.

[T.D. 8637, 60 FR 66115, Dec. 21, 1995]

§31.3406(b)(2)–2 Original issue discount.

(a) *Original issue discount subject to backup withholding.* The amount of original issue discount, treated as interest, subject to withholding under section 3406 is the amount subject to reporting under section 6049, but is limited to the amount of cash paid. In addition, if an original issue discount obligation, subject to reporting under section 6045, is sold prior to maturity and with respect to the seller a condition exists for imposing withholding under section 3406 on the gross proceeds, then withholding under §31.3406(b)(3)–2 applies to the gross proceeds of the sale reportable under section 6045, and not to the amount of any original issue discount includible in the gross income of the seller for the calendar year of the sale. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding and time when backup withholding is imposed with respect to short-term obligations.* In the case of an obligation with a fixed maturity date not exceeding one year from the date of issue (a short-term obligation), withholding under section 3406 applies to any payment of original issue discount on the obligation includible in the gross income of the holder to the extent of the cash amount of the payment. See § 1.1273–1 of this chapter to determine the amount of original issue discount on a short-term obligation. See § 1.446–2(e)(1) of this chapter to determine the amount of a payment treated as original issue discount.

(c) *Transferred short-term obligations*—(1) *Subsequent holder may establish purchase price*—(i) *In general.* At maturity of a short-term obligation, a subsequent holder (i.e., any person who purchased or otherwise obtained the obligation after the obligation was issued to the original holder) may establish the price of the obligation. The price established by the subsequent holder must then be treated as the original issue price for purposes of computing the amount of the original issue discount subject to withholding under section 3406. The price of a short-term obligation may be established by confirmation receipt or other record of a similar type or, if the obligation is redeemed by or through the person from whom the obligation was purchased or otherwise obtained, by the records of the person from whom or through whom the obligation was purchased or otherwise obtained. The subsequent holder is not required to certify under penalties of perjury that the price determined under this paragraph (c)(1)(i) is correct.

(ii) *Exception.* A payor may elect to disregard the price at which the subsequent holder purchased or otherwise obtained the obligation if the payor's computer or recordkeeping system on which the details of the obligation are stored is not able to accept that price without significant manual intervention.

(2) *Subsequent holder unable (or not permitted) to establish purchase price.* If a subsequent holder fails (or is unable, pursuant to paragraph (c)(1)(ii) of this section) to establish the purchase price of the obligation, then the person redeeming the obligation must determine the amount subject to withholding under section 3406 as though the obligation had been purchased by the holder on the date of issue. If the person redeeming the obligation is the issuer of the obligation, then the issuer must determine the amount subject to withholding from its records. If a person other than the issuer of the obligation redeems the obligation and the obligation is listed in Internal Revenue Service Publication 1212, List of Original Issue Discount Obligations, that person must determine the amount subject to withholding by using the issue price indicated in Publication 1212.

(3) *Transferred obligation.* If a short-term obligation is transferred, no part of the purchase price is considered a reportable interest payment under section 6049. Withholding under section 3406 applies, however, to the gross proceeds of the sale of the obligation if the transfer is subject to reporting under section 6045 and a condition exists for imposing withholding. For the rules regarding withholding for amounts subject to reporting under section 6045, see § 31.3406(b)(3)-2.

(d) *Amount subject to backup withholding and time when backup withholding is imposed with respect to long-term obligations*—(1) *No cash payments prior to maturity.* In the case of an obligation with a fixed maturity date that is more than one year from the date of issue (a long-term obligation) and with no cash payments prior to maturity, withholding under section 3406 applies at the maturity of the obligation to the amount of original issue discount includible in the gross income of the holder for the calendar year in which the obligation matures. The amount required to be withheld must not exceed the amount of the cash payment.

(2) *Registered long-term obligations with cash payments prior to maturity.* In the case of a long-term obligation in registered form that provides for cash payments prior to maturity, withholding under section 3406 applies at the time cash payments are made to the sum of the amounts of qualified stated interest and original issue discount includible in the gross income of the holder for the calendar year in which the cash payments are made. The amount required to be withheld at the time of any cash payment, however, must not exceed the amount of the cash payment. If more than one cash payment is made during a calendar year, the tax that is required to be withheld with respect to original issue discount must be allocated among all the expected

cash payments in the ratio that each cash payment bears to the total of the expected cash payments.

(3) *Transferred registered long-term obligations with payments prior to maturity.* In the case of a long-term obligation that is transferred after its issuance from the original holder, the amount subject to withholding under section 3406 with respect to a subsequent holder is the amount of original issue discount includible in the gross income of all holders during the calendar year (without regard to any amount paid by a subsequent holder at the time of transfer). If the person redeeming the obligation at maturity is the issuer of the obligation, the issuer must determine the amount subject to withholding through its records by treating the holder as if he were the original holder. If a person redeeming the obligation at maturity is a person other than the issuer of the obligation, and the obligation is listed in Internal Revenue Service Publication 1212, List of Original Issue Discount Obligations, the person must determine the amount subject to withholding by using the issue price indicated in Publication 1212.

(e) *Bearer long-term obligations.* In the case of a bearer long-term obligation with cash payments prior to maturity—

(1) *Payments prior to maturity.* Withholding under section 3406 applies prior to maturity only to the payment of qualified stated interest (and not to any amount of original issue discount) includible in the gross income of the holder for the calendar year.

(2) *Payments at maturity.* At maturity of the obligation, withholding applies to the sum of any qualified stated interest payment made at maturity and the total amount of original issue discount includible in the gross income of the holder during the calendar year of maturity. The amount required to be withheld at the time of the cash payment, however, must not exceed the amount of the cash payment.

[T.D. 8637, 60 FR 66115, Dec. 21, 1995; 61 FR 12135, Mar. 25, 1996]

§ 31.3406(b)(2)–3 Window transactions.

(a) *Requirement to backup withhold.* Withholding under section 3406 applies to a window transaction (as defined in paragraph (b) of this section) only if the payee does not furnish a taxpayer identification number to the payor in the manner required in paragraph (c) of this section or furnishes an obviously incorrect number as described in § 31.3406(h)–1(b)(2). Withholding does not apply to a window transaction even though the Internal Revenue Service notifies the payor of the payee's incorrect taxpayer identification number under section 3406(a)(1)(B) or of notified payee underreporting under section 3406(a)(1)(C). The payee in a window transaction is not required to certify under penalties of perjury that the payee is not subject to withholding due to notified payee underreporting (as described in § 31.3406(d)–2(b)(2)).

(b) *Window transaction defined. Window transaction* means a payment of interest with respect to any of the following obligations:

(1) An interest coupon in bearer form that is subject to taxation (i.e., other than exempt interest described in § 1.6049–5(b)(1)(ii) of this chapter);

(2) A United States savings bond; or

(3) A discount obligation having a maturity at issue of one year or less, including commercial paper and bankers' acceptances that are in definitive form (i.e., evidenced by a paper document other than a confirmation receipt) but not including short-term government obligations (as defined in section 1271(a)(3)(B)).

(c) *Manner of furnishing taxpayer identification number in the case of a window transaction.* A payee must furnish the payee's taxpayer identification number to the payor with respect to a window transaction either orally or in writing at the time that the window transaction occurs. See § 31.3406(g)–3(c)(1)(i), which provides that a payee may not claim the payee is awaiting receipt of a taxpayer identification number with respect to a window transaction. The payee is not required to certify, under penalties of perjury, that the taxpayer identification number provided is correct.

[T.D. 8637, 60 FR 66116, Dec. 21, 1995]

§ 31.3406(b)(2)–4 Reportable dividend payment.

(a) *Dividends subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6042 (relating to returns regarding payments of dividends and corporate earnings and profits) is a reportable payment for purposes of section 3406. See paragraph (b) of this section for certain dividends not subject to withholding under section 3406. See § 31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Dividends not subject to backup withholding.* Except as provided in § 31.3406(b)(3)–2 (relating to transactions reportable under section 6045), withholding under section 3406 does not apply to—

(1) Any amount treated as a taxable dividend by reason of section 302 (relating to redemptions of stock), section 304 (relating to redemptions through the use of related corporations), section 306 (relating to disposition of certain stock), section 356 (relating to receipt of additional consideration in connection with certain reorganizations), or section 1081(e)(2) (relating to certain distributions pursuant to an order of the Securities and Exchange Commission);

(2) Any exempt-interest dividend, as defined in section 852(b)(5)(A), paid by a regulated investment company; or

(3) Any amount paid or treated as paid during a year by a regulated investment company, provided that the payor reasonably estimates, as provided in paragraph (c)(2) of this section, that 95 percent or more of all dividends paid or treated as paid during the year are exempt-interest dividends.

(c) *Amount subject to backup withholding*—(1) *In general.* The amount of a dividend subject to withholding under section 3406 is the amount subject to reporting under section 6042, including any dividend that is reinvested pursuant to a plan under which a shareholder may elect to receive stock as a dividend instead of property. Except as otherwise provided in this paragraph (c), withholding applies to the entire amount of the distribution.

(2) *Reasonable estimate of amount of dividend subject to backup withholding.* Pursuant to section 6042(b)(3) and § 1.6042–3(c) of this chapter, if the payor is unable to determine the portion of a distribution that is a dividend, the entire amount of the distribution must be treated as a dividend for information reporting under section 6042. Hence, withholding applies to the entire amount of the distribution. If a payor is able reasonably to estimate under section 6042 and § 1.6042–3(c) of this chapter the portion of a distribution that is not a dividend, however, the payor must not withhold on that portion (which is not considered a dividend). A payor making a payment, all or a portion of which may not be a dividend, may use previous experience to estimate the portion of a distribution that is not a dividend. The payor's estimate is considered reasonable if—

(i) The estimate does not exceed the proportion of the distributions made by the payor during the most recent calendar year for which a Form 1099 was required to be filed that was not reported by the payor as a dividend; and

(ii) The payor has no reasonable basis to expect that the proportion of the distribution that is not a dividend will be substantially different for the current year.

(3) *Reinvested dividends.* In the case of a dividend paid pursuant to a dividend reinvestment plan, withholding under section 3406 applies, pursuant to § 31.3406(a)–4(a), at the time and to the amount made available to the shareholder or credited to the shareholder's account. At the discretion of the payor, withholding under section 3406 need not be applied to any excess of the fair market value of the shares of stock received by the shareholder or credited to the shareholder's account over the purchase price of the shares (including shares acquired by the shareholder at a discount in connection with the dividend distribution) or to any fee that is paid by the payor in the nature of a broker's fee for purchase of the stock or service charge for maintenance of the shareholder's account. The payor must, however, treat any excess amounts and fees on a consistent basis for each calendar year.

[T.D. 8637, 60 FR 66117, Dec. 21, 1995]

§ 31.3406(b)(2)–5 Reportable patronage dividend payment.

(a) *Patronage dividends subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6044 (relating to returns regarding patronage dividends) is a reportable payment for purposes of section 3406. See § 31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding*—(1) *Failure to provide taxpayer identification number or notification of incorrect taxpayer identification number.* For purposes of sections 3406(a)(1) (A) and (B), the amount of a payment described in paragraph (a) of this section that is subject to withholding under section 3406 is the amount subject to reporting under section 6044, but only to the extent the payment is made in money. For purposes of this paragraph (b), *money* includes cash or a qualified check (as defined in section 1388(c)(4)).

(2) *Notified payee underreporting or payee certification failure.* For purposes of sections 3406(a)(1) (C) and (D), the amount of a payment described in paragraph (a) of this section that is subject to withholding under section 3406 is the amount subject to withholding under paragraph (b)(1) of this section, but only if 50 percent or more of that reportable amount is paid in money. Thus, a payor is required to withhold according to this paragraph (b)(2) on a payment if—

(i) There has been a notified payee underreporting described in section 3406(a)(1)(C) and § 31.3406(c)–1 or there has been a payee certification failure described in section 3406(a)(1)(D) and § 31.3406(d)–2;

(ii) The payor makes a reportable payment subject to reporting under section 6044 to the payee; and

(iii) Fifty percent or more of the payment is in cash or by qualified check.

[T.D. 8637, 60 FR 66117, Dec. 21, 1995]

§ 31.3406(b)(3)–1 Reportable payments of rents, commissions, nonemployee compensation, etc.

(a) *Section 6041 and 6041A(a) payments subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6041 (relating to information reporting of rents, commissions, nonemployee compensation, etc.) or a payment that is required to be reported under section 6041A(a) (relating to information reporting of payments to nonemployees for services) is a reportable payment for purposes of section 3406. See paragraph (b) of this section for an exception concerning payments aggregating less than $600. See § 31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding*—(1) *In general.* The amount of a payment described in paragraph (a) of this section subject to withholding under section 3406 is the amount subject to reporting under section 6041 or section 6041A(a).

(2) *Net commissions.* Withholding under section 3406 does not apply to net commissions paid to unincorporated special agents with respect to insurance policies that are subject to reporting under section 6041, provided that no cash is actually paid by the payor to the special agent.

(3) *Payments aggregating $600 or more for the calendar year*—(i) *In general.* A payment is a reportable payment under paragraph (a) of this section only if the aggregate amount of the current payment and all previous payments to the payee during the calendar year aggregate $600 or more. The amount subject to withholding is the entire amount of the payment that causes the total amount paid to the payee to equal $600 or more and the amount of any subsequent payments made to the payee during the calendar year. This paragraph (b)(3)(i) does not apply to gambling winnings (as provided in § 31.3406(g)–2(e)(1)).

(ii) *Exceptions*—(A) *The $600 aggregation rule.* The $600 aggregation rule of paragraph (b)(3)(i) of this section does not apply if the payor was required to make an information return under section 6041 or 6041A(a) for the preceding calendar year with respect to payments to the payee, or the payor was required to withhold under section 3406 during the preceding calendar year with respect to payments to the payee that were reportable under section 6041 or 6041A(a).

(B) *Determination of whether payments aggregate $600 or more.* In determining whether payments to a payee aggregate $600 or more during a calendar year for purposes of withholding under section 3406, the payor must aggregate only payments of the same kind made to the same payee. For this purpose, payments are of the same kind if they are of the same type, regardless of whether they are reportable under the same section. However, a payor with different paying departments making reportable payments of the same kind is not required to aggregate payments made by all those departments unless it is the payor's customary method to aggregate those payments. A payor may, in its discretion, aggregate—

(*1*) Payments not of the same kind to the same payee, reportable under either section 6041 or 6041A(a); and

(*2*) Payments reportable under section 6041 with payments reportable under section 6041A(a).

[T.D. 8637, 60 FR 66117, Dec. 21, 1995]

§ 31.3406(b)(3)–2 Reportable barter exchanges and gross proceeds of sales of securities or commodities by brokers.

(a) *Transactions subject to backup withholding.* A payment of a kind, and to a payee, that any broker (as defined in section 6045(c) and § 1.6045–1(a)(1) of this chapter) or any barter exchange (as defined in section 6045(c) and § 1.6045–1(a)(4) of this chapter) is required to report under section 6045 is a reportable payment for purposes of section 3406. See § 31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding*—(1) *In general.* The amount subject to withholding under section 3406 is the amount subject to reporting under section 6045. The amount subject to withholding with respect to broker reporting is the amount of gross proceeds (as determined under § 1.6045–1(d)(5) of this chapter). The amount subject to withholding with respect to barter exchanges is the amount received by any member or client (as determined under § 1.6045–1(f)(4) of this chapter).

(2) *Forward contracts, including foreign currency contracts, and regulated futures contracts*—(i) *In general.* If a customer is subject to withholding under section 3406 with respect to a forward contract (subject to information reporting under § 1.6045–1(c)(5) of this chapter), including a foreign currency contract (as defined in section 1256(g)(2)), or a regulated futures contract (as defined in section 1256(g)(1)), or with respect to an account through which those contracts are disposed of or acquired, the broker must withhold on both of the following amounts:

(A) All cash or property withdrawn from the account by the customer during the relevant year; and

(B) The amount of cash in the account available for withdrawal by the customer at the relevant year-end (including both gross proceeds and variation margin).

(ii) *Rules concerning withdrawals.* A withdrawal includes the use of money (including both gross proceeds and variation margin) or property in the account to purchase any property other than property acquired in connection with the closing of a contract. For this purpose, the acceptance of a warehouse receipt or other taking of delivery to close a contract is in connection with the closing of a contract only if the property acquired is disposed of by the close of the seventh trading day following the trading day that the customer takes delivery under the contract. In addition, making delivery to close a contract is in connection with the closing of a contract only if the broker is able to determine that the property used to close the contract was acquired no earlier than the seventh trading day prior to the trading day on which delivery is made. Withdrawals do not include repayments of debt incurred in connection with making or taking delivery that meets the requirements of this paragraph (b)(2). Withdrawals also do not include payments of commissions, fees, transfers of cash from the account to another futures account that is subject to this paragraph (b)(2) or cash withdrawals traceable to dispositions of property other than futures (not including profit on the contract separately reportable under §1.6045–1(c)(5)(i)(*b*) of this chapter).

(iii) *Special rule for forward contracts, including foreign currency contracts, and regulated futures contracts.* The determination of whether the customer is subject to withholding under section 3406 with respect to an account containing forward contracts, including foreign currency contracts, or regulated futures contracts must be made at the time of the cash or property withdrawals or the relevant year-end, whichever is applicable.

(3) *Security sales made through a margin account.* The amount described in paragraph (a) of this section that is subject to withholding under section 3406 in the case of a security sale made through a margin account (as defined in 12 CFR part 220 (Regulation T)) is the gross proceeds (as defined in §1.6045–1(d)(5) of this chapter) of the sale. The amount required to be withheld with respect to the sale, however, is limited to the amount of cash available for withdrawal by the customer immediately after the settlement of the sale. For this purpose, the amount available for withdrawal by the customer does not include amounts required to satisfy margin maintenance under Regulation T, rules and regulations of the National Association of Securities Dealers and national securities exchanges, and generally applicable self-imposed rules of the margin account carrier.

(4) *Security short sales*—(i) *Amount subject to backup withholding.* The amount subject to withholding under section 3406 with respect to a short sale of securities is the gross proceeds (as defined in §1.6045–1(d)(5) of this chapter) of the short sale. At the option of the broker, however, the amount subject to withholding may be the gain upon the closing of the short sale (if any); consequently, the obligation to withhold under section 3406 would be deferred until the closing transaction. A broker may use this alternative method of determining the amount subject to withholding under section 3406 with respect to a short sale only if at the time the short sale is initiated, the broker expects that the amount of gain realized upon the closing of the short sale will be determinable from the broker's records. If, due to events unforeseen at the time the short sale was initiated, the broker is unable to determine the basis of the property used to close the short sale, the property must be assumed for this purpose to have a basis of zero.

(ii) *Time of backup withholding.* The determination of whether a short seller is subject to withholding under section 3406 must be made on the date of the initiation or closing, as the case may be, or on the date that the initiation or closing, as the case may be, is entered on the broker's books and records.

(5) *Fractional shares.* A broker is not required to withhold under section 3406 with respect to a sale of a fractional share of stock resulting in less than $20 of gross proceeds (as described in §5f.6045–1(c)(3)(ix) of this chapter).

[T.D. 8637, 60 FR 66118, Dec. 21, 1995]

§31.3406(b)(3)–3 Reportable payments by certain fishing boat operators.

(a) *Payments subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6050A (relating to information reporting by certain fishing boat operators) is a reportable payment for purposes of section 3406. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding.* The amount described in paragraph (a) of this section subject to withholding under section 3406 is the amount subject to reporting under section 6050A, but only to the extent the amount is paid in money and represents a share of the proceeds of the catch.

[T.D. 8637, 60 FR 66119, Dec. 21, 1995]

§31.3406(b)(3)–4 Reportable payments of royalties.

(a) *Royalty payments subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6050N (relating to information reporting of payments of royalties) is a reportable payment for purposes of section 3406. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding.* In general, the amount described in paragraph (a) of this section that is subject to withholding under section 3406 is the amount subject to reporting under section 6050N. However, if the reportable payment is for an oil or gas interest, the amount subject to withholding is the net amount the payee receives (i.e., the gross proceeds less production-related taxes such as state severance taxes).

[T.D. 8637, 60 FR 66119, Dec. 21, 1995]

§ 31.3406(b)(4)–1 Exemption for certain minimal payments.

(a) *In general.* A payor of reportable interest or dividends (as described in section 3406(b)(2)) or of royalties (as described in section 3406(b)(3)(E)) may elect not to withhold from a payment that does not exceed $10 and that on an annualized basis does not exceed $10 (see paragraph (c) of this section). A broker or barter exchange may elect not to withhold on gross proceeds of $10 or less without regard to the annualization requirement. See § 31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Manner of making the election.* The election not to withhold from payments that do not exceed $10 can be made only for payments described in paragraph (a) of this section. The election may be made on a payment-by-payment basis.

(c) *How to annualize*—(1) *In general.* To annualize a reportable interest payment, dividend payment, or royalty payment, a payor must calculate what the amount of the payment would be if it were paid for a 1-year period (instead of the period for which it actually is paid). The annualized amount is determined by dividing the amount of the payment by the number of days in the period for which it is being paid and then multiplying that result by the number of days in the year. If the annualized amount is $10 or less, the payor may elect not to withhold on that payment regardless of whether more than $10 may be or has been paid to the payee in other reportable payments during the calendar year. Conversely, if the annualized amount is more than $10, withholding applies even if $10 or less is actually paid to the payee during the calendar year. For purposes of computing the annualized amount, the payor may assume that February always consists of 28 days and that the year always consists of 360 days. For amounts that are deposited with a payor in a new account or certificate between the dates on which the payor customarily pays or credits interest, the payor may assume that the period for which the interest is paid is the payor's customary period for paying or crediting interest.

(2) *Special aggregation rule for reportable interest and dividends.* If a payor maintains records that reflect multiple holdings of one payee and the payor makes an aggregate payment of reportable interest or dividends (as defined in section 3406(b)(2)) with respect to those multiple holdings (such as a dividend check that reflects payment on all stock owned by the payee), the payor must annualize the aggregate payment.

(d) *Exception for window transactions and original issue discount.* A payor is not required to annualize payments made in window transactions (as defined in § 31.3406(b)(2)–3(b)) or payments of original issue discount. With respect to a window transaction, however, the payor is required to aggregate all payments made in the same transaction (e.g., payments made with respect to coupons or obligations presented for payment at the same time as described in § 1.6049–4(e)(4) of this chapter).

[T.D. 8637, 60 FR 66119, Dec. 21, 1995]

§ 31.3406(c)–1 Notified payee underreporting of reportable interest or dividend payments.

(a) *Overview.* Withholding under section 3406(a)(1)(C) applies to any reportable interest or dividend payment (as defined in section 3406(b)(2)) made with respect to an account of a payee if the Internal Revenue Service or a broker notifies a payor under paragraph (c) (1) or (2) of this section that the payee is subject to withholding due to notified payee underreporting (as defined in paragraph (b)(1) of this section), and the payor is required under paragraph (c)(3) of this section to identify that account. After receiving the notice and identifying accounts, the payor must notify the payee, in accordance with paragraph (d) of this section, that withholding due to notified payee underreporting has started. Paragraph (e) of this section describes the period for which withholding due to notified payee underreporting is required. Paragraph (f) of this section provides rules concerning notices that the Internal Revenue Service will send to a payee before notifying a payor that the payee is subject to withholding due to notified payee underreporting. Paragraph (g) of this section provides rules that a payee can use to prevent withholding due to notified payee underreporting from starting or to stop it once it has started. Paragraph (h) of this section provides special rules for joint accounts of payees who have filed a joint return. See section 6682 for the penalties that may apply to a payee subject to withholding under section 3406(a)(1)(C).

(b) *Definitions*—(1) *Notified payee underreporting. Notified payee underreporting* means that the Internal Revenue Service has—

(i) Determined that there was a payee underreporting (as defined in paragraph (b)(2) of this section);

(ii) Mailed at least four notices under paragraph (f)(1) of this section to the payee (over a period of at least 120 days) with respect to the underreporting; and

(iii) Assessed any deficiency attributable to the underreporting in the case of any payee who has filed a return.

(2) *Payee underreporting*—(i) *In general. Payee underreporting* means that the Internal Revenue Service has determined, for a taxable year, that—

(A) A payee failed to include in the payee's return of tax under chapter 1 of the Internal Revenue Code for that year any portion of a reportable interest or dividend payment required to be shown on that tax return; or

(B) A payee may be required to file a return for that year and to include a reportable interest or dividend payment in the return, but failed to file the return.

(ii) *Payments included in making payee underreporting determination.* The determination of whether there is payee underreporting is made by treating as reportable interest or dividend payments, all payments of dividends reported under section 6042, all patronage dividends reported under section 6044, and all interest and original issue discount reported under section 6049, regardless of whether withholding due to notified payee underreporting applies to those payments.

(c) *Notice to payors regarding backup withholding due to notified payee underreporting*—(1) *In general.* If the Internal Revenue Service or a broker notifies a payor that a payee is subject to withholding due to notified payee underreporting, the payor must—

(i) Identify any accounts of the payee under the rules of paragraph (c)(3) of this section; and

(ii) Notify the payee and withhold under section 3406 on reportable interest or dividend payments made with respect to any identified account under the rules of paragraphs (d) and (e) of this section.

(2) *Additional requirements for payors that are also brokers*—(i) *In general.* A broker must notify the payor of a readily tradable instrument that the payee of the instrument is subject to withholding due to notified payee underreporting if—

(A) The broker (in its capacity as a payor) receives a notice from the Internal Revenue Service under paragraph (c)(1) of this section that a payee is subject to withholding due to notified payee underreporting and the broker is required to identify an account of the payee under paragraph (c)(3) of this section;

(B) The payee subsequently acquires the instrument from the broker through the same account; and

(C) The acquisition of the instrument occurs after the close of the 30th business day after the date that the broker receives the notice (or on any earlier date that the broker may begin applying this paragraph (c)(2) after receipt of the notice described in paragraph (c)(1) of this section).

(ii) *Transfer out of street name.* For purposes of this paragraph (c)(2), an acquisition includes a transfer of an instrument out of street name into the name of the registered owner (i.e., the payee).

(iii) *Method of providing notice.* A broker must provide the notice required under this paragraph (c)(2) to the payor of the instrument with the transfer instructions for the acquisition. See § 31.3406(d)–4(a)(2).

(iv) *Termination of obligation to provide information.* The obligation of a broker to provide notice to payors under this paragraph (c)(2) terminates simultaneously with the termination of the broker's obligation to withhold (in its capacity as payor) due to notified payee underreporting on reportable interest or dividends made with respect to the account.

(3) *Payor identification of accounts of the payee subject to backup withholding due to notified payee underreporting*—(i) *In general*—(A) *Notice from the Internal Revenue Service.* If a payor receives a notice from the Internal Revenue Service under paragraph (c)(1) of this section, the payor must identify, exercising reasonable care, all accounts using the same taxpayer identification number for information reporting purposes as the one provided in the notice. The notice may provide, however, that the payor need only identify the account or accounts corresponding to any account number or designation and related taxpayer identification number used for information reporting purposes as that listed on the notice.

(B) *Notice from a broker.* If a payor receives a notice from a broker under paragraphs (c) (1) and (2) of this section, the payor is not required to identify any account other than the account identified in the notice.

(ii) *Exercise of reasonable care.* If an account identified pursuant to paragraph (c)(3)(i)(A) of this section contains a customer identifier that can be used to retrieve systemically any other accounts that use the same taxpayer identification number for information reporting purposes, the payor must identify all accounts that can be so retrieved. Otherwise, a payor is considered to exercise reasonable care in identifying accounts subject to withholding under section 3406(a)(1)(C) if the payor searches any computer or other recordkeeping system for the region, division, or branch that serves the geographic area in which the payee's mailing address is located and that was established (or is maintained) to reflect reportable interest or dividend payments.

(iii) *Newly opened accounts.* (A) In general, a new account is not subject to withholding under section 3406(a)(1)(C) if the payee provides to the payor a Form W–9 (or other acceptable substitute) on which the payor may reasonably rely (within the meaning of § 31.3406(h)–3(e)(2) without regard to § 31.3406(h)–3(e)(2)(v)), unless the payor has actual knowledge (within the meaning of paragraph (c)(3)(iii)(B) of this section) that the statements made on the form are not true.

(B) For purposes of paragraph (c)(3)(iii)(A) of this section, a payor is considered to have actual knowledge that a payee's statement that the payee is not subject to withholding under section 3406(a)(1)(C) is not true if—

(*1*) The employee or individual agent of the payor who receives the payee's certification knows that the statement is not true;

(*2*) In conducting the investigation, if any, required by paragraph (c)(3)(iii)(C) of this section, the payor identifies any other accounts of the payee that are already subject to withholding under section 3406(a)(1)(C); or

(*3*) In the course of processing the certification or in administering an account to which a certification relates, the payor discovers that the payor was previously notified by the Internal Revenue Service that the payee is subject to withholding under section 3406(a)(1)(C) and no notice was received to stop withholding pursuant to section 3406(c)(3) prior to the time of the discovery.

(C) Except as provided in this paragraph (c)(3)(iii)(C), a payor is not required to investigate whether the statements made on the Form W–9 described in paragraph (c)(3)(iii)(A) of this section are true. If, however, in opening a new account, the payor relies on the same Form W–9 (or appropriate substitute) that it relied on previously in opening another account, the payor must investigate whether any such existing account is subject to withholding under section 3406(a)(1)(C). Similarly, if the payor utilizes a universal account system described in the first sentence of paragraph (c)(3)(ii) of this section, and in opening a new account the payor searches its records to determine whether the new account should be identified under an existing identifier (because the payee has existing accounts with the payor), the payor must investigate whether any existing accounts identified with the same identifier are subject to withholding under section 3406(a)(1)(C).

(d) *Notice from payors of backup withholding due to notified payee underreporting*—(1) *In general.* If a payor receives notice from the Internal Revenue Service or a broker under paragraph (c)(1) of this section and is required to identify an account under paragraph (c)(3) of this section as an account of the payee, the payor must notify the payee in accordance with paragraph (d)(2) of this section that withholding due to notified payee underreporting has started.

(2) *Procedures.* The payor must send the notice required by paragraph (d)(1) of this section to the payee no later than 15 days after the date that the payor makes the first payment subject to withholding due to notified payee underreporting. The payor must send the notice by first-class mail to the payee at the payee's last known address. The notice to the payee required by paragraph (d)(1) of this section must state—

(i) That the Internal Revenue Service has given notice that the payee has underreported reportable interest or dividends;

(ii) That, as a result of the underreporting, the payor is required under section 3406(a)(1)(C) of the Internal Revenue Code to withhold 31 percent of reportable interest or dividend payments made to the payee;

(iii) The date that the payor started (or plans to start) withholding due to notified payee underreporting under section 3406(a)(1)(C);

(iv) The account number or numbers that are subject to withholding due to notified payee underreporting;

(v) That the payee must obtain a determination from the Internal Revenue Service in order to stop the withholding due to notified payee underreporting; and

(vi) That while the payee is subject to withholding due to notified payee underreporting, the payee may not certify to a payor making reportable interest or dividend payments (or to a broker acquiring a readily tradable instrument for the payee) that the payee is not subject to withholding due to notified underreporting.

(e) *Period during which backup withholding is required*—(1) *In general.* If a payor receives notice from the Internal Revenue Service or a broker under paragraph (c)(1) of this section, the payor must impose withholding under section 3406(a)(1)(C) on all reportable interest or dividend payments with respect to any account of the payee required to be identified under paragraph (c)(3) of this section made after the close of the 30th business day after the day on which the payor receives that notice and before the stop date (as described in paragraph (e)(2) of this section). A payor may choose to start withholding under this paragraph (e)(1) at any time during the 30-business-day period described in the preceding sentence.

(2) *Stop withholding*—(i) *When no underreporting exists or undue hardship exists*—(A) *Stop date.* In the case of a determination under paragraph (g)(3) (i) or (iii) of this section that no underreporting exists or that an undue hardship exists, the stop date is the day that is 30 days after the earlier of—

(*1*) The date on which the payor receives written notification from the Internal Revenue Service under paragraph (g) of this section that withholding is to stop; or

(*2*) The date on which the payor receives a copy of the written certification provided to the payee by the Internal Revenue Service under paragraph (g) of this section that withholding is to stop.

(B) *Acceleration of stop date.* A payor may choose to stop withholding at any time during the 30-day period described in paragraph (e)(2)(i)(A) of this section.

(ii) *When underreporting is corrected or bona fide dispute exists.* In the case of a determination under paragraph (g)(3) (ii) or (iv) of this section that the underreporting has been corrected or that a bona fide dispute exists, the stop date occurs on the first day of January (immediately following a period of at least twelve months ending on October 15 of any calendar year in which the determination has been made) or if later, the stop date determined under paragraph (e)(2)(i) of this section.

(3) *Dormant accounts.* The requirement that a payor withhold under this paragraph (e) on reportable interest or dividend payments made with respect to an account terminates no later than the close of the third calendar year ending after the later of—

(i) The date that the most recent reportable interest or dividend payment was made with respect to that account; or

(ii) The date that the payor received notice under paragraph (c)(1) of this section.

(f) *Notice to payees from the Internal Revenue Service*—(1) *Notice period.* After the Internal Revenue Service determines under paragraph (b)(2) of this section that payee underreporting exists, the Internal Revenue Service will mail to the payee at least four notices over a period of at least 120 days (the notice period) before payors will be notified under paragraph (c)(1) of this section that the payee is subject to withholding due to notified payee underreporting. The notices may be accompanied by, or incorporated in, other notices provided to the payee by the Internal Revenue Service.

(2) *Payee subject to backup withholding.* After the Internal Revenue Service provides the notices described in paragraph (f)(1) of this section, the Internal Revenue Service will send notices to payors under paragraph (c)(1) of this section unless—

(i) A payee obtains a determination under paragraph (g) of this section; or

(ii) In the case of a payee who has filed a tax return, the Internal Revenue Service has not assessed the deficiency attributable to the underreporting.

(3) *Disclosure of names of payors and brokers.* Pursuant to section 3406(c)(5) the Internal Revenue Service may require a payee subject to withholding due to notified payee underreporting to disclose the names of all the payee's payors of reportable interest or dividend payments and the names of all of the brokers with whom the payee has accounts which may involve reportable interest or dividend payments. To the extent required in the request from the Internal Revenue Service, the payee must also provide the payee's account numbers and other information necessary to identify the payee's accounts.

(4) *Backup withholding certification.* After a payee receives a final notice from the Internal Revenue Service under paragraph (f)(1) of this section, the payee is not permitted to certify to any payor or broker, under penalties of perjury, that the payee is not subject to withholding under section 3406(a)(1)(C), until the payee receives the certification from the Internal Revenue Service under paragraph (g) of this section advising the payee that the payee is no longer subject to withholding under section 3406(a)(1)(C). A final notice will contain the information described in this paragraph (f)(4). See sections 6682 and 7205(b) for civil and criminal penalties for making a false certification.

(g) *Determination by the Internal Revenue Service that backup withholding should not start or should be stopped*—(1) *In general.* A payee may prevent withholding due to notified payee underreporting from starting, or stop the withholding once it has started, by requesting and receiving a determination from the Internal Revenue Service under one or more of the provisions of paragraph (g)(3) of this section. Following its review of a request for a determination under paragraph (g)(3) of this section, the Internal Revenue Service will either make the determination or provide the payee with a written report informing the payee that the request for determination is being denied and the reasons for the denial. If a determination is made during the notice period (as defined in paragraph (f)(1) of this section), the payee is not subject to withholding due to notified payee underreporting with respect to any taxable year for which a determination was made. If a determination is made after the notice period, the Internal Revenue Service will, at the time prescribed in paragraph (g)(2) of this section, provide written certification to a payee that withholding is to stop, and will notify payors who were contacted pursuant to paragraph (c)(1) of this section to stop withholding. A broker who (in its capacity as payor) under this paragraph (g)(1) receives a notice from the Internal Revenue Service or a copy of the certification provided to a payee by the Internal Revenue Service is not required to provide a corresponding notice to any payors whom the broker has previously notified under paragraph (c)(2) of this section.

(2) *Date notice to stop backup withholding will be provided*—(i) *Underreporting corrected or bona fide dispute.* If the Internal Revenue Service makes a determination under paragraph (g)(3)(ii) or (iv) of this section during the 12-month period ending on October 15 of any calendar year (as described in paragraph (e)(2)(ii) of this section), the Internal Revenue Service will provide the certification and the notices described in paragraph (g)(1) of this section no later than December 1 of that calendar year.

(ii) *No underreporting or undue hardship.* If the Internal Revenue Service makes a determination under paragraph (g)(3)(i) or (iii) of this section, the Internal Revenue Service will provide the notices described in paragraph (g)(1) of this section no later than the 45th day after the day on which the Internal Revenue Service makes its determination.

(3) *Grounds for determination.* The Internal Revenue Service will make a determination that withholding due to notified payee underreporting should not start or should stop once it has started if the payee—

(i) Shows that there was no payee underreporting (as provided in paragraph (g)(4) of this section) for each taxable year with respect to which the Internal Revenue Service determined under paragraph (b)(2) of this section that there was payee underreporting;

(ii) Corrects any payee underreporting (as provided in paragraph (g)(5) of this section) for each taxable year with respect to which the Internal Revenue Service determined under paragraph (b)(2) of this section that there was payee underreporting;

(iii) Shows that withholding will cause or is causing an undue hardship (as defined in paragraph (g)(6) of this section) and that it is unlikely that the payee will underreport interest or dividend payments again; or

(iv) Shows that a bona fide dispute exists regarding whether any underreporting has occurred (as provided in paragraph (g)(7) of this section) for each taxable year with respect to which the Internal Revenue Service determined under paragraph (b)(2) of this section that there was payee underreporting.

(4) *No underreporting.* A payee may show that no underreporting of reportable interest or dividends payments exists by presenting—

(i) Receipts or other satisfactory documentation to the Internal Revenue Service showing that all taxes relating to the payments were reported; or

(ii) Evidence showing that the payee did not have to file a return for the taxable year in question (e.g., because the payee did not make enough income) or that the underreporting determination was based upon a factual, clerical, or other error.

(5) *Correcting any payee underreporting*—(i) *Before issuance of a statutory notice of deficiency.* Before a statutory notice of deficiency is issued to a payee pursuant to section 6212, the payee may correct underreporting—

(A) By filing a return if one was not previously filed and including the unreported interest and dividends thereon;

(B) By filing an amended return in the event a return was filed and including the unreported interest and dividends thereon; or

(C) By consenting to the additional assessment according to applicable notices and forms sent to the payee by the Internal Revenue Service with respect to the underreporting, and paying taxes, penalties, and interest due with respect to any underreported interest or dividend payments.

(ii) *After issuance of a statutory notice of deficiency.* After a statutory notice of deficiency is issued to a payee—

(A) The payee may correct underreporting at any time, by filing a return if one was not previously filed and paying the entire deficiency and any other taxes including penalties and interest attributable to any payee underreporting of interest or dividend payments; or

(B) The payee may correct underreporting after the mailing of the statutory notice of deficiency but before the expiration of the 90-day or 150-day period described in section 6213(a) or, if a petition is filed with the United States Tax Court, before the decision of the Tax Court is final, by making a remittance to the Internal Revenue Service of the amounts described in paragraph (g)(5)(ii)(A) of this section. The payee must specifically designate in writing that the remittance is a deposit in the nature of a cash bond.

(iii) *Special rules.* For purposes of paragraph (g)(5)(ii) of this section, the payee will not be deemed to have corrected the payee underreporting under paragraph (g)(5)(ii)(B) of this section after the remittance is returned to the payee in the manner described in any applicable administrative procedure. For further guidance on a deposit in the nature of a cash bond, see subparagraph 2 of section 4.01 of Rev. Proc. 84–58 (1984–2 C.B. 501). (See § 601.601(d)(2) of this chapter.) Once the remittance is returned to the payee, the rules of this section will apply. If the Internal Revenue Service previously contacted payors of the payee to start withholding with respect to the notified payee underreporting, however, the Internal Revenue Service will recontact those payors to start withholding under paragraph (c)(1) of this section with respect to the payee underreporting without regard to paragraph (f) of this section.

(6) *Undue hardship*—(i) *In general.* A determination of undue hardship will be based on the overall impact to the payee of having reportable interest or dividend payments withheld at a 31 percent rate under section 3406. In addition, a determination of undue hardship will be made only if the Internal Revenue Service concludes that it is unlikely that any payee underreporting will occur again.

(ii) *Factors.* Factors that will be considered in determining whether withholding causes undue hardship include, but are not limited to, the following—

(A) Whether estimated tax payments, and other credits for current tax liabilities, or amounts withheld on employee wages or pensions, in addition to withholding under section 3406, would cause significant overwithholding;

(B) The payee's health, including the payee's ability to pay foreseeable medical expenses;

(C) The extent of the payee's reliance on interest and dividend payments to meet necessary living expenses and the existence, if any, of other sources of income;

(D) Whether other income of the payee is limited or fixed

(e.g., social security, pension, and unearned income);

(E) The payee's ability to sell or liquidate stocks, bonds, bank accounts, trust accounts, or other assets, and the consequences of doing so;

(F) Whether the payee reported and timely paid the most recent year's tax liability, including interest and dividend income; and

(G) Whether the payee has filed a bankruptcy petition with the United States Bankruptcy Court.

(7) *Bona fide dispute.* The Internal Revenue Service may make a determination under this paragraph (g)(7) if there is a dispute between the payee and the Internal Revenue Service on a question of fact or law that is material to a determination under paragraph (g)(3)(i) of this section and, based upon all the facts and circumstances, the Internal Revenue Service finds that the dispute is asserted in good faith by the payee and there is a reasonable basis for the payee's position.

(h) *Payees filing a joint return*—(1) *In general.* For purposes of this section, if payee underreporting is found to exist with respect to a joint return, then the provisions of this section apply to both payees (i.e., the husband and wife). As a result, both payees are subject to withholding on accounts in their individual names as well as accounts in their joint names. Either or both payees may satisfy the criteria for a determination that no payee underreporting exists, that the underreporting has been corrected, or that a bona fide dispute exists (as provided in paragraph (g)(3) (i), (ii), or (iv) of this section). Both payees, however, must satisfy the criteria for a determination that withholding will cause or is causing undue hardship (as provided in paragraph (g)(3)(iii) of this section).

(2) *Exceptions*—(i) *Innocent spouse.* A spouse who files a joint return may obtain a determination that withholding should stop or not start with respect to payments made to his or her individual accounts, if the spouse shows that—

(A) He or she did not underreport income because he or she is a spouse described in section 6013(e), i.e., innocent spouse; or

(B) There is a bona fide dispute regarding whether he or she is an innocent spouse and hence did not underreport income.

(ii) *Divorced or legally separated payee.* A payee who, at the time of the request for a determination under paragraph (g) of this section, is divorced or separated under State law may obtain a determination that undue hardship exists (or would exist) under paragraph (g)(3)(iii) of this section with respect to reportable interest or dividend payments made to his or her individual accounts if the divorced or legally separated payee satisfies the criteria for a determination under paragraph (g)(6) of this section.

(i) *Reserved.*

(j) *Penalties.* For the application of penalties related to this section, see sections 6682 and 7205(b).

[T.D. 8637, 60 FR 66119, Dec. 21, 1995]

§31.3406(d)–1 Manner required for furnishing a taxpayer identification number.

(a) *Requirement to backup withhold.* Withholding under section 3406(a)(1)(A) applies to a reportable payment (as defined in section 3406(b)) if the payee does not furnish the payee's taxpayer identification number to the payor in the manner required by this section. The period for which withholding is required is described in §31.3406(e)–1(b). See §31.3406(d)–3(a) and (b) for special rules when an account is established directly with, or an instrument is acquired directly from, the payor by electronic transmission or by mail, or an instrument is sold through a broker by electronic transmission or by mail. See §31.3406(d)–4 for special rules applicable to readily tradable instruments acquired through a broker. See §31.3406(h)–3(e) for the rules on when a payor may rely on a Form W–9. See also §31.3406(g)–3 for rules regarding a payee awaiting receipt of a taxpayer identification number. See the applicable information reporting sections and section 6109 and the regulations thereunder to determine whose taxpayer identification number should be provided.

(b) *Reportable interest or dividend account*—(1) *Manner required for furnishing a taxpayer identification number with respect to a pre-1984 account or instrument.* A payee must furnish the payee's taxpayer identification number to the payor with respect to any obligation, deposit, certificate, share, membership, contract, investment, account, or other relationship or instrument established or acquired on or before December 31, 1983 (a pre-1984 account) and with respect to which the payor makes a reportable interest or dividend payment (as defined in section 3406(b)(2)). The manner of determining whether an account or an instrument is a pre-1984 account is described in paragraph (b)(2) of this section. The payee of a pre-1984 account may furnish the payee's taxpayer identification number to the payor orally or in writing. The payee is not required to certify under penalties of perjury that the taxpayer identification number is correct.

(2) *Determination of pre-1984 account or instrument*—(i) *In general.* An account that is in existence before January 1, 1984, will be considered a pre-1984 account, regardless of whether additional deposits are made to the account on or after January 1, 1984. An account established as an expansion of a credit union prime account in existence prior to January 1, 1984, constitutes a pre-1984 account. If funds taken from one account in existence prior to January 1, 1984, are used to create a new account on or after that date, however, the new account does not constitute a pre-1984 account except as provided in the preceding sentence. An instrument acquired prior to January 1, 1984, is a pre-1984 account. Regardless of when an instrument was acquired, if it is negotiated in a window transaction as defined in §31.3406(b)(2)–3(b), it is treated as an instrument acquired after December 31, 1983. An obligation in bearer form and subject to reporting under section 6045, whenever acquired, is not

a pre-1984 account. Any instrument, whenever acquired, that is held in a brokerage account is considered a pre-1984 account if the brokerage account is not a post-1983 brokerage account (as described in paragraph (c)(1)(ii) of this section). If shares of a corporation are held before January 1, 1984 (or considered held before that date by operation of this paragraph (b)(2)), and additional shares are acquired by the holder, irrespective of whether the shares are received by reason of a stock dividend, investing new cash, or otherwise, the new shares, in the discretion of the payor, may be considered a pre-1984 account. In the case of a qualified employee trust that distributes instruments in kind, any instrument distributed from the trust is considered a pre-1984 account with respect to employees who were participants in the trust before 1984. Similarly, when a payor offers participants in a plan the opportunity to purchase stock of the payor after a specified time, using the money that the payee invested during that period of time, the stock so purchased after December 31, 1983, is considered a pre-1984 account with respect to participants in the plan who either owned shares or invested money in the plan before January 1, 1984.

(ii) *Account or instrument automatically acquired on the maturity or termination of an account.* When an account is opened, or an instrument is acquired, automatically on the maturity or termination of an account that was in existence or an instrument that was held before January 1, 1984 (or considered to have been in existence or held before that date by operation of this paragraph (b)(2)(ii)), without the participation of the payee, the new account or instrument, in the discretion of the payor, may be considered a pre-1984 account. For purposes of the preceding sentence, a payee is not considered to have participated in the acquisition of the new account or instrument solely because the payee failed to exercise a right to withdraw funds at the maturity or termination of the old account or instrument.

(iii) *Insurance policies.* In the case of insurance policies in effect on December 31, 1983, the election of a dividend accumulation option pursuant to which interest is paid (as defined in § 1.6049–5(a)(4) of this chapter), or the creation of an account in which proceeds of a policy are held for the policy beneficiary, may, in the payor's discretion, be treated as a pre-1984 account.

(iv) *Acquisitions of accounts and instruments*—(A) *Pre-1984 or post-1983 status known.* If a payor acquires accounts or instruments of another payor (including through a tax-free reorganization under section 368), the acquiring payor must treat the persons specified in this paragraph (b)(2)(iv)(A) as having the same requirement to furnish a taxpayer identification number in the manner required under this paragraph (b) to the acquiring payor for information reporting, withholding, and related tax provisions as existed with respect to the payor whose accounts or instruments were acquired. Persons specified in this paragraph (b)(2)(iv)(A) are persons who held accounts or instruments in the other payor immediately before the acquisition and who receive an account or instrument in the acquiring payor immediately after the acquisition.

(B) *Pre-1984 or post-1983 status unknown.* If the acquiring payor, as described in paragraph (b)(2)(iv)(A) of this section, is unable to identify from the business records of the other payor whether any or all of the accounts or instruments of the persons specified in paragraph (b)(2)(iv)(A) of this section are pre-1984 (or post-1983) accounts or instruments, then the acquiring payor may treat these unidentified accounts or instruments as pre-1984 accounts or instruments.

(C) *Cross reference.* See § 31.3406(g)–2(g) for the limited exception from withholding under section 3406(a)(1)(A) on accounts or instruments described in paragraphs (b)(2)(iv) (A) and (B) of this section for which the payor does not have a taxpayer identification number.

(3) *Manner required for furnishing a taxpayer identification number with respect to an account or instrument that is not a pre-1984 account.* A payee who receives reportable interest or dividend payments (as defined in section 3406(b)(2)) from a payor must certify under penalties of perjury that the taxpayer identification number the payee furnishes to the payor is the payee's

correct taxpayer identification number. The payee must make the certification only with respect to an account or instrument that is not a pre-1984 account (as described in paragraph (b)(2) of this section). See § 31.3406(h)–3 for a description of the certificate on which the certification must be made. See § 31.3406(d)–2 for the requirement that the payee must certify under penalties of perjury that the payee is not subject to withholding due to notified payee underreporting. See § 31.3406(d)–3(a) with respect to an account established directly with, or an instrument acquired directly from, the payor by electronic transmission or by mail. See § 31.3406(d)–4 for the rules applicable to readily tradable instruments acquired through a broker.

(4) *Special rule with respect to the acquisition of a readily tradable instrument in a transaction between certain parties acting without the assistance of a broker.* If a payee, at any time, acquires a readily tradable instrument without the assistance of a broker, and no party to the acquisition is a broker or an agent of the payor, the payee must furnish the payee's taxpayer identification number to the payor prior to the time reportable payments are made on the instrument. The payee is not required to certify under penalties of perjury that the number is correct. See § 31.3406(d)–2 for the rule that a payee is not subject to withholding due to notified payee underreporting with respect to a readily tradable instrument acquired in the manner described in this paragraph (b)(4). A broker is considered to provide assistance in the acquisition of an instrument if the person effecting the acquisition would be required to make an information return under section 6045 if such person were to sell the instrument. See § 31.3406(d)–4 for rules relating to an acquisition of a readily tradable instrument when a broker is involved.

(c) *Brokerage account*—(1) *Manner required for furnishing a taxpayer identification number with respect to a brokerage relationship that is not a post-1983 brokerage account*—(i) *In general.* With respect to any instrument, investment, or deposit made through a brokerage account that is not a post-1983 brokerage account, a payee must furnish the payee's taxpayer identification number to the broker either orally or in writing. The payee is not required to certify under penalties of perjury that the taxpayer identification number is correct. See paragraph (b)(2)(i) of this section for the rule that any instrument, whenever acquired, that is held in a brokerage account that is not a post-1983 brokerage account, is considered held in an account that is not a post-1983 brokerage account. For example, in 1983 a payee established and acquired a readily tradable instrument from a brokerage account; no activity took place through that account until the payee purchased a readily tradable instrument in 1995. That readily tradable instrument is not held in a post-1983 brokerage account; therefore, the payee need not certify under penalties of perjury that the payee's taxpayer identification number is correct.

(ii) *Definition of a brokerage account that is not a post-1983 brokerage account.* A brokerage account that was established by a payee before January 1, 1984, through which during 1983 the broker either bought or sold securities for the payee or held securities on behalf of the payee as a nominee (i.e., in street name), is an account that is not a post-1983 brokerage account.

(2) *Manner required for furnishing a taxpayer identification number with respect to a post-1983 brokerage account*—(i) *In general.* With respect to a post-1983 brokerage account, the payee must furnish the payee's taxpayer identification number to the broker and certify under penalties of perjury that the taxpayer identification number furnished is correct, except as provided in § 31.3406(d)–3(b).

(ii) *Definition of a post-1983 brokerage account.* A brokerage account established after December 31, 1983 (or before January 1, 1984, through which during 1983 the broker neither bought nor sold securities nor held securities on behalf of the payee as a nominee (i.e., in street name)), is a post-1983 brokerage account.

(d) *Rents, commissions, nonemployee compensation, and certain fishing boat operators, etc.—Manner required for furnishing a taxpayer identification number.* For accounts, contracts, or relationships subject to information reporting under section 6041 (relating to information reporting at source on rents, royalties, salaries, etc.), section 6041A(a) (relating to information reporting of payments for nonemployee services), section 6050A (relating to information reporting by certain fishing boat operators), or section 6050N (relating to information reporting of payments of royalties), the payee must furnish the payee's taxpayer identification number to the payor either orally or in writing. Except as provided in § 31.3406(d)–5, the payee is not required to certify under penalties of perjury that the taxpayer identification number is correct regardless of when the account, contract, or relationship is established.

[T.D. 8637, 60 FR 66123, Dec. 21, 1995]

§ 31.3406(d)–2 Payee certification failure.

(a) *Requirement to backup withhold.* Withholding under section 3406(a)(1)(D) applies to a reportable interest or dividend payment (as defined in section 3406(b)(2)) if, and only if, the payee fails to certify to the payor, under penalties of perjury, that the payee is not subject to withholding due to notified payee underreporting under section 3406(a)(1)(C). The period for which withholding applies is described in § 31.3406(e)–1(e). See § 31.3406(d)–3(a) for special rules when an account is established directly with, or an instrument is acquired directly from, the payor by electronic transmission or by mail. See § 31.3406(c)–1(c)(3)(iv) for rules with respect to a payor's reliance on a payee certification for a new account following notified payee underreporting. See § 31.3406(d)–4 for special rules relating to the acquisition of a readily tradable instrument through a broker. The certificate on which the certification should be made is described in § 31.3406(h)–3.

(b) *Exceptions.* Withholding under section 3406(a)(1)(D) and paragraph (a) of this section does not apply to reportable interest or dividend payments (as defined in section 3406(b)(2)) made—

(1) With respect to a pre-1984 account (as defined in § 31.3406(d)–1(b)(1));

(2) In a window transaction (as defined in § 31.3406(b)(2)–3(b));

(3) With respect to a readily tradable instrument described in § 31.3406(d)–1(b)(2)(iv) or § 31.3406(d)–4(a)(3); or

(4) During the period and with respect to an account or readily tradable instrument described in § 31.3406(d)–3.

[T.D. 8637, 60 FR 66125, Dec. 21, 1995]

§ 31.3406(d)–3 Special 30-day rules for certain reportable payments.

(a) *Accounts or readily tradable instruments acquired directly from the payor (including a broker who holds an instrument in street name) by electronic transmission or by mail.* In the case of an account established directly with, or a readily tradable instrument acquired directly from, the payor by means of electronic transmission (i.e., telephone or wire instruction) or by mail, the payor may permit the payee to furnish the certifications required in § 31.3406(d)–1(b)(3) (relating to certification that the payee's taxpayer identification number is correct) and § 31.3406(d)–2 (relating to certification of notified payee underreporting) within 30 days after the establishment or acquisition without subjecting the account to withholding during the 30 days. The preceding sentence applies only if the payee furnishes a taxpayer identification number to the payor at the time of the establishment or acquisition, and the payee does not withdraw more than 69 percent of a reportable interest or dividend payment before the certifications are received within the 30 days. If the payee does not provide the required certifications within 30 days of the establishment or acquisition, the payor must withhold 31 percent of any reportable interest or dividend payments made to the account after its acquisition. For purposes of this section, an account or instrument is considered acquired directly from the payor if the instrument was acquired by the payee without the assistance of a broker or the instrument was acquired directly from a broker who holds the instrument as nominee for the payee (i.e., in street name) and who is considered a payor under § 31.3406(a)–2. For payments made after December 31, 1998, see § 1.6049–5(d)(2)(ii) of this chapter for the application of a 90-day grace period in lieu of the 30-day grace period described in this paragraph (a) if, at the beginning of the 90-day grace period, certain conditions are satisfied. If the grace period provisions of §1.6049–5(d)(2)(ii) or §1.1441–1(b)(3)(iv) of this chapter are applied with respect to a new account, the grace period provisions of this paragraph (a) shall not apply to that account.

(b) *Sale of an instrument for a customer by electronic transmission or by mail.* The special rules set forth in paragraph (a) of this section apply comparably with respect to certification of the taxpayer identification number for the sale of an instrument under section 6045 (as described in §31.3406(b)(3)–2) through a post-1983 brokerage account (as described in §31.3406(d)–1(c)(2)) for a customer by electronic transmission or by mail. However, the 30-day rules may apply only if the payee furnishes the payee's taxpayer identification number before the sale occurs. For purposes of applying the 30-day rules under this paragraph (b), a payee's reinvestment of the gross proceeds of the sale into other instruments constitutes a withdrawal.

(c) *Application to foreign payees.* The rules of paragraphs (a) and (b) of this section also apply to a payee from whom the payor is required to obtain a Form W–8 (or an acceptable substitute) or other evidence of foreign status (pursuant to relevant regulations under an applicable Internal Revenue Code section without regard to the requirement to furnish a taxpayer identifying number, and the certifications described in §§31.3406(d)–1(b)(3) and 31.3406(d)–2), provided the payee represents orally or otherwise, before or at the time of the acquisition or sale of the instrument or the establishment of the account, that the payee is not a United States citizen or resident. The 30-day rules described in paragraph (a) or (b) of this section may apply only if the payee does not qualify for, or the payor does not apply, the 90-day grace period described in §1.6049–5(d)(2)(ii) or §1.1441–1(b)(3)(iv) of this chapter.

[T.D. 8637, 60 FR 66125, Dec. 21, 1995, as amended by T.D. 8734, 62 FR 53493, Oct. 14, 1997]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53493, Oct. 14, 1997, §31.3406(d)–3 was amended by adding two sentences at the end of paragraph (a); removing the words "30-day" in the first sentence, revising the word "these" to "the 30-day", and adding the word "may" immediately before the words "apply only if" in the second sentence; revising the word "those" to "the" in the third sentence in paragraph (b); and by revising paragraph (c), effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000. For the convenience of the user, the superseded text is set forth as follows:

§31.3406(d)–3 Special 30-day rules for certain reportable payments.

(a) * * *

(b) * * * The special 30-day rules set forth in paragraph (a) of this section apply comparably with respect to certification of the taxpayer identification number for the sale of an instrument under section 6045 (as described in §31.3406(b)(3)–2) through a post-1983 brokerage account (as described in §31.3406(d)–1(c)(2)) for a customer by electronic transmission or by mail. However, these rules apply only if the payee furnishes the payee's taxpayer identification number before the sale occurs. For purposes of applying those 30-day rules under this paragraph (b), a payee's reinvestment of the gross proceeds of the sale into other instruments constitutes a withdrawal.

(c) *Application to foreign payees.* The rules of paragraphs (a) and (b) of this section also apply to a payee from whom the payor is required to obtain a Form W–8 or a substitute of the form or is to obtain other evidence of foreign status (pursuant to the relevant regulations issued under sections 6049 and 6045), provided the payee represents orally or otherwise, before or at the time of the acquisition or sale of the instrument or the establishment of the account, that the payee is not a United States citizen or resident.

§31.3406(d)–4 Special rules for readily tradable instruments acquired through a broker.

(a) *Readily tradable instruments acquired through post-1983 brokerage accounts with a broker who is not a payor*—(1) *In general.* If a readily tradable instrument is acquired through a post-1983 brokerage account (as defined in §31.3406(d)–1(c)(2)) and the broker is not the payor of the instrument (as defined in §31.3406(a)–2(b)(3)), the broker must—

(i) Obtain once with respect to each account the certifications described in §31.3406(d)–2(a) and §31.3406(d)–1(b)(3) and (c)(2) from the payee (relating to certification regarding payee underreporting and taxpayer identification number, respectively);

(ii) Furnish the payee's taxpayer identification number to the payor; and

(iii) Notify the payor to impose withholding if the payee fails to make either of the required certifications to the broker or if the broker has been notified by the Internal Revenue Service before the acquisition of the instrument that the payee is subject to withholding due to notified payee underreporting under section 3406(a)(1)(C) or that the payee is subject to withholding because the payee's taxpayer identification number is incorrect under section 3406(a)(1)(B) (as described in § 31.3406(d)–5).

(2) *Additional requirements.* The broker must give the information required by paragraphs (a)(1) (ii) and (iii) of this section to the payor with the transfer instructions for the acquisition (including account registration instructions transmitted by a broker in the case of acquisitions of shares in a mutual fund). A notice including the information described in paragraph (b)(1) of this section fulfills the broker's requirement to give notice to the payor. Once the broker transmits the transfer instructions containing the information required by this section, the broker has no further responsibility to obtain a missing taxpayer identification number or missing certification or to provide additional notices to the payee or payor with respect to the acquisition of the instrument. Upon receiving the notice from a broker, the payor must impose withholding on the account pursuant to § 31.3406(a)–1.

(3) *Transactions entered into through a brokerage account that is not a post-1983 brokerage account.* If a broker acquires readily tradable instruments for a payee through an account (with the broker) that is not a post-1983 brokerage account (as defined in § 31.3406(d)–1(c)(1)), and the broker is not the payor of the instruments, the broker must furnish the payee's taxpayer identification number to the payor. In addition, if the broker has been notified by the Internal Revenue Service that the payee is subject to withholding under section 3406 either because of an incorrect taxpayer identification number or due to notified payee underreporting as described in section 3406(a)(1) (B) or (C), respectively, the broker must notify the payor of the instrument to impose withholding with respect to that payee and transmit the information in the manner described in this paragraph (a). After a payor receives a notice from a broker pursuant to section 3406(d)(2)(B) and this paragraph (a), the payor must impose withholding on any accounts of the payee paying reportable interest or dividends as defined in section 3406(b)(2) in accordance with § 31.3406(a)–1.

(4) *Payor must notify payee*—(i) *Failure to provide certifications.* If a payor is notified by a broker, as required in paragraph (a)(1) of this section, that a payee is subject to withholding because the payee failed to provide the certifications, as described in § 31.3406(d)–2(a) and § 31.3406(d)–1(b)(3) and (c)(2), and the payor has not received the certifications from the payee, then the payor must notify the payee that withholding has started (or will start) no later than 15 days after the payor makes the first payment to the payee that is subject to withholding under section 3406. A notice that contains the information described in paragraph (b)(2) of this section satisfies the payor's requirement to give notice to the payee. If the broker notifies the payor that the payee failed to make a required certification and the payor has received the certification from the payee, the payor may disregard the notice from the broker.

(ii) *Notified payee underreporting and incorrect taxpayer identification number.* The payor must notify the payee under this section if the Internal Revenue Service or a broker notifies the payor to withhold either because of an incorrect taxpayer identification number under section 3406(a)(1)(B) (as described in § 31.3406(d)–5) or due to notified payee underreporting under section 3406(a)(1)(C) (as described in § 31.3406(c)–1). If a payor is notified by the Internal Revenue Service or a broker with respect to a readily tradable instrument, the payor may not ignore the notice even if the payee previously provided the payee's taxpayer identification number under penalties of perjury to the payor and even if the payee certified to the payor that the payee is not subject to backup withholding due to a notified payee underreporting. See § 31.3406(d)–5(c) (1) and (2) and (f)(2) for notice requirements under section 3406(a)(1)(B) due to an incorrect taxpayer identification number. See § 31.3406(c)–1(c)(2) for notice requirements under section 3406(a)(1)(C) due to notified payee underreporting.

(b) *Notices*—(1) *Form of notice by broker to payor.* A broker who is required under paragraphs (a)(1)(iii) and (2) of this section to notify the payor with respect to a readily tradable instrument may notify the payor in connection with the transfer instructions by means of magnetic media, machine readable document, or any other medium, provided that the notice includes the following information—

(i) The payee's name, address, and taxpayer identification number (if provided to the broker); and

(ii) A statement that the payee is subject to withholding under section 3406(a)(1) (A), (B), (C), or (D) of the Internal Revenue Code, whichever section applies; and

(iii) When applicable, a statement that the broker was notified by the Internal Revenue Service that the payee is subject to withholding under section 3406(a)(1)(B) or (C).

(2) *Form of notice by payor to payee.* A payor who is required to notify a payee that the payee is subject to withholding must provide notice that is substantially similar to the following—

(i) For a notification concerning a failure to provide a taxpayer identification number in the required manner under section 3406(a)(1)(A) or a failure to make the following certification described in section 3406(a)(1)(D):

Recently, you purchased (identify security acquired). Because of the existence of one or more of the following conditions, payments of interest, dividends, and other reportable amounts that are made to you will be subject to withholding of tax at a 31 percent rate: (specify the condition or conditions, described below, that are applicable)

(1) You failed to provide a taxpayer identification number, or failed to provide this number under penalties of perjury, in connection with the purchase of the acquired security. (An individual's taxpayer identification number is his or her social security number.)

(2) You failed to certify, under penalties of perjury, that you are not subject to withholding due to notified payee underreporting as required under section 3406(a)(1)(D) of the Internal Revenue Code.

If condition (1) applies, you may stop withholding by providing your taxpayer identification number on the enclosed Form W–9, signing the form, and returning it to us. If you do not have a taxpayer identification number, but have applied (or will soon apply) for one, you may so indicate on the Form W–9. Withholding may apply during the 60-day period you are waiting for your taxpayer identification number. You must provide us with your taxpayer identification number promptly after you receive it in order to avoid withholding after the end of the 60-day period or to stop withholding if it has already begun. Certain persons, described on the enclosed Form W–9, are exempt from withholding. Follow the instructions on that form if applicable to you.

If condition (2) applies, you may stop withholding by certifying on the enclosed Form W–9 that you are not subject to withholding due to notified payee underreporting, signing the form, and returning it to us.

If more than one condition applies, you must remove all applicable conditions to stop withholding.

Please address any questions concerning this notice to: [Insert payor identifying information].

(Do not address questions to the broker who purchased the securities for you.)

(ii) For the form of the notice concerning imposition of withholding due to an incorrect taxpayer identification number, see § 31.3406(d)–5 (d)(2) and (g)(2).

(iii) For the form of the notice concerning the imposition of withholding due to notified payee underreporting, see § 31.3406(c)–1(d)(2).

(c) *Payor's reliance on information from broker*—(1) *In general.* A payor of an instrument acquired by a payee through a broker may rely on the information that the payor receives from the broker pursuant to paragraphs (a) and (b) of this section.

(2) *Amount subject to backup withholding.* The payor is required to withhold under section 3406 depending on the payor's customary method of making payment on an instrument or instruments owned by a payee. If it is the practice of a payor to combine in one account all readily tradable instruments of the same issue owned by a payee and if only certain of those instruments are subject to withholding, the payor must withhold on the aggregate payment made with respect to all

the instruments in the account. Otherwise, the payor must withhold on the payment made on the instrument or instruments with respect to which the payee is subject to withholding.

[T.D. 8637, 60 FR 66125, Dec. 21, 1995; 61 FR 11307, Mar. 20, 1996; 61 FR 12135, Mar. 25, 1996]

§ 31.3406(d)–5 Backup withholding when the Service or a broker notifies the payor to withhold because the payee's taxpayer identification number is incorrect.

(a) *Overview*. Backup withholding under section 3406(a)(1)(B) applies to any reportable payment made with respect to an account of a payee if the Internal Revenue Service or a broker notifies a payor under paragraph (c)(1) or (2) of this section that the payee's name and taxpayer identification number combination (name/TIN combination) is incorrect and the payor is required under paragraph (c)(3) of this section to identify that account as having the same name/TIN combination. After receiving a notice from the Internal Revenue Service or a broker under paragraph (c)(1) or (2) of this section and identifying an account as having the incorrect name/TIN combination under paragraph (c)(3) of this section, the payor must notify the payee in accordance with paragraph (d) of this section. In addition, under paragraph (e) of this section, the payor must backup withhold on all reportable payments made to such account after the close of the 30th business day after the date that the payor receives the notice and on or before the close of the 30th calendar day after the date that the payor receives from the payee the certification required under paragraph (f) of this section. Under paragraph (g) of this section, if a payor receives 2 notices from the Internal Revenue Service or broker within 3 calendar years with respect to a payee's account, the payor must notify the payee in accordance with paragraph (g)(2) (rather than paragraph (d)) of this section. In addition, the payor must backup withhold on all reportable payments made with respect to the account after the close of the 30th business day after the date that the payor receives the second notice and on or before the 30th calendar day after the date that the payor receives notification from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination for the account. Paragraph (h) of this section requires a payor to use a corrected name/TIN combination on subsequent information returns.

(b) *Definitions and special rules.*—(1) *Definition of incorrect name/TIN combination*. An incorrect name/TIN combination is a combination of a name and taxpayer identification number provided on an information return with respect to which the Internal Revenue Service determines that the taxpayer identification number provided is not assigned under section 6109 to the name provided.

(2) *Definition of account*. The term ''account'' means any account, instrument, or other relationship with the payor.

(3) *Definition of business day*. The term ''business day'' means any day other than a Saturday, Sunday, or legal holiday (within the meaning of section 7503).

(4) *Certain exceptions*—(i) *In general*. This section does not apply with respect to any notice received under paragraph (c)(1) or (2) of this section with respect to payments that—

(A) Were made to a fiduciary or nominee account; or

(B) Were not reportable payments (for example, because the payments were made to an exempt recipient).

See § 301.6724–1(f)(3) of this chapter for certain solicitation rules applicable after receipt of a notice under paragraph (c)(1) or (2) of this section with respect to a fiduciary or nominee account.

(ii) *Definition of fiduciary or nominee account*. A fiduciary or nominee account is an account with respect to which at least one person named in the registration is identified as acting in the capacity as nominee or as administrator, conservator, custodian, receiver, tutor, curator, committee, executor, guardian, trustee, or other fiduciary capacity recognized under governing law.

(c) *Notice regarding an incorrect name/TIN combination*—(1) *In general*. If the Internal Revenue Service notifies a payor that a payee's name/TIN combination is incorrect and that the payor must commence backup withholding as required on reportable payments made with respect to accounts of the payee with the same name/TIN combination, the payor must—

(i) Identify under paragraph (c)(3) of this section any account or accounts of the payee having the same name/TIN combination;

(ii) Except as provided in paragraph (g) of this section, notify the payee and backup withhold on reportable payments made to the account or accounts under the rules of paragraphs (d), (e), and (f) of this section.

This paragraph (c)(1) also applies if the payor receives notice from a broker under paragraph (c)(2) of this section.

(2) *Additional requirements for payors that are also brokers*—(i) *In general.* A broker must notify the payor of an instrument of the information required under paragraph (c)(2)(ii) of this section, if—

(A) The broker (in its capacity as a payor) receives a notice from the Internal Revenue Service under paragraph (c)(1) of this section that a payee's name/TIN combination is incorrect and is required to identify an account of the payee pursuant to paragraph (c)(3) of this section as having the name/TIN combination;

(B) The payee acquires through the same account with the broker a readily tradable instrument with respect to which the broker is not the payor; and

(C) The acquisition of such instrument occurs after the close of the 30th business day after the date that the broker receives that notice (or on any earlier date that the broker chooses to begin applying this paragraph (c)(2)).

For purposes of this paragraph (c)(2)(i), with respect to notices under paragraph (c)(1) of this section received on or after September 1, 1992, an acquisition includes a transfer of an instrument out of street name into the name of the registered owner, *i.e.*, the payee.

(ii) *Required information.* The information required to be provided under this paragraph (c)(2)(ii) is:

(A) The fact that the broker was notified by the Internal Revenue Service that the payee furnished an incorrect name/TIN combination;

(B) The incorrect name/TIN combination; and

(C) The fact that the named payee is subject to backup withholding under section 3406(a)(1)(B).

The broker is required to provide this information to the payor of the instrument in connection with the transfer instructions for the acquisition.

(iii) *Termination of obligation to provide information.* The obligation of a broker to provide information to payors under this paragraph (c)(2) terminates simultaneously with the termination of the broker's obligation to backup withhold (in its capacity as payor) on reportable payments to the account.

(3) *Payor identification of the account or accounts of the payee that have the incorrect taxpayer identification number*—(i) *In general.* If an account number or designation is provided in the notice received under paragraph (c)(1) of this section, the payor need only identify any account or accounts corresponding to that number or designation that has the same name/TIN combination provided in the notice. If no account number or designation is provided in the notice received under paragraph (c)(1) of this section, the payor must identify, using reasonable care, all accounts of the payee having the same name/TIN combination provided in the notice. If a payor receives notice from a broker under paragraph (c)(2) of this section with respect to the acquisition of a readily tradable instrument, the payor is not required to identify any other account of the payee.

(ii) *Reasonable care where no account number or designation is provided.* A payor who satisfies the following two-part facts-and-circumstances test will be considered to have exercised reasonable care for purposes of this paragraph (c)(3).

(A) Part one of the test is satisfied if a payor searches for accounts of the payee on the computer or other recordkeeping system that the payor can reasonably associate with the information return that generated the notice under paragraph (c)(1) of this section. For example, a payor who maintains separate computer or recordkeeping systems for different product lines will have identified and used the appropriate system if the payor searches for accounts of the payee on the computer or recordkeeping system that contains the product line for the type of payments reported on the information return. A payor with the same product line on several nonintegrated computer or record systems will have identified and used the appropriate system if the payor searches for accounts of the payee on any computer or record system that the payor otherwise can reasonably associate with the information return.

(B) Part two of the test is satisfied if the payor inputs the name/TIN combination provided on the notice from the Internal Revenue Service under paragraph (c)(1) of this section into the system that is described in paragraph (c)(3)(ii)(A) of this section. If the system of a payor cannot utilize the name/TIN combination, the payor must input appropriate data or criteria, as determined by the capability of the payor's computer or recordkeeping system.

(iii) *No identification if error is caused by payor.* A payor may treat an account as not having the incorrect name/TIN combination if the error resulted because the name or taxpayer identification number on such account is not the name or taxpayer identification number that was provided to the payor. This may occur, for example, where a payor transposes numbers in the taxpayer identification number when incorporating it into the payor's business records.

(4) *Special rules for joint accounts*—(i) *In general.* In the case of a joint account, the relevant name/TIN combination for purposes of this section is the name/TIN combination used for information reporting purposes.

(ii) *Transitional rule.* With respect to notices received under paragraph (c) (1) or (2) of this section prior to September 1, 1993, a payor may treat the name/TIN combination of the first person on a joint account as the relevant name/TIN combination, unless that person is an exempt foreign person and the account registration includes names of persons who are not foreign persons.

(iii) *Optional rule where names are switched.* A payor may backup withhold under this section on reportable payments made to a joint account if the order of the names (or taxpayer identification numbers) on the account is merely changed subsequent to receipt of a notice under paragraph (c) (1) or (2) of this section, provided that the name of the person to which the incorrect name/TIN combination originally applies remains on the account.

(5) *Date of receipt.* For purposes of this section, the date set forth on the notice from the Internal Revenue Service or broker under paragraph (c) (1) or (2) of this section is considered to be the date of receipt of the notice by the payor. However, if the payor demonstrates to the satisfaction of the Internal Revenue Service that the date of actual receipt of the notice is later than the date on the notice, the actual date of receipt is controlling.

(d) *Notice from payors of backup withholding due to an incorrect name/TIN combination*—(1) *In general.* Except as provided in paragraph (g) of this section, if a payor receives notice under paragraph (c)(1) or (2) of this section and is required to identify an account as having the incorrect name/TIN combination under paragraph (c)(3) of this section, the payor must send a copy of the notice (or an acceptable substitute notice) to the payee of the account in accordance with the procedures of paragraph (d)(2) of this section.

(2) *Procedures*—(i) *In general.* The notice that a payor must send to a payee under paragraph (d)(1) of this section must comply with such procedural requirements as the Internal Revenue Service provides in the Internal Revenue Bulletin such as to form and manner of delivery. A payor must send the notice to the payee within 15 business days after the date that the payor receives the notice from the Internal Revenue Service or a broker under paragraph (c)(1) or (2) of this section.

(ii) *Two or more notices for an account in the same calendar year.* A payor who receives, under the same payor taxpayer identification number, two or more notices under paragraph (c)(1) or (2) of this section in a calendar year with respect to the same account of a payee need only send one notice to the payee under this section.

(e) *Period during which backup withholding is required due to notification of an incorrect name/TIN combination*—(1) *In general.* Except as provided in paragraph (g) of this section, if a payor receives a notice under paragraph (c)(1) or (2) of this section and is required to identify an account as having the same name/TIN combination under paragraph (c)(3) of this section, the payor must impose backup withholding on all reportable payments made with respect to the account after the close of the 30th business day after the date the payor receives that notice and on or before the close of the 30th calendar day after the day the payor receives from the payee the certification required under paragraph (f) of this section.

(2) *Grace periods*—(i) *Starting backup withholding.* A payor may, on an account-by-account basis or in general, choose to begin backup withholding under this paragraph (e) at any time during the 30-business-day period described in paragraph (e)(1) of this section.

(ii) *Stopping backup withholding.* A payor may, on an account-by-account basis or in general, choose to stop backup withholding under this paragraph (e) at any time within 30 calendar days after the payor receives from the payee the certification required under paragraph (f) of this section.

(3) *Dormant accounts.* The requirement that a payor backup withhold under this paragraph (e) on reportable payments made with respect to an account terminates no later than the close of the third calendar year ending after the later of—

(i) The date that the last reportable payment was made to that account; or

(ii) The date that the payor received the notice under paragraph (c)(1) or (2) of this section.

(f) *Manner required for payee to furnish certified taxpayer identification number.* (1) Except as provided in paragraph (g) of this section, in order to prevent backup withholding under paragraph (e) of this section from starting, or to stop it once it has begun, a payee with respect to whom the payor has been notified under paragraph (c)(1) or (2) that the payee's name/TIN combination is incorrect is required on Form W–9 (or an acceptable substitute form) to—

(i) Provide the payee's name and taxpayer identification number; and

(ii) Certify, under penalties of perjury, that the taxpayer identification number being provided is correct.

(2) The certification must be made even if the account is a pre-1984 account and even if the payment to the account is a reportable payment other than interest, dividends, patronage dividends, original issue discount, or proceeds of a sale of a security or commodity. In order to prevent backup withholding under paragraph (e) of this section from starting or to stop it once it has begun, a payee is not required to certify, under penalties of perjury, that the payee is not subject to backup withholding due to notified payee underreporting under section 3406(a)(1)(C). With respect to notices received under paragraph (c)(1) or (2) of this section on or after September 1, 1993, the requirements of this paragraph (f) are not satisfied if a payee provides only an awaiting TIN certification. As a result, a payor must not fail to begin backup withholding under paragraph (e) of this section solely because the payee provided an awaiting TIN certification, or stop it once it has begun solely because the payee provided an awaiting TIN certification.

(g) *Receipt of two notices within a 3-year period*—(1) *In general.* If a payor receives notification under paragraph (c)(1) or (2) of this section twice within 3 calendar years, and in each case the payor is required to identify the same account as having the incorrect name/TIN combination, the payor must—

(i) Disregard any future certifications (described in paragraph (f) of this section) furnished by the payee with respect to the account until the payor receives notice from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination under paragraph (g)(5) of this section;

(ii) Send the notice described in paragraph (g)(2) of this section to the payee (and not the notice required under paragraph (d) of this section) within 15 business days after the date that the payor receives the second notice; and

(iii) Impose backup withholding on the account for the period described in paragraph (g)(3) of this section.

The payor must maintain sufficient records to determine whether the payor has received notices under paragraph (c) (1) or (2) of this section twice within 3 calendar years with respect to the same account.

(2) *Notice to payee who has provided two incorrect name/TIN combinations within 3 calendar years.* The notice to the payee required by paragraph (g)(1) of this section must comply with such procedural requirements as the Internal Revenue Service provides in the Internal Revenue Bulletin such as to form and manner of delivery.

(3) *Period during which backup withholding is required due to a second notice of an incorrect name/taxpayer identification combination within 3 calendar years*—(i) *In general.* If paragraph (g)(1) of this section applies, the payor must backup withhold on all reportable payments made with respect to the account of the payee after the close of the 30th business day after the date that the payor receives the second notice under paragraph (c) (1) or (2) of this section and on or before the close of the 30th calendar day after the date that the payor receives notice from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination under paragraph (g)(5) of this section for the account. However, a payor may choose not to commence backup withholding under this paragraph (g) until January 1, 1992.

(ii) *Grace periods*—(A) *Starting backup withholding.* A payor may, on an account-by-account basis or in general, choose to begin backup withholding under this paragraph (g) at any time during the 30-business-day period described in paragraph (g)(3)(i) of this section.

(B) *Stopping backup withholding.* A payor may, on an account-by-account basis or in general, choose to stop backup withholding under this paragraph (g) at any time within 30 calendar days after the date the payor receives notice from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination under paragraph (g)(5) of this section for the account.

(iii) *Dormant accounts.* The requirement that a payor backup withhold under this paragraph (g) on reportable payments made with respect to an account terminates no later than the close of the third calendar year ending after the later of—

(A) The date that the last reportable payment was made to that account; or

(B) The date that the payor received the second notice under paragraph (c) (1) or (2) of this section.

(4) *Receipt of two notices in one calendar year.* A payor must treat the receipt of two or more notices under paragraph (c) (1) or (2) of this section in a calendar year with respect to an account as the receipt of one notice for purposes of this paragraph (g). The preceding sentence applies only if the two or more notices are received under the same payor taxpayer identification number.

(5) *Notification from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination.* The Social Security Administration (or the Internal Revenue Service) will notify a payor after it validates a name/TIN combination that the payee provides for an account to which paragraph (g)(1) of this section applies. Notification from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination satisfies the requirements of this paragraph (g)(5) only if it complies with such procedural requirements as the Internal Revenue Service provides in the Internal Revenue Bulletin such as to form and manner of delivery. In order to obtain notification from the Social Security Administration (or the Internal Revenue Service) validating a name/TIN combination for an account, a payee who receives notice from a payor under paragraph (g)(2) of this section should follow such procedures as the Internal Revenue Service provides in the Internal Revenue Bulletin.

(h) *Payor must use newly provided certified number.* If a payor receives a certification under paragraph (f) of this section or a notification under paragraph (g)(5) of this section for an account, the payor must use the name/

TIN combination provided on such certification or notification on information returns for the account for which the due date (without regard to extensions) is more than 30 calendar days after the date that the payor receives the certification or notification. A payor who uses that name/TIN combination on the first such information return satisfies the requirement of section 3406(h)(9) to provide this information to the Internal Revenue Service. If the payor is not required to file any information returns with respect to the account after the date that the payor receives the certification or notification, a payor is deemed to satisfy the requirements of section 3406(h)(9).

(i) *Effective date.* Except as otherwise provided in this section, the provisions of this section are effective with respect to notices received on or after September 1, 1990, under paragraph (c) (1) or (2) of this section.

(j) *Examples.* The application of the provisions of this section may be illustrated by the following examples:

Example 1. D opened an account with Bank O prior to 1984 and furnished a taxpayer identification number to O at the time he opened the account. O pays interest on the account at the end of each calendar month, and the account is a pre-1984 account. On October 1, 1990, the Internal Revenue Service notifies Bank O that the name/TIN combination provided by D is incorrect. O timely notifies D as required in paragraph (d)(1) of this section. O does not receive the certification required under paragraph (f) of this section from D. O is required to backup withhold 20 percent of all reportable payments made after November 14, 1990 (which is 30 business days after the date the Internal Revenue Service notified O). Therefore, O is not required to backup withhold on the reportable payment made on October 31, 1990, but is required to backup withhold on the reportable payment made on November 30, 1990. O is required to continue to backup withhold under section 3406(a)(1)(B) until O receives the certification required under paragraph (f) of this section from D (or, if earlier, until backup withholding terminates under paragraph (e)(3) of this section).

Example 2. Assume the same facts as in *Example 1* except that D furnishes a new taxpayer identification number to O on November 1, 1990, but does not certify, under penalties of perjury, that it is his correct taxpayer identification number as required under paragraph (f) of this section. Even though the account is a pre-1984 account, O is required to withhold 20 percent of all reportable payments made after November 14, 1990 (which is 30 business days after the date the Internal Revenue Service notified O), and before the date O receives the certification required under paragraph (f) of this section from D.

Example 3. Assume the same facts as in *Example 2* except that D provides O with the certification required under paragraph (f) of this section on November 10, 1990. D elects pursuant to paragraph (e)(2)(ii) of this section to treat the certification as received on November 20, 1990. Even though D did not provide the certification to O within 30 business days after the Internal Revenue Service notified O that D provided an incorrect taxpayer identification number, O is not required to backup withhold under section 3406(a)(1)(B) because O did not make any reportable payment to D after 30 business days after notification of an incorrect name/TIN combination and before O received D's certification under paragraph (f) of this section (or, if earlier, until backup withholding terminates under paragraph (e)(3) of this section).

Example 4. Individual F has two post-1983 accounts with Bank R that pay reportable interest: a savings account and a money market account. The money market account was opened in 1986, and the savings account was opened on February 1, 1991. R treats each of these accounts as a separate account on its books and records for business purposes. On October 1, 1990, the Internal Revenue Service notified R pursuant to paragraph (c)(1) of this section that F furnished an incorrect name/TIN combination with respect to the money market account. R timely sends F the notice required under paragraph (d) of this section and receives the certification required under paragraph (f) of this section from F on November 1, 1990. On October 1, 1991, the Internal Revenue Service again notifies R that F furnished an incorrect name/TIN combination with respect to the money market account. Further, R determines from its business records that two notifications of an incorrect name/TIN combination have been received with respect to the money market account within 3 calendar years. R must send F the notice required under paragraph (g)(2) of this section and must commence backup withholding on reportable interest paid on the money market account pursuant to paragraph (g)(3) of this section after November 14, 1991, which is 30 business days after R received the second notice. R must continue to backup withhold under paragraph (g) of this section on the money market account until R receives notification from the Social Security Administration as described in paragraph (g)(5) of this section (or, if earlier, until backup withholding terminates under paragraph (g)(3)(iii) of this section). R is not required to backup withhold on the savings account unless and until it receives notice under paragraph (c) (1) or (2) of this section with respect to the savings account.

[T.D. 8409, 57 FR 13031, Apr. 15, 1992]

§ 31.3406(e)–1 Period during which backup withholding is required.

(a) *In general.* A payor must withhold under section 3406 at a rate of 31 percent on any reportable payment (as defined in section 3406(b)) made to a payee during the period described in this section (irrespective of the number of conditions for imposing withholding under section 3406 that exist with respect to the payee). A payor must continue to withhold under section 3406 until no condition for imposing backup withholding exists with respect to the payee.

(b) *Failure to furnish a taxpayer identification number in the manner required*—(1) *Start withholding.* A payor is required to withhold under section 3406(a)(1)(A) at a rate of 31 percent on any reportable payment (as defined in section 3406(b)) at the time the payor pays the reportable payment (as described in § 31.3406(a)–4) to a payee if—

(i) The payor has not received the payee's taxpayer identification number in the manner required in § 31.3406(d)–1; or

(ii) The payor has received notice from a broker (as required in § 31.3406(d)–4(a)(1)(iii)) with respect to a readily tradable instrument that the payee did not furnish a taxpayer identification number to the broker in the manner required in § 31.3406(d)–1 and the payor has not received the taxpayer identification number from the payee in this manner.

(2) *Stop withholding.* The payor must stop withholding under section 3406(a)(1)(A) within 30 days after the payor receives—

(i) The payee's taxpayer identification number in the manner required under § 31.3406(d)–1; or

(ii) A statement, in such form and containing such information as is required under applicable regulations, that the payee is not a United States person.

(c) *Notification of an incorrect taxpayer identification number.* See § 31.3406(d)–5(e) and (g)(3) for the period for which withholding is required in the case of notification of an incorrect taxpayer identification number.

(d) *Notified payee underreporting.* See § 31.3406(c)–1(e) for the period for which withholding is required in the case of notified payee underreporting.

(e) *Payee certification failure*—(1) *Start withholding.* A payor is required to withhold under section 3406(a)(1)(D) at a rate of 31 percent on any reportable interest or dividend payment (as defined in section 3406(b)(2)) at the time the payor pays such reportable interest or dividend payment (as described in § 31.3406(a)–4) to a payee if—

(i) The payor has not received from the payee the certification required in § 31.3406(d)–2; or

(ii) The payor has received notice from a broker (as required in § 31.3406(d)–4(a)(1)(iii)) with respect to a readily tradable instrument that the payee did not make the required certification and the payor has not received the required certification from the payee.

(2) *Stop withholding.* The payor must stop withholding under section 3406(a)(1)(D) on any reportable interest or dividend payment within 30 days after the payor receives the certification from the payee in the manner required by § 31.3406(d)–2.

(f) *Rule for determining when the payor receives a taxpayer identification number or certificate from a payee.* In determining whether a payee has failed to provide a taxpayer identification number or any certification to a payor (including a Form W–8 or substitute form), a payor is required to process the taxpayer identification number or certification within 30 days after the payor receives the taxpayer identification number or certification from the payee or in certain cases, from a broker. Thus, the payor may take up to 30 days to treat the taxpayer identification number or a certificate as having been received.

[T.D. 8637, 60 FR 66127, Dec. 21, 1995]

§ 31.3406(f)–1 Confidentiality of information.

(a) *Confidentiality and liability for violation.* Pursuant to section 3406(f) no person may use any information obtained under section 3406 for any purpose except for the purpose of complying with the requirements of section 3406 or for purposes permitted under section 6103 (subject to the safeguards of section 6103). See section 7431 for civil damages for violating the confidential use of the information (subject to an exception for good faith).

(b) *Permissible use of information*—(1) *In general.* A payor or broker may transmit information on a Form W–9, Form W–8, or other acceptable form relating to withholding to the department, institution, or firm (or to any employee therein) responsible for withholding or processing of taxpayer identification numbers, certifications described in §31.3406(h)–3, or other substitute forms. In addition, a broker may notify the payor with respect to a readily tradable instrument of the requirement to withhold and the condition or conditions for imposing withholding (as described in §31.3406(d)–4) that exist with respect to the payee. A payor or broker may, without violating the Internal Revenue Code, close an account of, refuse to open an account for, issue an instrument to, or redeem an instrument for, a person solely because the person fails to furnish the person's taxpayer identification number or documentation of foreign status in the manner required in §31.3406(d)–1 and §31.3406(g)–1, respectively. A payor who closes an account of a payee in the calendar year in which the account was opened and during which no taxpayer identification number or evidence of foreign status was provided for that account will be presumed in the absence of evidence to the contrary to have closed the account without violating section 3406(f) even though the payee is subject to backup withholding under section 3406(a)(1)(A). A payor, except as provided in §§31.3406(d)–3 and 31.3406(g)–3, may not prohibit a payee who fails to furnish the payee's taxpayer identification number in the manner required in §31.3406(d)–1 from withdrawing any funds in the account.

(2) *Window transactions.* In the case of a window transaction (as defined in §31.3406(b)(2)–3(b)), a payor may, without violating the Internal Revenue Code, refuse to redeem or may refuse to make payment if the payee fails to provide a taxpayer identification number regardless of when the obligation was issued or acquired.

(c) *Specific restrictions on the use of information.* Except as provided in paragraph (b) of this section, a payor or broker is not permitted to—

(1) Close an account (or instrument) of a payee solely because that payee (or the account of a payee) is subject to withholding under section 3406(a)(1)(A), (B), (C), or (D);

(2) Refuse to open an account or to issue an instrument if the person fails to certify, under penalties of perjury, that the person is not subject to withholding under section 3406(a)(1)(C) (relating to notified payee underreporting);

(3) Use information obtained under section 3406 (including a payee's failure or inability to certify that the payee is not subject to withholding due to notified payee underreporting or the fact that the account is subject to withholding), surcharge an account (i.e., charge an account more than the fee charged a similar account that was not subject to withholding under section 3406), or use that information to determine whether to open or close an account, whether to issue or redeem an instrument, or whether to extend credit to the payee.

[T.D. 8637, 60 FR 66127, Dec. 21, 1995]

§31.3406(g)–1 Exception for payments to certain payees and certain other payments.

(a) *Exempt recipients*—(1) *In general.* A payor of any reportable payment (as defined in section 3406(b)) must not withhold under section 3406 if the payee is—

(i) An organization exempt from taxation under section 501(a) or an individual retirement account;

(ii) The United States or any wholly owned agency or instrumentality thereof;

(iii) A state, the District of Columbia, a possession of the United States, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing;

(iv) A foreign government, a political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one or more of the foregoing (as defined in regulations under section 892); or

(v) An international organization or any wholly owned agency or instrumentality thereof (as defined in section 7701(a)(18)).

(2) *Nonexclusive list.* Paragraph (a)(1) of this section does not prescribe an exclusive list of payees that are exempt from information reporting and also are exempt from withholding under section 3406.

(b) *Determination of whether a person is described in paragraph (a)(1) of this section.* The determination of whether a person is a payee described in paragraph (a)(1) of this section must be made as provided in the applicable provisions of section 6049 and the regulations issued thereunder. A payor, even if permitted to treat a person as an exempt recipient without requiring a certificate under the provisions of section 6049, may require a payee, otherwise not required to file a certificate regarding its exempt status, to file a certificate and may treat a payee who fails to file the certificate as a person who is not an exempt recipient. See § 31.3406(h)–3 for a description of the Form W–9 or a substitute form prescribed under section 3406 for claiming exempt status.

(c) *Prepaid or advance premium life-insurance contracts.* A payor of a reportable payment (as defined in section 3406(b)(1)) may, but is not required to, withhold under section 3406 on reportable payments made from January 1, 1984, to December 31, 1996, on prepaid or advance premium life-insurance contracts to a payee who is the owner for tax purposes of the prepaid or advance premium life-insurance contract. For purposes of this exception from backup withholding, a prepaid or advance premium life-insurance contract is one entered into on or before June 30, 1984, by the payee and under which the increment in value of the prepaid or advance premium is used for the payment of premiums during the period in which the exception from backup withholding applies.

(d) *Reportable payments made to Canadian nonresident alien individuals.* A payment of interest made to a Canadian nonresident alien individual under § 1.6049–8(a) of this chapter is not subject to withholding under section 3406.

(e) *Certain reportable payments made outside the United States by foreign persons, foreign offices of United States banks and brokers, and others.* For reportable payments made after December 31, 1999, a payor is not required to backup withhold under section 3406 on a reportable payment that qualifies for the documentary evidence rule described in § 1.6049–5(c)(1) or (4) of this chapter, whether or not documentary evidence is actually provided to the payor, unless the payor has actual knowledge that the payee is a United States person. Further, no backup withholding is required for payments upon which a 30-percent amount was withheld by another payor in accordance with the withholding provisions under chapter 3 of the Internal Revenue Code and the regulations under that chapter. For rules applicable to notional principal contracts, see § 1.6041–1(d)(5) of this chapter.

[T.D. 8637, 60 FR 66128, Dec. 21, 1995, as amended by T.D. 8664, 61 FR 17574, Apr. 22, 1996; T.D. 8734, 62 FR 53493, Oct. 14, 1997; T.D. 8804, 63 FR 72189, Dec. 31, 1998]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53493, Oct. 14, 1997, § 31.3406(g)–1 was amended by adding paragraph (e), effective Jan. 1, 1999. At 63 FR 72183, 72189, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000, and paragraph (e), first sentence, was amended by removing ''December 31, 1998'' and adding ''December 31, 1999'', effective, Jan. 1, 2000.

§ 31.3406(g)–2 Exception for reportable payment for which withholding is otherwise required.

(a) *In general.* A payor of a reportable payment (as defined in section 3406(b)) must not withhold under section 3406 if the payment is subject to withholding under any other provision of the Internal Revenue Code.

(b) *Payment of wages.* A payor who is required to make an information return under section 6041 with respect to a payment of wages (as defined in section 3401) because, e.g., the employee makes a certification under section 3402(n) (relating to employees incurring no income tax liability), must not withhold under section 3406 on those wages.

(c) *Distribution from a pension, annuity, or other plan of deferred compensation.* An amount reportable under section 6047, such as a designated distribution under section 3405, is not a reportable payment subject to withholding under section 3406. See section 3406(b). Designated distributions not subject to withholding under section 3406 include—

(1) Distributions from a pension, annuity, profit-sharing, stock bonus plan, or other plan deferring the receipt of compensation;

(2) Distributions from an individual retirement account or annuity;

(3) Distributions from an owner-employee plan; and

(4) Certain surrenders of life insurance contracts.

(d) *Gambling winnings*—(1) *In general.* A payor of a reportable gambling winning must not withhold under section 3406 if tax is required to be withheld from the gambling winning under section 3402(q) (relating to the extension of withholding to certain gambling winnings). If the reportable gambling winning is not required to be withheld upon under section 3402(q), withholding under section 3406 applies to the gambling winning if, and only if, the payee does not furnish a taxpayer identification number to the payor. Section 31.3406(b)(3)–1(b)(3) does not apply to a reportable gambling winning. The payor of a reportable gambling winning is not required to aggregate all such winnings made to a payee during a calendar year, nor is the payor required to determine whether an information return was required to be made with respect to the payee for the preceding year.

(2) *Definition of a reportable gambling winning and determination of amount subject to backup withholding.* For purposes of withholding under section 3406, a reportable gambling winning is any gambling winning subject to information reporting under section 6041. The amount of a reportable gambling winning is—

(i) The amount paid with respect to the amount of the wager reduced, at the option of the payor; by

(ii) The amount of the wager.

(3) *Special rules.* Amounts paid with respect to identical wagers are treated as paid with respect to a single wager. The determination of whether wagers are identical is made under § 31.3402(q)–1(c)(1)(ii). In addition, a gambling winning (other than a winning from bingo, keno, or slot machines) is a reportable gambling winning only if the amount paid with respect to the wager is $600 or more and if the proceeds are at least 300 times as large as the amount wagered. See § 7.6041–1 of this chapter to determine whether a winning from bingo, keno, or slot machines is a reportable gambling winning and thus subject to withholding under section 3406.

(e) *Certain real estate transactions.* A real estate reporting person (the so-called broker) as defined in section 6045(e)(2) must not withhold under section 3406 on a payment made with respect to a real estate transaction that is subject to reporting under sections 6045 (a) and (e) and § 1.6045–4 of this chapter.

(f) *Certain payments after an acquisition of accounts or instruments.* A payor who acquires pre-1984 accounts or instruments described in § 31.3406(d)–1(b)(2)(iv) for which the payor does not have a taxpayer identification number or has an obviously incorrect taxpayer identification number as defined in § 31.3406(h)–1(b)(2) must start withholding under section 3406(a)(1)(A) and § 31.3406(d)–1 on those accounts or instruments no later than sixty days following the date of the payor's acquisition of those accounts or instruments.

(g) *Certain gross proceeds.* No withholding under section 3406 is required with respect to any portion of the original issue discount on an instrument or security that is subject to withholding under section 3406 as reportable gross proceeds of such instrument or security under section 6045.

[T.D. 8637, 60 FR 66128, Dec. 21, 1995]

§ 31.3406(g)–3 Exemption while payee is waiting for a taxpayer identification number.

(a) *In general*—(1) *Backup withholding not required for 60 days.* If a payor has received an awaiting-TIN certificate from a payee with respect to an account or instrument receiving reportable interest or dividends as described in section 3406(b)(2), the payor must exempt the payee from withholding under section 3406(a)(1)(A) during the 60-day exemption period to the extent and in the manner described in either paragraph (a) (2) or (3) of this section. The 60-day exemption period means the 60-consecutive-day period beginning with the day the payor receives the awaiting-TIN certificate. The payor must withhold under section 3406 beginning after the 60-day exemption period if the payor has not received a taxpayer identification number from the payee in the manner required in § 31.3406(d)–1. Regardless of whether the payee provides an awaiting-TIN certificate to a payor, the payor is required to withhold under section 3406(a)(1)(D) and § 31.3406(d)–2 on reportable interest or dividend payments as described in § 31.3406(d)–2 if the payee fails to certify, under penalties of perjury, that the payee is not subject to withholding due to notified payee underreporting as required in section 3406(a)(1)(D) and § 31.3406(d)–2.

(2) *Reserve method.* A payor must not withhold under section 3406 during the 60-day exemption period unless the payee (or a joint payee in the case of a joint account) desires to make a withdrawal of more than $500 of either principal or interest from the account in any single transaction during the period. If a payee (or a joint payee) desires to make a withdrawal of more than $500 during the 60-day exemption period, the payor is required under section 3406 to withhold 31 percent of all reportable payments made during the period and at the time of withdrawal unless the payee reserves 31 percent of all reportable payments made to the account during the period.

(3) *Alternative rule; 7-day grace period*—(i) *In general.* A payor who receives an awaiting-TIN certificate may elect, on a payee-by-payee basis or in general, to exempt reportable interest or dividend payments to a payee from withholding under section 3406 applying the rules in paragraph (a)(3) (ii) or (iii) of this section.

(ii) *Withholding on withdrawals.* Under this paragraph (a)(3)(ii), a payor must obtain a certified taxpayer identification number from the payee within 60 days after the date that the payor receives the awaiting-TIN certification. In addition, the payor must withhold under section 3406 on any withdrawals made after the close of 7 business days after the date the awaiting-TIN certification is received and before the earlier of the date that the payor receives a certified taxpayer identification number from the payee, the date the account is closed (in which case the payor must withhold on any reportable payment made at the time the account or relationship is closed), or the date withholding under section 3406 starts on all reportable payments made to the account, instrument, or relationship. All cash withdrawals in an amount up to the reportable payments made from the day after the date of receipt of the awaiting-TIN certification to the date of withdrawal are treated as reportable payments.

(iii) *Withholding regardless of withdrawals.* Under this paragraph (a)(3)(iii), a payor must start withholding under section 3406 on the account not later than 7 business days after the date the payor receives the awaiting-TIN certification on reportable payments thereafter made to the account (whether or not the payee makes a cash withdrawal). The payor must withhold under section 3406 until the earlier of the date the payor receives a certified taxpayer identification number from the payee, the date the account is closed, or the date withholding under section 3406 starts on all reportable payments made to the account, instrument, or relationship. The payor must obtain a certified taxpayer identification number from the payee within 60 days after the date that the payor receives the awaiting-TIN certificate or undertake a mailing each year soliciting the certified taxpayer identification number from the payee until the earlier of the calendar year that the certified taxpayer identification number is received, or the calendar year in which the account is closed. However, if the account is closed in December of a calendar year, the mailing must be made after the account is closed and before January 31 of the subsequent calendar year.

(b) *Special rule for readily tradable instruments.* The 60-day awaiting-TIN exemption described in paragraph (a)(1) of this section applies to payments made with respect to readily tradable instruments only if the payee provides an awaiting-TIN certificate directly to the payor. If a broker acquires a readily tradable instrument through a post-1983 brokerage account (as described in §31.3406(d)–1(c)(2)) for a payee who has no taxpayer identification number, the broker must advise the payor as required in §31.3406(d)–4(a)(1) that the payee failed to provide a taxpayer identification number under penalties of perjury, regardless of whether the payee provides an awaiting-TIN certificate to the broker. Once a payor is notified by a broker that a payee failed to provide a taxpayer identification number in the required manner, or that the payee is subject to withholding under section 3406(a)(1) (B) or (C), the payor must impose withholding under section 3406 for the appropriate period described in §31.3406(e)–1.

(c) *Exceptions*—(1) *In general.* The 60-day awaiting-TIN exemption described in paragraph (a) of this section does not apply to—

(i) Window transactions (as defined in §31.3406(b)(2)–3(b));

(ii) Redemptions of bearer obligations that are subject to reporting under section 6045; or

(iii) Other amounts that are subject to reporting under section 6045 (except as described in paragraph (c)(2) of this section).

(2) *Special rule for amounts subject to reporting under section 6045 other than proceeds of redemptions of bearer obligations.* If a broker's customer does not provide a taxpayer identification number to the broker, and the broker effects a sale that is subject to reporting under section 6045 (other than a redemption of a bearer obligation), §31.3406(d)–3(b) applies, whether or not the sale is pursuant to an instruction by electronic transmission, provided the customer furnishes an awaiting-TIN certificate to the broker before the sale. For purposes of this paragraph (c)(2), the 30-day period provided in §31.3406(d)–3(b) is a 60-day period.

(d) *Awaiting-TIN certificate.* A payee qualifies for the 60-day awaiting-TIN exemption provided in paragraph (a) of this section if the payee furnishes a written statement to the payor, signed under penalties of perjury, that the payee has not been issued a taxpayer identification number, that the payee has applied for a taxpayer identification number or intends to apply for a number in the near future, and that the payee understands that if the payee does not provide a number to the payor within 60 days, the payor is required under section 3406 to withhold 31 percent of any reportable payment thereafter made to the payee until the payor receives a number, and 31 percent of a withdrawal to the extent of reportable payments made to the payee during the 60-day period, as described in paragraph (a) of this section. Language that is substantially similar to the awaiting-TIN certification on Form W–9 will satisfy the requirements of this paragraph (d).

(e) *Form for awaiting-TIN certificate.* A payor may use Form W–9 for the awaiting-TIN certificate, or a payor may include language that is substantially similar to the awaiting-TIN certification on Form W–9 in any other document of the payor. See §31.3406(h)–3, which provides that Form W–9 is the prescribed form but permits use of substitute forms, and specifies the length of time the payor is required to retain the form. If Form W–9 is used, the payee should write ''Applied For'' in the space reserved for the taxpayer identification number.

[T.D. 8637, 60 FR 66129, Dec. 21, 1995]

§31.3406(h)–1 Definitions.

(a) *In general.* For purposes of section 3406 and the regulations thereunder, the definitions of this section apply.

(b) *Taxpayer identification number*—(1) *In general. Taxpayer identification number* means the identifying number assigned to a person under section 6109 (relating to identifying numbers, generally a nine-digit social security number for an individual and a nine-digit employer identification number for a nonindividual, e.g., a corporation, partnership, trust, or estate). An obviously incorrect number is not considered a taxpayer identification number. See §31.6011(b)–2 and §301.6109–1 of this chapter for provisions relating to obtaining a taxpayer identification number.

(2) *Obviously incorrect number. Obviously incorrect number* means a number that does not contain nine digits or a number that includes an alpha character as one of the nine digits.

(c) *Broker. Broker* is defined in section 6045(c)(1) and § 1.6045–1(a)(1) of this chapter. If there could be more than one broker with respect to any acquisition, only the broker having the closest contact (as determined under § 5f.6045–1(c)(3) (ii) and (iii) of this chapter) with the payee is treated as a broker. In the case of any instrument, the term *broker* does not include any person who is the payor with respect to the instrument as described in § 31.3406(a)–2.

(d) *Readily tradable instrument. Readily tradable instrument* means—

(1) Any instrument that is part of an issue any portion of which is traded on an established securities market (within the meaning of section 453(f)(5)); or

(2) Any instrument that is regularly quoted by brokers or dealers making a market.

(e) *Day. Day* means a calendar day unless specified otherwise under any section of the regulations under section 3406. For example, see §§ 31.3406(d)–5(a) and 31.3406(g)–3(a)(2).

(f) *Business day. Business day* means any day other than a Saturday, Sunday, or legal holiday (within the meaning of section 7503).

[T.D. 8637, 60 FR 66130, Dec. 21, 1995; 61 FR 12135, Mar. 25, 1996]

§ 31.3406(h)–2 Special rules.

(a) *Joint accounts*—(1) *Relevant name and taxpayer identification number combination.* For purposes of identifying the account subject to withholding under sections 3406(a)(1) (B) and (C), the relevant name and taxpayer identification number combination is that which is used for information reporting purposes.

(2) *Optional rule for accounts subject to backup withholding under section 3406(a)(1) (B) or (C) where the names are switched.* See § 31.3406(d)–5(c)(4)(iii) under which a payor may withhold under section 3406(a)(1)(B) as required even though the names or taxpayer identification numbers on the account have been switched. The rules under § 31.3406(d)–5(c)(4)(iii) may be applied comparably by a payor who is required to withhold under section 3406(a)(1)(C).

(3) *Joint foreign payees*—(i) *In general.* If the relevant payee listed on a jointly owned account or instrument provides a Form W–8 or documentary evidence described in § 1.1441–1(e)(1)(ii) regarding its foreign status, withholding under section 3406 applies unless every joint payee provides the statement regarding foreign status (under the provisions of chapters 3 or 61 of the Internal Revenue Code and the regulations under those provisions) or any one of the joint owners who has not established foreign status provides a taxpayer identification number to the payor in the manner required in §§ 31.3406(d)–1 through 31.3406(d)–5. See § 1.6049–5(d)(2)(iii) of this chapter for corresponding joint payees provisions.

(ii) *Information reporting on an account including foreign payees.* If any one of the joint payees who has not established foreign status provides a taxpayer identification number under paragraph (a)(3)(i)(B) of this section, that number is the taxpayer identification number that is required to be furnished for purposes of information reporting and withholding under section 3406.

(b) *Backup withholding from an alternative source*—(1) *In general.* A payor may not withhold under section 3406 from a source maintained by the payor other than the source with respect to which there exists a liability to withhold under section 3406 with respect to the payee. See section 3403 and § 31.3403–1, which provide that the payor is liable for the amount required to be withheld regardless of whether the payor withholds.

(2) *Exceptions for payments made in property*—(i) *Backup withholding from alternative source.* In the case of a payment that is made in property (other than money), the payor must withhold under section 3406, 31 percent of the fair market value of the property determined immediately before or on the date of payment. The payor may withhold under section 3406 from the principal amount being deposited with the payor or from another source maintained by the payee with the payor. The source from which the tax is withheld under section 3406 must be payable

to at least one of the persons listed on the account subject to withholding. If the account or source is not payable exclusively to the same person or persons listed on the account subject to withholding under section 3406, then the payor must obtain a written statement from all other persons to whom the account or source is payable authorizing the payor to withhold under section 3406 from the alternative account or source. A payor that elects to withhold under section 3406 from an alternative source may determine the account or source from which the tax is to be withheld, or may allow the payee to designate the alternative source. A payee may not, however, require a payor to withhold under section 3406 from a specific alternative source. See § 31.3402(q)–1(d), *Example 5,* for methods of withholding on prizes, awards, and gambling winnings paid in property other than cash.

(ii) *Deferral of withholding.* If the payor cannot locate, using reasonable care (following procedures substantially similar to those set forth in § 31.3406(d)–5(c)(3)(ii) (A) and (B)), an alternative source of cash from which the payor may satisfy its withholding obligation pursuant to paragraph (b)(2)(i) of this section, the payor may defer its obligation to withhold under section 3406, except for reportable payments of property made in connection with prizes, awards, or gambling winnings, until the earlier of—

(A) The date the payor makes a cash payment to the account subject to withholding under section 3406 or cash is otherwise deposited in the account in a sufficient amount to satisfy the obligation in full; or

(B) The close of the fourth calendar year after the obligation arose.

(iii) *Barter exchanges.* In the case of a barter exchange that issues scrip to, or credits the account of, a member or client of the exchange in payment for property or services, the barter exchange may withhold under section 3406 from—

(A) The scrip or credit, if converted to cash in order to satisfy the deposit requirements of section 6302 and § 31.6302–4; or

(B) Any other source maintained by the exchange for the member or client in the manner described in paragraph (b)(2) of this section.

(c) *Trusts.* Withholding under section 3406 applies to reportable payments made to a trust if any of the conditions for imposing withholding under section 3406 apply to the trust. Generally, a trust is not a payor and will not be required to withhold under section 3406 on reportable payments that it makes to its beneficiary who is subject to withholding under section 3406. The preceding sentence does not apply, however, to a grantor trust with two or more grantors described in § 31.3406(a)–2(b)(4), which is treated as a middleman payor. The trustee of a trust described in this paragraph (c) may certify that the trust's taxpayer identification number is correct and that the trust is not subject to withholding due to notified payee underreporting, without regard to the status of the beneficiaries of the trust.

(d) *Adjustment of prior withholding by middlemen.* A middleman payor (as defined in § 31.3406(a)–2(b)) who receives a payment from which tax has been erroneously withheld under section 3406 may seek a refund of the tax withheld by the payor from whom the middleman payor received the payment (referred to as the "upstream payor"). Alternatively, the middleman payor may obtain a refund of the tax by claiming a credit for the amount of tax withheld by the upstream payor against the deposit of any tax imposed by this chapter which the middleman payor is required to withhold and deposit (as described in section 6413 and § 31.6413(a)–2). In either case, the middleman payor must pay or credit the gross amount of the payment (including the tax withheld) to its payee as though it had received the gross amount of the payment from the upstream payor and must withhold under section 3406 only if one of the conditions for imposing backup withholding exists with respect to its payee. If its payee is not subject to withholding under section 3406, the payor must pay or credit the full amount of the payment to the payee, unless, with respect to payments made after December 31, 1999, the payor chooses to apply prior withholding under section 3406 to an amount required to be withheld under another section of the Internal Revenue Code (such as under section 1441) to the extent permitted under procedures prescribed by the Internal Revenue Service (see § 601.601(d)(2) of this chapter). See § 31.6413(a)–3 regarding repayment by a payor of tax erroneously collected from a payee.

(e) *Conversion of amounts paid in foreign currency into United States dollars—. (1) Convertible foreign currency.* If a payment is made in a currency other than the United States dollar, the amount subject to withholding under section 3406 is determined by applying the statutory rate of backup withholding to the foreign currency payment and converting the amount withheld into United States dollars on the date of payment at the spot rate (as defined in § 1.988–1(d)(1) of this chapter) or pursuant to a reasonable spot rate convention. For example, a withholding agent may use a month-end spot rate or a monthly average spot rate. A spot rate convention must be used consistently with respect to all non-dollar amounts withheld and from year to year. Such convention cannot be changed without the consent of the Commissioner.

(2) *Nonconvertible foreign currency.* [Reserved]

(f) *Coordination with other sections.* For purposes of section 31, chapter 24 (other than section 3402(n)) of subtitle C of the Internal Revenue Code (relating to employment taxes and collection of income tax at source) and so much of subtitle F (other than section 7205) of the Internal Revenue Code (relating to procedure and administration) as relates to this chapter, and the regulations thereunder—

(1) An amount required to be withheld under section 3406 must be treated as a tax required to be withheld under section 3402;

(2) An amount withheld under section 3406 must be treated as an amount withheld under section 3402;

(3) An amount withheld under section 3406 must be deposited as required under § 31.6302–4;

(4) *Wages* includes the gross amount of any reportable payment (as defined in section 3406(b)) except for purposes of section 6014 (relating to an election by the taxpayer not to compute the tax on his annual return);

(5) *Employee* includes a payee of any reportable payment; and

(6) *Employer* includes a payor who is required to withhold the tax under section 3406 (as defined in § 31.3406(a)–2(a)) with respect to any reportable payment (as defined in section 3406(b)).

(g) *Tax liabilities and penalties.* A payor is subject to the same civil and criminal penalties for failing to impose withholding under section 3406 as an employer who fails to withhold on a payment of wages. In addition, a broker may be subject to the penalty under section 6705 (failure of a broker to provide notice to a payor).

(h) *To whom payor is liable for amount withheld.* A payor is not liable to any person for any amount withheld under section 3406. A payor is liable only to the United States for an amount that is required to be withheld as provided in § 31.3403–1.

[T.D. 8637, 60 FR 66130, Dec. 21, 1995; 61 FR 11307, Mar. 20, 1996, as amended by T.D. 8734, 62 FR 53493, Oct. 14, 1997; T.D. 8804, 63 FR 72189, Dec. 31, 1998]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53493, Oct. 14, 1997, § 31.3406(h)–2 was amended by revising paragraph (a)(3)(i); revising the penultimate sentence in paragraph (d); removing the heading of paragraph (e)(1); removing the paragraph designation (e)(1); and removing paragraph (e)(2), effective Jan. 1, 1999. At 63 FR 72183, 72189, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000, and paragraph (d) penultimate sentence, was amended by removing ‘‘December 31, 1998’’ and adding ‘‘December 31, 1999’’, effective Jan. 1, 2000. For the convenience of the user, the superseded text is set forth as follows:

§ 31.3406(h)–2 Special rules.

(a) * * *

(3) *Joint foreign payees*—(i) *In general.* If the first payee listed on an account or instrument provides the penalties of perjury statement regarding its foreign status, withholding under section 3406 applies unless—

(A) Every joint payee provides the statement regarding foreign status (pursuant to the relevant regulations issued under sections 6045 and 6049); or

(B) Any one of the joint payees who has not established foreign status provides a taxpayer identification number to the payor in the manner required in § 31.3406(d)–1.

* * * * *

(d) * * * If its payee is not subject to withholding under section 3406, the middleman payor must pay or credit the full amount of the payment to the payee. * * *

* * * * *

§31.3406(h)–3 Certificates.

(a) *Prescribed form to furnish information under penalties of perjury*—(1) *In general.* Except as provided in paragraph (c) of this section, the Form W–9 is the form prescribed under section 3406 on which the payee certifies, under penalties of perjury, that—

(i) The taxpayer identification number furnished to the payor is correct (as required in §31.3406(d)–1 and §31.3406(d)–5);

(ii) The payee is not subject to withholding due to notified payee underreporting (as required in §31.3406(d)–2);

(iii) The payee is an exempt recipient (as described in §31.3406(g)–1); or

(iv) The payee is awaiting receipt of a taxpayer identification number (as described in §31.3406(g)–3).

(2) *Use of a single or multiple Forms W–9 for accounts of the same payee.* A valid Form W–9 must include the name and taxpayer identification number of the payee. Except as provided in paragraph (b) of this section, the payee must sign under penalties of perjury and date the Form W–9 in order to satisfy the requirements of this section. A payor or broker may require a payee to furnish a separate Form W–9 for each obligation, deposit, certificate, share, membership, contract, or other instrument, or one Form W–9 for all the payee's obligations or relationships with the payor or broker. In addition, a payee of a mutual fund that has a common investment advisor or common principal underwriter with other mutual funds (within the same family of funds) may be permitted, in the discretion of the mutual fund, to provide one Form W–9 with respect to shares acquired or owned in any of the funds.

(b) *Prescribed form to furnish a noncertified taxpayer identification number.* With respect to accounts or other relationships where the payee is not required to certify, under penalties of perjury, that the taxpayer identification number being furnished is correct, the payor or broker may obtain the taxpayer identification number orally or may use Form W–9, a substitute form, or any other document, but the payee is not required to sign the form.

(c) *Forms prepared by payors or brokers—(1) Substitute forms; in general.* A payor or broker may prepare and use a form that contains provisions that are substantially similar to those of the official Form W–9. A payor or broker may use any document relating to the transaction, such as the signature card for an account, so long as the certifications are clearly set forth. A payor or broker who uses a substitute form may furnish orally or in writing the instructions for the Form W–9 that relate to the account. A payor or broker may refuse to accept certifications (including the official Form W–9) that are not made on the form or forms provided by the payor or broker. A payor or broker may refuse to accept a certification provided by a payee only if the payor or broker furnishes the payee with an acceptable form immediately upon receipt of an unacceptable form or within 5 business days of receipt of an unacceptable form. An acceptable form for this purpose must contain a notice that the payor or broker has refused to accept the form submitted by the payee and that the payee must submit the acceptable form provided by the payor in order for the payee not to be subject to withholding under section 3406. If the payor or broker requires the payee to furnish a form for each account of the payee, the payor or broker is not required to furnish an acceptable form until the payee furnishes the payor or broker with the payee's account numbers. A payor or broker may use separate substitute forms to have a payee certify under penalties of perjury that—

(i) The payee's taxpayer identification number is correct; and

(ii) The payee is not subject to withholding under section 3406 due to notified payee underreporting.

(2) *Form for exempt recipient.* A payor or broker may use a substitute form for the payee to certify, under penalties of perjury, that the payee is an exempt recipient (described in §31.3406(g)–1 or described in the respective reporting section), provided the

form contains provisions that are substantially similar to those of the official Form W–9 relating to exempt recipients. A certificate must be prepared in accordance with the instructions applicable to exempt recipients on Form W–9, and must set forth fully and clearly the data called for therein. If a payor will treat the payee as an exempt recipient only if the payee files a certificate as to its exempt status, the certificate is valid only if it contains the payee's taxpayer identification number. Thus, a payee must include the payee's taxpayer identification number on a certificate that a payor requires to be made in order to treat the payee as an exempt recipient.

(d) *Special rule for brokers.* A broker may act as the payee's agent for purposes of furnishing a taxpayer identification number or certification to a payor with respect to any readily tradable instrument (as defined in § 31.3406(h)–1(d)) provided the payee provides a taxpayer identification number on Form W–9 or other acceptable substitute form to the broker. The payor may rely on a taxpayer identification number provided by the broker unless certification is required (as described in § 31.3406(d)–4) and the broker notifies the payor that the number was not certified.

(e) *Reasonable reliance on certificate*—(1) *In general.* A payor is not liable for the tax imposed under section 3406 if the payor's failure to deduct and withhold the tax is due to reasonable reliance, as defined in paragraph (e)(2) of this section, on a Form W–9 (or other acceptable substitute) required by this section.

(2) *Circumstances establishing reasonable reliance.* For purposes of paragraph (e)(1) of this section, a payor can reasonably rely on a Form W–9 (or other acceptable substitute) unless—

(i) The form does not contain the name and taxpayer identification number of the payee (or does not state, in lieu of a taxpayer identification number, that the payee is awaiting receipt of a taxpayer identification number (i.e., an awaiting-TIN certificate));

(ii) The form is not signed and dated by the payee;

(iii) The form does not contain the statement, when required, that the payee is not subject to withholding due to notified payee underreporting;

(iv) The payee has deleted the jurat or other similar provisions by which the payee certifies or affirms the correctness of the statements contained on the form; or

(v) For purposes of section 3406(a)(1)(C), the payor is required to subject the account to which the form relates to withholding under section 3406(a)(1)(C) under the circumstances described in § 31.3406(c)–1(c)(3)(iii).

(f) *Who may sign certificate*—(1) *In general.* A Form W–9 or other acceptable substitute form may be signed by any person who is authorized to sign a declaration under penalties of perjury on behalf of the payee as provided in section 6061 and the regulations thereunder (relating to who may sign generally for an individual, which includes certain agents who may sign returns and other documents), section 6062 and the regulations thereunder (relating to who may sign corporate returns), and section 6063 and the regulations thereunder (relating to who may sign partnership returns).

(2) *Notified payee underreporting.* A payee who has not been notified that he is subject to withholding under section 3406(a)(1)(C) as a result of notified payee underreporting may make the certification related to notified payee underreporting. In addition, a payee who was subject to withholding under section 3406(a)(1)(C) due to notified payee underreporting may certify that he is not subject to withholding under section 3406(a)(1)(C) due to notified payee underreporting if the Internal Revenue Service has provided the payee with written certification that withholding under section 3406(a)(1)(C) due to notified payee underreporting has terminated.

(g) *Retention of certificates*—(1) *Accounts or instruments that are not pre-1984 accounts and brokerage relationships that are post-1983 brokerage accounts.* With respect to an account or instrument that is not a pre-1984 account (as described in § 31.3406(d)–1(b)(3)), or with respect to a brokerage relationship that is a post-1983 brokerage account (as described in § 31.3406(d)–1(c)(2)), a payor or broker who receives a Form W–9 or other acceptable substitute form related to withholding under section 3406 must retain the form in its records for 3 years from the date the account is opened or the instrument is purchased. The form may be retained on microfilm or microfiche.

(2) *Accounts or instruments that are pre-1984 accounts and brokerage relationships that are not post-1983 brokerage accounts.* With respect to a pre-1984 account (as described in § 31.3406(d)–1(b)(1)) or with respect to a brokerage relationship that is not a post-1983 brokerage account (as described in § 31.3406(d)–1(c)(1)), a payor or broker is not required to retain any Form W–9 or other acceptable substitute form. If, however, the payor or broker requires the payee to file only one Form W–9 or substitute form for all accounts or instruments of the payee, the payor or broker must retain the single form in the manner and for the period of time described in paragraph (g)(1) of this section if that form relates to any account or instrument that is not a pre-1984 account or relates to a post-1983 brokerage account. If a payee has certified that the payee is an exempt recipient described in § 31.3406(g)–1, the payor or broker must retain the form unless the payor or broker can establish the existence of procedures that are reasonably calculated to ensure that a payee who has so certified is accurately identified in the payor's or broker's records.

(h) *Cross references.* For the requirement to file an information return (and furnish the related statement) with respect to a reportable payment, particularly if that payment has been subject to withholding under section 3406, see subtitle F, chapter 61, subparts B and C of the Internal Revenue Code. See § 31.6302–4 for the requirement to deposit amounts withheld under section 3406 on either a monthly or semi-weekly basis. See § 31.6011(a)–4(b) for the requirement to file Form 945, Annual Return of Withheld Federal Income Tax, to reflect amounts withheld under section 3406. See § 31.6071(a)–1 for the time for filing the Form 945.

[T.D. 8637, 60 FR 66131, Dec. 21, 1995]

§ 31.3406(i)–1 Effective date.

Sections 31.3406–0 through 31.3406(i)–1 (except §§ 31.3406(d)–5 and 31.3406(g)–1(c) and except for international transactions) are effective after December 31, 1996, and, optionally, for reportable payments made and transactions occurring on or after December 21, 1995. For the effective date of § 31.3406(d)–5, see § 31.3406(d)–5(i). Section 31.3406(g)–1(c) is effective before January 1, 1997. See §§ 35a.9999–0T through 35a.9999–5 of this chapter for rules that apply to international transactions after December 31, 1996.

[T.D. 8637, 60 FR 66133, Dec. 21, 1995]

§ 31.3406(j)–1 Taxpayer Identification Number (TIN) matching program.

(a) *The matching program.* Under section 3406(i), the Commissioner has the authority to establish Taxpayer Identification Number (TIN) matching programs. The Commissioner may prescribe in a revenue procedure (see § 601.601(d)(2) of this chapter) or other appropriate guidance the scope of and the terms and conditions of participating in any TIN matching program. In general, under a matching program, prior to filing information returns with respect to reportable payments as defined under section 3406(b)(1), a payor of those reportable payments who is entitled to participate in the matching program may contact the Internal Revenue Service (IRS) with respect to the TIN furnished by a payee who has received or is likely to receive a reportable payment. The IRS will inform the payor whether or not a name/TIN combination furnished by the payee matches a name/TIN combination maintained in the data base utilized for the particular matching program.

(b) *Notice of incorrect TIN.* No matching details received by a payor through a matching program will constitute a notice regarding an incorrect name/TIN combination under § 31.3406(d)–5(c) for purposes of imposing backup withholding under section 3406(a)(1)(B).

(c) *Application of section 3406(f).* The provisions of section 3406(f), relating to confidentiality of information, apply to any matching details received by a payor through the matching program. A payor may not take into account any such matching details in determining whether to open or close an account with a payee.

(d) *Reasonable cause.* The IRS will not use either a payor's decision not to participate in an available TIN matching program or the results received by a payor from participation in a TIN matching program implemented under the authority of this section as a basis to assert that the payor lacks reasonable cause under section 6724(a) for the failure to file an information return under section 6721 or to furnish a correct payee statement under section 6722. If the establishment of reasonable cause may be relevant to a substantial number of the participants in a TIN matching program implemented under the authority of this section, the extent to which, if any, a payor may establish reasonable cause by participating in the TIN matching program will be set forth in the guidance establishing the program.

(e) *Definition of account. Account* means any account, instrument, or other relationship with a payor and with respect to which a payor has made or is likely to make a reportable payment as defined in section 3406(b)(1).

(f) *Effective date.* The provisions of this section are effective on and after June 18, 1997.

[T.D. 8721, 62 FR 33009, June 18, 1997]

Subpart F—General Provisions Relating to Employment Taxes (Chapter 25, Internal Revenue Code of 1954)

§ 31.3501(a)–1T Question and answer relating to the time employers must collect and pay the taxes on noncash fringe benefits (Temporary).

The following questions and answers relate to the time employers must collect and pay the taxes imposed by subtitle C on noncash fringe benefits:

Q–1: If a noncash fringe benefit constitutes ''wages'' under section 3121(a), 3306(b), or 3401(a), or constitutes ''compensation'' under section 3231(e), when must an employer collect and pay the taxes imposed by Subtitle C?

A–1: For purposes of an employer's liability to collect and pay the taxes imposed by Subtitle C, an employer may deem such fringe benefit to be paid at any time on or after the date on which it is provided, as long as such date is on or before the last day of the calendar quarter in which such benefit is provided. An employer may consider the benefit to be provided in two or more parts for purposes of the preceding sentence. For example, if a fringe benefit with a fair market value of $1,000 is provided on January 1, 1985, the employer could deem $500 paid on February 28, 1985 and $500 paid on March 31, 1985.

With respect to noncash fringe benefits provided during the first calendar quarter of 1985, a special rule applies. Such benefits may be deemed paid at any time on or after the date on which they are provided as long as the date they are deemed paid is on or before the last day of the second calendar quarter of 1985.

In addition, for purposes of § 31.6302(c)–1(a)(1)(i), the term ''tax'' does not include the employer tax under section 3111 with respect to noncash fringe benefits which are deemed by the employer to be paid on the last day of any calendar quarter. For purposes of the first sentence of § 31.6302(c)–2(a)(1), the phrase ''employer tax imposed after December 31, 1983, under section 3221 (a) and (b)'' will not include any such employer tax with respect to noncash fringe benefits which are deemed by the employer to be paid on the last day of the quarter; provided that for purposes of deposits required under § 31.6302(c)–1(a)(1)(v), such first sentence applies to such noncash fringe benefits.

Notwithstanding anything in this section to the contrary, if an employer in fact withholds, the amount withheld is subject to the general deposit rules.

The manner in which and the time at which the employer withholds amounts from the wages of an employee to pay the taxes imposed under section 3101, 3201, and/or 3402 will generally be left to be determined by the employer and the employee. Any delay in withholding, however, does not affect the employer's obligation upon the filing of an employment tax return, to pay amounts which would be due under this subtitle if the employer had withheld, with respect to noncash fringe benefits, the amount which would have been required to be withheld if such noncash fringe benefits had been paid in cash on the date the benefits were deemed paid. However, if such amounts are not withheld from the wages of an employee within a reasonable period after payment of the taxes by the employer, payment by the employer may be deemed additional compensation of the employee.

Q–2: Are any fringe benefits excepted from the rules contained in Q/A–1 of this section?

A–2: Yes. The rules contained in Q/A–1 of this section do not apply to the transfer of personal property (both tangible and intangible) of a kind held for investment or to the transfer of real property. Accordingly, an employer is liable for the collection and payment of taxes imposed by this subtitle when such property is transferred. For example, stock transferred in connection with the performance of services is paid, for purposes of this subtitle C, on the date the stock is transferred, i.e., on the date the stock vests pursuant to section 83 (absent a section 83(b) election).

Q–3: What is an example of the application of the rules contained in Q/A–1 of this section with respect to obligations under Chapters 21 and 24 of subtitle C?

A–3: All of employer A's employees received $100 in cash as wages each week from A. In addition, during a calendar quarter, each such employee receives noncash fringe benefits, the fair market value of which is $500. A deems all such noncash fringe beneftis to be paid on the last day of the quarter. As of the end of the quarter, no amount has been withheld from the employee's wages with respect to such noncash fringe benefits, and A has ''undeposited taxes'' (within the meaning of § 31.6302(c)–1(a)(1)(i)) of more than $3,000 attributable to amounts actually withheld under section 3102 or section 3402 or due under section 3111 with respect to cash wages of A's employees. The amount which A must deposit within 3 banking days after the end of the quarter will be determined without regard to the noncash fringe benefits deemed paid on the last day of the quarter.

During the month following the quarter, A withholds from its employees with respect to the noncash fringe benefits deemed paid on the last day of the quarter. As A withholds amounts, such amounts become ''taxes'' subject to § 31.6302(c)–1(a)(1)(i). If, as of the date of filing of the return for the period which includes the last day of the quarter, A has not deposited all amounts with respect to the quarter which are due under section 3111 or which would have been due had A withheld, under sections 3102 and 3402, with respect to noncash fringe benefits, the amount which would have been required to be withheld had such benefits been paid in cash, A shall pay the balance with its return. A must make such payment regardless of whether, at the time the return is filed, he has actually withheld all amounts which he would have been required to withhold had such benefits been paid in cash.

Q–4: If an employee is provided with a noncash fringe benefit and separates from service before the benefit is deemed paid by the employer, is the employer liable for the taxes imposed by subtitle C?

A–4: Yes. The employer's liability is unaffected by his ability to collect the tax from the former employer.

Q–5: If an entity other than the employer provides a noncash fringe benefit to an employee, is that entity considered the employer of such employee with respect to such noncash fringe benefit for any purposes of subtitle C?

A–5: The provision of noncash fringe benefits by an entity to an employee of another employer does not make such entity the employer of such employee with respect to such noncash fringe benefit for any purpose of subtitle C, so long as such noncash fringe benefits are incidental to the provision of wages by the employer to such employee. For example, if two unrelated airlines, A and B, enter into a reciprocal agreement where by the parents of employees of both airlines are entitled to free flights on both airlines, the fact that A is providing a noncash fringe benefit to the employees of B generally will not make A the employer of such employees for purposes of subtitle C.

Q–6: Do special rules apply to the provision of taxable noncash fringe benefits by a nonemployer under a reciprocal agreement with the employee's employer?

A–6: If the provision of taxable noncash fringe benefits meets the requirements of Q/A–5 of this section, the nonemployer provider of the benefits is not required to withhold. The employer must take the steps necessary to obtain the relevant information from the provider of the benefits in order to enable the employer to satisfy, in a timely manner, its obligations under subtitle C to collect and pay taxes with respect to the noncash fringe benefits provided by the nonemployer.

Q–7: For purposes of subtitle C, how is the fair market value of an employer-provided automobile or other road vehicle during any time period to be determined?

A–7: The value of the availability of an employer-provided automobile or other road vehicle must be determined under the rules provided in § 1.61–2T and § 1.132–1T. (For purposes of this section, the terms ''automobile'' and ''road vehicle'' have the meaning given those terms in Q/A–11 of § 1.61–2T). For example, assume that an employee adopts the special rule provided in § 1.61–2T and that the Annual Lease Value, as defined in § 1.61–2T, of an automobile or other road vehicle is $2,100. The automobile or other road vehicle is provided to employee A on January 1, 1985. As of March 31, A had driven the automobile or other road vehicle 1,000 personal miles and 3,000 miles in the course of his employer's business. For the quarter, A would have had wages of $131.25 attributable to his personal use of the automobile or other road vehicle computed by subtracting a $393.75 working condition fringe from $525 ($2,100 divided by 4). See section 132(d) and § 1.132–1T. During the second quarter of 1985, A drives the automobile or other road vehicle only 1,000 miles, all of which are personal. In order to calculate the value of the wages provided to A in the second quarter in the form of the availability of the employer-provided automobile or other road vehicle, first A's employer calculates the Annual Lease Value attributable to the first six months of 1985 which is $1,050 ($2,100 divided by 2). Second, A's employer calculates the working condition fringe exclusion which is $630 ($1,050 multiplied by a fraction the numerator of which is A's business mileage (3,000 miles) and the denominator of which is A's total mileage (5,000 miles)). The calculations result in a total inclusion of $420 ($1,050—$630). From the total inclusion of $420, the wages provided in the first quarter, $131.25, are subtracted, leaving $288.75 as the wages includible in the second quarter attributable to the availability to A of the employer-provided automobile or other road vehicle.

Q–8: May an employer treat any part of the Annual Lease Value or Daily Lease Value (as defined in § 1.61–2T), or the fair market value if the special rule of § 1.61–2T is not or cannot be used, of an automobile or other road vehicle made available to an employee as includible in the employee's gross income without regard to whether the employee has used the automobile or other road vehicle in the employer's business?

A–8: No, except as otherwise provided in this Q/A–8, an employer may not include any amount in an employee's income with respect to an employer-provided automobile or other road vehicle unless such inclusion is based on:

(a) Records or a statement submitted by an employee that contain the business and total mileage for the period beginning on January 1, 1985, and ending on the last day of the employer's taxable year that began in 1984, or

(b) Records that satisfy the employer's ''adequate contemporaneous record'' requirement under section 274(d)(4) and the regulations thereunder for the employer's taxable years beginning after December 31, 1984.

For example, an employer who is subject to (b) of this Q/A–8 may rely on a statement submitted by the employee indicating for the period the number of miles driven by the employee in the employer's business and the total number of miles driven by the employee unless the employer knows or has reason to know the statement submitted is not based on ''adequate contemporaneous records''. (For purposes of this section, if a road vehicle is available to any person and such availability would be taxable to an employee, miles driven by that person will be considered miles driven by the employee).

Notwithstanding the preceding paragraph of this Q/A–8, an employer may include in an employee's income the value of the availability of an employer-provided road vehicle, calculated without regard to a working condition fringe exclusion based on business mileage if one of the conditions listed in §1.274–6T(f)(1) is satisfied with respect to the relevant period.

In addition, the employer must, before including any amount in an employee's income with respect to an employer-provided road vehicle, take into account other working condition fringe exclusions, such as the security exclusion discussed in §1.132–1T. If proper calculation of an exclusion requires information from the employee and the employee does not respond within a reasonable period of time to a request for that information or produces information which the employer knows or has reason to know is not accurate, the employer may disregard such exclusion in reporting the employee's gross income.

Q–8a: May an employer withhold amounts attributable to noncash fringe benefits on the basis of average wages as permitted under section 3402(h)(1)?

A–8a: In general, yes. In estimating wages under section 3402(h)(1)(A), however, the employer must take into account estimated business use of the benefit (such as an employer-provided road vehicle). In no event, however, may the amount reported by the employer as ''wages'' for any employee for any quarter be based on an estimation. However, the rules in Q/A–1 of this section regarding permissible delays in actual withholding apply.

Q–9: If an employee purchases any property or service from an employer at a discount and the discount is not excludable under section 132 and any applicable regulations thereunder, when is the noncash fringe benefit provided?

A–9: Such property or service is provided at the time that ownership is transferred, in the case of property, or the time service is rendered, in the case of services. This will be true regardless of when the employee pays for such property or service or the date payment is due or the rate of interest charged prior to payment. The time at which ownership of the property is transferred must be determined under general tax principles.

Q–10: What rules apply with respect to the treatment of the payment of any noncash fringe benefit as the payment of supplemental wages under section 3402?

A–10: An employer may treat the payment of any noncash fringe benefit as the payment of supplemental wages. Thus, if noncash fringe benefits are provided and tax has been withheld from the employee's regular wages, the employer may determine the tax to be withheld with respect to such noncash fringe benefits by using a flat percentage rate of 20 percent, without allowance for exemptions and without reference to any regular payment of wages. For example, assume that during a calendar quarter A receives from his employer a taxable noncash fringe benefit with a fair market value of $1,000. If the requirements specified above are satisfied, A's employer may determine the tax to be withheld with respect to such benefit by using a flat percentage rate of 20 percent. The employer may also determine the tax to be withheld with respect to such benefit by use of the method described in §31.3402 (g)–1(a)(2).

(Approved by the Office of Management and Budget under control numbers 1545–0074 and 1545–0907)

[T.D. 8004, 50 FR 756, Jan. 7, 1985, as amended by T.D. 8009, 50 FR 7046, Feb. 20, 1985]

§31.3502–1 Nondeductibility of taxes in computing taxable income.

For provisions relating to the nondeductibility, in computing taxable income under subtitle A, of the taxes imposed by sections 3101, 3201, and 3211, and of the tax deducted and withheld under chapter 24, see §§1.164–2 and 1.275–1 of this chapter (Income Tax Regulations). For provisions relating to the credit allowable to the recipient of the income in respect of the tax deducted and withheld under chapter 24, see §1.31–1 of this chapter (Income Tax Regulations).

[T.D. 6780, 29 FR 18148, Dec. 22, 1964]

§ 31.3503–1 Tax under chapter 21 or 22 paid under wrong chapter.

If, for any period, an amount is paid as tax—

(a) Under chapter 21 or corresponding provisions of prior law by a person who is not liable for tax for such period under such chapter or prior law, but who is liable for tax for such period under chapter 22 or corresponding provisions of prior law, or

(b) Under chapter 22 or corresponding provisions of prior law by a person who is not liable for tax for such period under such chapter or prior law, but who is liable for tax for such period under chapter 21 or corresponding provisions of prior law,

the amount so paid shall be credited against the tax for which such person is liable and the balance, if any, shall be refunded. Each claim for refund or credit under this section shall be made on Form 843 and in accordance with § 31.6402(a)–2 and the applicable provisions of section 6402(a) and the regulations thereunder in Part 301 of this chapter (Regulations on Procedure and Administration).

§ 31.3504–1 Acts to be performed by agents.

(a) *In general.* In the event wages as defined in chapter 21 or 24 of the Internal Revenue Code of 1954, or compensation as defined in chapter 22 of such Code, of an employee or group of employees, employed by one or more employers, is paid by a fiduciary, agent, or other person, or if such fiduciary, agent, or other person has the control, receipt, custody, or disposal of such wages, or compensation, the district director, or director of a service center, may, subject to such terms and conditions as he deems proper, authorize such fiduciary, agent, or other person to perform such acts as are required of such employer or employers under those provisions of the Internal Revenue Code of 1954 and the regulations thereunder which have application, for purposes of the taxes imposed by such chapter or chapters, in respect of such wages or compensation. If the fiduciary, agent, or other person is authorized by the district director, or director of a service center, to perform such acts, all provisions of law (including penalties) and of the regulations prescribed in pursuance of law applicable to employers in respect of such acts shall be applicable to such fiduciary, agent, or other person. However, each employer for whom such fiduciary, agent, or other person performs such acts shall remain subject to all provisions of law (including penalties) and of the regulations prescribed in pursuance of law applicable to an employer in respect of such acts. Any application for authorization to perform such acts, signed by such fiduciary, agent, or other person, shall be filed with the district director, or director of a service center, with whom the fiduciary, agent, or other person will, upon approval of such application, file returns in accordance with such authorization.

(b) *Prior authorizations continued.* An authorization in effect under section 1632 of the Internal Revenue Code of 1939 on December 31, 1954, continues in effect under section 3504 and is subject to the provisions of paragraph (a) of this section.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D 7012, 34 FR 7693, May 15, 1969]

§ 31.3505–1 Liability of third parties paying or providing for wages.

(a) *Personal liability in case of direct payment of wages*—(1) *In general.* A lender, surety, or other person—

(i) Who is not an employer for purposes of section 3102 (relating to deduction of tax from wages under the Federal Insurance Contributions Act), section 3202 (relating to deduction of tax from compensation under the Railroad Retirement Tax Act), or section 3402 (relating to deduction of income tax from wages) with respect to an employee or group of employees, and

(ii) Who pays wages on or after January 1, 1967, directly to such employee or group of employees, employed by one or more employers, or to an agent on behalf of such employee or employees,

shall be liable in his own person and estate for payment to the United States of an amount equal to the sum of the taxes required to be deducted and withheld from those wages by the employer under subtitle C of the Code and interest from the due date of the employer's return relating to such taxes for the period in which the wages are paid.

(2) *Example.* The provisions of this paragraph may be illustrated by the following example:

Example. Pursuant to a wage claim of $200, A, a surety company, paid a net amount of $158 to B, an employee of the X Construction Company. This was done in accordance with A's payment bond covering a private construction job on which B was an employee. If X Construction Company fails to make timely payment or deposit of $42.00, the amount of tax required by subtitle C of the Code to be deducted and withheld from, a $200 wage payment to B, A becomes personally liable for $42.00 (*i.e.*, an amount equal to the unpaid taxes), plus interest upon this amount from the due date of X's return.

(b) *Personal liability where funds are supplied*—(1) *In general.* A lender, surety, or other person who—

(i) Advances funds to or for the account of an employer for the specific purpose of paying wages of the employees of that employer, and

(ii) At the time the funds are advanced, has actual notice or knowledge (within the meaning of section 6323(i)(1)) that the employer does not intend to, or will not be able to, make timely payment or deposit of the amounts of tax required by subtitle C of the Code to be deducted and withheld by the employer from those wages,

shall be liable in his own person and estate for payment to the United States of an amount equal to the sum of the taxes which are required by subtitle C of the Code to be deducted and withheld from wages paid on or after January 1, 1967, and which are not paid over to the United States by the employer, and interest from the due date of the employer's return relating to such taxes. However, the liability of the lender, surety, or other person shall not exceed 25 percent of the amount supplied by him for the payment of wages. The preceding sentence and the second sentence of section 3505(b) limit the liability of a lender, surety, or other person arising solely by reason of section 3505, and they do not limit the liability which the lender, surety or other person may incur to the United States as a third-party beneficiary of an agreement between the lender, surety, or other person and the employer. The liability of a lender, surety, or other person does not include penalties imposed on the taxpayer.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. D, a savings and loan association, advances $10,000 to Y for the specific purpose of paying the net wages of Y's employees. D advances those funds with knowledge that Y will not be able to make timely payment of the taxes required to be deducted and withheld from these wages by subtitle C of the Code, Y uses the $10,000 to pay the net wages of his employees but fails to remit withholding taxes under subtitle C in the amount of $2,600. D's liability, under this section, is limited to $2,500, 25 percent of the amount supplied for the payment of wages to Y's employees.

Example 2. E, a loan company, advances $15,000 to F, a contractor, for the specific purpose of paying $20,000 of net wages due to F's employees. E advances those funds with knowledge that F will not be able to make timely payment of the taxes required to be deducted and withheld from these wages by subtitle C of the Code. F applies $5,000 of its own funds toward payment of these wages. The amount of tax required to be deducted and withheld from the gross wages is $4,500. The limitation applicable to E's liability is $3,750 (25 percent of $15,000). However, because E furnished only a portion of the total net wages, E is liable for $3,375 of the taxes required to be deducted and withheld ($4,500×$15,000/$20,000).

(3) *Ordinary working capital loan.* The provisions of section 3505(b) do not apply in the case of an ordinary working capital loan made to an employer, even though the person supplying the funds knows that part of the funds advanced may be used to make wage payments in the ordinary course of business. Generally, an ordinary working capital loan is a loan which is made to enable the borrower to meet current obligations as they arise. The person supplying the funds is not obligated to determine the specific use of an ordinary working capital loan or the ability of the employer to pay the amounts of tax required by subtitle C of the Code to be deducted and withheld. However, section 3505(b) is applicable where the person supplying the funds has actual notice or knowledge (within the meaning of section 6323(i)(1)) at the time of the advance that the funds, or a portion thereof, are to be used specifically to pay net wages, whether or

not the written agreement under which the funds are advanced states a different purpose. Whether or not a lender has actual notice or knowledge that the funds are to be used to pay net wages, or merely that the funds may be so used, depends upon the facts and circumstances of each case. For example, a lender, who has actual notice or knowledge that the withheld taxes will not be paid, will be deemed to have actual notice or knowledge that the funds are to be used specifically to pay net wages where substantially all of the employer's ordinary operating expenses consist of salaries and wages even though fund for other incidental operating expenses may be supplied pursuant to an agreement described as a working capital loan agreement.

(c) *Definition of other person*—(1) *In general.* As used in this section, the term ''other person'' means any person who directly pays the wages or supplies funds for the specific purpose of paying the wages of an employee or group of employees of another employer. It does not include a person acting only as agent of the employer or as agent of the employees.

(2) *Examples.* The provisions of this paragraph may be illustrated by the following examples:

Example 1. Pursuant to an agreement between L, a labor union, and M, an employer, M makes monthly vacation payments (of a sum equal to a certain percentage of the remuneration paid to each union member employed by M during the previous month) to a union administered pool plan under which each employee's rights are fully vested and nonforfeitable from the time the money is paid by M. Vacation allowances are accumulated by the plan and distributed to eligible employees during their vacations. L, acting merely as a conduit with respect to these payments, would incur no liability under section 3505.

Example 2. N, a construction company, maintains a payroll account with the O Bank in which N deposits its own funds. Pursuant to an automated payroll service agreement between N and O, O prepares payroll checks and earnings statements for each of N's employees reflecting the net pay due each such employee. These checks are delivered to N for signature. After the checks are signed, O distributes them directly to N's employees on the regularly scheduled pay day. O, acting only in the capacity of a disbursing agent of N's funds, would incur no liability under section 3505 with respect to these payroll distributions. However, O may incur liability under section 3505 in the capacity of a lender if it supplies the funds for the payment of wages.

(d) *Payment of taxes and interest*—(1) *Procedure for payment.* A lender, surety, or other person may satisfy the personal liability imposed upon him by section 3505 by executing Form 4219 and filing it, accompanied by payment of the amount of tax and interest due the United States, in accordance with the instructions for the form. In the event that the lender, surety, or other person does not satisfy the liability imposed by section 3505, the United States may collect the liability by appropriate civil proceedings commenced within 10 years after assessment of the tax against the employer.

(2) *Effect of payment*—(i) *In general.* A person paying the amounts of tax required to be deducted and withheld by subtitle C of the Code as a result of section 3505 and this section is not required to pay the employer's portion of the payroll taxes upon those wages, or file an employer's tax return with respect to those wages, or furnish annual wage and tax statements to the employees.

(ii) *Amounts paid by a lender, surety, or other person.* Any amounts paid by the lender, surety, or other person to the United States pursuant to this section shall be credited against the liability of the employer on whose behalf those payments are made and shall also reduce the total liability imposed upon the lender, surety, or other person under section 3505 and this section.

(iii) *Amounts paid by the employer.* Any amounts paid to the United States by an employer and applied to his liability under subtitle C of the Code shall reduce the total liability imposed upon that employer by subtitle C. Such payments will also reduce the liability imposed upon a lender, surety, or other person under section 3505 except that such liability shall not be reduced by any portion of an employer's payment applied against the employer's liability under subtitle C which is in excess of the total liability imposed upon the lender, surety, or other person under section 3505. For example, if a lender supplies $1,000 to an employer for the payment of net wages, upon which $300 withholding tax liability is imposed, a part-payment of $25 by the employer which is applied to this liability would reduce the employer's total liability under subtitle C of the Code by that amount, but the liability imposed upon the lender by section 3505(b) in an amount equal to the withholding tax liability of the employer, which is limited to 25 percent of the amount supplied by him, would remain $250. However, if the employer makes another payment of $200 which is applied to his liability for the withholding taxes, the lender's liability under section 3505 attributable to the withholding taxes is reduced by $175 ($225 less $50 (the amount by which the employer's liability exceeds the lender's liability after application of the limitation)). Thus, after the second payment by the employer, the lender's liability under section 3505(b) is $75 ($250 less $175), plus interest due on the underpayment for the period of underpayment, to a maximum of $250, 25 percent of the funds supplied.

(3) *Extensions of the period for collection.* Prior to the expiration of the 10-year period for collection after assessment against the employer, the lender, surety, or other third party may agree in writing with the district director, service center director, or compliance center director to extend the 10-year period for collection. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. If any timely proceeding in court for the collection of the tax and any applicable interest is commenced, the period during which such tax and interest may be collected shall be extended and shall not expire until the liability for the tax (or a judgment against the lender, surety, or other third party arising from such liability) is satisfied or becomes unenforceable.

(e) *Returns required by employers and statements for employees.* This section does not relieve the employer of the responsibilities imposed upon him to file the returns and supply the receipts and statements required under subchapter A, Chapter 61 of the Code (relating to returns and records).

(f) *Time when liability arises.* The liability under section 3505 and this section of a lender, surety, or other person paying or supplying funds for the payment of wages is incurred on the last day prescribed for the filing of the employer's Federal employment tax return (determined without regard to any extension of time) in respect of such wages.

(g) *Effective date.* These regulations are effective on August 1, 1995.

[T.D. 7430, 41 FR 35175, Aug. 20, 1976, as amended by T.D. 8604, 60 FR 39110, Aug. 1, 1995]

§ 31.3506–1 Companion sitting placement services.

(a) *Definitions*—(1) *Companion sitting placement service.* For purposes of this section, the term ''companion sitting placement service'' means a person (whether or not an individual) engaged in the trade or business of placing sitters with individuals who wish to avail themselves of the sitters' services.

(2) *Sitters.* For purposes of this section, the term ''sitters'' means individuals who furnish personal attendance, companionship, or household care services to children or to individuals who are elderly or disabled.

(b) *General rule.* For purposes of subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes), a companion sitting placement service shall not be treated as the employer of its sitters, and the sitters shall not be treated as the employees of the placement service. However, the rule of the preceding sentence shall apply only if the companion sitting placement service neither pays nor receives (directly or through an agent) the salary or wages of the sitters, but is compensated, if at all, on a fee basis by the sitters or the individuals for whom the sitting is performed.

(c) *Individuals deemed self-employed.* Any individual who, by reason of this section, is deemed not to be the employee of a companion sitting placement service shall be deemed to be self-employed for purposes of the tax on self-employment income (see sections 1401–1403 and the regulations thereunder in Part 1 of this chapter (Income Tax Regulations)).

(d) *Scope of rules.* The rules of this section operate only to remove sitters and companion sitting placement services from the employee-employer relationship when, under §§ 31.3121(d)–1 and 31.3121(d)–2, that relationship would otherwise exist. Thus, if, under §§ 31.3121(d)–1 and 31.3121(d)–2, a sitter is considered to be the employee of the individual for whom the sitting is performed rather than the employee of the companion sitting placement service, this section has no effect upon that employee-employer relationship.

(e) *Examples.* The provisions of this section may be illustrated by the following examples:

Example 1. X is an agency that places babysitters with individuals who desire babysitting services. X furnishes all the sitters with an instruction manual regarding their conduct and appearance, requires them to file semimonthly reports, and determines the total fee to be charged the individual for whom the sitting is performed. Individuals who need a babysitter contact the agency, are informed of the charges, and, if agreement is reached, a sitter is sent to perform the services. The sitter collects the entire amount of the charges and remits a percentage to X as a fee for the placement. X is a companion sitting placement service within the meaning of paragraph (a)(1) of this section. Therefore, since the agency does not actually pay or receive the wages of the sitters, X is not treated as the employer of the sitters for purposes of this subtitle. The sitters are deemed to be self-employed for the purpose of the tax imposed by section 1401.

Example 2. Assume the same facts as in example 1, except that the individual for whom the sitting is performed pays to X the entire amount of the charges. X retains a percentage and pays the difference to the sitter. Since X actually receives and pays the wages of the sitters, X is the employer of the sitters.

Example 3. As a service to the community a neighborhood association maintains a list of individuals who are available to babysit. Parents in need of a sitter contact the association and are provided with a list of names and telephone numbers. The association charges no fee for the service and takes no action other than compiling the list of sitters and making it available to members of the community. Issues such as hours of work, amount of payment, and the method by which the services are performed are all resolved between the sitter and parent. A, a parent, used the list to hire B to sit for A's child. B performs the services four days a week in A's home and follows specific instructions given by A. Under § 31.3121(d)–1, B is the employee of A rather than the employee of the neighborhood association. Consequently, this section does not apply and B remains the employee of A.

(f) *Effective date.* This section shall apply to remuneration received after December 31, 1974.

(Secs. 3506 and 7805 of the Internal Revenue Code of 1954; 91 Stat. 1356 (26 U.S.C. 3506); 68A Stat. 917 (26 U.S.C. 7805))

[T.D. 7691, 45 FR 24129, Apr. 9, 1980]

§ 31.3507–1 Advance payments of earned income credit.

(a) *General rule*—(1) *In general.* Every employer paying wages after June 30, 1979, to an employee with respect to whom an earned income credit advance payment certificate is in effect must, at the time of paying the wages, also pay the employee the advance earned income credit amount of that employee. For the purposes of applying this section and § 31.3507–2—

(i) In the case of an individual who receives wages which are subject to income tax withholding, the term ''employee'' has the same meaning as set forth in section 3401(c) and the regulations thereunder, and the term ''wages'' has the same meaning as set forth in sections 3401(a) and 3402(e) and the regulations under those sections; and

(ii) In the case of an individual who does not receive wages which are subject to income tax withholding, but who receives wages which are subject to employee FICA taxes, the term ''employee'' has the same meaning as set forth in section 3121(d) and the regulations thereunder and the term ''wages'' has the same meaning as set forth in section 3121(a) and the regulations thereunder.

An individual not having wages subject to either income tax withholding or employee FICA taxes is not entitled to advance payments of the earned income credit. Moreover, notwithstanding paragraph (a)(1)(i) and (ii) of this section, employers are not required to pay advance earned income credit amounts to agricultural workers paid on a daily basis. For this purpose an ''agricultural worker'' is an employee who performs ''agricultural labor'', as that term is defined in section 3121(g) and the regulations thereunder.

(2) *Cross references.* For determination of the advance earned income credit amount of an employee, see paragraph (b) of this section. For rules relating to the treatment of the payment of an employee's advance earned income credit amount as equivalent to payment by the employer of withholding and FICA taxes, see paragraph (c) of this section. For rules describing the earned income credit advance payment certificate, see §31.3507–2 (a) and (b). For rules relating to the employee's furnishing of the earned income credit advance payment certificate and the payroll periods for which the certificate is effective, see §31.3507–2 (c) and (d).

(b) *Advance earned income credit amount.* The advance earned income credit amount of an employee is determined, with respect to any payroll period, on the basis of the employee's wages from the employer for the period and in accordance with the advance amount tables prescribed by the Commissioner of Internal Revenue and then in effect for the payroll period. See, however, paragraph (c)(2) of this section. The advance amount paid is reflected on the employee's W–2 form as a separate item (and neither as a reduction of withholding nor an increase in compensation). For purposes of applying this section and §31.3507–2, the term ''payroll period'' has the meaning set forth in section 3401(b) and the regulations thereunder. As required by section 3507(c)(2)(A), these advance amount tables must be similar in form to, and coordinated with, the tables prescribed under section 3402 (relating to income tax collected at the source). Sections 3507(c)(2)(B) and 3507(c)(2)(C) provide, respectively, separate rules for the treatment in the advance amount tables of the advance earned income credit of the following two separate classes of employees:

(1) Employees who are not married (within the meaning of section 143), or employees whose spouses do not have an earned income credit advance payment certificate in effect; and

(2) Employees whose spouses have an earned income credit advance payment certificate in effect.

If during the calendar year an employer has paid an employee amounts of earned income, within the meaning of section 43(c)(2)(A)(i), which in the aggregate equal or exceed $10,000, the employer need not make further payments of advance earned income credit to the employee during that calendar year.

(c) *Payment of advance earned income credit amount as payment of withholding and FICA taxes*—(1) *In general.* (i) The provisions of this paragraph (c) apply for all purposes of the Internal Revenue Code of 1954. Payments of advance earned income credit amounts pursuant to paragraph (a)(1) of this section do not constitute the payment of compensation. These payments by the employer are treated as made—

(A) First, from the aggregate amount, with respect to all employees, required to be deducted and withheld for the payroll period under section 3401 (relating to income tax withholding);

(B) Second, from the aggregate amount, with respect to all employees, required to be deducted for the payroll period under section 3102 (relating to employee FICA taxes); and

(C) Third, from the aggregate amount of the taxes imposed for the payroll period under section 3111 (relating to employer FICA taxes).

For purposes of the requirements of sections 3401, 3102, and 3111, as the case may be, and 6302, amounts equal to the advance earned income credit amounts paid to employees are treated as if paid to the Treasury Department on the day on which the wages (and advance amounts) are paid to the employees. The employer must report the payment and treatment of the advance amounts on the employer's Form 941, 941E, 942, or 943, as the case may be, in accordance with the applicable instructions.

(ii) The provisions of paragraph (c)(1)(i) of this section may be illustrated by the following example:

Example. Employer X has ten employees, each of whom is entitled to advance earned income credit payment of $10. The total of advance amounts paid by the employer to the ten employees for the payroll period is

$100. The total of income tax withholding for the payroll period is $90. The total of employee FICA taxes for the payroll period is $61.30, and the total of employer FICA taxes for the payroll period is also $61.30. Under the rules of paragraph (c)(1)(i) of this section, the total of advance amounts paid to employees is treated as if X had paid the Treasury Department on the day X paid the employees' wages: first, the $90 aggregate amount of income tax withholding; and second, $10 of the aggregate amount of employee FICA tax. X remains liable only for $112.60 of the aggregate FICA tax [$51.30+$61.30=$112.60].

(2) *Advance payments exceeding taxes due.* (i) if, for any payroll period, the aggregate amount of advance earned income credit amounts required to be paid by an employer under paragraph (a)(1) of this section exceeds the sum of the amounts for the payroll period referred to in paragraphs (c)(1)(i) (A) through (C) of this section, the employer reduces each advance amount paid for the payroll period by an amount which bears the same ratio to the excess of the advance amounts as the subject advance amount bears to the aggregate of advance amounts for the payroll period. However, this paragraph (c)(2) does not apply if the employer makes the election provided by paragraph (c)(3) of this section.

(ii) The provisions of paragraph (c)(2) of this section may be illustrated by the following example.

Example. Assume the same facts as the example in paragraph (c)(1)(ii) of this section, except that the employer is a state government which does not pay FICA taxes. Under these facts, the advance amounts would be $10 greater than the $90 total of income tax withholding for the payroll period. Assume 10 employees each receiving $10 in advance payments. Under the rule of this paragraph (c)(2), the employer X reduces the amount of the advance amount paid to each employer by 1⁄10, computed as follows: $10/$100=1⁄10. This is the same result as would be obtained by reducing the advance payment of $10 for each of the ten employees by one-tenth 10/100 of the $10 excess or $1.00.

(3) *Election to treat excess amounts as advance tax payment.* In lieu of reducing advance payments under paragraph (c)(2) of this section, an employer may elect under this paragraph (c)(3) to pay in full all advance earned income credit amounts. However, if no election is made, the employer is required to reduce advance amounts paid in accordance with paragraph (c)(2) of this section. The election, if made, applies to all advance earned income credit amounts required to be paid for the payroll period. The employer reflects the election on the employer's Form 941, 941E, 942, or 943 as the case may be, and must specify (with supporting computations) the amount of the excess of advance amounts paid and the payroll period to which the excess relates. Separate elections may be made for separate payroll periods. The excess of advance amounts paid is treated as an advance payment by the employer of employment taxes described in paragraph (c)(3)(i) through (iii) of this section and due for the period reported on the Form 941, 941E, 942, or 943 which includes the payroll period during which the excess amounts were paid. The amount of the excess advance payment is applied to the amounts of the employer's liability—

(i) First, for income tax withholding due under section 3401 for the reporting period in which the payment is made;

(ii) Second, for employee FICA taxes due under section 3102 for the reporting period in which the payment is made; and

(iii) Third, for employer FICA taxes due under section 3111 for the reporting period in which the payment is made.

If the amount of the employment taxes (as described) for which the employer remains liable for the reporting period in which the excess payment is made is less than the excess payment, the employer may claim a refund of that portion of the excess amount paid which exceeds the employer's remaining liability for these taxes for the reporting period. This refund may be claimed, in the same manner as a refund of wage withholding taxes paid by the employer under section 3401, on the employer's Form 941, 941E, 942, or 943, as the case may be, for the reporting period. In the absence of a claim for refund, that portion of the excess amount will be applied by the Internal Revenue Service against the employer's liability for employment taxes reported on the employer's Form 941, 941E, 942, or 943, as the case may be, filed for the next reporting period.

(4) *Failure to make advance payments.* The failure to pay an employee, at the time required by paragraph (a)(1) of this section, all or any part of an advance earned income credit amount as required by this section is treated, for all purposes including penalties, as a failure by the employer as of that time to deduct and withhold under chapter 24 of the Internal Revenue Code of 1954 an amount equal to the advance amount (or part thereof) not paid. This treatment applies to the failure to pay an advance amount to an eligible employee without regard to whether the employee is ultimately not entitled to claim the earned income credit (in full or in part) on a return for the year, so long as the employee has a valid earned income credit advance payment certificate in effect with the employer at the time when the wages were paid. If an employer fails to pay an advance earned income credit amount as required under this section, the advance amount will not be collected by the Internal Revenue Service from the employer if the employer has properly withheld and deposited all income taxes and FICA taxes applicable with respect to the employee. However, such amount may be collected if the employer has not properly withheld and deposited these taxes.

[T.D. 7766, 46 FR 10151, Feb. 2, 1981]

§ 31.3507–2 Earned income credit advance payment certificates.

(a) *Definition.* For the purposes of this section and § 31.3507–1, an earned income credit advance payment certificate is a statement furnished by an employee to the employer which—

(1) Certifies that the employee reasonably expects to be eligible to receive the earned income credit provided by section 43 for the employee's last taxable year under subtitle A of the Internal Revenue Code of 1954 which begins in the calendar year in which the wages are paid:

(2) Certifies that the employee does not have an earned income credit advance payment certificate in effect for the calendar year (in which the wages are paid) with respect to the payment of wages by another employer, and

(3) States if the employee's spouse has an earned income credit advance payment certificate in effect with any employer. For the rule for determining if an employee's spouse has a certificate in effect, see paragraph (c)(3) of this section.

(b) *Form and content of earned income credit advance payment certificate*—(1) *In general.* Form W–5 (Earned Income Credit Advance Payment Certificate) is the prescribed form for the earned income credit advance payment certificate. The Form W–5 must be prepared in accordance with the instructions applicable thereto and must set forth fully and clearly the data therein called for. In lieu of the prescribed form, a form the provisions of which are identical with those of the prescribed form may be used.

(2) *Invalid certificates.* A Form W–5 does not meet the requirements of section 3507 or this section and is invalid if it is not completed or signed or contains an alteration or unauthorized addition (as defined in § 31.3402(f)(5)–1(b)(1) and (2)). Any earned income credit advance payment certificate which the employee clearly indicates to be false by oral statement or written statement to the employer must be treated by the employer as a certificate which is invalid as of the date of the employee's statement. For purposes of the preceding sentence, the term ''employer'' includes any individual authorized by the employer to receive earned income credit advance payment certificates or to make payroll distributions. If an employer receives from an employee an invalid certificate, the employer must consider it a nullity with respect to all payments of wages thereafter to the employee and must inform the employee of the certificate's invalidity. The employer is not required to ascertain whether any completed and signed earned income credit advance payment certificate is correct. However, the employer should inform the district director if the employer has reason to believe that the certificate contains any incorrect statement.

(c) *When earned income credit advance payment certificate takes effect*—(1) *No previous certificate.* An earned income credit advance payment certificate furnished the employer where no previous certificate is or has been in effect with the employer for that employee for the calendar year takes effect with—

(i) The date of the beginning of the first payroll period ending on or after the date on which the certificate is received by the employer;

(ii) The date of the first payment of wages made without regard to a payroll period on or after the date on which the certificate is received by the employer; or

(iii) The first day of the calendar year for which the certificate is furnished, if that day is later than the otherwise applicable effective date specified in paragraph (c)(1)(i) or (ii) of this section.

(2) *Previous certificate.* Except as otherwise provided in this paragraph (c)(2), an earned income credit advance payment certificate furnished the employer where a previous certificate is or has been in effect with the employer for that employee for the calendar year takes effect on the date of the first payment of wages made on or after the first status determination date (as defined in paragraph (c)(4) of this section) occurring at least thirty days after the date on which the certificate is received by the employer. However, if the employer so chooses, the employer may treat the certificate as effective on the date of any payment of wages made on or after the date on which the certificate is received by the employer (without regard to any status determination date).

(3) *Certificate of spouse.* For the sole purpose of applying paragraph (a)(3) of this section, in determining if a certificate is in effect with respect to an employee's spouse, the spouse's certificate is treated as then in effect if the spouse's certificate will be or is reasonably expected to be in effect on the first status determination date following the date on which the employer receives the employee's certificate.

(4) *Status determination date.* For the purposes of this section, the term ''status determination date'' means January 1, May 1, July 1, and October 1 of each year.

(d) *Period during which certificate remains in effect; change of status*—(1) *Period certificate remains in effect.* An earned income credit advance payment certificate which takes effect during a calendar year continues in effect with respect to the employee only during that calendar year and until revoked by the employee or until another certificate takes effect. See paragraphs (d)(2) and (c)(2) of this section.

(2) *Change of status*—(i) *Revocation of certificate.* If, after an employee has furnished an earned income credit advance payment certificate—

(A) The employee no longer wishes to receive advance earned income credit payments; or

(B) There has been a change of circumstances which has the effect of either making the employee ineligible for the earned income credit for the taxable year or causing a certificate to be in effect for the employee's spouse, then the employee must revoke the certificate previously furnished by furnishing the employer a new certificate (Form W–5 or identical form) in revocation of the earlier certificate. Depending upon the nature of the change of circumstances, the employer may be required, pursuant to the new certificate, to pay further advance earned income credit amounts to the employee (but in different amounts than previously paid to the employee). The Form W–5 (or identical form) must be prepared in accordance with the instructions applicable thereto and must set forth fully and clearly the data therein called for. In the case of revocation due to change of circumstances, the new certificate in revocation must be delivered to the employer within ten days after the employee first learns of the change of circumstances. The new certificate is effective under the rules provided in paragraph (c)(2) of this section for later certificates. A new certificate furnished by an employee which is invalid within the meaning of paragraph (b)(2) of this section is considered a nullity with respect to all payments of wages thereafter to the employee. The prior certificate of the employee remains in effect, unless the employee clearly indicates by an oral or written statement to the employer that the prior certificate is invalid. See paragraph (b)(2) of this section.

The employer is not required to ascertain whether any employee has experienced a change of circumstances described in subdivision (i)(B) of this paragraph which necessitates the employee's furnishing a new certificate. However, the employer should inform the district director if the employer has reason to believe than an employee has experienced a change of circumstances as described if the employee does not deliver a new certificate to the employer within the ten day period.

(ii) *Change in spouse's certificate.* If, after an employee has furnished an earned income credit advance payment certificate stating that a certificate is in effect for the spouse of the employee, the certificate of the spouse is no longer in effect, the employee may furnish the employer with a new certificate which reflects this change of circumstances.

[T.D. 7766, 46 FR 10152, Feb. 2, 1981]

Subpart G—Administrative Provisions of Special Application to Employment Taxes (Selected Provisions of Subtitle F, Internal Revenue Code of 1954)

§31.6001–1 Records in general.

(a) *Form of records.* The records required by the regulations in this part shall be kept accurately, but no particular form is required for keeping the records. Such forms and systems of accounting shall be used as will enable the district director to ascertain whether liability for tax is incurred and, if so, the amount thereof.

(b) *Copies of returns, schedules, and statements.* Every person who is required, by the regulations in this part or by instructions applicable to any form prescribed thereunder, to keep any copy of any return, schedule, statement, or other document, shall keep such copy as a part of his records.

(c) *Records of claimants.* Any person (including an employee) who, pursuant to the regulations in this part, claims a refund, credit or abatement, shall keep a complete and detailed record with respect to the tax, interest, addition to the tax, additional amount, or assessable penalty to which the claim relates. Such record shall include any records required of the claimant by paragraph (b) of this section and by §§31.6001–2 to 31.6001–5, inclusive, which relate to the claim.

(d) *Records of employees.* While not mandatory (except in the case of claims), it is advisable for each employee to keep permanent, accurate records showing the name and address of each employer for whom he performs services as an employee, the dates of beginning and termination of such services, the information with respect to himself which is required by the regulations in this subpart to be kept by employers, and the statements furnished in accordance with the provisions of §31.6051–1.

(e) *Place and period for keeping records.* (1) All records required by the regulations in this part shall be kept, by the person required to keep them, at one or more convenient and safe locations accessible to internal revenue officers, and shall at all times be available for inspection by such officers.

(2) Except as otherwise provided in the following sentence, every person required by the regulations in this part to keep records in respect of a tax (whether or not such person incurs liability for such tax) shall maintain such records for at least four years after the due date of such tax for the return period to which the records relate, or the date such tax is paid, whichever is the later. The records of claimants required by paragraph (c) of this section shall be maintained for a period of at least four years after the date the claim is filed.

(f) *Cross reference.* See §§31.6001–2 to 31.6001–5, inclusive, for additional records required with respect to the Federal Insurance Contributions Act, the Railroad Retirement Tax Act, the Federal Unemployment Tax act, and the collection of income tax at source on wages, respectively.

§31.6001–2 Additional records under Federal Insurance Contributions Act.

(a) *In general.* (1) Every employer liable for tax under the Federal Insurance Contributions Act shall keep records of all remuneration, whether in cash or in a medium other than cash, paid to his employees after 1954 for services (other than agricultural labor which constitutes or is deemed to constitute employment, domestic service in a private home of the employer, or service not in the course of the employer's trade or business) performed for him after 1936. Such records shall show with respect to each employee receiving such remuneration—

(i) The name, address, and account number of the employee and such additional information with respect to the employee as is required by paragraph (c) of § 31.6011(b)–2 when the employee does not advise the employer what his account number and name are as shown on an account number card issued to the employee by the Social Security Administration.

(ii) The total amount and date of each payment of remuneration (including any sum withheld therefrom as tax or for any other reason) and the period of services covered by such payment.

(iii) The amount of each such remuneration payment which constitutes wages subject to tax. See §§ 31.3121(a)–1 to 31.3121(a)(12)–1, inclusive.

(iv) The amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected. See paragraph (b) of § 31.3102–1 for provisions relating to collection of amounts equivalent to employee tax.

(v) If the total remuneration payment (paragraph (a)(1)(ii) of this section) and the amount thereof which is taxable (paragraph (a)(1)(iii) of this section) are not equal, the reason therefor.

(2) Every employer shall keep records of the details of each adjustment or settlement of taxes under the Federal Insurance Contributions Act made pursuant to the regulations in this part. The employer shall keep as a part of his records a copy of each statement furnished pursuant to paragraph (c) of § 31.6011(a)–1.

(3) Every employer shall keep records of all remuneration in the form of tips received by his employees after 1965 in the course of their employment and reported to him pursuant to section 6053(a). The employer shall keep as part of his records employee statements of tips furnished him pursuant to section 6053(a) (unless the information disclosed by such statements is recorded on another document retained by the employer pursuant to paragraph (a)(1) of this section) and copies of employer statements furnished employees pursuant to section 6053(b).

(b) *Agricultural labor, domestic service, and service not in the course of employer's trade or business.* (1) Every employer who pays cash remuneration after 1954 for the performance for him after 1950 of agricultural labor which constitutes or is deemed to constitute employment, of domestic service in a private home of the employer not on a farm operated for profit, or of service not in the course of his trade or business shall keep records of all such cash remuneration with respect to which he incurs, or expects to incur, liability for the taxes imposed by the Federal Insurance Contributions Act, or with respect to which amounts equivalent to employee tax are deducted pursuant to section 3102(a). See §§ 31.3101–3, 31.3111–3, and 31.3121(a)–2 for provisions relating, respectively, to the liability for employee tax which is incurred when wages are received, the liability for employer tax which is incurred when wages are paid, and the time when wages are paid and received. Such records shall show with respect to each employee receiving such cash remuneration—

(i) The name of the employee.

(ii) The account number of each employee to whom wages for such services are paid within the meaning of § 31.3121(a)–2, and such additional information as is required by paragraph (c) of § 31.6011(b)–2 when the employee does not advise the employer what his account number and name are as shown on an account number card issued to the employee by the Social Security Administration.

(iii) The amount of such cash remuneration paid to the employee (including any sum withheld therefrom as tax or for any other reason) for agricultural labor which constitutes or is deemed to constitute employment, for domestic service in a private home of the employer not on a farm operated for profit, or for service not in the course of the employer's trade or business; the calendar month in which such cash remuneration was paid; and the character of the services for which such cash remuneration was paid. When the employer incurs liability for the taxes imposed by the Federal Insurance Contributions Act with respect to any such cash remuneration which he did not previously expect would be subject to the taxes, the amount of any such cash remuneration not previously made a matter of record shall be determined by the employer to the best of his knowledge and belief.

(iv) The amount of employee tax, or any amount equivalent to employee tax, collected with respect to such cash remuneration and the calendar month in which collected. See paragraph (b) of §31.3102–1 for provisions relating to collection of amounts equivalent to employee tax.

(v) To the extent material to a determination of tax liability, the number of days during each calendar year after 1956 on which agricultural labor which constitutes or is deemed to constitute employment is performed by the employee for cash remuneration computed on a time basis.

(2) Every person to whom a ''crew leader'', as that term is defined in section 3121(i), furnishes individuals for the performance of agricultural labor after December 31, 1958, shall keep records of the name; permanent mailing address, or if none, present address; and identification number, if any, of such ''crew leader''.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7001, 34 FR 1003, Jan. 23, 1969]

§31.6001–3 Additional records under Railroad Retirement Tax Act.

(a) *Records of employers.* (1) Every employer liable for tax under the Railroad Retirement Tax Act shall keep records of all remuneration (whether in money or in something which may be used in lieu of money), other than tips, paid to his employees after 1954 for services rendered to him (including ''time lost'') after 1954. Such records shall show with respect to each employee—

(i) The name and address of the employee.

(ii) The total amount and date of each payment of remuneration to the employee (including any sum withheld therefrom as tax or for any other reason) and the period of service (including any period of absence from active service) covered by such payment.

(iii) The amount of such remuneration payment with respect to which the tax is imposed.

(iv) The amount of employee tax collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected.

(v) If the total payment of remuneration (paragraph (a)(1)(ii) of this section) and the amount thereof with respect to which the tax is imposed (paragraph (a)(1)(iii) of this section) are not equal, the reason therefor.

(2) The employer shall keep records of the details of each adjustment or settlement of taxes under the Railroad Retirement Tax Act made pursuant to the regulations in this part.

(b) *Records of employee representatives.* Every individual liable for employee representative tax under the Railroad Retirement Tax Act shall keep records of all remuneration (whether in money or in something which may be used in lieu of money) paid to him after 1954 for services rendered (including ''time lost'') by him as an employee representative after 1954. Such records shall show—

(1) The name and address of each employee organization employing him.

(2) The total amount and date of each payment of remuneration for services rendered as an employee representative (including any sum withheld therefrom as tax or for any other reason) and the period of service (including any period of absence from active service) covered by such payment.

(3) The amount of such remuneration payment with respect to which the employee representative tax is imposed.

(4) If the total payment of remuneration (paragraph (a)(2) of this section) and the amount thereof with respect to which the employee representative tax is imposed (paragraph (a)(3) of this section) are not equal, the reason therefor.

§ 31.6001–4 Additional records under Federal Unemployment Tax Act.

(a) *Records of employers.* Every employer liable for tax under the Federal Unemployment Tax Act for any calendar year shall, with respect to each such year, keep such records as are necessary to establish—

(1) The total amount of remuneration (including any sum withheld therefrom as tax or for any other reason) paid to his employees during the calendar year for services performed after 1938.

(2) The amount of such remuneration which constitutes wages subject to the tax. See § 31.3306(b)–1 through § 31.3306(b)(8)–1.

(3) The amount of contributions paid by him into each State unemployment fund, with respect to services subject to the law of such State, showing separately (i) payments made and neither deducted nor to be deducted from the remuneration of his employees, and (ii) payments made and deducted or to be deducted from the remuneration of his employees.

(4) The information required to be shown on the prescribed return and the extent to which the employer is liable for the tax.

(5) If the total remuneration paid (paragraph (a)(1) of this section) and the amount thereof which is subject to the tax (paragraph (a)(2) of this section) are not equal, the reason therefor.

(6) To the extent material to a determination of tax liability, the dates, in each calendar quarter, on which each employee performed services not in the course of the employer's trade or business, and the amount of cash remuneration paid at any time for such services performed within such quarter See § 31.3306(c)(3)–1.

The term ''remuneration,'' as used in this paragraph, includes all payments whether in cash or in a medium other than cash, except that the term does not include payments in a medium other than cash for services not in the course of the employer's trade or business. See § 31.3306(b)(7)–1.

(b) *Records of persons who are not employers.* Any person who employs individuals in employment (see §§ 31.3306(c)–1 to 31.3306(c)–3, inclusive) during any calendar year but who considers that he is not an employer subject to the tax (see § 31.3306(a)–1) shall, with respect to each such year, be prepared to establish by proper records (including, where necessary, records of the number of employees employed each day) that he is not an employer subject to the tax.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6658, 28 FR 6642, June 27, 1963]

§ 31.6001–5 Additional records in connection with collection of income tax at source on wages.

(a) Every employer required under section 3402 to deduct and withhold income tax upon the wages of employees shall keep records of all remuneration paid to (including tips reported by) such employees. Such records shall show with respect to each employee—

(1) The name and address of the employee, and after December 31, 1962, the account number of the employee.

(2) The total amount and date of each payment of remuneration (including any sum withheld therefrom as tax or for any other reason) and the period of services covered by such payment.

(3) The amount of such remuneration payment which constitutes wages subject to withholding.

(4) The amount of tax collected with respect to such remuneration payment, and, if collected at a time other than the time such payment was made, the date collected.

(5) If the total remuneration payment (paragraph (a)(2) of this section) and the amount thereof which is taxable (paragraph (a)(3) of this section) are not equal, the reason therefor.

(6) Copies of any statements furnished by the employee pursuant to paragraph (b)(12) of § 31.3401(a)–1 (relating to permanent residents of the Virgin Islands).

(7) Copies of any statements furnished by the employee pursuant to §§ 31.3401(a)(6)–1 and 31.3401(a)(7)–1, relating to nonresident alien individuals.

(8) Copies of any statements furnished by the employee pursuant to § 31.3401(a)(8)(A)–1 (relating to residence or physical presence in a foreign country).

(9) Copies of any statements furnished by the employee pursuant to

§31.3401(a)(8)(C)–1 (relating to citizens resident in Puerto Rico).

(10) The fair market value and date of each payment of noncash remuneration, made to an employee after August 9, 1955, for services performed as a retail commission salesman, with respect to which no income tax is withheld by reason of §31.3402(j)–1.

(11) [Reserved]

(12) In the case of the employer for whom services are performed, with respect to payments made directly by him after December 31, 1955, under an accident or health plan (as defined in section 105 and the regulations thereunder)—

(i) The beginning and ending dates of each period of absence from work for which any such payment was made; and

(ii) Sufficient information to establish the amount and weekly rate of each such payment.

(13) The withholding exemption certificates (Forms W–4 and W–4E) filed with the employer by the employee.

(14) The agreement, if any, between the employer and the employee for the withholding of additional amounts of tax pursuant to §31.3402(i)–1.

(15) To the extent material to a determination of tax liability, the dates, in each calendar quarter, on which the employee performed services not in the course of the employer's trade or business, and the amount of cash remuneration paid at any time for such services performed within such quarter. (See §31.3401(a)(4)–1.)

(16) In the case of tips received by an employee after 1965 in the course of his employment, copies of any statements furnished by the employee pursuant to section 6053(a) unless the information disclosed by such statements is recorded on another document retained by the employer pursuant to the provisions of this paragraph.

(17) Any request of an employee under section 3402(h)(3) and §31.3402(h)(3)–1 to have the amount of tax to be withheld from his wages computed on the basis of his cumulative wages, and any notice of revocation thereof.

The term ''remuneration,'' as used in this paragraph, includes all payments whether in cash or in a medium other than cash, except that the term does not include payments in a medium other than cash for services not in the course of the employer's trade or business, and does not include tips received by an employee in any medium other than cash or in cash if such tips amount to less than $20 for any calendar month. See §§31.3401(a)(11)–1 and 31.3401(a)(16)–1, respectively.

(b) The employer shall keep records of the details of each adjustment or settlement of income tax withheld under section 3402 made pursuant to the regulations in this part.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6606, 27 FR 8516, Aug. 25, 1962; T.D. 6908, 31 FR 16776, Dec. 31, 1966; T.D. 7001, 34 FR 1003, Jan. 23, 1969; T.D. 7048, 35 FR 10292, June 24, 1970; T.D. 7053, 35 FR 11628, July 21, 1970; T.D. 7888, 48 FR 17588, Apr. 25, 1983]

§31.6001–6 Notice by district director requiring returns, statements, or the keeping of records.

The district director may require any person, by notice served upon him, to make such returns, render such statements, or keep such specific records as will enable the district director to determine whether or not such person is liable for any of the taxes to which the regulations in this part have application.

§31.6011(a)–1 Returns under Federal Insurance Contributions Act.

(a) *Requirement*—(1) *In general.* Except as otherwise provided in §31.6011 (a)–5, every employer required to make a return under the Federal Insurance Contributions Act, as in effect prior to 1955, for the calendar quarter ended December 31, 1954, in respect of wages other than wages for agricultural labor, shall make a return for each subsequent calendar quarter (whether or not wages are paid in such quarter) until he has filed a final return in accordance with §31.6011(a)–6. Except as otherwise provided in §31.6011(a)–5, every employer not required to make a return for the calendar quarter ended December 31, 1954, shall make a return for the first calendar quarter thereafter in which he pays wages, other than wages for agricultural labor, subject to the tax imposed by the Federal

Insurance Contributions Act as in effect after 1954, and shall make a return for each subsequent calendar quarter (whether or not wages are paid therein) until he has filed a final return in accordance with § 31.6011(a)–6. Except as otherwise provided in § 31.6011 (a)–8 and in subparagraphs (3) and (4) of this paragraph, Form 941 is the form prescribed for making the return required by this subparagraph. Such return shall not include wages for agricultural labor required to be reported on any return prescribed by subparagraph (2) of this paragraph. The return shall include wages received by an employee in the form of tips only to the extent of the tips reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a).

(2) *Employers of agricultural workers*—(i) *Quarterly returns for 1955.* Every employer who, at any time before October 1 of the calendar year 1955, incurs liability of $100 or more for the taxes imposed by the Federal Insurance Contributions Act with respect to wages paid in such year for agricultural labor shall make a return—

(a) For the first calendar quarter of such year if the liability for such taxes incurred in such quarter is $100 or more,

(b) For the period consisting of the first and second calendar quarters of such year if the liability for such taxes incurred in those quarters totals $100 or more, except that such return shall be made only for the second calendar quarter if a return was required under *(a)* of this subdivision and if the liability for such taxes incurred in the second calendar quarter is $100 or more, and

(c) For the period consisting of the first, second, and third calendar quarters of such year if the liability for such taxes incurred in those quarters totals $100 or more, except that such return shall be made *(1)* only for the period consisting of the second and third calendar quarters if a return was required under *(a)* of this subdivision but not under *(b)* of this subdivision, and if the total liability for such taxes incurred in the second and third calendar quarters totals $100 or more; or *(2)* only for the third calendar quarter if a return was required under *(b)* of this subdivision, and if the liability for such taxes incurred in the third calendar quarter is $100 or more.

Form 943A is the form prescribed for making the return required by this subdivision, except that, if the return is required to be filed with the office of the United States Internal Revenue Service in Puerto Rico, the return shall be made on Form 943A–PR if the Internal Revenue Service furnishes Form 943A–PR to the employer for use in lieu of Form 943A (see § 31.6091–1).

(ii) *Annual returns for 1955 and subsequent years.* Every employer who pays wages after 1954 for agricultural labor with respect to which taxes are imposed by the Federal Insurance Contributions Act shall make a return for the first calendar year in which he pays such wages and for each calendar year thereafter (whether or not wages are paid therein) until he has filed a final return in accordance with § 31.6011(a)–6. Form 943 is the form prescribed for making the annual return required by this subdivision, except that, if the return is required to be filed with the office of the United States Internal Revenue Service in Puerto Rico, the return shall be made on Form 943PR if the Internal Revenue Service furnishes Form 943PR to the employer for use in lieu of Form 943 (see § 31.6091–1).

(3) *Employers of domestic workers.* Form 942 is the form prescribed for use by every employer in making a return as required under paragraph (a)(1) of this section in respect of wages, as defined in the Federal Insurance Contributions Act, paid by him in any calendar quarter for domestic service in a private home of the employer not on a farm operated for profit. If, however, the employer is required under paragraph (a)(1) of this section to make a return on Form 941 for such calendar quarter, such employer, at his election may—

(i) Report all wages on Form 941, or

(ii) Report on Form 942 the wages for domestic service in a private home of the employer not on a farm operated for profit and omit such wages from the return on Form 941.

An employer entitled to make the election referred to in the preceding sentence who has chosen one method shall not change to the other method without first notifying the internal revenue office with which he is required to file his returns that he will thereafter use such other method. See, however, §31.6011(a)–6 relating to final returns on Form 941. An employer who makes a return of tax on form 942 pursuant to this section shall submit as part of such return for a period ending December 31, or for any period for which such return is made as a final return, the Internal Revenue Service copy of a Form W-2 for each employee with respect to whose wages tax is reported thereon. The provisions of this subparagraph shall not apply to any employer filing a return on Forms 941PR or 942PR (see §31.6091–1).

(4) *Employers in Puerto Rico or the Virgin Islands.* Form 941PR is the form prescribed for use in making the return required under paragraph (a)(1) of this section in the case of every employer who is required to file such return with the office of the United States Internal Revenue Service in Puerto Rico, except that the return shall be made on Form 941VI if the Internal Revenue Service furnishes Form 941VI to the employer for use in lieu of Form 941PR. However, Form 941 is the form prescribed for making such return in the case of every such employer who is required pursuant to §31.6011(a)–4 to make a return of income tax withheld from wages.

(b) *When to report wages.* Wages with respect to which taxes are imposed by the Federal Insurance contributions Act shall be reported in the return of such taxes required under this section or §31.6011(a)–5 for the return period in which they are actually paid unless they were constructively paid in a prior return period, in which case such wages shall be reported only in the return for such prior period. However, if such wages are deemed to be paid in a later return period, they shall be reported only in the return for such later period. See §31.3121(a)–2 relating to the time when wages are paid or deemed to be paid.

(c) *Correction of returns or schedules.* If in a return required under this section or §31.6011(a)–5, or in any other manner, the employer fails to report, or incorrectly reports, the name, account number, or wages of an employee, the employer shall furnish to the internal revenue office with which he is required to file his returns a written statement fully explaining the omission or error; except that such statement is not required by this paragraph if correction of the omission or error is made in connection with a supplemental return, adjustment, credit, refund, or abatement. The employer shall include in such statement his identification number (except that an identification number need not be included if the omission or error is with respect to information required to be reported on a return on Form 942), each return period for which the data were omitted or for which the incorrect data were furnished, the data incorrectly reported for each period, and the data which should have been reported. A copy of such statement shall be retained by the employer as a part of his records under §31.6001–2. No particular form is prescribed for making such statement, but if printed forms are desired, any internal revenue office will supply copies of Form 941c or Form 941cPR, whichever is appropriate, upon request.

(d) *Returns by employees in respect of tips.* If—

(1) An employee, during a calendar year, is paid wages in the form of tips which are subject to the tax under section 3101, and

(2) Any portion of the tax under section 3101 in respect of such wages cannot be collected by the employer from wages (exclusive of tips) of such employee or from funds turned over by the employee to the employer,

the employee shall make a return for the calendar year in respect of the employee tax not collected by the employer. Except as otherwise provided in this subparagraph, the return shall be made on Form 1040. The form to be used by residents of the Virgin Islands, Guam, or American Samoa is Form 1040SS. In the case of a resident of Puerto Rico who is not required to make a return of income under section 6012(a), the form to be used is Form 1040SS, except that Form 1040PR shall be used if it is furnished by the Internal Revenue Service to such resident for use in lieu of Form 1040SS.

(e) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §§ 31.6071 (a)–1 and 31.6091–1, respectively.

(f) *Wages paid in nonconvertible foreign currency.* For provisions relating to returns filed by certain employers who pay wages in nonconvertible foreign currency, see § 301.6316–7 of this chapter (Regulations on Procedure and Administration).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7001, 34 FR 1004, Jan. 23, 1969; T.D. 7001, 34 FR 1826, Feb. 7, 1969; T.D. 7200, 37 FR 16544, Aug. 16, 1972; T.D. 7351, 40 FR 17144, Apr. 17, 1975; T.D. 7396, 41 FR 1903, Jan. 13, 1976]

§ 31.6011(a)–2 Returns under Railroad Retirement Tax Act.

(a) *Requirement*—(1) *Employers.* Every employer shall make a return for the first return period after 1954 within which compensation taxable under the Railroad Retirement Tax Act is paid to his employee or employees for services rendered after 1954, and for each subsequent return period (whether or not taxable compensation is paid therein) until he has filed a final return in accordance with § 31.6011(a)–6. For calendar years after 1975, the return period shall be the calendar year; for calendar years prior to 1976, the return period shall be the calendar quarter. Form CT–1 is the form prescribed for making the return required under this paragraph. One original and a duplicate of each return on Form CT–1 shall be filed with the director of the service center.

(2) *Employee representatives.* Every employee representative shall make a return for the first calendar quarter after 1954 within which he is paid taxable compensation for services rendered after 1954 as an employee representative, and for each subsequent calendar quarter (whether or not he is paid taxable compensation therein) until he has filed a final return in accordance with § 31.6011(a)–6. Form CT–2 is the form prescribed for making the return required under this subparagraph. One original and a duplicate of each return on Form CT–2 shall be filed with the director of the service center.

(b) *When to report compensation*—(1) *In general.* Except as otherwise provided in subparagraph (2) of this paragraph, compensation taxable under the Railroad Retirement Tax Act shall be reported in the return required under this section for the period in which it is deemed, under paragraph (d) of § 31.3231(e)–1 to be paid, unless under such section the compensation may be deemed to be paid in more than one return period, in which case it shall be reported only in the return for the first return period in which it is deemed to be paid.

(2) *Pre-1976 returns of employers required by State law to pay compensation on weekly basis*—(i) *In general.* If any employer is required by the laws of any State to pay compensation weekly in any calendar year prior to 1976, the return of tax with respect to such compensation may, at the election of such employer, cover all payroll weeks which, or the major part of which, fall within the period for which a return of tax is required by paragraph (a)(1) of this section. This provision shall not apply, however, to any payroll week which falls in two calendar years. Any employer who elects to file a return as provided in this subparagraph shall notify the district director in writing of such election and shall include therein a statement setting forth the facts which entitle him to make the election. Such notice shall be in duplicate and shall be attached to the original and duplicate of the return for the first period to which such election applies. Any election so made shall be binding upon the employer with respect to all returns subsequently made by him until the director of the service center authorizes or directs the employer to make a return on a different basis. For the purpose of determining the time when compensation is deemed to be paid in accordance with paragraph (d) of § 31.3231(e)–1 and of determining the due date of a return in accordance with paragraph (b) of § 31.6071(a)–1, the calendar month following the period covered by the return of an employer making such election is the same calendar month which would be determinative

for such purposes if the employer had not made the election.

(ii) *Prior elections.* An election made by an employer, pursuant to the provisions of 26 CFR (1939) 410.501(b) (Regulations 100) or of 26 CFR (1939) 411.601 (b) (Regulations 114), which is in force and effect at the time the employer makes his first return under this section shall satisfy the requirements of paragraph (b)(2)(i) of this section with respect to the making of an election and shall be binding upon the employer with respect to all returns made by him under this section until the director of the service center authorizes or directs the employer to make a return on a different basis.

(iii) *Example.* Employer X is required by State law to pay his employees within 6 days after the compensation is earned. In compliance with the State law, employer X, for services rendered to him for the payroll week of June 27 to July 2, 1955, pays his employees on the last-named date. June 1955 is the last month of a period for which a return of tax is required by paragraph (a)(1) of this section. Employer X may elect to include in the return required by paragraph (a)(1) of this section for the period April 1 to June 30, 1955, the compensation paid to his employees for the payroll week of June 27 to July 2, 1955, inclusive, although the compensation for July 1 and 2 falls within another period for which a return is required by paragraph (a)(1) of this section. If, in this example, the payroll week ended on July 5, 1955, the compensation paid for the payroll week of June 29 to July 5 would be included in the return period in which July falls although the compensation earned for June 29 and 30 fell in a prior return period under the general rule.

(c) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §§31.6071 (a)–1 and 31.6091–1, respectively.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7396, 41 FR 1903, Jan. 13, 1976]

§31.6011(a)–3 Returns under Federal Unemployment Tax Act.

(a) *Requirement.* Every person shall make a return of tax under the Federal Unemployment Tax Act for each calendar year with respect to which he is an employer as defined in §31.3306(a)–1. Except as otherwise provided in §31.6011 (a)–8, Form 940 is the form prescribed for use in making the return.

(b) *When to report wages.* Wages taxable under the Federal Unemployment Tax Act shall be reported in the return required under this section for the return period in which they are actually paid unless they were constructively paid in a prior return period, in which case such wages shall be reported only in the return for such prior period.

(c) *Time and place for filing returns.* For provisons relating to the time and place for filing returns, see §§31.6071 (a)–1 and 31.6091–1, respectively.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7200, 37 FR 16544, Aug. 16, 1972]

§31.6011(a)–3A Returns of the railroad unemployment repayment tax.

(a) *Requirement*—(1) *Employers.* Every rail employer (as defined in section 3323(a) and section 1 of the Railroad Unemployment Insurance Act) shall make a return of the tax imposed by section 3321(a) (relating to the railroad unemployment repayment tax) for each taxable period (as defined in section 3322(a)) with respect to the total rail wages (as defined in section 3323(b)) paid by the rail employer during the taxable period. Form CT–1 is the form prescribed for use in making the return. One original and a duplicate of each return on Form CT–1 shall be filed with the director of the service center as designated in the instructions to Form CT–1. Rail wages taxable under section 3321(a) shall be reported in the return required under this section for the return period in which they are actually paid unless they were constructively paid in a prior return period, in which case such wages shall be reported only in the return for such prior period.

(2) *Employee representatives.* Each employee representative (as defined in section 3323(d)(2) and section 1 of the Railroad Unemployment Insurance Act) shall make a return of the tax imposed by section 3321(b) on the rail wages paid to him (as determined under section 3321(b)(2)) during each

calendar quarter within a taxable period. Form CT–2 is the form prescribed for use in making the return. One original and a duplicate of each return on Form CT–2 shall be filed with the director of the service center as designated in the instructions to Form CT–2. Rail wages taxable under section 3321(b) shall be reported in the return required under this section for the return period in which they are actually paid unless they were constructively paid in a prior return period, in which case such wages shall be reported only in the return for such prior period.

(b) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §31.6071(a)–1A and §31.6091–1, respectively.

[T.D. 8105, 51 FR 40168, Nov. 5, 1986. Redesignated and amended at T.D. 8227, 53 FR 34736, Sept. 8, 1988]

§31.6011(a)–4 Returns of income tax withheld.

(a) *Withheld from wages*—(1) *In general.* Except as otherwise provided in paragraphs (a)(3) and (b) of this section, and in §31.6011(a)–5, every person required to make a return of income tax withheld from wages pursuant to section 3402 shall make a return for the first calendar quarter in which the person is required to deduct and withhold such tax and for each subsequent calendar quarter, whether or not wages are paid therein, until the person has filed a final return in accordance with §31.6011(a)–6. Except as otherwise provided in paragraphs (a) (2) and (3) and (b) of this section, and in §31.6011(a)–8, Form 941 is the form prescribed for making the return required under this paragraph.

(2) *Wages paid for domestic service.* Form 942 is the form prescribed for making the return required under subparagraph (1) of this paragraph with respect to income tax withheld, pursuant to an agreement under section 3402(p), from wages paid for domestic service in a private home of the employer not on a farm operated for profit. The preceding sentence shall not apply in the case of an employer who has elected under paragraph (a)(3) of §31.6011(a)–1 to use Form 941 as his return with respect to such payments for purposes of the Federal Insurance Contributions Act. For the requirements relating to Form 942 with respect to qualified State individual income taxes, see paragraph (d)(3)(iv) of §301.6361–1.

(3) *Wages paid for agricultural labor.* Every person shall make a return of income tax withheld, pursuant to an agreement under section 3402(p), from wages paid for agricultural labor for the first calendar year in which he is required (by reason of such agreement) to deduct and withhold such tax and for each subsequent calendar year (whether or not wages for agricultural labor are paid therein) until he has filed a final return in accordance with §31.6011 (a)–6. Form 943 is the form prescribed for making the return required under this subparagraph. For the requirements relating to Form 943 with respect to qualified State individual income taxes, see paragraph (d)(3)(iv) of §301.6361–1.

(b) *Withheld from nonpayroll payments.* Every person required to withhold tax from nonpayroll payments for calendar year 1994 must make a return for calendar year 1994 and for any subsequent calendar year in which the person is required to withhold such tax until the person makes a final return in accordance with §31.6011(a)–6. Every person not required to withhold tax from nonpayroll payments for calendar year 1994 must make a return for the first calendar year after 1994 in which the person is required to withhold such tax and for any subsequent calendar year in which the person is required to withhold such tax until the person makes a final return in accordance with §31.6011(a)–6. Form 945, Annual Return of Withheld Federal Income Tax, is the form prescribed for making the return required under this paragraph (b). Nonpayroll payments are—

(1) Certain gambling winnings subject to withholding under section 3402(q);

(2) Retirement pay for services in the Armed Forces of the United States subject to withholding under section 3402;

(3) Certain annuities as described in section 3402(o)(1)(B);

(4) Pensions, annuities, IRAs, and certain other deferred income subject to withholding under section 3405; and

(5) Reportable payments subject to backup withholding under section 3406.

(c) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §§ 31.6071 (a)–1 and 31.6091–1, respectively.

(86 Stat. 944, 26 U.S.C. 6364; and 68A Stat. 917, 26 U.S.C. 7805; 68A Stat. 747, 26 U.S.C. 6051)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 7096, 36 FR 5217, Mar. 18, 1971; T.D. 7200, 37 FR 16544, Aug. 16, 1972; T.D. 7577, 43 FR 59359, Dec. 20, 1978; T.D. 7580, 43 FR 60159, Dec 26, 1978; T.D. 8504, 58 FR 68035, Dec. 23, 1993; T.D. 8624, 60 FR 53510, Oct. 16, 1995; T.D. 8672, 61 FR 27008, May 30, 1996]

§ 31.6011(a)–5 Monthly returns.

(a) *In general*—(1) *Requirement.* The provisions of this section are applicable in respect of the taxes reportable on Form 941, Form 941PR, Form 941VI, or Form 945 pursuant to § 31.6011(a)–1 or § 31.6011 (a)–4. An employer (or other person) who is required by § 31.6011(a)–1 or § 31.6011(a)–4 to make quarterly returns on any such form shall, in lieu of making such quarterly returns, make returns of such taxes in accordance with the provisions of this section if he is so notified in writing by the district director. The district director may so notify any employer (or other person) (i) who, by reason of notification as provided in § 301.7512–1 of this chapter (Regulations on Procedure and Administration), is required to comply with the provisions of such § 301.7512–1, or (ii) who has failed to *(a)* make any such return on Form 941, Form 941PR, Form 941VI, or Form 945 *(b)* pay tax reportable on any such form, or *(c)* deposit any such tax as required under the provisions of § 31.6302(c)–1. Every employer (or other person) notified by the district director shall make a return for the calendar month in which the notice is received and for each calendar month thereafter (whether or not wages are paid in any such month) until he has filed a final return or is required to make quarterly returns pursuant to notification as provided in subparagraph (2) of this paragraph. However, if the notice provided for in this subparagraph is received after the close of the first calendar month of a calendar quarter, the first return under this section shall be made for the period beginning with the first day of such quarter and ending with the last day of the month in which the notice is received. Each return required under this section shall be made on the form prescribed for making the return which would otherwise be required of the employer (or other person) under the provisions of § 31.6011 (a)–1 or § 31.6011(a)–4, except that, if some other form is furnished by the district director for use in lieu of such prescribed form, the return shall be made on such other form.

(2) *Termination of requirement.* The district director, in his discretion, may notify the employer in writing that he shall discontinue the filing of monthly returns under this section. If the employer is so notified, the last month for which a return shall be made under this section is the last month of the calendar quarter in which such notice of discontinuance is received. Thereafter, the employer shall make quarterly returns in accordance with the provisions of § 31.6011(a)–1 or § 31.6011(a)–4.

(b) *Information returns*—(1) *Federal Insurance Contributions Act.* Every employer who is required under paragraph (a) of this section to make a return of tax under the Federal Insurance Contributions Act for any period within a calendar quarter shall make an information return for such calendar quarter. Such return shall be made on Schedule A of Form 941, or the equivalent schedule of Form 941PR or Form 941VI, except that, if some other form or schedule is furnished by the district director for the purpose of making such return, the return shall be made on such other form or schedule. The informaiton reported on such return shall include, with respect to each employee to whom the employer pays wages as defined in the Federal Insurance Contributions act, the account number of the employee, the employee's name, the total amount of wages paid by the employer to the employee during the calendar quarter, and such other information as may be called for on the form provided for making such return.

(2) *Information returns on Form W–3 and Social Security Administration copies of Form W–2.* See § 31.6051–2 for requirements with respect to information returns on Form W–3 and Social Security Administration copies of Form W–2.

(c) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §§ 31.6071 (a)–1 and 31.6091–1, respectively.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7351, 40 FR 17145, Apr. 17, 1975; T.D. 7580, 43 FR 60154, Dec. 26, 1978; T.D. 8637, 60 FR 66133, Dec. 21, 1995]

§ 31.6011(a)–6 Final returns.

(a) *In general*—(1) *Federal Insurance Contributions Act; income tax withheld from wages and nonpayroll payments.* An employer (or other person) who is required to make a return on a particular form pursuant to § 31.6011(a)–1, § 31.6011(a)–4, or § 31.6011(a)–5, and who in any return period ceases to pay wages or nonpayroll payments in respect of which he is required to make a return on that form, must make the return for the period as a final return. Each return made as a final return shall be marked ''Final return'' by the person filing the return. Every such person filing a final return (other than a final return on Form 942 or Form 943) must furnish information showing the date of the last payment of wages (as defined in section 3121(a) or section 3401(a)), and, if appropriate, the date of the last payment of nonpayroll payments defined in § 31.6011(a)–4(b). An employer (other than an employer making returns on Form 942) who has only temporarily ceased to pay wages, because of seasonal activities or for other reasons, shall not make a final return but shall continue to file returns. If (i) for any return period an employer makes a final return on a particular form, and (ii) after the close of such period the employer pays wages, as defined in section 3121(a) or section 3401(a), in respect of which the same or a different return form is prescribed, such employer shall make returns on the appropriate return form. For example, if an employer who has filed a final return on Form 941 pays wages only for domestic service in his private home not on a farm operated for profit, the employer is required to make returns on Form 942 in respect of such wages.

(2) *Railroad Retirement Tax Act*— (i) *Form CT–1.* An employer required to make returns on Form CT–1 who in any return period ceases to pay taxable compensation shall make the return on Form CT–1 for such period as a final return. Such return shall be marked ''Final return'' by the person filing the return, and such person shall furnish information showing the date of the last payment of taxable compensation. An employer who has only temporarily ceased to pay taxable compensation shall continue to file returns on Form CT–1.

(ii) *Form CT–2.* An employee representative required to make returns on Form CT–2 who in any calendar quarter ceases to be paid taxable compensation for services as an employee representative shall make the return on Form CT–2 for such quarter as a final return. Such return shall be marked ''Final return'' by the person filing the return, and such person shall furnish information showing the date of the last payment of taxable compensation. An employee representative who only temporarily ceases to be paid taxable compensation for services as an employee representative shall continue to file returns on Form CT–2.

(3) *Federal Unemployment Tax Act.* An employer required to make a return on Form 940 for a calendar year in which he ceases to be an employer, as defined in § 31.3306(a)–1, because of the discontinuance, sale, or other transfer of his business, shall make such return as a final return. Such return shall be marked ''Final return'' by the person filing the return.

(b) *Statement to accompany final return.* There shall be executed as a part of each final return, except in the case of a final return on Form 942, a statement showing the address at which the records required by the regulations in this part will be kept, the name of the person keeping such records, and, if the business of an employer has been sold or otherwise transferred to another person, the name and address of such person and the date on which such sale or other transfer took place. If no such sale or transfer occurred or the employer does not know the name of the person to whom the business was sold or transferred, that fact should be included in the statement. Such statement shall include any information required by this section as to the date of the last payment of wages or compensation. If the statement is executed as a part of a final return on Form CT–1 or Form CT–2, such statement shall be furnished in duplicate.

(c) *Time and place for filing returns.* For provisions relating to the time and place for filing returns, see §§31.6071 (a)–1 and 31.6091–1, respectively.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7396, 41 FR 1904, Jan. 14, 1976; T.D. 8637, 60 FR 66133, Dec. 21, 1995]

§31.6011(a)–7 Execution of returns.

(a) *In general.* Each return required under the regulations in this part, together with any prescribed copies or supporting data, shall be filled in and disposed of in accordance with the forms, instructions, and regulations applicable thereto. The return shall be carefully prepared so as fully and accurately to set forth the data required to be furnished therein. Returns which have not been so prepared will not be accepted as meeting the requirements of the regulations in this part. The return may be made by an agent in the name of the person required to make the return if an acceptable power of attorney is filed with the internal revenue office with which such person is required to file his returns and if such return includes all taxes required to be reported by such person on such return for the period covered by the return. Only one return on any one prescribed form for a return period shall be filed by or for a taxpayer. Any supplemental return made on such form in accordance with §31.6205–1 shall constitute a part of the return which it supplements. Except as may be provided under procedures authorized by the Commissioner with respect ot taxes imposed by the Railroad Retirement Tax Act, consolidated returns of two or more employers are not permitted, as for example, returns of a parent and a subsidiary corporation. For provisions relating to the filing of returns of the taxes imposed by the Federal Insurance Contributions Act and of income tax withheld under section 3402 in the case of governmental employers see §§31.3122 and 31.3404–1.

(b) *Use of prescribed forms*—(1) *In general.* Copies of the prescribed return forms will so far as possible be regularly furnished taxpayers by the Internal Revenue Service. A taxpayer will not be excused from making a return, however, by the fact that no return form has been furnished to him. Taxpayers not supplied with the proper forms should make application therefor to an internal revenue office in ample time to have their returns prepared, verified, and filed on or before the due date with the internal revenue office with which they are required to file their returns. See §§31.6071 (a)–1 and 31.6091–1, relating, respectively, to the time and place for filing returns. In the absence of a prescribed return form, a statement made by a taxpayer disclosing the aggregate amount of wages or compensation reportable on such form for the period in respect of which a return is required and the amount of taxes due may be accepted as a tentative return. If filed within the prescribed time, the statement so made will relieve the taxpayer from liability for the addition to tax imposed for the delinquent filing of the return, provided that without unnecessary delay such tentative return is supplemented by a return made on the proper form. For additions to the tax in case of failure to file a return within the prescribed time, see the provisions of §301.6651–1 of this chapter (Regulations on Procedure and Administration).

In any case where the use of Form W–2 is required from the purpose of making a return or reporting information, such requirement may be satisfied by submitting the information required by such form on magnetic tape or by other media, provided that the prior consent of the Commissioner of Social Security (or other authorized officer or employee thereof has been obtained.

(c) *Signing and verification.* For provisions relating to the signing of returns, see §31.6061–1. For provisions relating to the verifying of returns, see §31.6065(a)–1.

(d) *Reporting of identifying numbers.* For provisions relating to the reporting of identifying number on returns required under the regulations in this part, see §31.6109–1.

(68A Stat. 747, 26 U.S.C. 6051; and 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6606, 27 FR 8516, Aug. 25, 1962; T.D. 6883, 31 FR 6590, May 3, 1966; T.D. 7276, 38 FR 11345, May 7, 1973; T.D. 7396, 41 FR 1904, Jan. 13, 1976; T.D. 7580, 43 FR 60159, Dec. 26, 1978]

§ 31.6011(a)–8 Composite return in lieu of specified form.

The Commissioner may authorize the use, at the option of the employer, of a composite return in lieu of any form specified in this part for use by an employer, subject to such conditions, limitations, and special rules governing the preparation, execution, filing, and correction thereof as the Commissioner may deem appropriate. Such composite return shall consist of a form prescribed ty the Commissioner and an attachment or attachments of magnetic tape or other approved media. Notwithstanding any provisions in this part to the contrary, a single form and attachment may comprise the returns of more than one employer. To the extent that the use of a compsoite return has been authorized by the Commissioner, references in this part to a specific form for use by the employer shall be deemed to refer also to a composite return under this section.

[T.D. 7200, 37 FR 16544, Aug. 16, 1972]

§ 31.6011(a)–9 Instructions to forms control as to which form is to be used.

Notwithstanding provisions in this part which specify the use of a particular form for a return or other document required by this part, the use of a different form may be required by the latter form's instructions. In such case, the latter form shall be completed in accordance with its instructions.

[T.D. 7351, 40 FR 17145, Apr. 17, 1975]

§ 31.6011 (a)–10 Instructions to forms may waive filing requirement in case of no liability tax returns.

Notwithstanding provisions in this part which require that a tax return be filed, the instructions to the form on which a return of tax is otherwise required by this part to be made may waive such requirement with respect to a particular class or classes of no liability tax returns. Returns in a class for which such requirement has been so waived need not be made.

This Treasury decision is not adverse to any taxpayer. For this reason, it is found unnecessary to issue this Treasury decision with notice and public procedure under subsection (b) of section 553 of title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

[T.D. 8229, 53 FR 35811, Sept. 15, 1988]

§ 31.6011(b)–1 Employers' identification numbers.

(a) *Requirement of application*—(1) *In general*—(i) *Before October 1, 1962.* Except as provided in paragraph (b) of this section, every employer who on any day after December 31, 1954, and before October 1, 1962, has in his employ one or more individuals in employment for wages subject to the taxes imposed by the Federal Insurance Contributions Act, but who prior to such day neither has been assigned an identification number nor has applied therefor, shall make an application on Form SS–4 for an identification number.

(ii) *On or after October 1, 1962.* Except as provided in paragraph (b) of this section, every employer who on any day after September 30, 1962, has in his employ one or more individuals in employment for wages which are subject to the taxes imposed by the Federal Insurance Contributions act or which are subject to the withholding of income tax from wages under section 3402, but who prior to such day neither has been assigned an identification number nor has applied therefor, shall make an application on Form SS–4 for an identification number.

(iii) *Method of application.* The application, together with any supplementary statement, shall be prepared in accordance with the form, instructions, and regulations applicable thereto, and shall set forth fully and clearly the data therein called for. Form SS–4 may be obtained from any district director or director of a service center or any district office of the Social Security Administration. The application shall be filed with the internal revenue officer designated in the instructions applicable to Form SS-4, or with the nearest district office of the Social Security Administration. The application shall be signed by *(a)* the individual, if the employer is an individual; *(b)* the president, vice president, or other principal officer, if the employer is a corporation; *(c)* a responsible and duly authorized member or officer having knowledge of its affairs, if the employer is a partnership or other unincorporated organization; or *(d)* the fiduciary, if the employer is a trust or estate. An identification number will be assigned to the employer in due course upon the basis of the information reported on the application required under this section.

(2) *Time for filing Form SS–4.* The application for an identification number shall be filed on or before the seventh day after the first payment of wages to which reference is made in paragraph (a)(1) of this section. For provisions relating to the time when wages are paid, see §31.3121(a)–2 and paragraph (b) of §31.3402(a)–1.

(b) *Employers who are assigned identification numbers without application.* An identification number may be assigned, without application by the employer, in the case of an employer who has in his employ only employees who are engaged exclusively in the performance of domestic service in his private home not on a farm operated for profit (see §31.3121(a)(7)–1. If an identification number is so assigned, the employer is not required to make an application on Form SS–4 for the number.

(c) *Crew leaders.* Any person who, as a crew leader within the meaning of section 3121(o), furnishes individuals to perform agricultural labor for another person shall, on or before the first date on which he furnishes such individuals to perform such labor for such other person, advise such other person of his name; permanent mailing address, or if none, present address; and identification number, if any.

(d) *Use of identification number.* The identification number assigned to an employer (other than a household employer referred to in paragraph (b) of this section) shall be shown in the employer's records, and shall be shown in his claims to the extent required by the applicable forms, regulations, and instructions. For provisions relating to the inclusion of identification numbers in returns, statements on Form W–2, and depositary receipts, see §31.6109–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6606, 27 FR 8517, Aug. 25, 1962; T.D. 7012, 34 FR 7693, May 15, 1969]

§31.6011(b)–2 Employees' account numbers.

(a) *Requirement of application*—(1) *In general*—(i) *Before November 1, 1962.* Every employee who on any day after December 31, 1954, and before November 1, 1962, is in employment for wages subject to the taxes imposed by the Federal Insurance Contributions Act, but who prior to such day has neither secured an account number nor made application therefor, shall make an application on Form SS–5 for an account number.

(ii) *On or after November 1, 1962.* Every employee who on any day after October 31, 1962, is in employment for wages which are subject to the taxes imposed by the Federal Insurance Contributions Act or which are subject to the withholding of income tax from wages under section 3402 but who prior to such day has neither secured an account number nor made application therefore, shall make an application on Form SS–5 for an account number.

(iii) *Method of application.* The application shall be prepared in accordance with the form, instructions, and regulations applicable thereto, and shall set forth fully and clearly the data therein called for. The employee shall file the applicaiton with any district office of the Social Security Administration or, if the employee is not working within the United States, with the district office of the Social Security Administration at Baltimore, Maryland. Form SS–5 may be obtained from any district office of the Social Security Administration or from any district director. An account number will be assigned to the employee by the Social Security Administration in due course upon the basis of information reported on the application required under this section. A card showing the name and account number of the employee to whom an account number has been assigned will be furnished to the employee by the Social Security administration.

(2) *Time for filing Form SS–5.* The application shall be filed on or before the seventh day after the occurrence of the first day of employment to which reference is made in paragraph (a)(1) of this section, unless the employee leaves the employ of his employer before such seventh day, in which case the application shall be filed on or before the date on which the employee leaves the employ of his employer.

(3) *Changes and corrections.* Any employee may have his account number changed at any time by applying to a district office of the Social Security Administration and showing good reasons for a change. With that exception, only one account number will be assigned to an employee. Any employee whose name is changed by marriage or otherwise, or who has stated incorrect information on Form SS–5, should report such change or correction to a district office of the Social Security Administration Copies of the form for making such reports may be obtained from any district office of the administration.

(b) *Duties of employee with respect to his account number*—(1) *Information to be furnished to employer.* An employee shall, on the day on which he enters the employ of any employer for wages, comply with the provisions of paragraph (b)(1)(i), (ii), (iii), or (iv) of this section, except that, if the employee's services for the employer consist solely of agricultural labor, domestic service in a private home of the employer not on a farm operated for profit, or service not in the course of the employer's trade or business, the employee shall comply with such provisions on the first day on which wages are paid to him by such employer, within the meaning of § 31.3121(a)–2.

(i) *Employee who has account number card.* If the employee has been issued an account number card by the Social Security Administration and has the card available, the employee shall show it to the employer.

(ii) *Employee who has number but card not available.* If the employee does not have available the account number card issued to him by the Social Security Administration but knows what his account number is, and what his name is, exactly as shown on such card, the employee shall advise the employer of such number and name. Care must be exercised that the employer is correctly advised of such number and name.

(iii) *Employee who has receipt acknowledging application.* If the employee does not have an account number card but has available a receipt issued to him by an office of the Social Security Administration acknowledging that an application for an account number has been received, the employee shall show such receipt to the employer.

(iv) *Employee who is unable to furnish number or receipt.* If an employee is unable to comply with the requirement of paragraph (b)(1)(i), (ii), or (iii) of this section, the employee shall furnish to the employer a statement in writing, signed by the employee, setting forth the date of the statement, the employee's full name, present address, date and place of birth, father's full name, mother's full name before marriage, and the employee's sex, including a statement as to whether the employee has previously filed an application on Form SS–5 and, if so, the date and place of such filing. The information required by this subdivision shall be furnished on Form SS–5, if a copy of Form SS–5 is available. The furnishing of such a Form SS–5 or other statement by the employee to the employer does not relieve the employee of his obligation to make an application on Form SS–5 and file it with a district office of the Social Security Administration as required by paragraph (a) of this section. The foregoing provisions of this subdivision are not applicable to an employee engaged exclusively in the performance of domestic service in a private home of his employer not on a farm operated for profit, or in the performance of agricultural labor, if the services are performed for an employer other than an employer required to file returns of the taxes imposed by the Federal Insurance Contributions Act with the office of the United States Internal Revenue Service in Puerto Rico. However, such employee shall advise the employer of his full name and present address.

For provisions relating to the duties of an employer when furnished the information required by paragraph (b)(1) (i), (ii), (iii), or (iv) of this section, see paragraph (c) of this section.

(2) *Additional information to be furnished by employee to employer.* Every employee who, on the day on which he is required to comply with paragraph (b)(1)(i), (ii), (iii), or (iv) of this section, has an account number card but for any reason does not show such card to the employer on such day shall promptly thereafter show the card to the employer. An employee who does not have an account number card on such day shall, upon receipt of an account number card from the Social Security Administration, promptly show such card to the employer, if he is still in the employ of that employer. If the employee has left the employ of the employer when the employee receives an account number card from the Social Security Administration, he shall promptly advise the employer of his account number and name exactly as shown on such card. The account number originally assigned to an employee (or the number as changed in accordance with paragraph (a)(3) of this section) shall be used by the employee as required by this paragraph even though he enters the employ of other employers.

(3) *Furnishing of account number by employee to employer.* See §31.6109–1 for additional provisions relating to the furnishing of an account number by the employee to his employer.

(c) *Duties of employer with respect to employees' account numbers*—(1) *Employee who shows account number.* Upon being shown the account number card issued to an employee by the Social Security administration, the employer shall enter the account number and name, exactly as shown on the card, in the employer's records, returns, statements for employees, and claims to the extent required by the applicable forms, regulations, and instructions.

(2) *Employee who does not show account number card.* With respect to an employee who, on the day on which he is required to comply with paragraph (b)(1)(i), (ii), (iii), or (iv) of this section, does not show the employer an account number card issued to the employee by the Social Security Administration, the employer shall request such employee to show him such card. If the card is not shown, the employer shall comply with the applicable provisions of paragraph (c)(1)(i), (ii), (iii), (iv), or (v) of this section:

(i) *Employee who has not applied for account number.* If the employee has not been assigned an account number and has not made application therefor with a district office of the Social Security Administration, the employer shall inform the employee of his duties under this section.

(ii) *Employee who has account number.* If the employee advises the employer of his number and name as shown on his account number card, as provided in paragraph (b)(1)(ii) of this section, the employer shall enter such number and name in his records.

(iii) *Employee who has receipt for application.* If the employee shows the employer, as provided in paragraph (b)(1)(iii) of this section, a receipt issued to him by an office of the Social Security Administration acknowledging that an application for an account number has been received from the employee, the employer shall enter in his records with respect to such employee the name and address of the employee exactly as shown on the receipt, the expiration date of the receipt, and the address of the issuing office. The receipt shall be retained by the employee.

(iv) *Employee who furnishes Form SS–5 or statement.* If the employee furnishes information to the employer as provided in paragraph (b)(1)(iv) of this section, the employer shall retain such information for use as provided in paragraph (c)(3)(ii) of this section.

(v) *Household or agricultural employees.* If the employee advises the employer of his full name and present address in accordance with those provisions of paragraph (b)(1)(iv) of this section which are applicable in the case of employees engaged exclusively in the performance of domestic service in a private home of the employer not on a farm operated for profit, or agricultural labor, the employer shall enter such name and address in his records.

(3) *Account number unknown when return is filed.* In any case in which the employee's account number is for any reason unknown to the employer at the time the employer's return is filed for

any return period with respect to which the employer is required to report the wages paid to such employee—

(i) *If employee has shown receipt for application.* If the employee has shown to the employer, as provided in paragraph (b)(1)(iii) of this section, a receipt issued to him by an office of the Social Security Administration acknowledging that an application for an account number has been received from the employee, the employer shall enter on the return, with the entry with respect to the employee, the name and address of the employee exactly as shown on the receipt, the expiration date of the receipt, and the address of the issuing office.

(ii) *If employee furnished Form SS–5 or statement.* If the employee has furnished information to the employer as provided in paragraph (b)(1)(iv) of this section, the employer shall prepare a copy of the Form SS–5 or statement furnished by the employee and attach the copy to the return.

(iii) *If employee did not furnish receipt, Form SS–5, or statement.* If neither paragraph (c)(3)(i) nor (ii) of this section is applicable, the employer shall, except as provided in paragraph (c)(4) of this section, attach to the return a Form SS–5 or statement, signed by the employer, setting forth as fully and clearly as practicable the employee's full name, his present or last known address, date and place of birth, father's full name, mother's full name before marriage, the employee's sex, and a statement as to whether an application for an account number has previously been filed by the employee and, if so, the date and place of such filing. The employer shall also insert in such Form SS–5 or statement an explanation of why he has not secured from the employee the information referred to in paragraph (b)(1)(iv) of this section and shall insert the word ''Employer'' as part of his signature.

(4) *Household or agricultural employees.* The provisions of paragraph (c)(3)(iii) of this section are not applicable with respect to an employee engaged exclusively in the performance of domestic service in a private home of his employer not on a farm operated for profit, or in the performance of agricultural labor, if the services are performed for an employer other than an employer required to file returns of the taxes imposed by the Federal Insurance Contributions Act with the office of the United States Internal Revenue Service in Puerto Rico. If any such employee has not furnished to the employer the information required by paragraph (b) (1) (i), (ii), or (iii) of this section prior to the time the employer's return is filed for any return period with respect to which the employer is required to report wages paid to such employee, the employer shall enter the word ''Unknown'' in the account number column of the return and (i) file with the return a statement showing the employee's full name and present or last known address, or (ii) enter such address on the return form immediately below the name of the employee.

(5) *Where to obtain Form SS–5.* Employers may obtain copies of Form SS–5 from any district office of the Social Security Administration or from any district director.

(6) *Prospective employees.* While not mandatory, it is suggested that the employer advise any prospective employee who does not have an account number of the requirements of paragraphs (a) and (b) of this section.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6606, 27 FR 8517, Aug. 25, 1962]

§ 31.6051–1 Statements for employees.

(a) *Requirement if wages are subject to withholding of income tax*—(1) *General rule.* (i) Every employer, as defined in section 3401(d), required to deduct and withhold from an employee a tax under section 3402, or who would have been required to deduct and withhold a tax under section 3402 (determined without regard to section 3402(n)) if the employee had claimed no more than one withholding exemption, shall furnish to each such employee, in respect of the remuneration paid by such employer to such employee during the calendar year, the tax return copy and the employee's copy of a statement on Form W–2. For example, if the wage bracket method of withholding provided in section 3402(c)(1) is used, a statement on Form W–2 must be furnished to each employee whose wages during any payroll period are equal to or in excess of the smallest wage from which tax must be withheld in the case of an employee claiming one exemption. If the percentage method is used, a statement on Form W–2 must be furnished to each employee whose wages during any payroll period, reduced by the amount of one withholding exemption, are equal to or in excess of the smallest amount of wages from which tax must be withheld. See section 3402 (a) and (b) and the regulations thereunder. Each statement on Form W–2 shall show the following:

(a) The name, address, and identification number of the employer.

(b) The name and address of the employee, and his social security account number if wages as defined in section 3121(a) have been paid or if the Form W–2 is required to be furnished to the employee for a period commencing after December 31, 1962.

(c) The total amount of wages as defined in section 3401(a),

(d) The total amount deducted and withheld as tax under section 3402,

(e) The total amount of wages as defined in section 3121(a),

(f) The total amount of employee tax under section 3101 deducted and withheld (increased by any adjustment in the calendar year for overcollection, or decreased by any adjustment in such year for undercollection, of such tax during any prior year) and the proportion thereof (expressed either as a dollar amount, as a percentage of the total amount of wages as defined in section 3121(a), or as a percentage of the total amount of employee tax under section 3101) withheld as tax under section 3101(b) for financing the cost of hospital insurance benefits,

See paragraph (d) of this section for provisions relating to the time for furnishing the statement required by this subparagraph. See paragraph (f) of this section for an exception for employers filing composite returns from the requirement that statements for employees be on Form W–2. For the requirements relating to Form W–2 with respect to qualified State individual income taxes, see paragraphs (d)(3)(ii) of § 301.6361–1 of this chapter (regulations on Procedure and Administration).

(*g*) Such information relating to coverage the employee has earned under the Federal Insurance Contributions act, as may be required by Form W–2 or its instructions, and

(*h*) The total amount paid to the employee under section 3507 (relating to advance payment of earned income credit).

(ii) Payments made in 1955 under a wage continuation plan shall be reported on Form W–2 to the extent, and in the manner, provided in paragraph (b)(8)(i) of § 31.3401(a)–1.

(iii) In the case of statements furnished by the employer for whom services are performed, with respect to wages paid after December 31, 1955, ‘‘the total amount of wages as defined in section 3401(a)’’, as used in section 6051(a)(3), shall include all payments made directly by such employer under a wage continuation plan which constitute wages in accordance with paragraph (b)(8)(ii)(*a*) of § 31.3401(a)–1, without regard to whether tax has been withheld on such amounts.

(iv) Form W–2 is not required in respect of any wage continuation payment made to an employee by or on behalf of a person who is not the employer for whom the employee performs services but who is regarded as an employer under section 340(d)(1). See paragraph (b)(8) of § 31.3401(a)–1.

(v) In the case of remuneration paid for service described in section 3121(m), relating to service in the uniformed services, performed after 1956, ‘‘wages as defined in section 3121(a)’’, as used in section 6051(a) (2) and (5), shall be determined in accordance with section 3121(i)(2) and section 3122.

(vi) In the case of remuneration in the form of tips received by an employee in the course of his employment, the amounts required to be shown by paragraphs (3) and (5) of section 6051(a) (see paragraph (a)(1)(i) (*c*) and (*e*) of this section) shall include only such tips as are reported by the employee to the employer in a written statement furnished to the employer pursuant to section 6053(a).

(2) *Statements for members of the Armed Forces of the United States.* Section 6051(b) contains certain special provisions which are applicable in the case of members of the Armed Forces of the

United States in active service. In such case, Form W–2 shall be furnished to each such member of the Armed Forces if any tax has been withheld under section 3402 during the calendar year from the remuneration of such member or if any of the remuneration paid during the calendar year for such active service is includible under chapter 1 of the Code in the gross income of such member. Form W–2, in the case of such member, shall show, as ''the total amount of wages as defined in section 3401(a)'' as used in section 6051(a)(3), the amount of the remuneration paid during the calendar year which is not excluded under chapter 1 from the gross income of such member, whether or not such remuneration constitutes wages as defined in section 3401(a) and whether or not paid for such active service.

(3) *Undelivered statements for employees.* The Internal Revenue Service copy and the employee's copy of each withholding statement for the calendar year which the employer is required to furnish to the employee and which after reasonable effort he is unable to deliver to the employee shall be retained by the employer for the 4-year period prescribed in paragraph (e)(2) of § 31.6001–1.

(b) *Requirement if wages are not subject to withholding of income tax*— (1) *General rule.* If during the calendar year an employer pays to an employee wages subject to the employee tax imposed by section 3101, but not subject to income tax withholding under section 3402, the employer shall furnish to such employee the tax return copy and the employee's copy of a statement on Form W–2 for such calendar year. Such statement shall show the following:

(i) The name and address of the employer,

(ii) The name, address, and social security account number of the employee,

(iii) The total amount of wages as defined in section 3121(a),

(iv) The total amount of employee tax deducted and withheld from such wages (increased by any adjustment in such year for overcollection, or decreased by any adjustment in such year for undercollection, of employee tax during any prior year) and the proportion thereof (expressed either as a dollar amount, as a percentage of the total amount of wages as defined in section 3121(a), or as a percentage of the total amount of employee tax under section 3101) withheld as tax under section 3101(b) for financing the cost of hospital insurance benefits, and

(v) Such information relating to coverage the employee has earned under the Federal Insurance Contributions Act, as may be required by Form W–2 or its instructions, and

(vi) The total amount paid to the employee under section 3507 (relating to advance payment of earned income credit).

See paragraph (d) of this section for provisions relating to the time for furnishing the statement required by this paragraph.

(2) *Uniformed services.* In the case of remuneration paid for service described in section 3121(m), relating to service in the uniformed services, performed after 1956, ''wages as defined in section 3121(a)'', as used in section 6051(a)(5), shall be determined in accordance with section 3121(i)(2) and section 3122.

(c) *Correction of statements*—(1) *Federal Insurance Contributions Act.* If (i) the amount of employee tax under section 3101 deducted and withheld in the calendar year from the wages, as defined in section 3121(a), paid during such year was less or greater than the tax imposed by section 3101 on such wages by reason of the adjustment in such year of an overcollection or undercollection of the tax in any prior year, or (ii) regardless of the reason for the error or the method of its correction, the amount of wages as defined in section 3121(a), or tax under section 3101, entered on a statement furnished pursuant to this section to an employee for a prior year was incorrect, a corrected statement for such prior year reflecting the adjustment or the correct data shall be furnished to the employee. Such statement shall be marked ''Corrected by Employer''.

(2) *Income tax withholding.* A corrected statement shall be furnished to the employee with respect to a prior calendar year (i) to show the correct amount of wages, as defined in section 3401(a), paid during the prior calendar

year if the amount of such wages entered on a statement furnished to the employee for such prior year is incorrect, or (ii) to show the amount actually deducted and withheld as tax under section 3402 if such amount is less or greater than the amount entered as tax withheld on the statement furnished the employee for such prior year. Such statement shall be indicated as corrected.

(3) *Cross reference.* For provisions relating to the disposition of the Internal Revenue Service copy of a corrected statement, see paragraph (b)(2) of § 31.6011(a)–4 and paragraph (b) of § 31.6051–2.

(d) *Time for furnishing statements*—(1)(i) *In general.* Each statement required by this section for a calendar year and each corrected statement required for the year shall be furnished to the employee on or before January 31 of the year succeeding such calendar year. If an employee's employment is terminated before the close of such calendar year, the employer, at his option, shall furnish the statement to the employee at any time after the termination but no later than January 31 of the year succeeding such calendar year. However, if an employee whose employment is terminated before the close of such calendar year requests the employer to furnish him the statement at an earlier time, and if there is no reasonable expectation on the part of both employer and employee of further employment during the calendar year, then the employer shall furnish the statement to the employee on or before the later of the 30th day after the day of the request or the 30th day after the day on which the last payment of wages is made. For provisions relating to the filing of the Internal Revenue Service copies of the statement, see § 31.6051–2.

(ii) *Expedited furnishing*—(A) *General rule.* If an employer is required to make a final return under § 31.6011(a)–6(a)(1) (relating to the final return for Federal Insurance Contributions Act taxes and income tax withholding from wages) on Form 941, or a variation thereof, the employer must furnish the statement required by this section on or before the date required for filing the final return. See § 31.6071(a)–1(a)(1). However, if the final return under § 31.6011(a)–6(a)(1) is a monthly return, as described in § 31.6011(a)–5, the employer must furnish the statement required by this section on or before the last day of the month in which the final return is required to be filed. See § 31.6071(a)–1(a)(2). Except as provided in paragraph (d)(2)(i) of this section, in no event may an employer furnish the statement required by this section later than January 31 of the year succeeding the calendar year to which it relates. The requirements set forth in this paragraph (d)(1)(ii) do not apply to employers with respect to employees whose wages are for domestic service in the private home of the employer. See § 31.6011(a)–1(a)(3).

(B) *Requests by employees.* An employer is not permitted to furnish a statement pursuant to the provisions of the third sentence of paragraph (d)(1)(i) of this section (relating to written requests by terminated employees for Form W–2) at a time later than that required by the provisions of paragraph (d)(1)(ii)(A) of this section.

(C) *Effective date.* This paragraph (d)(1)(ii) is effective January 1, 1997.

(2) *Extensions of time*—(i) *In general* (*a*) The Director, Martinsburg Computing Center, may grant an extension of time in which to furnish to employees the statements required by this section. A request may be made by a letter to the Director, Martinsburg Computing Center. The request must contain:

(*1*) The employer's name and address;

(*2*) The employer's taxpayer identification number;

(*3*) The type of return (i.e., Form W–2); and

(*4*) A concise statement of the reasons for requesting the extension.

(*b*) The application must be mailed or delivered on or before the applicable due date prescribed in paragraph (d)(1) of this section for furnishing the statements required by this section.

(*c*) In any case in which an employer is unable, by reason of illness, absence, or other good cause, to sign a request for an extension, any person standing in close personal or business relationship to the employer may sign the request on his behalf, and shall be considered as a duly authorized agent for this purpose, provided the request sets forth a reason for a signature other than the employer's and the relationship existing between the employer and the signer. For provisions relating to extensions of time for filing the Social Security Administration copies of the statement, see § 31.6081(a)–1(a)(3).

(ii) *Automatic Extension of Time.* The Commissioner may, in appropriate cases, publish procedures for automatic extensions of time to furnish Forms W–2 where the employer is required to furnish the Form W–2 on an expedited basis.

(e) *Reporting of reimbursements of or payments of expenses of moving from one residence to another residence after July 23, 1971.* Every employer who after July 23, 1971, makes reimbursement to, or payment to (other than direct cash reimbursement), an employee for his expenses of moving from one residence to another residence which is includable in gross income under section 82 shall furnish to the best of his ability to such employee information sufficient to assist the employee in the computation of any deduction allowable under section 217 with respect to such reimbursement or payment. The information required under this paragraph may be furnished on Form 4782 provided by the Internal Revenue Service or may be furnished on forms provided by the employer so long as the employee receives the same information he would have received had he been furnished with a completed Form 4782. The information shall include the amount of the reimbursement or payment and whether the reimbursement or payment was made directly to a third party for the benefit of an employee or furnished in kind to the employee. In addition, information shall be furnished as to whether the reimbursement or payment represents and expense described in subparagraphs (A) through (E) of section 217(b)(1), and if so, the amount and nature of the expenses described in each such subparagraph. The information described in this paragraph shall be furnished at the same time or before the written statement required by section 6051(a) is furnished in respect of the calendar year for which the information provided under this paragraph is required. The information required under this paragraph shall be provided for the taxable year in which the payment or reimbursement is received by the employee. For determining the taxable year in which a payment or reimbursement is received, see section 82 and § 1.82–1.

(f) *Statements with respect to compensation, as defined in the Railroad Retirement Tax Act, paid after December 31, 1967*—(1) *Required information relating to excess medicare tax on compensation paid after December 31, 1971*—(i) *Notification of possible credit or refund.* With respect to compensation (as defined in section 3231(e)) paid after December 31, 1971, every employer (as defined in section 3231(a)) who is required to deduct and withhold from an employee (as defined in section 3231(b)) a tax under section 3201, shall include on or with the statement required to be furnished such employee under section 6051(a), a notice concerning the provisions of this title with respect to the allowance of a credit or refund of the tax on wages imposed by section 3101(b) and the tax on compensation imposed by section 3201 or 3211 which is treated as a tax on wages imposed by section 3101(b). Such notice shall inform such employee of the eligibility of persons having a second employment, in addition to railroad employment, for a credit or refund of any excess hospital insurance tax which such persons have paid because of employment under both social security (including employee and self-employment coverage) and railroad retirement. See section 6413(c)(3) and paragraph (c) of § 31.6413(c)–1, relating to special refunds with respect to compensation as defined in the Railroad Retirement Tax Act.

(ii) *Information to be supplied to employees upon request.* With respect to compensation (as defined in section 3231(e)) paid after December 31, 1971, every employer (as defined in section 3231(a)) who is required to deduct and withhold tax under section 3201 from an employee (as defined in section 3231(b)) who has also received wages during such year subject to the tax imposed by section 3101(b), shall upon request of such employee furnish to him a written statement showing—

(a) The total amount of compensation with respect to which the tax imposed by section 3101(b) was deducted.

(b) The total amount of employee tax under section 3201 deducted and withheld (increased by any adjustment in the calendar year for overcollection, or decreased by any adjustment in such year for undercollection, of such tax during any prior year), and

(c) The proportion thereof (expressed either as a dollar amount, or a percentage of the total amount of compensation as defined in section 3231(e), or as a percentage of the total amount of employee tax under section 3201) withheld as tax under section 3201 for financing the cost of hospital insurance benefits.

(2) *Statements on Form W–2 (RR).* (i) *Compensation paid during 1970 or 1971.* With respect to compensation (as defined in section 3231(e)) paid during 1970 or 1971, every employer (as defined in section 3231(a)) who is required to deduct and withhold from an employee (as defined in section 3231(b)) a tax under section 3402 with respect to compensation, or who would have been required to deduct and withhold a tax under section 3402 (determined without regard to section 3402(n)) if the employee had claimed no more than one withholding exemption, shall furnish to each such employee in respect of such compensation the tax return copy and the employee's copy of a statement on Form W–2 (RR) instead of Form W–2, unless such employers are permitted by the Internal Revenue Service to continue to use Form W–2 in lieu of Form W–2 (RR). If the wage bracket method of withholding provided in section 3402(c)(1) is used in respect of such compensation, a statement on Form W–2 (RR) must be furnished to each employee whose wages during any payroll period are equal to or in excess of the smallest wage from which tax must be withheld in the case of an employee claiming one exemption. If the percentage method is used, a statement on Form W–2 (RR) must be furnished to each employee whose wages during any payroll period are in excess of one withholding exemption for such payroll period as shown in the percentage method withholding table contained in section 3402(b)(1). Each statement on Form W–2 (RR) shall show the following:

(a) The name, address, and identification number of the employer,

(b) The name and address of the employee and his social security account number,

(c) The total amount of wages as defined in section 3401(a),

(d) The total amount deducted and withheld as tax under section 3402,

(e) The total amount of compensation as defined in section 3231(e), and

(f) The total amount of employee tax under section 3201 deducted and withheld (increased by any adjustment in the calendar year for overcollection, or decreased by any adjustment in such year for undercollection, of such tax during any prior year) and the proportion thereof (expressed either as a dollar amount, as a percentage of the total amount of compensation as defined in section 3231(e), or as a percentage of the total amount of employee tax under section 3201) withheld as tax under section 3201 for financing the cost of hospital insurance benefits.

The provisions of this chapter applicable to Form W–2, other than those relating solely to the Federal Insurance Contributions Act, are hereby made applicable to Form W–2 (RR). See paragraph (d) of this section for provisions relating to the time and place for furnishing the statement required by this subparagraph.

(ii) *Compensation paid during 1968 or 1969.* At the option of the employer, the provisions of paragraph (f)(1)(i) of this section may apply with respect to compensation paid during 1968 or 1969.

(iii) Every employer who, pursuant to paragraph (i) or (ii) of this section, does not provide Form W–2 (RR) with respect to compensation must furnish the additional information required by Form W–2 (RR) upon request by the employee.

(g) *Employers filing composite returns.* Every employer who files a composite return pursuant to § 31.6011(a)–8 shall furnish to his employees the statements required under this section, except that in lieu of Form W–2 the statements may be in any form which is suitable for retention by the employee and which contains all information required to be shown on Form W–2.

(h) *Statements with respect to the refundable earned income credit*—(1) *In* *general.* In respect of remuneration paid in any calendar year beginning after December 31, 1986, for services performed after December 31, 1986, every employer shall furnish Notice 797 (You May be Eligible for a Refund on Your Federal Income Tax Return Because of the Earned Income Credit (EIC)), or a written statement that contains an exact reproduction of the wording contained in Notice 797, to each employee with respect to whom the employer paid wages (within the meaning of section 3401(a)) during the calendar year and who did not have any income tax withheld by the employer during the calendar year. Notwithstanding the preceding sentence, no such statement need be furnished to an employee who claimed exemption from withholding pursuant to section 3402(n) for the calendar year.

(2) *Time for furnishing statement*—(i) *General rule.* Except as otherwise provided in paragraph (h)(2)(ii) of this section, the statement required by this paragraph (h) for a calendar year shall be furnished—

(A) In the case of an employee who is required to be furnished a Form W–2, Wage and Tax Statement, for the calendar year, within one week of (before or after) the date that the employee is furnished a timely Form W–2 for the calendar year (or, if a Form W–2 is not so furnished, on or before the date by which it is required to be furnished), and

(B) In the case of an employee who is not required to be furnished a Form W–2 for the calendar year, on or before February 7 of the year succeeding the calendar year.

(ii) *Special rule with respect to certain Forms W–2 for 1987 and 1988.* With respect to an employee who is not furnished a Form W–2 for calendar year 1987 before October 24, 1988, or who was furnished such form on or before June 11, 1987, the statement required by this paragraph (h) shall be furnished on or before October 24, 1988. With respect to an employee who is furnished a Form W–2 after June 11, 1987, and before October 24, 1988, the statement required by this paragraph (h) shall be furnished within one week of (before or after) the date the employee is furnished the Form W–2. With respect to an employee who is required to be furnished a Form W–2 for calendar year 1988 before October 24, 1988, but is not so furnished, the statement required by this paragraph (h) shall be furnished on or before that date.

(3) *Manner of furnishing statement.* If an employee is furnished a Form W–2 in a timely manner, the statement required by this paragraph (h) may be furnished with the employee's Form W–2. Any statement not so furnished shall be furnished by direct, personal delivery to the employee or by first class mail addressed to the employee at his or her current or last known address. For purposes of the preceding sentence, direct, personal delivery means hand delivery to the employee. Thus, for example, an employer does not meet the requirements of this paragraph (h) if the statement is sent through inter-office mail or is posted on a bulletin board.

(i) *Cross references.* For provisions relating to the penalties provided for the willful furnishing of a false or fraudulent statement, or for the willful failure to furnish a statement, see § 31.6674–1 and section 7204. For additional provisions relating to the inclusion of identification numbers and account numbers in statements on Form W–2, see § 31.6109–1. For provisions relating to the penalty for failure to report an identification number or an account number, as required by § 31.6109–1, see § 301.6676–1 of this chapter (Regulations on Procedure and Administration). For the penalties applicable to information returns and payee statements the due date for which (determined without regard to extensions) is after December 31, 1989, see sections 6721–6724 as amended by section 7711 of the Omnibus Budget Reconciliation Act of 1989. See section 6723 (prior to its amendment by section 7711 of the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239, 103 Stat. 2106 (1989)) and § 31.6723–1A of this chapter (as issued thereunder) for provisions relating to the penalty for failure to include correct information on an information return or a payee statement and for the exceptions to the penalty, particularly the exception for timely correction, with respect to information returns and payee statements the due date for which, determined without regard to extensions, is after December 31, 1986, and before January 1, 1990.

(86 Stat. 944, 26 U.S.C. 6364; 68A Stat. 917, 26 U.S.C. 7805; 68A Stat. 747, 26 U.S.C. 6051(c))

[T.D. 6516, 25 FR 13032, Dec. 20, 1960]

EDITORIAL NOTE: For FEDERAL REGISTER citations to §31.6051–1, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§31.6051–2 Information returns on Form W–3 and Internal Revenue Service copies of Forms W–2.

(a) *In general.* Every employer who is required to make a return of tax under §31.6011(a)–1 (relating to returns under the Federal Insurance Contributions Act), §31.6011(a)–4 (relating to returns of income tax withheld from wages), or §31.6011(a)–5 (relating to monthly returns) for a calendar year or any period therein shall file the Social Security Administration copy of each Form W–2 required under §31.6051–1 to be furnished by the employer with respect to wages paid during the calendar year. Each Form W–2 and the transmittal Form W–3 shall together constitute an information return to be filed with the Social Security Administration office indicated on the instructions to such forms. However, in the case of an employer who elects to file a composite return pursuant to §31.6011(a)–8, the information return required by this section shall consist of magnetic tape (or other approved media) containing all information required to be on the employee statement, together with transmittal Form 4804.

(b) *Corrected returns.* The Social Security Administration copies of corrected Forms W–2 (or magnetic tape or other approved media) for employees for the calendar year shall be submitted with Form W–3 (or Form 4804), on or before the date on which information returns for the period in which the correction is made would be due under paragraph (a)(3)(ii) of §31.6071(a)–1, to the Social Security Administration office with which Forms W–2 are required to be filed.

(c) *Cross references.* For provisions relating to the time for filing the information returns required by this section and to extensions of the time for filing, see §§31.6071(a)–1(a)(3) and 31.6081(a)–1(a)(3), respectively. For the penalty provided in case of each failure to file, see paragraph (a) of §301.6652–1 of this chapter (Regulations on Procedure and Administration). For the penalties applicable to information returns and payee statements the due date for which (determined without regard to extensions) is after December 31, 1989, see sections 6721–6724 as amended by section 7711 of the Omnibus Budget Reconciliation Act of 1989 (Publ. L. 101–239, 103 Stat. 2106 (1989). See section 6723 (prior to its amendment by section 7211 of the Omnibus Reconciliation Act of 1989) and §301.6723–1A of this chapter for provisions relating to the penalty for failure to include correct information on an information return or a payee statement and for the exceptions to the penalty, particularly the exception for timely correction, with respect to information returns and payee statements the due date for which, determined without regard to extensions, is after December 31, 1986, and before January 1, 1990.

(68A Stat. 747, 26 U.S.C. 6051; 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 7351, 40 FR 17145, Apr. 17, 1975, as amended by T.D. 7580, 43 FR 60160, Dec. 26, 1978; T.D. 8155, 52 FR 34357, Sept. 10, 1987; T.D. 8344, 56 FR 15042, Apr. 15, 1991; T.D. 8636, 60 FR 66141, Dec. 21, 1995]

§31.6051–3 Statements required in case of sick pay paid by third parties.

(a) *Statements required from payor.* (1) Every payor of sick pay shall furnish to the employer of the payee of the sick pay a written statement. The written statement must contain the following information:

(i) The name and, if there is withholding from sick pay under section 3402(o) and the regulations thereunder, the social security account number of the payee,

(ii) The total amount of sick pay paid to the payee during the calendar year, and

(iii) The total amount (if any) deducted and withheld from sick pay under section 3402(o) and the regulations thereunder.

The statement must be furnished to the employer on or before January 15 of the year following the calendar year in which any sick pay was paid.

(2) These reporting requirements are in lieu of the requirements of sections 6051(a) (relating to written statements for employees) and 6041 (relating to information returns). Statements required to be furnished by this paragraph shall be treated as statements required under section 6051 to be furnished to employees for purposes of sections 6674 (relating to fraudulent statement or failure to furnish statement to employee) and 7204 (relating to fraudulent statement or failure to make statement to employees).

(3) A multiemployer plan paying sick pay pursuant to a collectively bargained agreement may furnish the statement required to be furnished by this paragraph, which shall include the total amount of sick pay paid to the employee under the plan regardless of the identity or number of employers for whom the employee worked during the calendar year under the plan, to one of the following:

(i) The employer for whom the employee worked the most hours during the calendar year for which the statement is to be furnished,

(ii) The employer for whom the employee first worked during such year,

(iii) The employer for whom the employee last worked during such year,

(iv) The employer for whom the employee worked immediately preceding his absence for which sick pay was paid,

(v) The employer for whom the employee worked immediately following his absence for which sick pay was paid,

(vi) The employer designated through the operation of a specific clause of the collective bargaining agreement, or

(vii) The employer designated through the operation of a specific system of designation chosen by the payor.

(b) *Information required to be furnished by employer.* Every employer of a payee of sick pay who receives a statement under paragraph (a) from a payor of sick pay shall furnish to each payee of sick pay a written statement, which must be furnished on Form W–2. The written statement must contain the following information:

(1) All of the information required to be furnished under paragraph (a),

(2) The name, the address, and the Employer Identification Number (EIN) of the employer,

(3) The words ‘‘sick pay’’, which shall be written in the box labelled ‘‘Employer’s use’’, and

(4) If any portion of the sick pay is excludable from gross income under section 104(a)(3), the amount of the portion which is not so excludable and of the portion which is so excludable. Only sick pay payments includable in gross income shall be reported in the box labelled ‘‘Wages, tips, other compensation’’ on Form W–2. Any amount excludable from gross income under section 104(a)(3) shall be reported in the box labelled ‘‘Employer’s use’’ on Form W–2 and any amount so reported shall be described as ‘‘Nontaxable’’. The information required to be furnished by this paragraph may be furnished either on the same Form W–2 that is required to be furnished under section 6051(a) or on a separate Form W–2. To the extent practicable, this statement should be furnished to the payee along with the statement (if any) required under section 6051(a) (relating to written statements for employees). The statement must be furnished to the payee on or before January 31 of the year following the calendar year in which any sick pay was paid. The employer shall file copy A of Form W–2 and Form W–3 with the Social Security Administration in accordance with section 6051(d) (relating to statements to constitute information returns) and the regulations thereunder.

(c) *Optional rule.* The payor and the employer may at their option enter into an agency agreement valid under local law whereby the employer designates the payor to be the employer’s agent for purposes of fulfilling the requirements of this section. This agreement must specify what portion, if any, of the sick pay is excludable from gross income under section 104(a)(3). If they enter into such an agreement, the payor shall not provide the statement required by paragraph (a) but shall instead furnish statements that meet all of the requirements of paragraph (b), except that the agreement must provide that the payor will furnish the statements with the payor's, rather than the employer's name, address, and Employer Identification Number (EIN) if "Sick Pay Statement Furnished under an Agency Agreement with Your Employer" appears in the box labelled "Employer's Use" on Form W–2. Paragraph (a)(2) remains applicable to statements furnished under this paragraph. In the case of sick pay paid under a multiemployer plan pursuant to a collectively bargained agreement, an amendment to either the multiemployer plan or the collectively bargained agreement designating the payor to be the employers' agent for purposes of fulfilling the requirements of this section shall be deemed an agency agreement that fulfills the requirements of the first sentence of this paragraph.

(d) *Definitions.* For purposes of this section, the terms "payor", "payee", and "sick pay" shall have the same meaning as ascribed thereto in section 3402(o) and the regulations thereunder. For purposes of this section, the term "employer" shall have the same meaning as ascribed thereto in section 3401(d) and the regulations thereunder, except that the term "employer" shall not include the payor for purposes of this section.

(e) *Additional requirements.* (1) Statements furnished to payees under this section must also comply with all requirements of section 6051 (c) and (d) and the regulations thereunder.

(2) The provisions of §1.9101–1 (relating to permission to submit information required by certain returns and statements on magnetic tape) shall be applicable to the information required by this section to be furnished on Form W–2 if the employer properly complies with those provisions.

(3) The provisions of section 6109 (relating to identifying numbers) and the regulations thereunder shall be applicable to Form W–2 and to any payee of sick pay to whom a statement on Form W–2 is required by this section to be furnished. Thus the employer must include the social security account number of the payee on all Forms W–2.

(f) *Effective date.* The provisions of this section shall apply to payments of sick pay made on or after May 1, 1981.

(g) *Transitional rule.* Payors may report all sick pay paid to a payee after December 31, 1980, and before May 1, 1981, on the same statement required to be furnished under paragraph (a) as is used to report sick pay paid to a payee on or after May 1, 1981. If the payor reports on the statement required to be furnished under paragraph (a), he shall not report sick pay paid after December 31, 1980, and before May 1, 1981, on Form 1099, if otherwise required to do so. If no sick pay is paid on or after May 1, 1981, the payor may report all sick pay paid to a payee after December 31, 1980, and before May 1, 1981, on the statement required to be furnished under paragraph (a). If he reports on the statement required to be furnished under paragraph (a), he shall not report sick pay paid on Form 1099, if otherwise required to do so.

(Secs. 3402(o), 7805, Internal Revenue Code of 1954 (94 Stat. 3495, (26 U.S.C. 3402(o)); 68A Stat. 917 (26 U.S.C. 7805))

[T.D. 7814, 47 FR 11277, Mar. 16, 1982]

§31.6051–4 Statement required in case of backup withholding.

(a) *Statements required from payor.* Every payor of any reportable payment (as defined in section 3406(b)(1)) who is required to deduct and withhold tax under section 3406 must furnish to the payee a written statement containing the information required by paragraph (c) of this section.

(b) *Prescribed form.* The prescribed form for the statement required by this section is Form 1099. In the case of any reportable interest or dividend payment as defined in section 3406(b)(2), the prescribed form is the Form 1099 required in §1.6042–4 of this chapter (relating to payments of dividends), §1.6044–5 of this chapter (relating to payments of patronage dividends), or §1.6049–6(e) of this chapter (relating to payments of interest or original issue discount). Statements required to be furnished by this section will be treated as statements required by the respective sections with respect to any reportable payment, except that the statement required under this section must include the amount of tax withheld under section 3406. In no event will a statement be required under this section if a statement with the same information is required to be furnished to the recipient under another section.

(c) *Information required.* Each statement on Form 1099 must show the following:

(1) The name, address, and taxpayer identification number of the person receiving any reportable payment;

(2) The amount subject to reporting under section 6041, 6041A(a), 6042, 6044, 6045, 6049, 6050A, or 6050N whether or not the amount of the reportable payment is less than the amount for which an information return is required. If tax is withheld under section 3406, the statement must show the amount of the payment withheld upon;

(3) The amount of tax deducted and withheld under section 3406;

(4) The name and address of the person filing the form;

(5) A legend stating that such amount is being reported to the Internal Revenue Service; and

(6) Such other information as is required by the form.

(d) *Time for furnishing statements.* The statement must be furnished to the payee no later than January 31 of the year following the calendar year in which the payment was made.

(e) *Aggregation.* The payor or broker may combine the information required to be shown under this section with information required to be shown under another section even if they do not relate to the same type of reportable payment.

[T.D. 8637, 60 FR 66133, Dec. 21, 1995]

§ 31.6053–1 Report of tips by employee to employer.

(a) *Requirement that tips be reported.* An employee who receives after 1965, in the course of his employment by an employer, tips which constitute wages as defined in section 3121(a) or section 3401 shall furnish to his employer a written statement, or statements, disclosing the total amount of such tips received by the employee in the course of his employment by such employer. For provisions relating to the treatment of tips as wages for purposes of the tax under section 3101, see 3121(a)(12) and 3121(q). For provisions relating to the treatment of tips as wages for purposes of the tax under section 3402, see §§ 31.3401(a)(16) and 31.3401(f). Tips received by an employee in a calendar month in the course of his employment by an employer which are required to be reported to the employer must be so reported on or before the 10th day of the following month. Thus, tips received by an employee in January 1966, are required to be reported by the employee to his employer on or before February 10, 1966.

(b) *Statement for use in reporting tips*—(1) *In general.* The written statement furnished by the employee to the employer in respect of tips received by the employee shall be signed by the employee and should disclose:

(i) The name, address, and social security number of the employee.

(ii) The name and address of the employer.

(iii) The period for which, and the date on which, the statement is furnished. If the statement is for a calendar month, the month and year should be specified. If the statement is for a period of less than 1 calendar month, the beginning and ending dates of the period should be shown (for example, January 1 through January 8, 1966).

(iv) The total amount of tips received by the employee during the period covered by the statement which are required to be reported to the employer (see paragraph (a) of this section).

(2) *Form of statement*—(i) *In general.* No particular form is prescribed which must be used in all cases in furnishing the statement required by this section. Unless some other form is provided by the employer for use by the employee in reporting tips received by him, Form 4070 may be used by the employee. Copies of Form 4070 will be furnished by district directors upon request.

(ii) *Forms provided by employers.* Subject to certain conditions and limitations, an employer may provide a form or forms for use by his employees in reporting tips received by them. Any such form provided for use by an employee, which is to be used solely for the purpose of reporting tips, shall meet all the requirements of paragraph (b)(1) of this section, and a blank copy of the form shall be made available to the employee for completion and retention by him. In lieu of a special form for tip reporting, and employer may provide regularly used forms (such as time cards) for use by employees in reporting tips. Any such regularly used form must meet the requirements of paragraph (b)(1) (iii) and (iv) of this section, and shall contain identifying information which will assure accurate identification of the employee by the employer. However, a regularly used form may be used for the purpose of reporting tips only if, at the time of the first payment of wages (or within a short period thereafter) following the reporting of tips by the employee, the employee is furnished a statement suitable for retention by him showing the amount of tips reported by the employee for the period. This requirement may be met, for example, through the use of a payroll check stub or other payroll document regularly furnished by the employer to the employee showing gross pay, deductions, etc.

(c) *Period covered by, and due date of, tip statement*—(1) *In general.* In no event shall the written statement furnished by the employee to the employer in respect of tips received by him cover a period in excess of 1 calendar month. An employer may, in his discretion, require the submission of a written statement in respect of a specified period of time, for example, on a weekly or biweekly basis, regular payroll period, etc. An employer may specify, subject to the limitation in paragraph (a) of this section, the time within which, or the date on which, the statement for a specified period of time should be submitted by the employee. For example, a statement covering a payroll period may be required to be submitted on the first (or second) day following the close of such payroll period. However, a written statement submitted by an employee after the date specified by the employer for its submission shall be considered as a statement furnished pursuant to section 6053(a) and this section if it is submitted to the employer on or before the 10th day following the month in which the tips were received.

(2) *Termination of employment.* If an employee's employment is being terminated, a written statement in respect of tips shall be furnished by the employee to the employer at the time the employee ceases to perform services for the employer. However, a written statement submitted by an employee after the date on which he ceases to perform services for the employer shall be considered as a statement furnished pursuant to section 6053(a) and this section if the statement is submitted to the employer prior to the day on which the final payment of wages is made by the employer to the employee and on or before the 10th day following the month in which the tips were received.

[T.D. 7001, 34 FR 1004, Jan. 23, 1969]

§ 31.6053–2 Employer statement of uncollected employee tax.

(a) *Requirement that statement be furnished.* If—

(1) The amount of the employee tax imposed by section 3101 in respect of tips reported by an employee to his employer pursuant to section 6053(a) (see § 31.6053–1) exceeds

(2) The amount of employee tax imposed by section 3101 in respect of such tips which can be collected by the employer from wages (exclusive of tips) of such employee or from funds furnished to the employer by the employee,

the employer shall furnish to the employee a statement showing the amount of the excess. For provisions relating to the collection of, and liability for, employee tax on tips, see § 31.3102–3.

(b) *Form of statement.* Form W–2 is the form prescribed for use in furnishing the statement required by paragraph (a) of this section, except that if an employer files a composite return pursuant to § 31.6011(a)–8 he may furnish to the employee, in lieu of Form W–2, a statement containing the required information in a form suitable for retention by the employee. A statement is required under this section in respect of an excess referred to in paragraph (a) of this section, even though the employer may not be required to furnish a statement to the employee under § 31.6051. Provisions applicable to the furnishing of a statement under § 31.6051 shall be applicable to statements under this section.

(c) *Excess to be shown on statement.* If there is an excess in respect of the tips reported by an employee in two or more statements furnished pursuant to section 6053(a), only the total excess for the period covered by the employer statement shall be shown on such statement.

[T.D. 7001, 34 FR 1005, Jan. 23, 1969, as amended by T.D. 7351, 40 FR 17145, Apr. 17, 1975]

§ 31.6053–3 Reporting by certain large food or beverage establishments with respect to tips.

(a) *Information return by an employer with respect to tips*—(1) *In general.* An employer shall file a separate information return for each calendar year (as defined in paragraph (j)(14) of this section) with respect to each large food or beverage establishment (as defined in paragraph (j)(7) of this section) in which such employer has employees. The information return shall contain the following:

(i) The employer's name, address, and employer identification number;

(ii) The establishment's name, address, and identification number (see paragraph (a)(5) of this section);

(iii) The aggregate gross receipts (other than nonallocable receipts) of the establishment from the provision of food or beverages;

(iv) The aggregate amount of charge receipts (other than nonallocable receipts) on which there were charged tips;

(v) The aggregate amount of charged tips shown on such charge receipts;

(vi) The aggregate amount of tips actually received by food or beverage employees of the establishment during the calendar year and reported to the employer under section 6053(a) (see paragraph (j)(15) of this section);

(vii) The aggregate amount the employer is required to report under section 6051 and the regulations thereunder with respect to service charges of less than 10 percent.

(viii) The name and social security number of each employee of the establishment during the calendar year to whom an allocation was made under section 6053(c)(3) and paragraph (d) of this section and the amount of such allocation.

(2) *Calendar year 1983 information return.* In the case of the 1983 calendar year information return, the information required by paragraphs (a)(1)(iii) through (viii) of this section shall be reported for the period beginning with the first payroll period ending on or after April 1, 1983, and ending with the end of the 1983 calendar year. See paragraph (c) of this section relating to information required for the first quarter of 1983.

(3) *Prescribed form.* The return required by this paragraph shall be made on Form 8027 with the transmittal form being Form 8027T. The information required by paragraph (a)(1)(viii) of this section may be provided by attaching to Form 8027 photocopies of each employee's W–2 for whom an allocation was made. A copy of any written good faith agreements applicable to a given calendar year (see paragraph (e) of this section) shall be attached to Form 8027 for such calendar year.

(4) *Time and place for filing.* The information return required by this paragraph shall be filed on or before the last day of February of the year following the calendar year for which the return is made with the Internal Revenue Service Center specified by the Form 8027 or its instructions. See section 6652(a) relating to the penalty for failure to file this information return.

(5) *Large food or beverage establishment identification number.* Each large food or beverage establishment shall have a unique identification number to be included on Form 8027 and any employer's application pursuant to paragraph (h) of this section. If an identification number is changed for any reason, for example if the establishment becomes a different ''type'' of establishment as described in paragraph (a)(5)(ii) of this section, or if the employer identification number changes, the employer shall notify the Service by including both the old and new identification numbers on the Form 8027 filed for the year in which the identification number was changed. An establishment identification number shall be determined as follows:

(i) The first nine digits shall be the employer's identification number (EIN).

(ii) The next digit shall identify the type of large food or beverage establishment, with the categories as follows:

(A) The number ''1'' signifies an establishment that serves evening meals only (with or without alcoholic beverages).

(B) The number ''2'' signifies an establishment that serves evening meals and other meals (with or without alcoholic beverages).

(C) The number ''3'' signifies an establishment that serves only meals other than evening meals (with or without alcoholic beverages).

(D) The number ''4'' signifies an establishment that serves food, if at all, as only an incidental part of the business of serving alcoholic beverages.

(iii) The last five digits are to differentiate between multiple establishments reporting under the same EIN number. For this purpose, the employer shall assign each establishment reporting under such employer's EIN number a unique five digit number. For example, each establishment could be assigned a unique number by beginning with ''00001'' and progressing in numerical sequence (*i.e.,* ''00002'', ''00003'', ''00004'', ''00005'') until each establishment has been assigned a number.

(6) *Definitions.* See paragraph (j) of this section for definitions of various terms used in this section.

(b) *Employer statement to employees*—(1) *In general.* The employer shall furnish to each employee to whom an amount is allocated under section 6053(c)(3) and paragraph (d) of this section a written statement for each calendar year containing the following information:

(i) The employer's name and address;

(ii) The name of the employee;

(iii) The aggregate amount allocated to the employee for the calendar year.

(2) *Prescribed form.* The written statement required by this paragraph shall be made on Form W–2.

(3) *Time and manner for furnishing the statement.* The written statement required by this paragraph shall be due at the same time and shall be furnished in the same manner as the statement required to be furnished under section 6051. See section 6678 relating to the penalty for failure to file this statement.

(4) *Employee's request for an early W–2.* If an employee's employment is terminated prior to the end of a calendar year and the employee requests an early W–2 under section 6051 and §31.6051–1(d), a tip allocation under section 6053(c) is not required to be shown on such early W–2. However, the employer may include on such early W–2 the employee's actual tip allocation under section 6053(c), if known, or a good faith estimate of such allocation. A good faith estimate of an allocation shall be signified by placing the word ''estimate'' next to the allocation on the employee's copy of the early W–2. An amended W–2 must be furnished to each employee to whom an amount is allocated under section 6053(c), during January of the calendar year following the calendar year for which the statement is made, if there is no tip allocation on the early W–2 or if the estimated allocation is found to vary from the actual allocation by more than 5 percent of the amount of the actual allocation.

(5) *Employee reporting of tip income.* Regardless of whether an employee receives an allocation under section 6053(c) and §31.6053–3, the employee is required to report as income on his or her Federal income tax return all tips received. For tips received before October 1, 1985, an employee must be able to substantiate the amount of reported tip income as provided in section 6001 and the regulations thereunder, For tips received on or after October 1, 1985, an employee must be able to substantiate the amount of reported tip income as provided in §31.6053–4. The Internal Revenue Service may determine that a tipped employee received a larger amount of tip income than is reflected by the employee's allocation.

(c) *First quarter report of 1983*—(1) *In general.* For the period beginning with the first day of calendar year 1983, and ending on the last day of the last payroll period ending before April 1, 1983, an employer must file an information return for each large food or beverage establishment that was a large food or beverage establishment on January 1, 1983, that contains the information required by paragraph (a)(1)(i)–(vii) of this section for such period.

(2) *Prescribed form.* The information return required by this paragraph shall be made on Form 8027. The returns for the first calendar quarter of 1983 and

for calendar year 1983 may be incorporated onto a single Form 8027 but must separately set forth the required information for each of the two return periods.

(3) *Time and place for filing.* The time and place for filing the information return required by this paragraph shall be the same as for the calendar year 1983 information return. See paragraph (a)(4) of this section.

(d) *Allocation of excess of 8 percent of gross receipts over the aggregate amount of reported tips*—(1) *In general.* An employer that operates a large food or beverage establishment shall allocate (as tips for purposes of the requirements of section 6053(c) among tipped employees at such establishment performing services during any payroll period an amount equal to the excess of:

(i) Eight percent of the gross receipts (other than nonallocable receipts) of such establishment for the payroll period, over

(ii) The aggregate amount of tips reported by employees at such establishment to the employer under section 6053(a) for such period. For this purpose, if an employee reports under section 6053(a) on the basis of a period other than a payroll period such employee may specify what portion of his or her reported tips are attributable to a given payroll period when reporting tips to the employer under section 6053(a). In the absence of any specification by the employee, the employer shall allocate the amount of tips reported by an employee to a given payroll period either:

(A) By multiplying the aggregate amount of those reported tips by a fraction, the numerator of which is the gross receipts attributable to the tipped employee for the payroll period and the denominator of which is the gross receipts attributable to the employee for the entire tip reporting period; or

(B) By multiplying the aggregate amount of those reported tips by a fraction, the numerator of which is the hours worked by the employee during the payroll period and the denominator of which is the total hours worked by the employee during the entire tip reporting period.

With respect to each establishment, the employer shall choose the method described in either paragraph (d)(1)(ii)(A) or paragraph (d)(1)(ii)(B) of this section for a calendar year and apply such method consistently in making all allocations required by the preceding sentence. If an employee is employed in more than one of an employer's food or beverage operations, such employee may specify what portion of his or her reported tips are attributable to a given operation when reporting tips to the employer under section 6053(a). In the absence of any specification by the employee, the employer shall allocate the amount of tips reported by the employee to a given food or beverage operation in a manner similar to that provided above for allocation of tips among payroll periods. The employer shall choose the method described in either paragraph (d)(1)(ii)(A) or paragraph (d)(1)(ii)(B) of this section for a calendar year and apply such method consistently in making all allocations required by the preceding sentence.

(2) *Employer not liable to employees for allocations.* An employer who makes allocations (as tips for purposes of the requirements of section 6053(c) and this section) among such employer's employees in accordance with paragraph (d) and either paragraph (e) or (f) of this section shall not be liable to any employee if any amount is improperly allocated. However, if an employee's total tip allocations for a calendar year as reported on Form W–2 varies from the correct allocation amount by more than 5 percent of the correct allocation amount, the employer shall adjust such employee's allocation. If such an adjustment of an employee's allocation is required, the employer shall also review all tips allocations made to other employees in the same establishment to assure that the error did not distort other allocated amounts by more than 5 percent. Any adjustments made for variances of more than 5 percent shall be reflected in amended W–2's issued to the affected employees. Tip allocations made under this section shall have no effect on the withholding responsibilities of the employer under subtitle C of the Code. Withholding on tips is authorized only with respect to amounts

of tips reported to employers by employees under section 6053(a).

(e) *Allocation pursuant to a good faith agreement.* The amount determined under paragraph (d)(2) of this section for each payroll period must be allocated among tipped employees providing services during such payroll period either on the basis of a good faith agreement described in this paragraph, or, if there is no good faith agreement applicable with respect to the payroll period on the basis of the allocation method provided in paragraph (f) of this section. A good faith agreement is a written agreement consented to by the employer and at least two-thirds of the members of each occupational category of tipped employees (*e.g.*, waiters, busboys, maitre d's) employed in the large food or beverage establishment at the time the agreement is adopted which:

(1) Provides for the allocation of the amount described in paragraph (d)(1) among tipped employees in a manner that, in combination with the tips reported by such employees under section 6053(a), will reflect a good faith approximation of the actual distribution of tip income among such tipped employees;

(2) Is effective prospectively beginning with the first day of a payroll period that begins after the date of adoption, but in no event later than the first day of the succeeding calendar year. However, a good faith agreement may be effective for calendar year 1983 if adopted on or before December 31, 1983.

(3) Is adopted at a time when there are tipped employees employed by the employer in each occupational category of tipped employees (*e.g.*, waiters, busboys, maitre d's) which would be affected by the agreement; and

(4) May be revoked prospectively by a written instrumnent adopted by a least two-thirds of the tipped employees who are employed in the establishment in occupational categories affected by the agreement at the time of the revocation. A revocation of an agreement shall be effective only at the beginning of a payroll period.

(f) *Allocation method to be used in the absence of a good faith agreement.* (1) In a case in which there is no good faith agreement in effect and the aggregate amount of tips reported pursuant to section 6053(a) with respect to a payroll period is less than 8 percent of the establishment's gross receipts for the payroll period, the employer shall allocate the difference as tips for purposes of section 6053(c) as provided in this paragraph. No allocations shall be made to indirectly tipped employees. An allocation shall be made to each directly tipped employee performing services for the establishment who has a reporting shortfall (as determined under paragraph (f)(1)(v) of this section) for the payroll period. The amount of each allocation shall be determined in the following manner:

(i) Multiply the amount of the establishment's gross receipts for the payroll period by 8 percent (0.08).

(ii) Determine the aggregate amount of tips reported for the payroll period by indirectly tipped employees.

(iii) Subtract from the amount determined under paragraph (f)(1)(i) the aggregate amount of tips reported by indirectly tipped employees as determined under paragraph (f)(1)(ii) of this section. The excess is the directly tipped employees' aggregate share of 8 percent of the gross receipts of the establishment for the payroll period.

(iv) For each directly tipped employee, multiply the amount determined under paragraph (f)(1)(iii) of this section by a fraction, the numerator of which is the amount of gross receipts of the establishment for the payroll period that is attributable to the employee and the denominator of which is the aggregate amount of gross receipts for the payroll period that is attributable to all directly tipped employees. The product is each directly tipped employee's share of 8 percent of the gross receipts of the establishment for the payroll period. The employer may determine the fraction described in the first sentence of this subparagraph by substituting for the numerator the number of hours worked by the directly tipped employee during the payroll period and by substituting for the denominator the number of hours worked by all directly tipped employees during the payroll period. For payroll periods beginning after December

31, 1986, the method of allocation described in the preceding sentence may be used only by an employer that employs less than the equivalent of 25 full-time employees (as defined in paragraph (j)(19) of this section) at the establishment during the payroll period.

(v) For each directly tipped employee, determine the excess, if any, of the amount determined under paragraph (f)(1)(iv) of this section over the amount reported as tips by the employee for the payroll period pursuant to section 6053(a). Such excess, if any, is the employee's shortfall for the payroll period.

(vi) Subtract from the amount determined under paragraph (f)(1)(i) of this section the aggregate amount of tips reported pursuant to section 6053(a) by all directly and indirectly tipped employees for the payroll period. The excess is the amount to be allocated as tips among directly tipped employees who had a shortfall for the payroll period as determined under paragraph (f)(1)(v) of this section.

(vii) For each directly tipped employee who had a shortfall for the payroll period, multiply the amount determined under paragraph (f)(1)(vi) of this section by a fraction, the numerator of which is the amount of such employee's shortfall (determined under paragraph (f)(1)(v) of this section and the denominator of which is the aggregate of all shortfalls for the payroll period for all directly tipped employees. The product is the employee's allocation for the payroll period.

(2) The provisions of this paragraph may be illustrated by the following examples:

Example 1. X is a large food or beverage establishment that has chosen to make tip allocations using its actual payroll period and gross receipts attributable to employees. X had gross receipts for a payroll period of $100,000 and tips reported for the payroll period of $6,200. Directly tipped employees reported $5,700 while indirectly tipped employees reported $500.

Directly tipped employees	Gross receipts for payroll period	Tips reported
A	18,000	1,080
B	16,000	880
C	23,000	1,810
D	17,000	800
E	12,000	450
F	14,000	680
Total	100,000	5,700

The allocation computations would be as follows:

(1) $100,000 (gross receipts)×0.08=$8,000.

(2) Tips reported by indirectly tipped employees=$500.

(3) $8,000−$500 (indirect employees tips)=$7,500.

(4)

Directly tipped employees	Directly tipped share of 8 pct gross	×	Gross receipts ratio	=	Employee share of 8 pct gross
A	$7,500		18,000/100,000		1,350
B	7,500		16,000/100,000		1,200
C	7,500		23,000/100,000		1,725
D	7,500		17,000/100,000		1,275
E	7,500		12,000/100,000		900
F	7,500		14,000/100,000		1,050
Total ...	....	....	....	....	7,500

(5)

Directly tipped employees	Employee share of 8 pct gross	−	Tips reported	=	Employee shortfall
A	$1,350		$1,080		$270
B	1,200		880		320
C	1,725		1,810		....
D	1,275		800		475
E	900		450		450
F	1,050		680		370
Total shortfall	....	....	....	....	1,885

Since employee C has no reporting shortfall there is no allocation to C.

(6) $8,000−6,200 (total tips reported)=$1,800 (amount allocable among shortfall employees).

(7)

Shortfall employees	Allocable amount	×	Shortfall ratio	=	Amount of allocation
A	$1,800		270/1885		$258
B	1,800		320/1885		306
D	1,800		475/1885		454
E	1,800		450/1885		430
F	1,800		370/1885		353

Example 2. Assume the same facts as in example 1 except that the employer uses employee hours worked to calculate tip allocations.

Directly tipped employees	Hours worked in payroll period	Tips reported
A	40	$1,080
B	35	880
C	45	1,810
D	40	800
E	15	450
F	25	680
Total	200	$5,700

The allocation computations would be as follows:

(1) $100,000 (gross receipts)×0.08=$8,000

(2) Tips reported by indirectly tipped employees=$500

(3) $8,000−$500 (indirect employees tips)=$7,500

(4)

Directly tipped employees	Directly tipped share of 8 pct gross	×	Hours worked ratio	=	Employee share of 8 pct gross
A	$7,500		40/200		$1,500
B	7,500		35/200		1,313
C	7,500		45/200		1,688
D	7,500		40/200		1,500
E	7,500		15/200		563
F	7,500		25/200		938

(5)

Directly tipped employees	Employee share of 8 pct gross	−	Tips reported	=	Employee shortfall
A	$1,500		$1,080		$420
B	1,313		880		433
C	1,688		1,810		....
D	1,500		800		700
E	563		450		113
F	938		680		258
Total shortfall	....	....	....	....	$1,924

Since employee C has no reporting shortfall there is no allocation to C.

(6) $8,000−6,200 (total tips reported)=$1,800 (amount allocable among shortfall employees).

(7)

Shortfall employees	Allocable amount	×	Shortfall ratio	=	Amount of allocation
A	$1,800		420/1,924		$393
B	1,800		433/1,924		405
D	1,800		700/1,924		655
E	1,800		113/1,924		106
F	1,800		258/1,924		241

Example 3. X is a large food or beverage establishment that has chosen to make tip allocations using a calendar year period. X had gross receipts for a calendar year of $2,000,000 and tips reported for the calendar year of $176,000. The amount to be allocated as tips is equal to the excess of 8 percent of the gross receipts of the establishment for the calendar year over the aggregate amount of tips reported by the employees of the establishment to the employer under section 6053(a) for the calendar year. Because the reported tips for the year ($176,000) are in excess of 8 percent of the gross receipts ($2,000,000× .08=$160,000), no tip allocations are made to the employees of this establishment for the calendar year.

Example 4. X is a large food or beverage establishment that has chosen to make tip allocations using a calendar year period and gross receipts attributable to employees. X had gross receipts for a calendar year of $1,500,000 and tips reported for the calendar year of $110,000. Directly tipped employees reported $94,000 while indirectly tipped employees reported $16,000.

Directly tipped employees	Gross receipts for calendar year	Tips reported
A	260,000	$18,600
B	240,000	14,600
C	380,000	31,200
D	260,000	13,000
E	160,000	6,000
F	200,000	10,600
Total	$1,500,000	$94,000

The allocation computations are as follows:

(1) $1,500,000 (gross receipts) ×0.08=$120,000.

(2) Tips reported by indirectly tipped employees=$16,000.

(3) $120,000−16,000 (indirect employees tips)=$104,000.

(4)

Directly tipped employees	Directly tipped share of 8 pct. gross	X	Gross receipts ratio	=	Employee share of 8 pct. gross
A	$104,000		260,000/1,500,000		$18,027
B	104,000		240,000/1,500,000		16,640
C	104,000		380,000/1,500,000		26,347
D	104,000		260,000/1,500,000		18,027
E	104,000		160,000/1,500,000		11,093
F	104,000		200,000/1,500,000		13,867

(5)

Directly tipped employees	Employee share of 8 pct. gross	−	Tips reported	=	Employee shortfall
A	18,027		18,600		....
B	16,640		14,600		2,040
C	26,347		31,200		....
D	18,027		13,000		5,027

Directly tipped employees	Employee share of 8 pct. gross	–	Tips reported	=	Employee shortfall
E	11,093		6,000		5,093
F	13,867		10,600		3,267
Total shortfall	....	....	....	....	15,427

Since employees A and C do not have a reporting shortfall there are no allocations to them.

(6) $120,000 − 110,000 (total tips reported)=$10,000 (amount allocable among shortfall employees).

(7)

Shortfall employees	Allocable amount	×	Shortfall ratio	=	Amount of allocation
B	10,000		2,040/15,427		$1,322
D	10,000		5,027/15,427		3,259
E	10,000		5,093/15,427		3,301
F	10,000		3,267/15,427		2,118
Total	....	....	....	....	$10,000

Example 5. Assume the same facts as in example 4 except that the employer has chosen the employee hours worked method of computing tip allocations, the calendar year gross receipts were $1,000,000, and the tips reported for the calendar year were $74,000. Directly tipped employees reported $70,000 while indirectly tipped employees reported $4,000.

Directly tipped employees	Hours worked in the calendar year	Tips reported
A	2,000	$11,800
B	1,750	9,800
C	2,250	15,100
D	2,000	9,000
E	750	4,500
F	1,250	7,800
G	490	3,200
H	510	2,800
I	200	800
J	1,000	5,200
Total	12,200	$70,000

The allocation computations would be as follows:

(1) $1,000,000 (gross receipts)×0.08=$80,000.

(2) Tips reported by indirectly tipped employees=$4,000.

(3) $80,000 − $4,000 (indirect employee tips)=$76,000.

(4)

Directly tipped employees	Directly tipped share of 8 pct. gross	×	Hours worked ratio	=	Employee share of 8 pct. gross
A	$76,000		2,000/12,200		$12,459
B	76,000		1,750/12,200		10,902
C	76,000		2,250/12,200		14,016
D	76,000		2,000/12,200		12,459
E	76,000		750/12,200		4,672
F	76,000		1,250/12,200		7,787
G	76,000		490/12,200		3,052
H	76,000		510/12,200		3,177
I	76,000		200/12,200		1,246
J	76,000		1,000/12,200		6,230
Total	....	....	....	....	$76,000

(5)

Directly tipped employees	Employee share of 8 pct. gross	–	Tips reported	=	Employee shortfall
A	12,459		11,800		$659
B	10,902		9,800		1,102
C	14,016		15,100		....
D	12,459		9,000		3,459
E	4,672		4,500		172
F	7,787		7,800		....
G	3,052		3,200		....
H	3,177		2,800		377
I	1,246		800		446
J	6,230		5,200		1,030
Total shortfall	....	....	....	....	$7,245

Since employees C, F, and G have no reporting shortfalls, there are no allocations made to them.

(6) $80,000 − 74,000 (total tips reported)=$6,000.

(7)

Shortfall employees	Allocable amount	×	Shortfall ratio	=	Amount of allocation
A	$6,000		659/7,245		$546
B	6,000		1,102/7,245		913
D	6,000		3,459/7,245		2,865
E	6,000		172/7,245		142
H	6,000		377/7,245		312
I	6,000		446/7,245		369
J	6,000		1,030/7,245		853
Total	....	....	....	....	$6,000

(g) *Period of allocation.* In applying paragraphs (d), (e), (f), and (h)(3) of this section an employer may substitute the calendar year or any period that results from a reasonable division of a calendar year for the term ‘‘payroll period’’ each place it appears in such paragraphs. If an employer makes such a substitution with respect to a large food or beverage establishment the substituted period shall be stated on Form 8027 for such large food or beverage establishment and shall be effective for such employer's large food or beverage establishment for the entire calendar year.

(h) *Lowering the percentage to be used*—(1) *In general.* On and after July 18, 1984, an employer or a majority of the employees (as defined in paragraph (h)(2)(iii) of this section) of an employer may petition the district director for the internal revenue district in which the employer's establishment is located to have the percentage of gross receipts that is used to determine the amount to be allocated under section 6053(c)(3)(A) and paragraph (d) of § 31.6053–3 reduced from 8 percent to the percentage that the petitioning employer or employees believe to be the actual percentage of the amount of the establishment's gross receipts that reflects the amount of tips. The district director may thereafter reduce the percentage of gross receipts used to determine the amount to be so allocated to the percentage that the district director determines to be the proper estimate of the actual percentage of gross receipts constituting tips. The district director, however, may not reduce the percentage below 2 percent. For the rules in effect prior to July 18, 1984, see 26 CFR 31.6053–3(h) (Rev. as of April 1, 1984).

(2) *Time and manner for petition to have percentage reduced*—(i) *In general.* The petition shall be in writing and shall include sufficient information to allow the district director to estimate with reasonable accuracy the actual tip rate of the establishment. For example, such information might include the charged tip rate, the type of establishment, menu prices, the location of the establishment, the amount of "self-service" required, the days and hours open for business, and whether the customer receives the check from or pays the server for the meal.

(ii) *Employer petitions.* In the case of employer-originated petitions, the employer has the burden of supplying sufficient information to allow the district director to estimate with reasonable accuracy the actual tip rate of the establishment. The employer also shall attach to the petition copies of Form 8027 (if any) filed for the establishment for the 3 years preceding calendar years.

(iii) *Employee petitions.* (A) In the case of employee-originated petitions, a majority of the employees of an establishment must consent to the petition. A majority for purposes of this paragraph is more than one-half of all the directly tipped employees (within the meaning of paragraph (j)(12) of this section) employed by the establishment at the time the petition is filed. In the case of a single petition for certain multi-establishment employers (see paragraph (h)(4) of this section), more than one-half of the aggregate directly tipped employees (at the time the petition is filed) of the establishments covered by the petition must consent. The petition filed with the district director must state the total number of directly tipped employees employed by the establishment (or establishments) and the number of the directly tipped employees consenting to the petition.

(B) The petitioning employees have the burden of supplying sufficient information to allow the district director to estimate with reasonable accuracy the actual tip rate of the establishment to the extent they possess such information. If the employer possesses relevant information, the employer must provide such information to the district director upon the request of the petitioning employees or district director. Employees who file a petition under this paragraph must promptly notify their employer of the petition. Promptly upon receipt of such notification, their employer must submit to the district director copies of the Form 8027 (if any) filed for the establishment for the 3 immediately preceding calendar years. Any information supplied by the employer during the petitioning process constitutes return information (as defined in section 6103(b)(2)) which shall not be disclosed by the Internal Revenue Service (except as provided in section 6103) to any employees of the employer or to representatives of such employees.

(3) *Effective date for reduced percentage.* The district director shall determine the term for which the reduced percentage is to be effective. At the

end of such term, the reduced percentage shall cease to apply unless previously extended by the district director for the district in which the large food or beverage establishment is located. In no event shall the reduced percentage be applied to payroll periods before the date the petition described in paragraph (h)(2) of this section is filed unless the establishment is a new business (as described in paragraph (i) of § 31.6053–3). In the case of a new business or a petition for reduction filed prior to September 30, 1983, the district director may allow the approved reduced percentage to be applied retroactively to the first day of the calendar year of the petition. Until such time as the employer is notified in writing by the district director of approval of a reduction, the employer must continue to use 8 percent of gross receipts for purposes of complying with section 6053(c) and this section.

(4) *Single petition for certain multi-establishment employers.* An employer (including a single employer as defined in section 52 (a) or (b)) or a majority of the employees of such employer may use a single petition for two or more of the employer's establishments if such establishments are essentially the same type of business, the petitioning employer or employees have made a good faith determination that the tip rates at such establishments are essentially the same, and the establishments are located in the same internal revenue region. Single petitions shall include the names and locations of the establishments for which a reduction is requested and the information required by paragraph (h)(2) of this section for a typical establishment. A single petition for multi-establishments located within an internal revenue region shall be filed with the district director for the internal revenue district in which the greatest number of the establishments included in the petition are located. If there is an equal number of establishments located in two or more internal revenue districts the employer or employees petitioning may choose the district to which the petition is sent.

(i) *Application of reporting requirements to new businesses*—(1) *In general.* A food or beverage operation is a new business if the employer of the operation did not operate any food or beverage operations during the preceding calendar year. An employer will not be considered to have operated a food or beverage operation during a calendar year if each food or beverage operation of the employer was operated for less than one calendar month during such year. In a calendar year in which a food or beverage operation is a new business, the determination of whether the operation is a large food or beverage establishment shall be made as provided in paragraph (i)(2) of this section and the employer shall comply with section 6053(c) and this section as provided in paragraph (i)(3) of this section.

(2) *Determination of status as a large food or beverage establishment.* A food or beverage operation shall be considered a large food or beverage establishment during the calendar year in which it is a new business if the average number of hours worked per business day by all employees of the employer at the new business during each of any two consecutive calendar months of the calendar year, computed in the manner provided in the second sentence of paragraph (j)(9) of this section, is greater than 80 hours.

(3) *New business compliance under section 6053(c).* A new business that is determined to be a large food or beverage establishment under paragraph (i)(2) of this section shall comply with section 6053(c) and this section beginning with the first payroll period that begins after the first period of two consecutive calendar months described in paragraph (i)(2) of this section.

(j) *Definitions.* For purposes of section 6053(c) and this section:

(1) *Gross receipts.* Gross receipts shall include all receipts (other than nonallocable receipts), from the provision of food or beverages by a large food or beverage establishment from cash sales, charge receipts (including charged tips only to the extent the cash sales amount has been reduced due to the employer paying cash to tipped employees for charged tips due them), charges to a hotel room (excluding tips charged to a hotel room only to the extent that the employer's accounting procedures allow such tips to be segregated out and excluding

charges that are otherwise included in charge receipts), and the retail value of complimentary food or beverages (as defined in paragraph (j)(16) of this section) served to customers. Gross receipts shall not include state or local taxes. In the case of a trade or business that does not charge separately for the provision of food or beverages (*i.e.*, a trade or business that provides other goods or services along with food or beverages for a combined price, such as a ''package deal'' for food and lodging), the employer shall make a good faith estimate of the gross receipts attributable to the provision of the food or beverages that reflects the cost to the employer of providing the food or beverages plus a reasonable profit factor.

(2) *Gross receipts attributable to a directly tipped employee.* Gross receipts attributable to a directly tipped employee are those gross receipts (as defined in paragraph (j)(1) of this section) from the provision of food or beverages to customers with respect to which the employee provided services. For example, if a directly tipped employee's name is on every check given to customers for whom the employee has provided services, the gross receipts attributable to such employee could be determined by aggregating the amounts of all checks bearing that employee's name (other than amounts from nonallocable receipts).

(3) *Nonallocable receipts.* Nonallocable receipts are receipts which are attributable to carryout sales or to services with respect to which a service charge of 10 percent or more is added. Carryout sales are sales of food or beverages for consumption off the premises of the establishment. Room service is not a carryout sale. If an establishment's accounting system does not segregate receipts from carryout sales from the establishment's other receipts, receipts from carryout sales may be determined as an estimated percentage of total receipts. The applicable percentage shall be determined in good faith by the employer on the basis of generally accepted accounting practices, including but not limited to, surveys of carryout sales as a percentage of gross sales. An employer may rely upon estimates as to carryout sales which are established in good faith between the employer and state or local governments for purposes of state or local taxation.

(4) *Charge receipts.* Charge receipts shall include credit card charges and charges under any other credit arrangement (e.g., house charges, city ledger, and charge arrangements to country club members). Charges to a hotel room may be excluded from charge receipts if such exclusion is consistent with the employer's normal accounting practices and the employer applies such exclusion consistently for a given large food or beverage establishment. Otherwise, charges to a hotel room shall be included in charge receipts.

(5) *Charged tips.* A tip included on a charge receipt is a charged tip.

(6) *Food or beverage operation.* A ''food or beverage operation'' is any business activity which provides food or beverages for consumption on the premises (other than ''fast food'' operations). If an employer conducts activities that provide food or beverages at more than one location, the activity at each separate location shall be considered to be a separate food or beverage operation, Each activity conducted within a single building shall be considered to be conducted at a separate location if the customers of the activity, while being provided with food or beverages, occupy an area separate from that occupied by customers of other activities and the gross receipts of the activity are recorded separately from the gross receipts of other activities. For example, a gourmet restaurant, a coffee shop, and a cocktail lounge in a hotel would each be treated as a separate food or beverage operation if gross receipts from each activity are recorded separately. In addition, an employer may treat different activities conducted in the identical place at different times as separate food or beverage operations if the gross receipts of the activities at each time are recorded separately. For example, a restaurant may record the gross receipts from its cafeteria style lunch operation separately from the gross receipts of its full service food or beverage operations.

(7) *Large food or beverage establishment.* A food or beverage operation is a ''large food or beverage establishment'' if:

(i) The employer at the food or beverage operation normally employed more than 10 employees on a typical business day during the preceding calendar year, and

(ii) The tipping of food or beverage employees of the food or beverage operation is customary. Generally, tipping would not be considered customary for a cafeteria style operation (as defined in paragraph (j)(18) of this section) or for a food or beverage operation where at least 95 percent of its total sales are nonallocable receipts, within the meaning of paragraph (j)(3) of this section, by reason of the addition of a service charge of 10 percent or more. Total sales shall include only gross receipts (as defined in paragraph (j)(1) of this section) and nonallocable receipts (other than carryout receipts) from the provision of food or beverages. In the case of an operation such as a restaurant that is a cafeteria style operation at lunch and that has full service with tipping customary at dinner, the entire operation is generally a large food or beverage establishment if the employer meets the 10-employee test. However, if the gross receipts of the cafeteria style operation at lunch are recorded separately from the dinner operation gross receipts the employer may treat the dinner operation as a large food or beverage establishment and the lunch operation as a separate food or beverage operation that is not a large food or beverage establishment due to the fact that tipping is not considered customary for cafeteria style operations.

(8) *Employee.* The term ''employee'' has the same meaning as in section 3401(c) and § 31.3401(c)–1.

(9) *More than 10 employees on a typical business day.* An employer shall be considered to have normally employed more than 10 employees on a typical business day during a calendar year if one-half of the sum of the average number of employee hours worked per business day during the calendar month in which the aggregate gross receipts from food or beverage operations were the greatest plus the average number of employee hours worked per business day during the calendar month in which the aggregate gross receipts from food or beverage operations were the least, is greater than 80 hours. The average number of employee hours worked per business day during a month shall be computed by dividing the total number of hours worked during the month by all employees of the employer who are employed in a food or beverage operation by the average of the number of days during the month that each food or beverage operation at which such employees worked was open for business. If an employer operates both a food or beverage operation and a nonfood or beverage operation, and one or more of his or her employees work for both operations, the employer may make a good faith estimate of the number of hours such employees worked for each operation in a given month. Similarly, in cases where one or more of an employer's employees work for more than one of such employer's food or beverage operations, a good faith estimate may be made of the number of hours such employees worked for each operation in a given month. For purposes of this subparagraph, employees who are employed in a food or beverage operation include all employees of the operation, not just food or beverage employees. The employees of an employer shall include all employees at all food or beverage operations who, along with the employees of such employer, would be treated as employees of a single employer under section 52 (a) or (b) (as in effect on September 3, 1982) and the regulations thereunder. For example, if an employer at a food or beverage operation is a member of a controlled group of corporations, then all employees of all corporations which are members of such controlled group of corporations shall be treated as employed by each such employer for purposes of this paragraph. However, an individual who owns 50 percent or more in value of the stock of a corporation operating an establishment shall not be treated as an employee of any establishment owned by the corporation.

(10) *Food or beverage employee.* A ''food or beverage employee'' is an employee who provides services in connection with the provision of food or beverages. Such employees include, but are not limited to, waiters, waitresses, busboys, bartenders, persons in charge of seating (such as a hostess, maitre d'

or dining room captain), wine stewards, cooks, and kitchen help. Examples of employees who are not food or beverage employees include, but are not limited to, coat check persons, bellhops, and doormen.

(11) *Tipped employee.* A ''tipped employee'' of a food or beverage operation is an employee who is a food or beverage employee that customarily receives tip income from employment at that operation. An employee who occasionally receives small amounts of tip income is not a tipped employee. Generally, an employee who receives less than $20 per month in tip income would not be considered as customarily receiving tip income.

(12) *Directly tipped employee.* A ''directly tipped employee'' is any tipped employee who receives tips directly from customers, including an employee who after receiving tips directly from customers turns all the tips over to a tip pool. Examples of directly tipped employees are waiters, waitresses, and bartenders.

(13) *Indirectly tipped employee.* An ''indirectly tipped employee'' is a tipped employee who does not normally receive tips directly from customers. Examples of indirectly tipped employees are busboys, service bartenders and cooks. An employee, such as a maitre d', who receives tips both directly from customers and indirectly through tip splitting or tip pooling shall be treated as a directly tipped employee.

(14) *Calendar year.* The term ''calendar year'' shall mean either the period from January 1 through December 31 or the period that begins with the first day of the first payroll period ending on or after January 1 and ends with the last day of the last payroll period ending in December of the same year. With respect to any establishment, the employer shall choose one of these two descriptions and apply it consistently.

(15) *Tips reported for a specified period.* Tips reported to an employer for a specified period under section 6053(a) are those tips actually received by an employee during such period without regard to the time when the tips are reported to the employer. Thus, if an employee reports to the employer in calendar year 1984 tips the employee actually received in calendar year 1983, the amount of tips actually received in calendar year 1983 must be included by the employer when making such information returns, statements and allocations required under section 6053(c) and this section for calendar year 1983.

(16) *Complimentary food or beverages.* Food or beverages served to customers without charge are complimentary if:

(i) Tipping for the provision of such food or beverages is customary at the establishment, and

(ii) Such food or beverages are provided in connection with an activity that is engaged in for profit and whose receipts would not be included in gross receipts as defined in paragraph (j)(1) of this section but for this subparagraph and are not nonallocable receipts which are attributable to services with respect to which a service charge of 10 percent or more is added.

For example, the retail values of complimentary hors d'oeuvres served at a bar or a complimentary dessert served to a regular patron of a restaurant would not be included in gross receipts because the receipts of the bar or restaurant would be included in gross receipts as defined in paragraph (j)(1) of this section. The retail value of a complimentary fruit basket placed in a hotel room generally would not be included in gross receipts because tipping for the provision of such items is not customary. The retail value of complimentary drinks served to customers in a gambling casino would be included in gross receipts because tipping for the provision of such items is customary, the gambling casino is an activity engaged in for profit, and the gambling receipts of the casino would not be included in gross receipts as defined in paragraph (j)(1) of this section except for this subparagraph.

(17) *Fast food operation.* An operation is a ''fast food'' operation only if its customers order, pick up, and pay for food or beverages at a counter, window, etc., and then carry the food or beverages to another location (either on or off the premises of such activities).

(18) *Cafeteria style operation.* The term ''cafeteria style'' operation means a food or beverage operation which is primarily self-service and in which the total cost of food or beverages selected

by a customer is paid prior to the customer's being seated or is stated on a check provided to the customer prior to the customer's being seated and is paid by the customer to a cashier. Generally, operations are primarily self-service if food or beverages are ordered or selected by a customer at one location and carried by the customer from such location to the customer's seat. For example, cafeteria lines, buffets, and smorgasbords are primarily self-service. If, after a customer is seated, a food or beverage employee delivers items such as an item that required additional preparation after being selected by the customer, condiments, beverages, or refills at no additional cost to the customer, a food or beverage operation's status as primarily self-service would not be affected.

(19) *Less than the equivalent of 25 full-time employees.* For purposes of paragraph (f)(1)(iv) of this section, an employer shall be considered to employ less than the equivalent of 25 full-time employees at an establishment during a payroll period (as defined in section 3401(b) and the regulations thereunder) if the average number of employee hours worked per business day during a payroll period is less than 200 hours. The average number of employee hours worked per business day during a payroll period shall be computed by dividing the total number of hours worked during the period by all employees of the employer who are employed in a food or beverage operation by the average of the number of days during the period that each food or beverage operation at which such employees worked was open for business. If an employer operates both a food or beverage operation and a nonfood or beverage operation, and one or more of his employees work for both operations, the employer may make a good faith estimate of the number of hours such employees worked for each operation in a given payroll period. Similarly, in cases where one or more of an employer's employees work for more than one of such employer's food or beverage operations, a good faith estimate may be made of the number of hours such employees worked for each operation in a given payroll period. If there is more than one payroll period for the establishment, the payroll period which is used for the greatest number of employees shall be the payroll period for purposes of this paragraph (j)(19). For purposes of this paragraph (j)(19), employees who are employed in a food or beverage operation include all employees of the operation, not just food or beverage employees. The employees of an employer shall include all employees at all food or beverage operations who, along with the employees of such employer, would be treated as employees of a single employer under section 52 (a) or (b) (as in effect on September 3, 1982) and the regulations thereunder. For example, if an employer at a food or beverage operation is a member of a controlled group of corporations, then all employees of all corporations which are members of such controlled group of corporations shall be treated as employed by each such employer for purposes of this paragraph.

(k) *Permission to submit information on magnetic tape.* For rules relating to permission to submit the information required by section 6053(c) and this section on magnetic tape of other media, see § 31.6011 (a)–8.

(l) *Recordkeeping requirements.* An employer shall keep records sufficient to substantiate any information returns, employer statements to employees, applications, or tip allocations made pursuant to section 6053(c) and this section. The records required by this paragraph shall be retained for 3 years after the due date of the return or statement to which they pertain.

(m) *Food or beverage operations outside the United States.* Employers at food or beverage operations outside the United States (as defined in section 7701(a)(9)) are not subject to the reporting requirements under section 6053(c) and this section.

(n) *Effective date.* This section is effective for calendar year 1983 and thereafter.

(96 Stat. 603, 26 U.S.C. 6053(c); 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 7906, 48 FR 36809, Aug. 15, 1983; 48 FR 40518, Sept. 8, 1983, as amended by T.D. 8039, 50 FR 29965, July 23, 1985; T.D. 8141, 52 FR 21511, June 8, 1987]

§31.6053–4 Substantiation requirements for tipped employees.

(a) *Substantiation of tip income*—(1) *In general.* An employee shall maintain sufficient evidence to establish the amount of tip income received by the employee during a taxable year. A daily record maintained by the employee (as described in paragraph (a)(2) of this section) shall constitute sufficient evidence. If the employee does not maintain a daily record, other evidence of the amount of tip income received during the year, such as documentary evidence (as described in paragraph (a)(3) of this section), shall constitute sufficient evidence, but only if such other evidence is as credible and as reliable as a daily record. However, notwithstanding any other provision of this paragraph (a) (1), a daily record or other evidence that is as credible and as reliable as a daily record may not be sufficient evidence if there are facts or circumstances which indicate that the employee received a larger amount of tip income. Moreover, oral statements of the employee, without corroboration, cannot constitute sufficient evidence.

(2) *Daily record.* The daily record shall state the employee's name and address, the employer's name, and the establishment's name. The daily record shall show for each work day the amount of cash tips and charge tips received directly from customers or from other employees, and the amount of tips, if any, paid out to other employees through tip sharing, tip pooling or other arrangements and the names of such employees. The record shall also show the date that each entry is made. Form 4070A, *Employee's Daily Record of Tips,* may be used to maintain such daily record. The daily record of tips received by an employee shall be prepared and maintained in such manner that each entry is made on or near the date the tip income is received. A daily record made on or near the date the tip income is received has a high degree of credibility not present with respect to a record prepared subsequent thereto when generally there is a lack of accurate recall. An entry is made ''near the date the tip income is received'' if the required information with respect to tips received and paid out by the employee for the day is recorded at a time when the employee has full present knowledge of those receipts and payments.

(3) *Documentary evidence.* Documentary evidence consists of copies of any documents that contain (i) amounts that were added to a check by customers as a tip and paid over to the employee or (ii) amounts that were paid by a customer for food or beverages with respect to which tips generally would be received by the employee. Examples of documentary evidence are copies of restaurant bills, credit card charges, or charges under any other arrangement (see §31.6053–3(j)(4)) containing amounts added by the customer as a tip.

(b) *Retention of records.* Records maintained under this section shall be kept at all times available for inspection by authorized internal revenue officers or employees, and shall be retained so long as the contents thereof may become material in the administration of any internal revenue law.

(c) *Effective date.* The substantiation requirements of this §31.6053–4 shall be effective for tips received on or after October 1, 1985. For the rules in effect prior to October 1, 1985, see section 6001 and the regulations thereunder. Substantiation considered sufficient as provided in this §31.6053–4 will also be considered sufficient for tips received before October 1, 1985.

[T.D. 8141, 52 FR 21513, June 8, 1987]

§31.6061–1 Signing of returns.

Each return required under the regulations in this subpart shall, if signature is called for by the form or instructions relating to the return, be signed by (a) the individual, if the person required to make the return is an individual; (b) the president, vice president, or other principal officer, if the person required to make the return is a corporation; (c) a responsible and duly authorized member or officer having knowledge of its affairs, if the person required to make the return is a partnership or other unincorporated organization; or (d) the fiduciary, if the person required to make the return is a trust or estate. The return may be signed for the taxpayer by an agent who is duly authorized in accordance with § 31.6011(a)–7 to make such return.

§ 31.6065(a)–1 Verification of returns or other documents.

If a return, statement, or other document made under the regulations in this part is required by the regulations contained in this part, or the form and instructions issued with respect to such return, statement, or other document, to contain or be verified by a written declaration that it is made under the penalties of perjury, such return, statement, or other document shall be so verified by the person signing it.

§ 31.6071(a)–1 Time for filing returns and other documents.

(a) *Federal Insurance Contributions Act and income tax withheld from wages and from nonpayroll payments*—(1) *Quarterly or annual returns.* Except as provided in subparagraph (4) of this paragraph each return required to be made under § 31.6011(a)–1, in respect of the taxes imposed by the Federal Insurance Contributions Act, or required to be made under § 31.6011(a)–4, in respect of income tax withheld, shall be filed on or before the last day of the first calendar month following the period for which it is made. However, a return may be filed on or before the 10th day of the second calendar month following such period if timely deposits under section 6302(c) of the Code and the regulations thereunder have been made in full payment of such taxes due for the period. For the purpose of the preceding sentence, a deposit which is not required by such regulations in respect of the return period may be made on or before the last day of the first calendar month following the close of such period, and the timeliness of any deposit will be determined by the earliest date stamped on the applicable deposit form by an authorized financial institution or by a Federal Reserve bank.

(2) *Monthly tax returns.* Each return in respect of the taxes imposed by the Federal Insurance Contributions Act or of income tax withheld which is required to be made under paragraph (a) of § 31.6011(a)–5 shall be filed on or before the fifteenth day of the first calendar month following the period for which it is made.

(3) *Information returns*—(i) *General rule.* Each information return in respect of wages as defined in the Federal Insurance Contributions Act or of income tax withheld from wages which is required to be made under § 31.6051–2 shall be filed on or before the last day of February following the calendar year for which it is made, except that, if a tax return under paragraph (a) of § 31.6011(a)–5 is filed as a final return for a period ending prior to December 31, the information statement shall be filed on or before the last day of the second calendar month following the period for which the tax return is filed.

(ii) *Expedited filing*—(A) *General rule.* If an employer who is required to make a return pursuant to § 31.6011(a)–1 or § 31.6011(a)–4 is required to make a final return on Form 941, or a variation thereof, under § 31.6011(a)–6(a)(1) (relating to the final return for Federal Insurance Contributions Act taxes and income tax withholding from wages), the return which is required to be made under § 31.6051–2 must be filed on or before the last day of the second calendar month following the period for which the final return is filed. The requirements set forth in this paragraph (a)(3)(ii) do not apply to employers with respect to employees whose wages are for domestic service in the private home of the employer. See § 31.6011(a)–1(a)(3).

(B) *Effective date.* This paragraph (a)(3)(ii) is effective January 1, 1997.

(4) *Employee returns under Federal Insurance Contributions Act.* A return of employee tax under section 3101 required under paragraph (d) of § 31.6011(a)–1 to be made by an individual for a calendar year on Form 1040 shall be filed on or before the due date of such individual's return of income (see § 1.6012–1 of this chapter (Income Tax Regulations)) for the calendar year, or, if the individual makes his return of income on a fiscal year basis, on or before the due date of his return of income for the fiscal year beginning in the calendar year for which a return of employee tax is required. A return of employee tax under section 3101 required under paragraph (d) of

§ 31.601(a)–1 to be made for a calendar year—

(i) On Form 1040SS or Form 1040PR, or

(ii) On Form 1040 by an individual who is not required to make a return of income for the calendar year or for a fiscal year beginning in such calendar year,

shall be filed on or before the 15th day of the fourth month following the close of the calendar year.

(b) *Railroad Retirement Tax Act.* Each return of the taxes imposed by the Railroad Retirement Tax Act required to be made under § 31.6011(a)–2 shall be filed on or before the last day of the second calendar month following the period for which it is made.

(c) *Federal Unemployment Tax Act.* Each return of the tax imposed by the Federal Unemployment Tax Act required to be made under § 31.6011(a)–3 shall be filed on or before the last day of the first calendar month following the period for which it is made. However, a return for a period which ends after December 31, 1970, may be filed on or before the 10th day of the second calendar month following such period if timely deposits under section 6302(c) of the Code and the regulations thereunder have been made in full payment of such tax due for the period. For the purpose of the preceding sentence, a deposit which is not required by such regulations in respect of the return period may be made on or before the last day of the first calendar month following the close of such period, and the timeliness of any deposit will be determined by the date the deposit is received (or is deemed received under section 7502(e)) by a Federal Reserve bank or by an authorized financial institution whichever is earlier.

(d) *Last day for filing.* For provisions relating to the time for filing a return when the prescribed due date falls on Saturday, Sunday, or a legal holiday, see the provisions of § 301.7503–1 of this chapter (Regulations on Procedure and Administration).

(e) *Late filing.* For additions to the tax in case of failure to file a return within the prescribed time, see the provisions of § 301.6651–1 of this chapter (Regulations on Procedure and Administration).

(f) *Cross reference.* For extensions of time for filing returns and other documents, see § 31.6081(a)–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6941, 32 FR 18041, Dec. 16, 1967; T.D. 7001, 34 FR 1005, Jan. 23, 1969; T.D. 7078, 35 FR 18525, Dec. 5, 1970; T.D. 7351, 40 FR 17146, Apr. 17, 1975; T.D. 7953, 49 FR 19644, May 9, 1984; T.D. 8504, 58 FR 68035, Dec. 23, 1993]

§ 31.6071(a)–1A Time for filing returns with respect to the railroad unemployment repayment tax.

(a) *In general.* Each return of the taxes imposed under section 3321 (a) and (b) required to be made under § 31.6011(a)–3A shall be filed on or before the last day of the second calendar month following the period for which it is made.

(b) *Last day for filing.* For provisions relating to the time for filing a return when the prescribed due date falls on Saturday, Sunday, or a legal holiday, see the provisions of § 301.7503–1 of this chapter (Regulations on Procedure and Administration).

(c) *Late filing.* For additions to the tax in the case of failure to file a return within the prescribed time, see the provisions of § 301.6651–1 of this chapter (Regulations on Procedure and Administration).

[T.D. 8105, 51 FR 40169, Nov. 5, 1986. Redesignated and amended at T.D. 8227, 53 FR 34736, Sept. 8, 1988]

§ 31.6081(a)–1 Extensions of time for filing returns and other documents.

(a) *Federal Insurance Contributions Act; income tax withheld from wages; and Railroad Retirement Tax Act*—(1) *In general.* Except as otherwise provided in subparagraphs (2) and (3) of this paragraph, no extension of time for filing any return or other document required in respect of the Federal Insurance Contributions Act, income tax withheld from wages, or the Railroad Retirment Tax Act will be granted.

(2) *Information returns of employers required to file monthly returns of tax*

under the Federal Insurance Contributions Act. The district director or director of a service center may, upon application of the employer, grant an extension of time in which to file any information return required under paragraph (b)(1) of § 31.6011(a)–5. Such extension of time shall not extend beyond the last day of the calendar month in which occurs the due date prescribed in paragraph (a)(3)(i) of § 31.6071(a)–1 for filing the information return. Each application for an extension of time for filing an information return shall be made in writing, properly signed by the employer or his duly authorized agent. Except as provided in paragraph (b) of § 301.6091–1 (relating to hand-carried documents), each application shall be addressed to the internal revenue officer with whom the employer will file the return. Each application shall contain a full recital of the reasons for requesting the extension, to aid the officer in determining the period of the extension, if any, which will be granted. Such a request in the form of a letter to such internal revenue officer will suffice as an application. The application shall be filed on or before the due date prescribed in paragraph (a)(3)(i) of § 31–6071(a)–1 for filing the information return.

(3) *Information returns of employers on Forms W–2 and W–3*—(i) *In general.* The Director, Martinsburg Computing Center, may grant an extension of time in which to file the Social Security Administration copy of Forms W–2 and the accompanying transmittal form which constitutes an information return under paragraph § 31.6051–2(a). The request must contain a concise statement of the reasons for requesting the extension. The request must be mailed or delivered on or before the date on which the employer is required to file the Form W–2 with the Social Security Administration.

(ii) *Automatic Extension of Time.* The Commissioner may, in appropriate cases, publish procedures for automatic extensions of time to file Forms W–2 where the employer is required to file the Form W–2 on an expedited basis.

(b) *Federal Unemployment Tax Act.* The district director or director of a service center may, upon application of the employer, grant a reasonable extension of time (not to exceed 90 days) in which to file any return required in respect of the Federal Unemployment Tax Act. Any application for an extension of time for filing the return shall be in writing, properly signed by the employer or his duly authorized agent. Except as provided in paragraph (b) of § 301.6091–1 (relating to hand-carried documents), each application shall be addressed to the internal revenue officer with whom the employer will file the return. Each application shall contain a full recital of the reasons for requesting the extension, to aid such officer in determining the period of the extension, if any, which will be granted. Such a request in the form of a letter to such internal revenue officer will suffice as an application. The application shall be filed on or before the due date prescribed in paragraph (c) of § 31.6071(a)–1 for filing the return, or on or before the date prescribed for filing the return in any prior extension granted. An extension of time for filing a return does not operate to extend the time for payment of the tax or any part thereof.

(c) *Duly authorized agent.* In any case in which an employer is unable, by reason of illness, absence, or other good cause, to sign a request for an extension, any person standing in close personal or business relationship to the employer may sign the request on his behalf, and shall be considered as a duly authorized agent for this purpose, provided the requests sets forth the reasons for a signature other than the employer's and the relationship existing between the employer and the signer.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6950, 33 FR 5358, Apr. 4, 1968; T.D. 7351, 40 FR 17146, Apr. 17, 1975]

§ 31.6091–1 Place for filing returns.

(a) *Persons other than corporations.* The return of a person other than a corporation shall be filed with the district director for the internal revenue district in which is located the principal place of business or legal residence of such person. If such person has no principal place of business or legal residence in any internal revenue district, the return shall be filed with the

District Director at Baltimore, Maryland, except as provided in paragraph (c) of this section.

(b) *Corporations.* The return of a corporation shall be filed with the district director for the district in which is located the principal place of business or principal office or agency of the corporation, except as provided in paragraph (c) of this section.

(c) *Returns of taxpayers outside the United States.* The return of a person (other than a corporation) outside the United States having no legal residence or principal place of business in any internal revenue district, or the return of a corporation having no principal place of business or principal office or agency in any internal revenue district, shall be filed with the Director of International Operations, Internal Revenue Service, Washington, D.C. 20225, unless the principal place of business or legal residence of such person, or the principal place of business or principal office or agency of such corporation, is located in the Virgin Islands or Puerto Rico, in which case the return shall be filed with the Director of International Operations, U.S. Internal Revenue Service, Hato Rey, Puerto Rico 00917.

(d) *Returns filed with internal revenue service centers or Social Security Administration office.* Notwithstanding paragraphs (a), (b), and (c) of this section, whenever instructions applicable to such returns provide that the returns shall be filed with an internal revenue service center or an office of the Social Security Administration, such returns shall be so filed in accordance with such instructions.

(e) *Hand-carried returns.* Except as provided in subparagraph (3) of this paragraph, and notwithstanding paragraphs (1) and (2) of section 6091(b) and paragraph (d) of this section—

(1) *Persons other than corporations.* Returns of persons other than corporations which are filed by hand carrying shall be filed with the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director) as provided in paragraph (a) of this section.

(2) *Corporations.* Returns of corporations which are filed by hand carrying shall be filed with the district director (or with any person assigned the adminstrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director) as provided in paragraph (b) of this section.

(3) *Exceptions.* This paragraph shall not apply to returns of—

(i) Persons who have no legal residence, no principal place of business, nor principal office or agency in any internal revenue district,

(ii) Citizens of the United States whose principal place of abode for the period with respect to which the return is filed is outside the United States,

(iii) Persons who claim the benefits of section 911 (relating to earned income from sources without the United States), section 922 (relating to special deduction for Western Hemisphere trade corporations), section 931 (relating to income from sources within possessions of the United States), section 933 (relating to income from sources within Puerto Rico), or section 941 (relating to the special deduction for China Trade Act corporations), and

(iv) Nonresident alien persons and foreign corporations.

(f) *Permission to file in district other than required district.* The Commissioner may permit the filing of any return required to be made under the regulations in this subpart in any internal revenue district, notwithstanding the provisions of paragraphs (1), (2), and (4) of section 6091(b) and paragraphs (a), (b), (c), (d), and (e) of this section.

(g) *Returns of officers and employees of the Internal Revenue Service.* The Commissioner may require any officer or employee of the Internal Revenue Service to file any return required of him under the regulations in this subpart in any internal revenue district selected by the Commissioner, notwithstanding the provisions of paragraphs (1), (2), and (4) of section 6091(b) and paragraphs (a), (b), (c), (d), and (e) of this section.

(68A Stat. 747, 26 U.S.C. 6051; 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6915, 32 FR 5261, Mar. 29, 1967; T.D. 7495, 42 FR 33727, July 1, 1977; T.D. 7580, 43 FR 60160, Dec. 26, 1978]

§ 31.6101–1 Period covered by returns.

The period covered by any return required under the regulations in this subpart shall be as provided in those provisions of the regulations under which the return is required to be made. See § 31.6011(a)–1, relating to returns of taxes under the Federal Insurance Contributions Act; § 31.6011(a)–2, relating to returns of taxes under the Railroad Retirement Tax Act; § 31.6011(a)–3, relating to returns of tax under the Federal Unemployment Tax Act; § 31.6011(a)–4, relating to returns of income tax withheld under section 3402; and § 31.6011 (a)–5, relating to monthly returns of taxes under the Federal Insurance Contributions Act and of income tax withheld under section 3402.

§ 31.6109–1 Supplying of identifying numbers.

(a) *In general.* The returns, statements, and other documents required to be filed under this subchapter shall reflect such identifying numbers as are required by each return, statement, or document and its related instructions. See § 301.6109–1 of this chapter (Regulations on Procedure and Administration).

(b) *Effective date.* The provisions of this section are effective for information which must be furnished after April 15, 1974. See 26 CFR § 31.6109–1 (revised as of April 1, 1973) for provisions with respect to information which must be furnished before April 16, 1974.

[39 FR 9946, Mar. 15, 1974]

§ 31.6151–1 Time for paying tax.

(a) *In general.* The tax required to be reported on each tax return required under this subpart is due and payable to the internal revenue officer with whom the return is filed at the time prescribed in § 31.6071(a)–1 for filing such return. See the applicable sections in Part 301 of this chapter (Regulations on Procedure and Administration), for provisions relating to interest on underpayments, additions to tax, and penalties.

(b) *Cross references.* For provisions relating to the use of Federal Reserve banks and authorized financial institutions in depositing the taxes, see §§ 31.6302(c)–1, 31.6302(c)–2, and 31.6302(c)–3. For rules relating to the payment of taxes in nonconvertible foreign currency, see § 301.6316–7 of this chapter (Regulations on Procedure and Administration).

[T.D. 6872, 31 FR 149, Jan. 6, 1966; T.D. 6915, 32 FR 5261, Mar. 29, 1967; T.D. 7037, 35 FR 6709, Apr. 28, 1970; T.D. 7953, 49 FR 19644, May 9, 1984]

§ 31.6157–1 Cross reference.

For provisions relating to the time and manner of depositing the tax imposed by section 3301, see the provisions of § 31.6302(c)–3. For provisions relating to the time and manner of depositing the railroad unemployment repayment tax imposed by section 3321(a), see § 31.6302(c)–2A.

[T.D. 7037, 35 FR 6709, Apr. 28, 1970, as amended at T.D. 8227, 53 FR 34736, Sept. 8, 1988]

§ 31.6161(a)(1)–1 Extensions of time for paying tax.

No extension of time will be granted for payment of any of the taxes to which the regulations in this part have application.

§ 31.6205–1 Adjustments of underpayments.

(a) *In general.* (1) An employer who makes, or has made, an undercollection or underpayment of—

(i) Employee tax under section 3101, employer tax under section 3111, or the employee or employer tax under corresponding provisions of prior law,

(ii) Employee tax under section 3201, employer tax under section 3221, or the employee or employer tax under corresponding provisions of prior law, or

(iii) Income tax required under section 3402 to be withheld,

with respect to any payment of wages or compensation, shall correct such error as provided in this section. Such correction shall constitute an adjustment without interest to the extent provided in paragraph (b) or (c) of this section.

(2) Every correction under this section of an underpayment of tax with respect to a payment of wages or compensation shall be made on the return form which is prescribed for use, at the time the correction is made, in reporting tax which corresponds to the tax underpaid.

(3) Every return or supplemental return on which an underpayment is corrected pursuant to this section must have securely attached as a part thereof a statement explaining the correction, designating the return period in which the error was ascertained and the return period to which the error relates, and setting forth such other information as may be required by the regulations in this subpart and by the instructions relating to the return.

(4) For purposes of this section, an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(5) If a correction is made under this section with respect to the erroneous reporting on a return, or omission from a return, under the Federal Insurance Contributions Act, as in effect prior to or on and after January 1, 1955, of an amount of wages required to be shown on the return as a separate item in respect of a particular employee, the statement referred to in paragraph (a)(3) of this section shall include the following information:

(i) The name and account number of each employee whose wages were erroneously reported or omitted from such return,

(ii) The period for which such wages were required to be reported on such return,

(iii) The amount, if any, of wages actually reported on such return for each such employee, and

(iv) The amount of wages which should have been reported on such return for each such employee.

No particular form is prescribed for furnishing the information required by this subparagraph, but if printed forms are desired, the district director will supply Form 941c or Form 941c PR, whichever is appropriate, upon request.

(6) No underpayment shall be reported pursuant to this section after receipt from the district director of notice and demand for payment thereof based upon an assessment, but the amount shall be paid in accordance with such notice and demand.

(7) For provisions relating to correction of erroneous statements furnished to employees in respect of wages subject to withholding of income tax under section 3402, and of wages under the Federal Insurance Contributions Act, see paragraph (c) of §31.6051–1.

(b) *Federal Insurance Contributions Act and Railroad Retirement Tax Act*—(1) *Undercollection ascertained before return is filed.* If no employee tax or less than the correct amount of employee tax is deducted from any payment to an employee of wages, as defined in the Federal Insurance Contributions Act, or compensation as defined in the Railroad Retirement Tax Act, and the error is ascertained before the filing of the return on which the employee tax with respect to such wages or compensation is required to be reported, the employer shall nevertheless report on such return and pay to the district director the correct amount of such employee tax. However, the reporting and payment by the employer of the correct amount of such tax in accordance with this subparagraph do not constitute an adjustment.

(2) *Underpayment ascertained after return is filed.* (i) If a return is filed, and if no employee tax, no employer tax, or less than the correct amount of either such tax with respect to any payment to an employee of wages as defined in the Federal Insurance Contributions Act or corresponding provisions of prior law, or compensation as defined in the Railroad Retirement Tax Act or corresponding provisions of prior law, is reported on such return and paid to the district director, the employer shall adjust the underpayment *(a)* by reporting the additional amount due by reason of the underpayment as an adjustment on a return filed on or before the last day on which the return is required to be filed for the return period in which the error is ascertained, or *(b)* by reporting such additional amount on a supplemental return for the return period in which such payment of wages or compensation is made. The reporting of such underpayment on a supplemental return constitutes an adjustment within the meaning of this

section only when the supplemental return is filed on or before the last day on which the return is required to be filed for the return period in which the error is ascertained. The amount of each underpayment adjusted in accordance with this subdivision shall be paid to the district director, without interest, at the time fixed for reporting the adjustment. If an adjustment is reported pursuant to this subdivision, but the amount thereof is not paid when due, interest thereafter accrues (see section 6601).

(ii) If a return is filed, and if no employee tax, no employer tax, or less than the correct amount of either such tax with respect to a payment to an employee of wages or compensation is reported on such return and paid to the district director, and such underpayment is not reported as an adjustment within the time prescribed by subdivision (i) of this subparagraph, the amount of such underpayment shall be *(a)* reported on the employer's next return, or *(b)* reported immediately on a supplemental return. For interest accruing on amounts so reported, see section 6601 and corresponding provisions of prior law.

(iii) If a return relating to tax under the Federal Insurance Contributions Act is filed although a return relating to tax under the Railroad Retirement Tax Act was required to be filed, or vice versa, and if the amount reported on the return filed and paid to the district director was less than the correct amount which should have been reported on the return required to be filed, the employer shall adjust the underpayment by reporting the additional amount due on an original return for the correct tax for the return period in which the payment of wages or compensation was made, accompanied by an explanation of the adjustment being reported. The reporting of such additional amount on an original return constitutes an adjustment within the meaning of this section only when the original return is filed on or before the last day on which the return for the correct tax is required to be filed for the return period in which the error is ascertained. The amount of each underpayment adjusted in accordance with this subdivision shall be paid to the district director, without interest, at the time fixed for reporting the adjustment. If an adjustment is reported pursuant to this subdivision, but the amount thereof is not paid when due, interest thereafter accrues (see section 6601).

(3) *Deductions from employees.* If an employer collects no employee tax or less than the correct amount of employee tax from an employee with respect to a payment of wages as defined in the Federal Insurance Contributions Act or corresponding provisions of prior law, or compensation as defined in the Railroad Retirement Tax Act or corresponding provisions of prior law, the employer shall collect the amount of the undercollection by deducting such amount from remuneration of the employee, if any, under his control after he ascertains the error. Such deductions may be made even though the remuneration, for any reason, does not constitute wages or compensation. The amount of an undercollection of employee tax from an employee shall be reported and paid, as provided in paragraph (b)(1) or (2) of this section, whether or not the undercollection is corrected by a deduction made as prescribed in the foregoing provisions of this subparagraph. If such a deduction is not made, the obligation of the employee to the employer with respect to the undercollection is a matter for settlement between the employee and the employer. If any employer makes an erroneous collection of employee tax from two or more of his employees, a separate settlement must be made with respect to each employee. Thus, an overcollection of employee tax from one employee may not be used to offset an undercollection of such tax from another employee.

(c) *Income tax required to be withheld from wages*—(1) *Undercollection ascertained before return is filed.* If no income tax, or less than the correct amount of income tax, required under section 3402 to be withheld from wages is deducted from wages paid to an employee in any return period, and if the error is ascertained before the return is filed for the period in which such wages are paid, the employer shall nevertheless report on such return the correct amount of the tax required to be withheld. However, the reporting and payment by an employer of tax in accordance with this subparagraph do not constitute an adjustment.

(2) *Underpayment ascertained after return is filed.* (i) If a return is filed for a return period, and if no income tax, or less than the correct amount of income tax, required under section 3402 to be withheld from wages paid to an employee in such period, is reported on a return and paid to the district director, the employer shall *(a)* report the additional amount due by reason of the underpayment on a return for any return period in the calendar year in which the wages were paid, or *(b)* report such additional amount on a supplemental return for the return period in which such wages were paid. Such reporting constitutes an adjustment within the meaning of this section only if the return or supplemental return on which the underpayment is reported is filed on or before the last day on which the return is required to be filed for the return period in which the error was ascertained.

(ii) If a return is filed for a return period, and if no income tax, or less than the correct amount of income tax, required under section 3402 to be withheld from wages paid to an employee in such period is reported on such return and paid to the district director, and such underpayment is not reported as an adjustment within the time prescribed by paragraph (c)(2)(i) of this section, the amount of such underpayment shall be *(a)* reported on the employer's next return, if such next return is for any return period in the calendar year in which the wages were paid, or *(b)* reported immediately on a supplemental return.

(3) *Payment of amounts reported as undercollections or underpayments.* (i) For provisions relating to the employer's liability for an underpayment of tax unless he can show that the income tax against which the tax under section 3402 may be credited has been paid, see § 31.3402(d)–1.

(ii) Except as provided in § 31.3402 (d)–1, any amount reported as an adjustment within the meaning of this paragraph shall be paid to the district director, without interest, at the time fixed for reporting the adjustment.

(iii) For interest accruing on amounts which are not paid when due, see section 6601.

(4) *Deductions from employee.* If no income tax, or less than the correct amount of income tax, required under section 3402 to be withheld from wages is deducted from wages paid to an employee in a calendar year, the employer shall collect the amount of the undercollection on or before the last day of such year by deducting such amount from remuneration of the employee, if any, under his control. Such deductions may be made even though the remuneration, for any reason, does not constitute wages. Any undercollection in a calendar year not corrected by a deduction made pursuant to the foregoing provisions of this subparagraph is a matter for settlement between the employee and the employer within such calendar year. For provisions relating to the employer's liability for the tax, whether or not he collects it from the employee, see § 31.3403–1.

[T.D. 6516, 25 FR 13032, Dec. 20, 1960; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7783, 46 FR 37890, July 23, 1981]

§ 31.6205–2 Adjustments of underpayments of hospital insurance taxes that accrue after March 31, 1986, and before January 1, 1987, with respect to wages of State and local government employees.

(a) *Adjustments without interest.* A State or local government employer who makes, or has made, an undercollection or underpayment of the hospital insurance taxes imposed by sections 3101(b) and 3111(b) that—

(1) Are required to be paid by reason of section 3121(u)(2), and

(2) Are required to be reported on returns due July 31, 1986, October 31, 1986, or February 2, 1987.

may make an adjustment without interest with respect to such taxes provided that all such taxes for the time period specified in paragraph (a)(2) (except for amounts that are subsequently paid pursuant to an interest-free adjustment under § 31.6205–1) are paid on or before February 2, 1987.

(b) *Example.* The application of the provisions of this section are illustrated by the following example:

Example. A State or local government employer should have withheld and paid $100 dollars in hospital insurance taxes for the quarter beginning April 1, 1986, and ending June 30, 1986. The due date for the return and payment for that period is July 31, 1986. If the employer made the payment by February 2, 1987, then, under section 6601, interest is not assessable with respect to the underpayment of the hospital insurance taxes. If the employer did not make the payment by February 2, 1987, the interest is assessable for the period from July 31, 1986, until the time of payment.

[T.D. 8156, 52 FR 33582, Sept. 4, 1987]

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(l) [Reserved].
(m) Effective date.

Section 31.6302–2 Federal tax deposit rules for amounts withheld under the Railroad Retirement Tax Act (R.R.T.A.) attributable to payments made after December 31, 1992.

(a) General rule.
(b) Separate application of deposit rules.
(c) Modification of Monthly rule determination.
(1) General rule.
(2) Exception.
(d) Wire-transfer exception.

Section 31.6302–3 Federal tax deposit rules for amounts withheld under the backup withholding requirements of Section 3406 for payments made after December 31, 1992.

(a) General Rule.
(b) Treatment of backup withholding amounts separately.
(c) Example.

[T.D. 8436, 57 FR 44102, Sept. 24, 1992]

§ 31.6302–1 Federal tax deposit rules for withheld income taxes and taxes under the Federal Insurance Contributions Act (FICA) attributable to payments made after December 31, 1992.

(a) *Introduction.* With respect to employment taxes attributable to payments made after December 31, 1992, an employer is either a monthly depositor or a semi-weekly depositor based on an annual determination. An employer must generally deposit employment taxes under one of two rules: the Monthly rule in paragraph (c)(1) of this section, or the Semi-Weekly rule in paragraph (c)(2) of this section. Various exceptions and safe harbors are provided. Paragraph (f) of this section provides certain safe harbors for employers who inadvertently fail to deposit the full amount of taxes. Paragraph (c)(3) of this section provides an overriding exception to the Monthly and Semi-Weekly rules where an employer has accumulated $100,000 or more of employment taxes. Paragraph (e) of this section provides the definition of employment taxes.

(b) *Determination of status*—(1) *In general.* The determination of whether an employer is a monthly or semi-weekly depositor for a calendar year is based on an annual determination and generally depends upon the aggregate amount of employment taxes reported by the employer for the lookback period as defined in paragraph (b)(4) of this section.

(2) *Monthly depositor*—(i) *In general.* An employer is a monthly depositor for the entire calendar year if the aggregate amount of employment taxes reported for the lookback period is $50,000 or less.

(ii) *Special rule.* An employer ceases to be a monthly depositor on the first day after the employer is subject to the One-Day ($100,000) rule in paragraph (c)(3) of this section. At that time, the employer immediately becomes a semi-weekly depositor for the remainder of the calendar year and for the following calendar year.

(3) *Semi-weekly depositor.* An employer is a semi-weekly depositor for the entire calendar year if the aggregate amount of employment taxes reported for the lookback period exceeds $50,000.

(4) *Lookback period.* The lookback period for each calendar year is the twelve month period ended the preceding June 30. For example, the lookback period for calendar year 1993 is the period July 1, 1991 to June 30, 1992. In determining status as either a monthly or semi-weekly depositor, an employer should determine the aggregate amount of employment tax liabilities reported on its quarterly returns (Form 941) for the four quarters constituting this period. New employers shall be treated as having employment tax liabilities of zero for any calendar quarter during which the employer did not exist.

(5) *Adjustments.* The tax liability shown on an original return for the return period shall be the amount taken into account in determining whether more than $50,000 has been reported during the lookback period. In determining the aggregate employment taxes for each quarter in a lookback period, an employer does not take into account any adjustments for the quarter made on a supplemental return filed after the due date of the return. However, adjustments made on a Form 941c, Statement to Correct Information, attached to a Form 941 filed for a subsequent quarter are taken into account in determining the employment tax liability for the subsequent quarter.

(c) *Deposit rules*—(1) *Monthly rule.* An employer that is a monthly depositor must deposit employment taxes accumulated with respect to payments made during a calendar month in a Federal Reserve bank or authorized financial institution on or before the 15th day of the following month. If the 15th day of the following month is not a banking day, taxes will be treated as timely deposited if deposited on the first banking day thereafter in accordance with paragraph (c)(4) of this section.

(2) *Semi-Weekly rule*—(i) *In general.* An employer that is a semi-weekly depositor for a calendar year must deposit its employment taxes in a Federal Reserve bank or authorized financial institution on or before the dates set forth below:

Payment dates/semi-weekly periods	Deposit date
Wednesday, Thursday and/or Friday.	On or before the following Wednesday.
Saturday, Sunday, Monday and/or Tuesday.	On or before the following Friday.

(ii) *Semi-weekly period spanning two return periods.* A special rule is provided in the case of a return period (quarterly or annual) that ends during a semi-weekly period. In this case, an employer must complete the Federal Tax Deposit (FTD) coupon in a manner which designates the proper return period for which the deposit relates (the return period in which the payment is made). In addition, if the return period ends during a semi-weekly period in which an employer has two or more payment dates, two deposit obligations may exist. For example, if one quarterly return period ends on Thursday and a new quarterly return period begins on Friday, employment taxes from payments on Wednesday and Thursday are subject to one deposit obligation, and taxes from payments on Friday are subject to a separate obligation. Two separate Federal Tax Deposit coupons are required.

(iii) *Special rule for non-banking days.* Semi-weekly depositors shall have at least three banking days following the close of the semi-weekly period by which to deposit employment taxes accumulated during the semi-weekly period. Thus, if any of the three weekdays following the close of a semi-weekly period is a holiday on which banks are closed, the employer shall have an additional banking day by which to make the required deposit. For example, if the Monday following the close of a Wednesday to Friday semi-weekly period is a holiday on which banks are closed, the required deposit for the semi-weekly period may be made by the following Thursday rather than the following Wednesday.

(3) *Exception—One-Day rule.* Notwithstanding paragraphs (c)(1) and (c)(2) of this section, if on any day within a deposit period (monthly or semi-weekly) an employer has accumulated $100,000 or more of employment taxes, those taxes must be deposited in a Federal Reserve bank or authorized financial institution by the close of the next banking day. For purposes of determining whether the $100,000 threshold is met—

(i) A monthly depositor takes into account only those employment taxes accumulated in the calendar month in which the day occurs; and

(ii) A semi-weekly depositor takes into account only those employment taxes accumulated in the Wednesday-Friday or Saturday-Tuesday semi-weekly period in which the day occurs.

(4) *Deposits required only on banking days.* If taxes are required to be deposited under this section on any day that is not a banking day, the taxes will be treated as timely deposited if deposited on the first banking day thereafter.

(d) *Examples.* The provisions of paragraphs (a), (b) and (c) of this section are illustrated by the following examples:

Example 1. Monthly depositor. (i) *Determination of status.* For the calendar year 1993, Employer *A* determines its depositor status using the lookback period July 1, 1991 to June 30, 1992. For the four calendar quarters within this period, *A* reported aggregate employment tax liabilities of $42,000 on its quarterly Forms 941. Because the aggregate amount did not exceed $50,000, *A* is a monthly depositor for the entire calendar year 1993.

(ii) *Monthly rule.* During January 1993, *A* (a monthly depositor) accumulates $3,500 in employment taxes. *A* has a $3,500 deposit obligation that must be satisfied by the 15th day of the following month. Since February 15, 1993, President's Day, is a holiday which is not a banking day, *A*'s deposit obligation will be satisfied if the deposit is made by the next banking day after February 15.

Example 2. Semi-weekly depositor. (i) *Determination of status.* For the four calendar quarters spanning July 1991 to June 1992, Employer *B* reported $88,000 in aggregate employment tax liabilities on its Forms 941. Because that amount exceeds $50,000, *B* is a semi-weekly depositor for the entire calendar year 1993.

(ii) *Semi-weekly rule.* On Friday, January 1, 1993, *B* (semi-weekly depositor) has a pay day on which it accumulates $4,000 in employment taxes. *B* has a $4,000 deposit obligation that must be satisfied on or before the following Wednesday, January 6, 1993.

(iii) *Deposit made within three banking days after payroll.* The example is the same as *Example 2 (ii),* except that *B* deposits its accumulated employment taxes within three banking days after payroll. *B* deposits its $4,000 in employment taxes on Wednesday, January 6, three banking days after its Friday payroll. Because *B* deposited its employment taxes on or before the following Wednesday, *B* has satisfied its semi-weekly deposit obligation. An employer who deposits within three banking days after payroll will always meet the Semi-Weekly rule.

Example 3. One-Day rule. On Monday, January 4, 1993, Employer *C* accumulates $110,000 in employment taxes with respect to wages paid on that date. *C* has a deposit obligation of $110,000 that must be satisfied by the next banking day. If *C* was not subject to the semi-weekly rule on January 4, 1993, *C* becomes subject to that rule as of January 5, 1993. See paragraph (b)(2)(ii) of this section.

Example 4. One-Day Rule in combination with subsequent deposit obligation. Employer *D* is subject to the semi-weekly rule for calendar year 1993. On Monday, January 4, 1993, *D* accumulates $110,000 in employment taxes. *D* has a $110,000 deposit obligation that must be satisfied by the next banking day. On Tuesday, January 5, *D* accumulates an additional $30,000 in employment taxes. Although *D* has a previous $110,000 deposit obligation incurred earlier in the semi-weekly period, *D* has an additional and separate deposit obligation of $30,000 on Tuesday that must be satisfied by the following Friday.

Example 5. Special non-banking day rule for semi-weekly depositors. Employer *E*, a semi-weekly depositor, accumulates $8,000 in employment taxes on Friday, February 12, 1993, a payment date. Under the general rule, *E* would be required to deposit the employment taxes on or before the following Wednesday, February 17. However, because Monday, February 15, is President's Day (a holiday on which banks are closed), *E* will have an additional day by which to satisfy its $8,000 deposit obligation. *E*'s deposit obligation is due on or before Thursday, February 18, 1993.

(e) *Employment taxes defined.* (1) For purposes of this section, the term ''employment taxes'' means—

(i) The employee portion of the tax withheld under section 3102;

(ii) The employer tax under section 3111;

(iii) The income tax withheld under sections 3402 and 3405, except income tax withheld with respect to payments made after December 31, 1993, on the following—

(A) Certain gambling winnings under section 3402(q);

(B) Retirement pay for service in the Armed Forces of the United States under section 3402;

(C) Certain annuities described in section 3402(o)(1)(B); and

(D) Pensions, annuities, IRAs, and certain other deferred income under section 3405; and

(iv) The income tax withheld under section 3406, relating to backup withholding with respect to reportable payments made before January 1, 1994.

(2) The term ''employment taxes'' does not include taxes with respect to wages for domestic service in a private home of the employer, unless the employer is otherwise required to file a Form 941 under § 31.6011(a)(4) or (5). In the case of employers paying advance earned income credit amounts, the amount of taxes required to be deposited shall be reduced by advance amounts paid to employees. Also, see § 31.6302–3 concerning a taxpayer's option with respect to payments made before January 1, 1994, to treat backup withholding amounts under section 3406 separately.

(f) *Safe harbor/De minimis rules*—(1) *Single deposit safe harbor.* An employer will be considered to have satisfied its deposit obligation imposed by this section if—

(i) The amount of any shortfall does not exceed the greater of $100 or 2 percent of the amount of employment taxes required to be deposited; and

(ii) The employer deposits the shortfall on or before the shortfall make-up date.

(2) *Shortfall defined.* For purposes of this paragraph (f), the term ''shortfall'' means the excess of the amount of employment taxes required to be deposited for the period over the amount deposited for the period. For this purpose, a period is either a monthly, semi-weekly or daily period.

(3) *Shortfall make-up date*—(i) *Monthly rule.* A shortfall with respect to a deposit required under the Monthly rule must be deposited or remitted no later than the due date for the quarterly return, in accordance with the applicable form and instructions.

(ii) *Semi-Weekly rule and One-Day rule.* A shortfall with respect to a deposit required under the Semi-Weekly rule or the One-Day rule must be deposited on or before the first Wednesday or Friday (whichever is earlier), falling on or after the 15th day of the month following the month in which the deposit was required to be made or, if earlier, the return due date for the return period.

(4) *De Minimis rule.* If the total amount of accumulated employment taxes for the quarter is less than $500 and the amount is fully deposited or remitted with a timely filed return for the quarter, the amount deposited or remitted will be deemed to have been timely deposited. For guidance regarding de minimis amounts for quarterly return periods beginning on or after July 1, 1998, and annual return periods beginning on or after January 1, 1999, see § 31.6302–1T(f)(4).

(5) *Examples.* The provisions of this paragraph (f) may be illustrated by the following examples:

Example 1. Safe-harbor rule satisfied. On Monday, January 4, 1993, *J* (a semi-weekly depositor), pays wages and accumulates employment taxes. As required under this section, *J* makes a deposit on or before the following Friday, January 8, 1993, in the amount of $4,000. Subsequently, *J* determines that it was actually required to deposit $4,090 by Friday. *J* has a shortfall of $90. The $90 shortfall does not exceed the greater of $100 or 2% of the amount required to be deposited (2% of $4,090=$81.80). Therefore, *J* satisfies the safe harbor of paragraph (f)(1) of this section as long as the $90 shortfall is deposited by the first deposit date (Wednesday or Friday) on or after the 15th day of the next month (in this case Wednesday, February 17, 1993).

Example 2. Safe-harbor rule not satisfied. The facts are the same as in *Example 1* except that on Friday, January 8, 1993, *J* makes a deposit of $25,000, and later determines that it was actually required to deposit $26,000. Since the $1,000 shortfall ($26,000 less $25,000) exceeds $520 (the greater of $100 or 2% of the amount required to be deposited (2% of $26,000=$520)), the safe harbor of paragraph (f)(1) of this section is not satisfied, and absent reasonable cause, *J* will be subject to a failure-to-deposit penalty under section 6656.

(g) *Agricultural employers—special rules*—(1) *In general.* An agricultural employer reports wages paid to farm workers annually on Form 943 (Employer's Annual Tax Return for Agricultural Employees) and reports wages paid to nonfarm workers quarterly on Form 941 (Employer's Quarterly Federal Tax Return). Accordingly, an agricultural employer must treat employment taxes reportable on Form 943 (''Form 943 taxes'') separately from employment taxes reportable on Form 941 (''Form 941 taxes''). Form 943 taxes and Form 941 taxes are not combined for purposes of determining whether a deposit of either is due, whether the One-Day rule of paragraph (c)(3) of this section applies, or whether any safe harbor is applicable. In addition, separate Federal tax deposit coupons must be used to deposit Form 943 taxes and Form 941 taxes. (See paragraph (b) of this section for rules for determining an agricultural employer's deposit status for Form 941 taxes.) The determination of whether an agricultural employer is a monthly or semi-weekly depositor of Form 943 taxes is made according to the rules of this paragraph (g).

(2) *Monthly depositor.* An agricultural employer is a monthly depositor of Form 943 taxes for a calendar year if the amount of Form 943 taxes accumulated in the lookback period (as defined in paragraph (g)(4) of this section) is $50,000 or less. An agricultural employer ceases to be a monthly depositor of Form 943 taxes on the first day after the employer is subject to the One-Day rule in paragraph (c)(3) of this section. At that time, the agricultural employer immediately becomes a semi-weekly depositor of Form 943 taxes for the remainder of the calendar year and the succeeding calendar year.

(3) *Semi-weekly depositor.* An agricultural employer is a semi-weekly depositor of Form 943 taxes for a calendar year if the amount of Form 943 taxes accumulated in the lookback period (as defined in paragraph (g)(4) of this section) exceeds $50,000.

(4) *Lookback period.* For purposes of this paragraph (g), the lookback period for Form 943 taxes is the second calendar year preceding the current calendar year. For example, the lookback period for calendar year 1993 is calendar year 1991.

(5) The following example illustrates the provisions of this section.

Example. A, an agricultural employer, employs both farm workers and nonfarm workers (employees in its administrative offices). *A*'s depositor status for calendar year 1993 for Form 941 taxes will be based upon its employment tax liabilities reported on Forms 941 for the third and fourth quarters of 1991 and the first and second quarters of 1992 (the period July 1 to June 30). *A*'s depositor status for Form 943 taxes will be based upon its employment tax liability reported on its annual Form 943 for calendar year 1991.

(h) *Time and manner of deposit—deposits required to be made by electronic funds transfer*—(1) *In general.* Section 6302(h) requires the Secretary to prescribe such regulations as may be necessary for the development and implementation of an electronic funds transfer system to be used for the collection of the depository taxes as described in paragraph (h)(3) of this section. Section 6302(h)(2) provides a phase-in schedule that sets forth escalating minimum percentages of those depository taxes to be deposited by electronic funds transfer. This paragraph (h) prescribes the rules necessary for implementing an electronic funds transfer system for collection of depository taxes and for effecting an orderly and expeditious phase-in of that system.

(2) *Threshold amounts, determination periods, and effective dates.* (i)(A) Taxpayers whose aggregate deposits of the taxes imposed by Chapters 21 (Federal Insurance Contributions Act), 22 (Railroad Retirement Tax Act), and 24 (Collection of Income Tax at Source on Wages) of the Internal Revenue Code

during a 12-month determination period exceed the applicable threshold amount are required to deposit all depository taxes described in paragraph (h)(3) of this section by electronic funds transfer (as defined in paragraph (h)(4) of this section) unless exempted under paragraph (h)(5) of this section. If the applicable effective date is January 1, 1995, or January 1, 1996, the requirement to deposit by electronic funds transfer applies to all deposits required to be made on or after the applicable effective date. If the applicable effective date is July 1, 1997, the requirement to deposit by electronic funds transfer applies to all deposits required to be made on or after July 1, 1997 with respect to deposit obligations incurred for return periods beginning on or after January 1, 1997. If the applicable effective date is January 1, 1998, or thereafter, the requirement to deposit by electronic funds transfer applies to all deposits required to be made with respect to deposit obligations incurred for return periods beginning on or after the applicable effective date. In general, each applicable effective date has one 12-month determination period. However, for the applicable effective date January 1, 1996, there are two determination periods. If the applicable threshold amount is exceeded in either of those determination periods, the taxpayer becomes subject to the requirement to deposit by electronic funds transfer, effective January 1, 1996. The threshold amounts, determination periods and applicable effective dates for purposes of this paragraph (h)(2)(i)(A) are as follows:

Threshold amount	Determination period	Applicable effective date
$78 million	1–1–93 to 12–31–93	Jan. 1, 1995.
$47 million	1–1–93 to 12–31–93	Jan. 1, 1996.
$47 million	1–1–94 to 12–31–94	Jan. 1, 1996.
$50 thousand	1–1–95 to 12–31–95	July 1, 1997.
$50 thousand	1–1–96 to 12–31–96	Jan. 1, 1998.
$50 thousand	1–1–97 to 12–31–97	Jan. 1, 1999.

(B) Unless exempted under paragraph (h)(5) of this section, a taxpayer that does not deposit any of the taxes imposed by chapters 21, 22, and 24 during the applicable determination periods set forth in paragraph (h)(2)(i)(A) of this section, but that does make deposits of other depository taxes (as described in paragraph (h)(3) of this section), is nevertheless subject to the requirement to deposit by electronic funds transfer if the taxpayer's aggregate deposits of all depository taxes exceed the threshold amount set forth in this paragraph (h)(2)(i)(B) during an applicable 12-month determination period. This requirement to deposit by electronic funds transfer applies to all depository taxes due with respect to deposit obligations incurred for return periods beginning on or after the applicable effective date. The threshold amount, determination periods, and applicable effective dates for purposes of this paragraph (h)(2)(i)(B) are as follows:

Threshold amount	Determination period	Applicable effective date
$50 thousand	1–1–95 to 12–31–95	Jan. 1, 1998.
$50 thousand	1–1–96 to 12–31–96	Jan. 1, 1998.
$50 thousand	1–1–97 to 12–31–97	Jan. 1, 1999.

(ii) Once a taxpayer is required to deposit by electronic funds transfer pursuant to this paragraph (h)(2), the taxpayer must continue to deposit by electronic funds transfer. Until such time as a taxpayer is required by this section to deposit by electronic funds transfer, the taxpayer may voluntarily make deposits by electronic funds transfer, but remains subject to the rules of paragraph (i) of this section, pertaining to deposits by Federal tax deposit (FTD) coupon, in making deposits other than by electronic funds transfer.

(3) *Taxes required to be deposited by electronic funds transfer.* The requirement to deposit by electronic funds transfer under paragraph (h)(2) of this section applies to all the taxes required to be deposited under §§ 1.6302–1, 1.6302–2, and 1.6302–3 of this chapter; §§ 31.6302–1, 31.6302–2, 31.6302–3, 31.6302–4, and 31.6302(c)–3; and § 40.6302(c)–1 of this chapter.

(4) *Definitions*—(i) *Electronic funds transfer. An electronic funds transfer* is any transfer of depository taxes made in accordance with Revenue Procedure 97–33, (1997–30 I.R.B.), (see § 601.601(d)(2) of this chapter), or in accordance with procedures subsequently prescribed by the Commissioner.

(ii) *Taxpayer.* For purposes of this section, a *taxpayer* is any person required to deposit federal taxes, including not only individuals, but also any trust, estate, partnership, association, company or corporation.

(5) *Exemptions.* If any categories of taxpayers are to be exempted from the requirement to deposit by electronic funds transfer, the Commissioner will identify those taxpayers by guidance published in the Internal Revenue Bulletin. (See § 601.601(d)(2)(ii)(*b*) of this chapter.)

(6) *Separation of deposits.* A deposit for one return period must be made separately from a deposit for another return period.

(7) *Payment of balance due.* If the aggregate amount of taxes reportable on the applicable tax return for the return period exceeds the total amount deposited by the taxpayer with regard to the return period, then the balance due must be remitted in accordance with the applicable form and instructions.

(8) *Time deemed deposited.* A deposit of taxes by electronic funds transfer will be deemed made when the amount is withdrawn from the taxpayer's account, provided the U.S. Government is the payee and the amount is not returned or reversed.

(9) *Time deemed paid.* In general, an amount deposited under this paragraph (h) will be considered to be a payment of tax on the last day prescribed for filing the applicable return for the return period (determined without regard to any extension of time for filing the return) or, if later, at the time deemed deposited under paragraph (h)(8) of this section. In the case of the taxes imposed by chapters 21 and 24 of the Internal Revenue Code, solely for purposes of section 6511 and the regulations thereunder (relating to the period of limitation on credit or refund), if an amount is deposited prior to April 15th of the calendar year immediately succeeding the calendar year that includes the period for which the amount was deposited, the amount will be considered paid on April 15th.

(i) *Time and manner of deposit*—(1) *General rules.* A deposit required to be made by this § 31.6302–1 must be made separately from a deposit required by any other section. See § 31.6302–3 for an exception in the case of backup withholding amounts. Further, a deposit for a deposit period in one return period must be made separately from a deposit for a deposit period in another return period.

(2) *Payment of balance due.* If the aggregate amount of taxes reportable on the return for the return period exceeds the total amount deposited by the employer with regard to the return period pursuant to this section, the balance due must be remitted in accordance with the applicable form and instructions.

(3) *Federal Tax Deposit (FTD) coupon.* Each deposit required to be made under this section must be accompanied by an FTD coupon (Form 8109). The FTD coupon shall be prepared in accordance with the instructions applicable thereto. The deposit, together with the FTD coupon, shall be forwarded to a financial institution authorized as a depository for Federal taxes in accordance with 31 CFR part 214 or, at the election of the employer, to a Federal Reserve bank. For procedures governing the deposit of Federal taxes at a Federal Reserve bank, see 31 CFR part 214.7.

(4) *Procurement of FTD coupons.* A new employer should receive its initial supply of FTD coupon books after receiving its employer identification number. In the event that a deposit is required to be made before receipt of the FTD coupon books, the employer should contact the local IRS office and

furnish the following information: the business name as it appears on IRS records, the employer identification number, address where the coupon books are to be sent, and the number of coupon books being requested. Filers of Form 1120, Form 990–C, Form 990PF (with net investment income), Form 990–T or Form 2438 must also provide the month the employer's tax year ends. If an employer has applied for an employer identification number but has not received it, and a deposit is required to be made, the employer should send a check or money order for the deposit amount to its Internal Revenue Service center. There should be included on the payment, the name and address of the entity as shown on Form SS–4, Application for Employer Identification Number, the kind of tax, the period covered, and the date on which the employer applied for the employer identification number.

(5) *Time deemed deposited.* The timeliness of a deposit will be determined by the date stamped on the FTD coupon by the Federal Reserve bank or the authorized financial institution or, if section 7502(e) applies, by the date the deposit is treated as received under section 7502(e).

(6) *Time deemed paid.* In general, amounts deposited under this section will be considered as paid at the time deemed deposited under paragraph (h)(5) of this section, or on the last day prescribed for filing the return (determined without regard to any extension of time for filing the return), whichever is later. For purposes of section 6511 and the regulations hereunder (relating to the period of limitation on credit or refund), if an amount is deposited prior to April 15th of the calendar year immediately succeeding the calendar year that contains the period for which the amount was deposited, the amount will be considered paid on April 15th.

(j) *Special rules*—(1) *District Director notice exception.* The provisions of this section are not applicable with respect to employment taxes for any month in which the employer receives notice from the district director that a return is required under § 31.6011(a)–5 (or for any subsequent month for which such a return is required), if those taxes are also required to be deposited under the separate accounting procedures provided in § 301.7512–1 of the Regulations on Procedure and Administration (which procedures are applicable if notification is given by the district director of failure to comply with certain employment tax requirements). In cases in which a monthly return is required under § 31.6011(a)–5 but the taxes are not required to be deposited under the separate accounting procedures provided in § 301.7512–1, the provisions of this section shall apply except those provisions shall not authorize the deferral of any deposit to a date after the date on which the return is required to be filed.

(2) *Wages paid in nonconvertible foreign currency.* The provisions of this section are not applicable with respect to wages paid in nonconvertible foreign currency pursuant to § 301.6316–7.

(k) *Cross references*—(1) *Failure to deposit penalty.* For provisions relating to the penalty for failure to make a deposit within the prescribed time, see section 6656 and the provisions of § 301.6656–1.

(2) *Saturday, Sunday, or legal holiday.* For provisions relating to the time for performance of acts where the last day falls on Saturday, Sunday, or a legal holiday, see the provisions of § 301.7503–1.

(l) [Reserved].

(m) *Effective date.* Sections 31.6302–1 through 31.6302–3 apply with respect to the deposit of employment taxes attributable to payments made after December 31, 1992. To the extent that the provisions of §§ 31.6302–1 through 31.6302–3 are inconsistent with the provisions of §§ 31.6302(c)–1 and 31.6302(c)–2, a taxpayer will be considered to be in compliance with §§ 31.6301–1 through 31.6302–3 if the taxpayer makes timely deposits during 1993 in accordance with §§ 31.6302(c)–1 and 31.6302(c)–2.

[T.D. 8436, 57 FR 44102, Sept. 24, 1992; 57 FR 48724, Oct. 28, 1992; T.D. 8504, 58 FR 68035, Dec. 23, 1993; T.D. 8436, 59 FR 6218, Feb. 10, 1994; T.D. 8723, 62 FR 37493, July 14, 1997; T.D. 8771, 63 FR 32736, June 16, 1998]

§ 31.6302–1T Federal tax deposit rules for withheld income taxes and taxes under the Federal Insurance Contributions Act (FICA) attributable to payments made after December 31, 1992 (temporary).

(a) through (f)(3). [Reserved] For further guidance, see § 31.6302–1(a) through (f)(3).

(f)(4) *De Minimis rule.* For quarterly return periods beginning on or after July 1, 1998, and annual return periods beginning on or after January 1, 1999, if the total amount of accumulated employment taxes for the return period is less than $1,000 and the amount is fully deposited or remitted with a timely filed return for the return period, the amount deposited or remitted will be deemed to have been timely deposited.

(f)(5) through (m). [Reserved] For further guidance, see § 31.6302–1(g) through (m).

[T.D. 8771, 63 FR 32736, June 16, 1998]

§ 31.6302–2 Federal Tax Deposit Rules for amounts withheld under the Railroad Retirement Tax Act (R.R.T.A.) attributable to payments made after December 31, 1992.

(a) *General rule.* Except as otherwise provided in this section, the rules of § 31.6302–1 determine the time and manner of making deposits of employee tax withheld under section 3202 and employer tax imposed under sections 3221 (a) and (b) attributable to payments made after December 31, 1992. Railroad retirement taxes described in section 3221(c) arising during the month must be deposited on or before the first date after the 15th day of the following month on which taxes are otherwise required to be deposited under § 31.6302–1.

(b) *Separate application of deposit rules.* A person who accumulates tax under sections 3202 or 3221 shall not take that tax into account for purposes of determining when taxes described in paragraph (e) of § 31.6302–1 must otherwise be deposited.

(c) *Modification of Monthly rule determination*—(1) *General rule.* Except as otherwise provided in this section, any person is allowed to use the Monthly rule of § 31.6302–1(c)(1) for an entire calendar year unless the amount of R.R.T.A. taxes required to be deposited under this section during the lookback period was more than $50,000. The lookback period is defined as the calendar year preceding the calendar year just ended. Thus, for purposes of determining if an R.R.T.A. employer qualifies to use the Monthly rule for calendar year 1993, a lookback must be made to calendar year 1991. New employers shall be treated as having employment tax liabilities of zero for any calendar year during which the employer did not exist.

(2) *Exception.* An employer shall immediately cease to be allowed to use the Monthly rule after any day on which that employer is subject to the One-Day rule set forth in § 31.6302–1(c)(3). Such employer immediately becomes subject to the Semi-Weekly rule of § 31.6302–1(c)(2) for the remainder of the calendar year and the following calendar year.

(d) *Wire-transfer exception.* If, for the calendar year prior to the calendar year preceding the current calendar year, the aggregate amount of taxes imposed under sections 3202 and 3221 with respect to an employer equalled or exceeded $1 million, the employer must deposit the aggregate amount of railroad retirement taxes required to be deposited for the current calendar year in accordance with § 31.6302(c)–2(a)(1).

[T.D. 8436, 57 FR 44105, Sept. 24, 1992]

§ 31.6302–3 Federal tax deposit rules for amounts withheld under the backup withholding requirements of section 3406 for payments made after December 31, 1992.

(a) *General rule.* The rules of § 31.6302–1 shall apply to determine the time and manner of making deposits of amounts withheld under the backup withholding requirements of section 3406.

(b) *Treatment of backup withholding amounts separately.* A taxpayer that withholds income tax under section 3406 with respect to reportable payments made after December 31, 1992, and before January 1, 1994, may, in accordance with the instructions provided with Form 941, deposit such tax under the rules of § 31.6302–1 without taking into account the other taxes described in paragraph (e) of § 31.6302–1 for purposes of determining when tax withheld under section 3406 must be deposited. A taxpayer that treats backup withholding amounts separately with respect to reportable payments made after December 31, 1992, and before January 1, 1994, shall not take tax withheld under section 3406 into account for purposes of determining when the other taxes described in paragraph (e) of § 31.6302–1 must otherwise be deposited under that section. See § 31.6302–4 for rules regarding the deposit of income tax withheld under section 3406 with respect to reportable payments made after December 31, 1993.

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

Example. For the last two calendar quarters of 1991 and the first two calendar quarters of 1992, Bank *A* reports employment taxes with respect to wages paid totalling in excess of $50,000. For the same four quarters, pursuant to section 3406, *A* withholds income tax with respect to dividend payments in an amount aggregating less than $50,000. For deposit and reporting purposes, *A* treated the backup withholding amounts separately from the employment taxes with respect to wages paid. Accordingly, for calendar year 1993, if *A* chooses to treat the items separately, *A* must use the Semi-Weekly rule of § 31.6302–1(c)(2) to deposit taxes with respect to wages paid but may use the Monthly rule of § 31.6302–1(c)(1) for the deposit of backup withholding amounts. If *A* chooses not to treat the items separately, the Semi-Weekly rule would apply to the combined amount of both the taxes with respect to wages paid and the backup withholding amounts.

[T.D. 8436, 57 FR 44106, Sept. 24, 1992, as amended by T.D. 8504, 58 FR 68035, Dec. 23, 1993]

§ 31.6302–4 Federal tax deposit rules for withheld income taxes attributable to nonpayroll payments made after December 31, 1993.

(a) *General rule.* With respect to nonpayroll withheld taxes attributable to nonpayroll payments made after December 31, 1993, a taxpayer is either a monthly or a semi-weekly depositor based on an annual determination. Except as provided in this section, the rules of § 31.6302–1 shall apply to determine the time and manner of making deposits of nonpayroll withheld taxes as though they were employment taxes. Paragraph (b) of this section defines nonpayroll withheld taxes. Paragraph (c) of this section provides rules for determining whether a taxpayer is a monthly or a semi-weekly depositor.

(b) *Nonpayroll withheld taxes defined.* For purposes of this section, effective with respect to payments made after December 31, 1993, *nonpayroll withheld taxes* means—

(1) Amounts withheld under section 3402(q), relating to withholding on certain gambling winnings;

(2) Amounts withheld under section 3402 with respect to amounts paid as retirement pay for service in the Armed Forces of the United States;

(3) Amounts withheld under section 3402(o)(1)(B), relating to certain annuities;

(4) Amounts withheld under section 3405, relating to withholding on pensions, annuities, IRAs, and certain other deferred income; and

(5) Amounts withheld under section 3406, relating to backup withholding with respect to reportable payments.

(c) *Determination of deposit status*—(1) *Rules for calendar years 1994 and 1995.* On January 1, 1994, a taxpayer's depositor status for nonpayroll withheld taxes is the same as the taxpayer's status on January 1, 1994, for taxes reported on Form 941 under § 31.6302–1. A taxpayer generally retains that depositor status for nonpayroll withheld taxes for all of calendar years 1994 and 1995. However, a taxpayer that under this paragraph (c) is a monthly depositor for 1994 and 1995 will immediately lose that status and become a semi-weekly depositor of nonpayroll withheld taxes if the One-Day rule of § 31.6302–1(c)(3) is triggered with respect to nonpayroll withheld taxes. See paragraph (d) of this section for a special rule regarding the application of the One-Day rule of § 31.6302–1(c)(3) to nonpayroll withheld taxes.

(2) *Rules for calendar years after 1995*—(i) *In general.* For calendar years after 1995, the determination of whether a taxpayer is a monthly or a semi-weekly depositor for a calendar year is based on an annual determination and generally depends on the aggregate amount of nonpayroll withheld taxes reported by the taxpayer for the lookback period as defined in paragraph (c)(2)(iv) of this section.

(ii) *Monthly depositor.* A taxpayer is a monthly depositor of nonpayroll withheld taxes for a calendar year if the amount of nonpayroll withheld taxes accumulated in the lookback period (as defined in paragraph (c)(2)(iv) of this section) is $50,000 or less. A taxpayer ceases to be a monthly depositor of nonpayroll withheld taxes on the first day after the taxpayer is subject to the One-Day rule in § 31.6302–1(c)(3) with respect to nonpayroll withheld taxes. At that time, the taxpayer immediately becomes a semi-weekly depositor of nonpayroll withheld taxes for the remainder of the calendar year and the succeeding calendar year. See paragraph (d) of this section for a special rule regarding the application of the One-Day rule of § 31.6302–1(c)(3) to nonpayroll withheld taxes.

(iii) *Semi-weekly depositor.* A taxpayer is a semi-weekly depositor of nonpayroll withheld taxes for a calendar year if the amount of nonpayroll withheld taxes accumulated in the lookback period (as defined in paragraph (c)(2)(iv) of this section) exceeds $50,000.

(iv) *Lookback period.* For purposes of this section, the lookback period for nonpayroll withheld taxes is the second calendar year preceding the current calendar year. For example, the lookback period for calendar year 1996 is calendar year 1994. A new taxpayer is treated as having nonpayroll withheld taxes of zero for any calendar year in which the taxpayer did not exist.

(d) *Special rules.* A taxpayer must treat nonpayroll withheld taxes, which are reported on Form 945, Annual Return of Withheld Federal Income Tax, separately from taxes reportable on Form 941, Employer's Quarterly Federal Tax Return. Taxes reported on Form 945 and taxes reported on Form 941 are not combined for purposes of determining whether a deposit of either is due, whether the One-Day rule of § 31.6302–1(c)(3) applies, or whether any safe harbor is applicable. In addition, separate Federal tax deposit coupons must be used to deposit taxes reported on Form 945 and taxes reported on Form 941. (See paragraph (b) of § 31.6302–1 for rules for determining an employer's deposit status for taxes reported on Form 941.) A deposit of taxes reported on Form 945 for one calendar year must be made separately from a deposit of taxes reported on Form 945 for another calendar year.

[T.D. 8504, 58 FR 68036, Dec. 23, 1993]

§ 31.6302(b)–1 Method of collection.

For provisions relating to collection by means of returns of the taxes imposed by chapter 21 (Federal Insurance Contributions Act), see §§ 31.6011(a)–1 and 31.6011(a)–5.

§ 31.6302(c)–1 Use of Government depositories in connection with taxes under Federal Insurance Contributions Act and income tax withheld for amounts attributable to payments made before January 1, 1993.

(a) *Requirement for calendar months beginning after December 31, 1980, but before January 1, 1993*—(1) *In general.* (i) In the case of a calendar month which begins after December 31, 1980, but before April 1, 1991—

(*a*) Except as provided in paragraph (b) of this section and hereinafter in this subdivision (i), if at the close of any calendar month the aggregate amount of undeposited taxes (as defined in paragraph (a)(1)(iii) of this section) is $500 or more, the employer shall deposit the undeposited taxes in a Federal Reserve bank or authorized financial institution (see paragraph (a)(3)(iii) of this section) within 15 calendar days after the close of such calendar month.

However, this (*a*) of subdivision (i) shall not apply if the employer was required to make a deposit of taxes pursuant to (*b*) of this subdivision (i) with respect to an eighth-monthly period which occurred during the calendar month.

(*b*) Except as provided in paragraph (b) of this section and except in the case of first-time 3-banking-day depositors, if at the close of any eighth-monthly period the aggregate amount of undeposited taxes is $3,000 or more, the employer shall deposit the undeposited taxes in a Federal Reserve bank or authorized financial institution within 3 banking days after the close of such eighth-monthly period. For purposes of determining the amount of undeposited taxes at the close of an eighth-monthly period, undeposited taxes with respect to wages paid during a prior eighth-monthly period shall not be taken into account if the employer has made a deposit with respect to such prior eighth-monthly period. An employer will be considered to have complied with the requirements of this paragraph (a)(1)(i)(*b*) for a deposit with respect to the close of an eighth-monthly period if—

(*1*) His deposit is not less than 95 percent (90 percent before January 1, 1982) of the aggregate amount of the taxes with respect to wages paid during the period for which the deposit is made, and

(*2*) If such eighth-monthly period occurs in a month other than the last month of a period for which a return is required to be filed (hereinafter in this subparagraph referred to as a return period), he deposits any underpayment with his first deposit which is otherwise required by this paragraph (a)(1)(i)(*b*) to be made after the 15th day of the following month.

For purposes of this paragraph (a)(1)(i)(*b*), a ''first-time 3-banking-day depositor'' is an employer who establishes to the satisfaction of the Commissioner that he was not required (but for this exception) to make a deposit pursuant to this paragraph (a)(1)(i)(*b*) (or pursuant to paragraph (a)(1)(ii)(*b*) of this section) with respect to each period in any preceding month of the current calendar quarter and with respect to each period in the 4 calendar quarters preceding the current calendar quarter. An employer may in no event qualify as a ''first-time 3-banking-day depositor'' with respect to any eighth-monthly period if the undeposited taxes at the close of that period are $10,000 or more.

The excess (if any) of a deposit over the actual taxes for a deposit period shall be applied in order of time to each of the employer's succeeding deposits with respect to the same return period, until exhausted, to the extent that the amount by which the taxes for a subsequent deposit period exceed the deposit for such subsequent deposit period. For purposes of this paragraph (a)(1)(i), ''eighth-monthly period'' means the first 3 days of a calendar month, the 4th day through the 7th day of a calendar month, the 8th day through the 11th day of a calendar month, the 12th day through the 15th day of a calendar month, the 16th day through the 19th day of a calendar month, the 20th day through the 22nd day of a calendar month, the 23rd day through the 25th day of a calendar month, or the portion of a calendar month following the 25th day of such month.

(*c*) The periods within which taxes must be desposited under this section are determined, in the case of employers paying advance earned income credit amounts, by reference to the amount of taxes required to be deposited after reduction for advance amounts paid to employees.

(ii) In the case of a calendar month which begins after March 31, 1991, but before January 1, 1993—

(*a*) Except as provided in §31.6302(c)–1(a)(1)(ii) (*b*) or (*c*), or §31.6302(c)–1(b), if with respect to any calendar month the aggregate amount of taxes (as defined in §31.6302(c)–1(a)(1)(iii)) accumulated with respect to wages paid is $500 or more, but less than $3,000, then the employer shall deposit that aggregate amount in a Federal Reserve bank or authorized financial institution within 15 calendar days after the close of that calendar month. Taxes accumulated with respect to wages paid in a prior calendar month within the same return period shall not be taken into account in determining the aggregate amount of taxes accumulated if a deposit was required to be made under this section with respect to such tax amounts. Deposits made during the calendar month of taxes with respect to wages paid during that month do not reduce the aggregate amount of taxes accumulated for purposes of determining the deposit requirement (if any) for that month. However, this paragraph (a)(1)(ii)(*a*) shall not apply if the employer was required to make a deposit of taxes pursuant to paragraph (a)(1)(ii)(*b*) of this section with respect to an eighth–month period which occurred during the calendar month.

Example 1. Employer *A*'s aggregate amount of taxes accumulated with respect to wages paid in April 1991 is $800. Since that amount is in excess of $500, but less than $3,000, *A* must deposit the $800 in a Federal Reserve bank or authorized financial institution by May 15, 1991.

Example 2. Employer *B*'s aggregate amount of taxes accumulated with respect to wages paid in April 1991 is $400. Since that amount is less than $500, *B* has no deposit obligation for the month of April. In May 1991 *B*'s aggregate amount of taxes accumulated with respect to wages paid during the month is $450. Since the $400 in taxes in April was not required to be deposited, that amount is taken into account in determining if a deposit is required for May. The aggregate amount of taxes accumulated with respect to wages paid for the two months is in excess of $500, thus requiring a deposit. Since June 15, 1991, is a Saturday, *B* must deposit the $850 in a Federal Reserve bank or authorized financial institution by Monday, June 17, 1991, pursuant to section 7503 of the Code.

Example 3. The facts are the same as in *Example 2* except that *B* deposits the $400 in taxes from April on May 15, 1991. Because the $400 was not required to be deposited, that amount is taken into account in determining if a deposit obligation exists for May. Since the aggregate amount of taxes accumulated with respect to wages paid for the two months, $850, is in excess of $500, a deposit in the aggregate amount of $850 is required by Monday, June 17, 1991. Since $400 was previously deposited, *B* must deposit an additional $450 by June 17, 1991.

Example 4. On Friday, April 5, 1991, a payroll date, Employer *C* accumulates $450 in taxes with respect to wages paid on that date. Although not required to do so, *C* deposits the $450 in an authorized depository. On Friday, April 19, 1991, *C* accumulates an additional $450 in taxes with respect to wages paid. The aggregate amount of taxes accumulated with respect to wages paid during the calendar month is $900. *C* has a deposit obligation of $900 for the calendar month and must deposit an additional $450 in an authorized depository by May 15, 1991.

(*b*) Except as provided in § 31.6302(c)–1(a)(1)(ii)(*c*) or § 31.6302(c)–1(b), and except in the case of first-time 3-banking-day depositors (as defined in § 31.6302(c)–1(a)(1)(i)(*b*)(*2*)), if with respect to any eighth-monthly period (as defined in § 31.6302(c)–1(a)(1)(i)(*b*)) the aggregate amount of taxes accumulated with respect to wages paid is $3,000 or more, but less than $100,000, the employer shall deposit that aggregate amount in a Federal Reserve bank or authorized financial institution within 3 banking days after the close of that eighth-monthly period. Taxes accumulated with respect to wages paid during a prior eighth-monthly period shall not be taken into account if a deposit was required to be made under this section with respect to such tax amounts. Deposits made during the eighth-monthly period of taxes with respect to wages paid during that eighth-monthly period do not reduce the aggregate amount of taxes accumulated for purposes of determining the deposit requirement (if any) for that eighth-monthly period. Solely for purposes of the examples in this paragraph (a)(1)(ii)(*b*) and paragraphs (a)(1)(ii)(*c*), (*d*), and (*f*) of this section, ''banking days'' are assumed to include all calendar days except Saturdays, Sundays, and Federal holidays.

Example 1. For the eighth-monthly period April 1–3, 1991, Employer *D*'s aggregate amount of taxes accumulated with respect to wages paid is $3,500. Since that amount is in excess of $3,000, but less than $100,000, *D* has a deposit obligation of $3,500 that must be satisfied by April 8, 1991, the third banking day after the close of the eighth-monthly period.

Example 2. For the eighth-monthly period April 1–3, 1991, Employer *E*'s aggregate amount of taxes accumulated with respect to wages paid is $3,500. *E* has a deposit obligation of $3,500 that must be satisfied by April 8, 1991, three banking days after the close of the April 1–3 eighth-monthly period. For the eighth-monthly period April 4–7, 1991, *E*'s aggregate amount of taxes accumulated with respect to wages paid is $2,800. Since *E* was required to make a deposit for the April 1–3 eighth-monthly period, that $3,500 amount is not taken into account in determining any obligations that arise in subsequent eighth-monthly periods. *E* does not have an eighth-monthly deposit obligation with respect to the April 4–7 period.

Example 3. For the eighth-monthly period April 1–3, 1991, Employer *F*'s aggregate amount of taxes accumulated with respect to wages paid is $2,800. Since that amount is less than $3,000, no deposit is required with respect to that eighth-monthly period. For the eighth-monthly period April 4–7, 1991, *F*'s aggregate amount of taxes accumulated with respect to wages paid is $2,500. Since *F* was not required to deposit the $2,800 in taxes from the April 1–3 eighth-monthly period, that amount is taken into account in determining *F*'s deposit obligation for the April 4–7 eighth-monthly period. The aggregate amount of taxes accumulated for the two eighth-monthly periods is $5,300. *F* has a deposit obligation of $5,300 that must be satisfied by April 10, 1991, three banking days after the close of the April 4–7 eighth-monthly period.

Example 4. The facts are the same as in *Example 3* except that *F* deposits the $2,800 from the April 1–3 eighth-monthly period on April 4, 1991. Because the $2,800 was not required to be deposited, that amount is taken into account in determining *F*'s deposit obligation for the April 4–7 eighth-monthly period. The aggregate amount of taxes accumulated for the two eighth-monthly periods is $5,300. Since that amount is in excess of $3,000, a deposit obligation exists after the close of the April 4–7 eighth-monthly period. As $2,800 of that amount was previously deposited, *F* has a deposit obligation of $2,500 that must be satisfied by April 10, 1991, three banking days after the close of the April 4–7 eighth-monthly period.

Example 5. On Friday, April 12, 1991, the beginning of an eighth-monthly period (April 12–15), *G* accumulates $3,500 in taxes with respect to wages paid and deposits the $3,500 in an authorized depository on that date although a deposit of the $3,500 was not required to be made on that date. On Monday, April 15, 1991, the end of the April 12–15 eighth-monthly period, *G* accumulates an additional $2,000 in taxes with respect to wages paid. The aggregate amount of taxes accumulated with respect to wages paid during the April 12–15 eighth-monthly period of $5,500. *G* has a deposit obligation for the eighth-monthly period of $5,500. Since $3,500 of that amount was previously deposited, *G* has a remaining deposit obligation of $2,000 that must be satisfied by Thursday, April 18, 1991, three banking days after the close of the eighth-monthly period.

(*c*) If on any day within an eighth-monthly period the aggregate amount of taxes accumulated with respect to wages paid is $100,000 or more, the employer shall deposit that aggregate amount in a Federal Reserve bank or authorized financial institution on the first banking day after that day. Taxes accumulated with respect to wages paid prior to that day shall not be taken into account if a deposit was required under this section with respect to such tax amounts. Taxes deposited on any given day with respect to wages paid on that day do not reduce the aggregate amount of taxes accumulated on that day for purposes of determining the deposit requirement (if any) for that day.

Example 1. On Thursday, April 4, 1991, the beginning of the April 4–7 eighth-monthly period, Employer *H* accumulates $55,000 in taxes with respect to wages paid on that date. On Saturday, April 6, 1991, *H* accumulates an additional $50,000 in taxes with respect to wages paid. *H* has a deposit obligation of $105,000 that must be satisfied by Monday, April 8, the next banking day after Saturday, April 6.

Example 2. On Friday, April 12, 1991, the beginning of the April 12–15 eighth-monthly period, *J* accumulates $60,000 in taxes with respect to wages paid and deposits the $60,000 in an authorized depository on that date although a deposit of the $60,000 was not required to be made on that date. On Monday, April 15, 1991, the last day in the April 12–15 eighth-monthly period, *J* accumulates an additional $50,000 in taxes with respect to wages paid. On Monday, April 15, the aggregate amount of taxes accumulated with respect to wages paid during the eighth-monthly period to date totals $110,000. *J* has a $110,000 deposit obligation that must be satisfied by the next banking day after the $100,000 threshold is reached. Since $60,000 of the $110,000 was already deposited, *J* has a remaining deposit obligation of $50,000 that must be satisfied by Tuesday, April 16, 1991, the next banking day following April 15th.

Example 3. On Monday, April 1, 1991, Employer *K* accumulates $105,000 in taxes with respect to wages paid on that date. On that same day, *K* deposits in an authorized depository $10,000 of the $105,000 accumulated. *K* has a $105,000 deposit obligation that must be satisfied by the next banking day, April 2, 1991. The $10,000 deposited on April 1 cannot be used to reduce the aggregate amount of accumulated taxes with respect to that date. *K* has a remaining deposit obligation of $95,000 that must be satisfied by April 2, 1991.

(*d*) If, with respect to any eighth-monthly period, an employer incurs an obligation to deposit in accordance with § 31.6302(c)–1(a)(1)(ii)(*c*), and later, within the same eighth-monthly period, accumulates with respect to wages paid taxes of $3,000 or more, but less than $100,000, an additional deposit is required in accordance with § 31.6302(c)–1(a)(1)(ii)(*b*). However, if the amount of taxes is $100,000 or more, an additional deposit is required in accordance with § 31.6302(c)–1(a)(1)(ii)(*c*).

Example. On Tuesday, April 2, 1991, Employer *L* accumulates $110,000 in aggregate taxes with respect to wages paid. In accordance with paragraph (a)(1)(ii)(*c*) of this section, *L* has a $110,000 deposit obligation that must be satisfied by Wednesday, April 3, 1991, the next banking day following April 2. On Wednesday, April 3, 1991, *L* accumulates an additional $10,000 in taxes with respect to wages paid that date. In accordance with paragraph (a)(1)(ii)(*b*) of this section, *L* now has an additional deposit obligation of $10,000 that must be satisfied by Monday, April 8, 1991, the 3rd banking day following the close of the April 1–3 eighth-monthly period. The obligation to deposit the $10,000 is separate and distinct from the obligation to deposit the $110,000.

(*e*) An employer will be considered to have satisfied the deposit obligation imposed by paragraphs (a)(1)(ii) (*b*), (*c*) and (*d*) of this section if—

(*1*) The deposit that is made is not less than 95 percent of the aggregate amount of taxes accumulated with respect to wages paid during the period for which the deposit is made, and

(*2*) If the eighth-monthly period (or, in the case of a deposit required under paragraph (a)(1)(ii)(*c*) of this section, the day on which the obligation arose) is in a month other than the last month of the return period, the employer deposits any remaining amount due with the first deposit otherwise required to be made after the fifteenth day of the following month. In the case of the last month of the return period, see § 31.6302(c)–1(a)(1)(iv).

(*f*) Any excess of a deposit over the actual taxes required to be deposited to date (overdeposit) during the return period shall be applied in order of time to each of the employer's succeeding deposit obligations within the same return period. In the determination of the aggregate amount of taxes accumulated with respect to wages paid in succeeding deposit periods, the overdeposit does not reduce the aggregate amount accumulated although the overdeposit is credited to the depositor's account.

Example. Employer *M*'s deposit obligation for the eighth-monthly period April 1–3, 1991, is $3,200. On April 8, 1991, three banking days after the close of the eighth-monthly period, *M* deposits $4,000 in an authorized depository, $800 in excess of the amount required to be deposited. During the eighth-monthly period April 4–7, 1991, *M* accumulates $3,750 in taxes with respect to wages paid during such period. Although the $800 overdeposit for the April 1–3 eighth-monthly period is credited to *M*'s account, it may not be used to determine whether a deposit obligation exists for the April 4–7 eighth-monthly period. The two deposit obligations are separate and distinct. Since the amount of taxes accumulated with respect to the April 4–7 eighth-monthly period is an amount greater than $3,000, a deposit is required under paragraph (a)(1)(ii)(*b*) of this section within three banking days after the close of the period. *M* has a remaining deposit obligation of $2,950 ($3,750 accumulated less $800 overdeposit) that must be satisfied by April 10, 1991, three banking days after the close of the period.

(*g*) The periods within which taxes must be deposited under this section are determined, in the case of employers paying advance earned income credit amounts, by reference to the amount of taxes required to be deposited after reduction for advance amounts paid to employees.

(*h*) For purposes of this paragraph (a)(1)(ii), the term ''wages paid'' includes all amounts included in wages, e.g., under section 3121(v) of the Code, regardless of whether they have actually been paid.

(iii) As used in subdivisions (i) and (ii) of this subparagraph, the term ''taxes'' means—

(a) The employee tax withheld under section 3102,

(b) The employer tax under section 3111, and

(c) The income tax withheld under section 3402, including amounts withheld with respect to qualified State individual income taxes,

Exclusive of taxes with respect to wages for domestic service in a private home of the employer or, if paid before April 1, 1971, wages for agricultural labor. In addition, with respect to wages paid after December 31, 1970, and before April 1, 1971, for agricultural labor, any taxes described in paragraph (a)(2)(ii) of this section which are not required under such subparagraph to be deposited, and any income tax (including qualified State individual income tax) withheld under section 3402 with respect to such wages, shall be deemed to be ''taxes'' on and after April 1, 1971. For the requirements relating to the deposit and payment of withheld tax and with respect to qualified State individual income taxes, see paragraph (d)(3)(iii) of § 301.6361–1 of this chapter (Regulations on Procedure and Administration).

(iv) If the aggregate amount of taxes reportable on a return (other than a return on Form 942) for a return period exceeds the total amount deposited by the employer pursuant to paragraph (a)(1) (i) or (ii) of this section for such return period (*a*) by $500 or more in the case of a return period which ends after December 31, 1980, or (*b*) by more than $200 in the case of a return period which ends after December 31, 1970, and before January 1, 1981, the employer shall, on or before the last day of the first calendar month following the return period, deposit with a Federal Reserve bank or authorized financial institution an amount equal to the amount by which the taxes reportable on the return exceed the total deposits (if any) made pursuant to subdivision (i) or (ii) of this subparagraph for such period. As used in this subdivision, the term ''taxes'' shall have the meaning assigned to such term in subdivision (iii) of this subparagraph, except that the term shall include the taxes referred to in (*a*), (*b*), and (*c*) of such subdivision (iii) of this subparagraph with respect to any wages for domestic service in a private home of the employer which the employer elects to report on a quarterly return other than a quarterly return made on Form 942.

(v) If the aggregate amount of taxes reportable on Form CT–1, the return relating to an employer's railroad retirement tax payments, for a return period exceeds the total amount deposited by the employer pursuant to paragraph (a)(1)(i) of this section for such return period by $100 or more, the employer shall, on or before the last day of the second calendar month following the return period, deposit with a Federal Reserve bank or authorized financial institution an amount equal to the amount by which the taxes reportable on Form CT–1 exceed the total deposits (if any) of such taxes made pursuant to subdivision (i) of this subparagraph for such period.

(2) *Depositary forms*—(i) *In general.* A deposit required to be made by this section shall be made separately from a deposit required by any other section. An employer may make one, or more than one, remittance of the amount required to be deposited. However, a deposit for a period in one calendar quarter shall be made separately from any deposit for a period in another calendar quarter. An amount of tax which is not required to be deposited may nevertheless be deposited if the employer so desires.

(ii) *Deposits.* Each remittance of amounts required to be deposited under paragraph (a)(1) of this section shall be accompanied by a Federal Tax Deposit form. Such form shall be prepared in accordance with the instructions applicable thereto. The remittance, together with the Federal Tax Deposit form, shall be forwarded to a financial institution authorized as a depositary for Federal taxes in accordance with 31 CFR Part 214 or, at the election of the employer, to a Federal Reserve bank. For procedures governing the deposit of Federal taxes at a Federal Reserve bank, see 31 CFR Part 214.7. The timeliness of the deposit will be determined by the date stamped on the Federal Tax Deposit form by the Federal Reserve bank or the authorized financial institution or, if section 7502(e) applies, by the date the deposit is treated as received under section 7502(e). Each employer making deposits under this section shall report on the return, for the period with respect to which such deposits are made, information regarding such deposits according to the instructions that apply to such return and pay at that time (or deposit by the due date of such return) the balance, if any, of the taxes due for such period.

(iii) *Time deemed paid.* In general, amounts deposited under subdivision (ii) of this subparagraph shall be considered as paid on the last day prescribed for filing the return in respect of such tax (determined without regard to any extension of time for filing such return), or at the time deposited, whichever is later. For purposes of section 6511 and the regulations thereunder, relating to period of limitation on credit or refund, if an amount is so deposited prior to April 15th of a calendar year immediately succeeding the calendar year which contains the period for which such amount was so deposited, such amount shall be considered as paid on such April 15th.

(3) *Procurement of prescribed form.* Copies of the Federal Tax Deposit form will so far as possible be furnished employers. An employer will not be excused from making a deposit, however, by the fact that no form has been furnished to it. An employer not supplied with the Federal Tax Deposit form should make application therefor in ample time to make the required deposits within the time prescribed. The employer may secure the form or additional forms by application therefor to the district director or director of a service center; such application shall

supply the employer's name, identification number, address, and the taxable period to which the deposits will relate.

(b) *Exceptions*—(1) *Monthly returns.* The provisions of this section are not applicable with respect to taxes for the month in which the employer receives notice from the district director that returns are required under § 31.6011 (a)–5 (or for any subsequent month for which such a return is required), if those taxes are also required to be deposited under the separate accounting procedures provided in § 301.7512–1 of this chapter (Regulations on Procedure and Administration) (which procedures are applicable if notification is given by the district director of failure to comply with certain employment tax requirements). In cases in which a monthly return is required under § 31.6011 (a)–5 but the taxes are not required to be deposited under the separate accounting procedures provided in § 301.7512–1, the provisions of this section shall apply except that paragraph (a)(1)(iv) shall not authorize the deferral of any deposit to a date after the date on which the return is required to be filed.

(2) *Wages paid in nonconvertible foreign currency.* The provisions of this section are not applicable with respect to taxes paid in nonconvertible foreign currency pursuant to § 301.6316–7 of this chapter (Regulations on Procedure and Administration).

(68A Stat. 775, 917; 26 U.S.C. 6302, 7805; secs. 6302 (c) and 7805 of the Internal Revenue Code of 1954; 68A Stat. 775, 26 U.S.C. 6302 (c); 68A Stat. 917; 26 U.S.C. 7805)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960]

EDITORIAL NOTE: For FEDERAL FEGISTER citations affecting § 31.6302(c)–1, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 31.6302(c)–2 Use of Government depositories in connection with employee and employer taxes under Railroad Retirement Tax Act for amounts attributable to payments made before January 1, 1993.

(a) *Requirement*—(1) *In general: after 1983 and before April 1, 1991.* In the case of a calendar month which begins after December 31, 1983, and before April 1, 1991, if, at a time prescribed under § 31.6302(c)–1(a)(1) (i) or (v) for the deposit of undeposited taxes, the aggregate amount of undeposited employee tax withheld after December 31, 1983, and before April 1, 1991, under section 3202 and employer tax imposed after December 31, 1983, and before April 1, 1991, under section 3221(a) and (b) equals an amount required to be deposited under § 31.6302(c)–1(a)(1) (i) or (v) the employer shall deposit the undeposited railroad retirement taxes described in sections 3202 and 3221 at such time in the manner prescribed in § 31.6302(c)–1(a)(1) (i) or (v) (except that undeposited railroad retirement taxes described in section 3221 (c) shall in no case be required to be deposited earlier than the first day on which a deposit is otherwise required by § 31.6302(c)–1(a)(1)(i) to be made after the 15th day of the month following the month in which the section 3221 (c) tax arises).

Notwithstanding the preceding sentence, and notwithstanding subdivision (v) of § 31.6302 (c)–1 (a) (1), if, for the calendar year prior to the calendar year preceding the current calendar year, the aggregate amount of taxes imposed under sections 3202 and 3221 with respect to an employer equalled or exceeded $1 million, such employer shall deposit his undeposited railroad retirement taxes required to be deposited for the current calendar year in accordance with Revenue Procedure 83–90, 1983–52 I.R.B. 18, (relating to transfers by wire to the Treasury).

(2) *In general: After March 31, 1991 and before January 1, 1993.* In the case of a calendar month which begins after March 31, 1991, if, at a time prescribed under § 31.6302(c)–1(a)(1)(ii) or (v) for the deposit of accumulated taxes, the aggregate amount of accumulated employee tax withheld after March 31, 1991, under section 3202 and employer tax imposed after March 31, 1991, under section 3221(a) and (b) equals an amount required to be deposited under § 31.6302(c)–1(a)(1)(ii) or (v), the employer shall deposit the accumulated railroad retirement taxes described in sections 3202 and 3221 at the time and in the manner prescribed in § 31.6302(c)–1(a)(1)(ii) or (v) (except that accumulated railroad retirement taxes described in section 3221(c) shall in no

case be required to be deposited earlier than the first day on which a deposit is otherwise required by §31.6302(c)–1(a)(1)(ii) to be made after the 15th day of the month following the month in which the section 3221(c) tax arises). Notwithstanding the preceding sentence, and notwithstanding §31.6302(c)–1(a)(1)(v), if, for the calendar year prior to the calendar year preceding the current calendar year, the aggregate amount of taxes imposed under sections 3202 and 3221 with respect to an employer equalled or exceeded $1 million, such employer shall deposit the aggregate amount of railroad retirement taxes required to be deposited for the current calendar year in accordance with Revenue Procedure 83–90, 1983–2 C.B. 615 (relating to transfers by wire to the Treasury).

(3) *Special requirement.* If an employer files a return on Form CT–1 for a return period beginning before January 1, 1984, and the taxes shown thereon exceed by more than $100 the total amount deposited by him pursuant to paragraph (a)(1) of this section for such return period the employer shall, on or before the last day of the second calendar month following the period for which the return is filed, deposit with a Federal Reserve bank or authorized financial institution an amount equal to the amount by which the taxes shown on the return exceed the total deposits (if any) made pursuant to paragraph (a)(1) of this section for such return period.

(b) *Depositary forms*—(1) *In general.* A deposit required to be made by this section shall be made separately from a deposit required by any other section. An employer may make one, or more than one remittance of the amount required to be deposited. An amount of tax which is not required to be deposited may nevertheless be deposited if the employer so desires. If the aggregate amount of the taxes deposited is in excess of the taxes shown on the return, a credit or refund may be obtained; and in the event the excess is applied as a credit against such taxes for a subsequent return period, the employer shall reduce the amount of one or more of the deposits otherwise required for such subsequent return period by the amount of such credit.

(2) *Deposits.* Each remittance of amounts required to be deposited shall be accompanied by a Federal Tax Deposit form which shall be prepared in accordance with the instructions applicable thereto. Except as provided in paragraph (a)(1) or (a)(2) of this section, the remittance, together with the form, shall be forwarded to a financial institution authorized as a depositary for Federal taxes in accordance with 31 CFR part 214 or, at the election of the employer, to a Federal Reserve bank. For procedures governing the deposit of Federal taxes at a Federal Reserve bank, see 31 CFR part 214.7. The timeliness of the deposit will be determined by the date stamped on the Federal Tax Deposit form by the Federal Reserve bank or the authorized financial institution or, if section 7502(e) applies, by the date the deposit is treated as received under section 7502(e). Each employer making deposits under this section shall report on the return, for the period with respect to which such deposits are made, information regarding such deposits according to the instructions that apply to such return and pay at that time (or deposit by the due date of such return) the balance, if any, of the taxes due for such period.

(3) *Time deemed paid.* In general, amounts deposited under subparagraph (2) of this paragraph shall be considered as paid on the last day prescribed for filing the return in respect of such tax (determined without regard to any extension of time for filing such return), or at the time deposited, whichever is later. For purposes of section 6511 and the regulations thereunder, relating to period of limitation on credit or refund, if an amount is so deposited prior to April 15th of a calendar year immediately succeeding the calendar year in which occurs the period for which such amount was so deposited, such amount shall be considered as paid on such April 15th.

(c) *Procurement of prescribed form.* Copies of the Federal Tax Deposit form will so far as possible be furnished employers. An employer will not be excused from making a deposit, however, by the fact that no form has been furnished to it. An employer not supplied with the form should make application therefor in ample time to make the required deposits within the time prescribed. The employer may secure the form or additional forms by applying therefor and supplying its name, identification number, address, and the taxable period to which the deposits will relate. Copies of the Federal Tax Deposit form may be secured by application therefor to the district director or director of a service center.

(Secs. 6302 (c) and 7805 of the Internal Revenue Code of 1954 (68A Stat. 775, 26 U.S.C. 6302 (c); 68A Stat. 917; 26 U.S.C. 7805)

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6941, 32 FR 18041, Dec. 16, 1967; T.D. 6957, 33 FR 8272, June 4, 1968; T.D. 7419, 41 FR 19632, May 13, 1976; T.D. 7931, 48 FR 57274, Dec. 29, 1983; T.D. 7953, 49 FR 19645, May 9, 1984; T.D. 8341, 56 FR 13403, Apr. 2, 1991; T.D. 8436, 57 FR 44106, Sept. 24, 1992]

§ 31.6302(c)–2A Use of Government depositaries in connection with the railroad unemployment repayment tax.

(a) *Effective date.* The provisions of this section apply with respect to the tax imposed by section 3321(a) on rail employers (as defined in section 3323(a)) on wages paid on or after July 1, 1986, during a taxable period.

(b) *Requirement*—(1) *Rail employers*—(i) *In general.* Except as provided in this section, every rail employer who is required by section 6157(d) to compute the tax imposed by section 3321(a) on a quarterly basis shall deposit the amount of the tax so computed with respect to a calendar quarter (other than the fourth quarter of a calendar year) with a Federal Reserve bank or with an authorized financial institution on or before the last day of the first calendar month following the close of the calendar quarter.

(ii) *Special rule for certain rail employers.* If, for the calendar year prior to the calendar year immediately preceding the current calendar year, the aggregate amount of taxes imposed under sections 3202 and 3221 of the Code (relating to the railroad retirement tax) with respect to an employer equaled or exceeded $1,000,000, such employer shall (except as provided below) deposit his undeposited railroad unemployment repayment tax imposed by section 3321(a) with respect to the current calendar year at the time such tax would otherwise be required to be deposited under this section in the manner set forth in Revenue Procedure 83–90, 1983–2 C.B. 615 (relating to transfers by wire to the Treasury). The funds transfer message described in Revenue Procedure 83–90 (with respect to the railroad retirement tax) shall be completed in the same manner as is prescribed in that Revenue Procedure, except that the amount required by item 12(f) shall be the amount of the railroad unemployment repayment tax (to be labeled as such by the rail employer). Item 12(g) is to be disregarded with respect to the use of the Revenue Procedure for deposits of the railroad unemployment repayment tax. A wire transfer required to be made by a rail employer with respect to the railroad unemployment repayment tax shall be made separately from any wire transfer required to be made with respect to any other tax.

(2) *Special rule where accumulated amount does not exceed $100.* The provisions of paragraph (b)(1) of this section shall not apply with respect to any calendar quarter if the amount of tax imposed by section 3321(a) for such calendar quarter as computed under section 6157, plus unpaid amounts for prior calendar quarters within the taxable period, does not exceed $100.

(3) *Requirement for deposit in lieu of payment with return.* If the amount of the tax reportable on a return of tax on Form CT–1 for a taxable period (as defined in section 3322(a)) exceeds by more than $100 the sum of the amounts deposited pursuant to paragraph (b)(1) of this section for such taxable period, the rail employer shall, on or before the last day of the first calendar month following the period, deposit the balance of the tax due with a Federal Reserve bank or with an authorized financial institution.

(4) *Special rule for third calendar quarter of 1986.* Notwithstanding paragraph (b)(1)(i) of this section, every rail employer required by section 6157(d) to compute the tax imposed by section 3321(a) for the third calendar quarter of 1986 shall deposit the tax so computed on or before December 15, 1986, in the manner provided by this section.

(c) *Depositary forms.* The provisions of paragraphs (b) and (c) of §31.6302(c)–2, relating to depositary forms, are incorporated in this §31.6302(c)–2A by reference.

[T.D. 8105, 51 FR 40169, Nov. 5, 1986. Redesignated and amended at T.D. 8227, 53 FR 34736, Sept. 8, 1988]

§31.6302(c)–3 Use of Government depositaries in connection with tax under the Federal Unemployment Tax Act.

(a) *Requirement*—(1) *In general.* Except as provided in paragraph (a)(2) of this section, every person who, by reason of the provisions of section 6157, computes the tax imposed by section 3301 on a quarterly or other time period basis shall—

(i) If he is a person described in subsection (a)(1) of section 6157, deposit the amount of such tax with a Federal Reserve bank or with an authorized financial institution on or before the last day of the first calendar month following the close of each of the first three calendar quarters in the calendar year, or

(ii) If he is a person other than a person described in subsection (a) (1) of section 6157, deposit the amount of such tax with a Federal Reserve bank or with an authorized financial institution on or before the last day of the first calendar month following the close of—

(a) The period beginning with the first day of the calendar year and ending with the last day of the calendar quarter (excluding the last calendar quarter) in which such person becomes an employer (as defined in section 3306(a)), and

(b) The third calendar quarter of such year, if the period specified in *(a)* of this subdivision includes only the first two calendar quarters of the calendar year.

(2) *Special rule where accumulated amount does not exceed $100.* The provisions of paragraph (a)(1) of this section shall not apply with respect to any period described therein if the amount of the tax imposed by section 3301 for such period as computed under the provisions of section 6157, plus amounts not deposited for prior periods does not exceed $100. Thus, an employer shall not be required to make a deposit for a period unless his tax for such period plus tax not deposited for prior periods exceeds $100.

(3) *Requirement for deposit in lieu of payment with return.* If the amount of tax reportable on a return on Form 940 for a calendar year beginning after December 31, 1969, exceeds by more than $100 the sum of the amount deposited by the employer pursuant to paragraph (a)(1) of this section for such calendar year, the employer shall, on or before the last day of the first calendar month following the calendar year for which the return is required to be filed, deposit the balance of the tax due with a Federal Reserve bank or with an authorized financial institution.

(b) *Manner of deposit—deposits required to be made by Federal tax deposit (FTD) coupon.* (1) *In general.* A deposit required to be made by an employer under this section shall be made separately from a deposit required by any other section. An employer may make one, or more than one, remittance of the amount required to be deposited. An amount of tax which is not required to be deposited may nevertheless be deposited if the employer so desires.

(2) *Use of Federal Tax Deposit form.* Each remittance of amounts required to be deposited under this section shall be accompanied by a prepunched and preinscribed Federal Tax Deposit form which shall be prepared in accordance with the instructions applicable thereto. The employer shall forward such remittance, together with the Federal Tax Deposit form, to a financial institution authorized as a depositary for Federal taxes in accordance with 31 CFR part 214 or, at the election of the employer, to a Federal Reserve bank. For procedures governing the deposit of Federal taxes at a Federal Reserve bank, see 31 CFR 214.7. The timeliness of deposits is determined by the date stamped on the Federal Tax Deposit form by the Federal Reserve bank or the authorized financial institution or, if section 7502(e) applies, by the date the deposit is treated as received under section 7502(e).

(3) *Time deemed paid.* In general, amounts deposited under this section shall be considered as paid on the last day prescribed for filing the return in

respect of such tax (determined without regard to any extension of time for filing such return), or at the time deposited, whichever is later. For purposes of section 6511 and the regulations thereunder, relating to period of limitation on credit or refund, if an amount is so deposited prior to the last day prescribed for filing the return in respect of such tax (determined without regard to any extension of time for filing such return), such amount shall be considered as paid on such last day.

(4) *Procurement of prescribed form.* Copies of the Federal Tax Deposit form will so far as possible be furnished employers. An employer will not be excused from making a deposit, however, by the fact that no form has been furnished to him. An employer not supplied with the proper form should make application therefor in ample time to make the required deposits within the time prescribed. The employer may secure the form or additional forms by applying therefor and supplying his name, identification number, address and the taxable year to which the deposits will relate. Copies of the Federal Tax Deposit form may be secured by application to the district director or director of a service center.

(c) *Manner of deposit—deposits required to be made by electronic funds transfer.* For the requirement to deposit tax under the Federal Unemployment Tax Act by electronic funds transfer, see § 31.6302–1(h). A taxpayer not required to deposit by electronic funds transfer pursuant to § 31.6302–1(h) remains subject to the rules of paragraph (b) of this section.

(d) *Effective date.* The provisions of paragraphs (a) and (b) of this section apply with respect to calendar quarters beginning after December 31, 1969. The provisions of paragraph (c) of this section apply with respect to calendar quarters beginning on or after January 1, 1995.

[T.D. 7037, 35 FR 6709, Apr. 28, 1970; 35 FR 7070, May 5, 1970, as amended by T.D. 7062, 35 FR 14840, Sept. 24, 1970; T.D. 7953, 49 FR 19645, May 9, 1984; 49 FR 25239, June 20, 1984; T.D. 8723, 62 FR 37494, July 14, 1997]

§ 31.6302(c)–4 Cross references.

(a) *Failure to deposit.* For provisions relating to the penalty for failure to make a deposit within the prescribed time, see the provisions of § 301.6656–1 of this chapter (Regulations on Procedure and Administration).

(b) *Saturday, Sunday, or legal holiday.* For provisions relating to the time for performance of acts where the last day falls on Saturday, Sunday, or a legal holiday, see the provisions of § 301.7503–1 of this chapter (Regulations on Procedure and Administration).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960. Redesignated by T.D. 7037, 35 FR 6709, Apr. 28, 1970]

§ 31.6361–1 Collection and administration of qualified State individual income taxes.

Except as otherwise provided in §§ 301.6361–1 to 301.6385–2, inclusive, of this chapter (Regulations on Procedure and Administration), the provisions of this part under subtitle F or chapter 24 of the Internal Revenue Code of 1954 relating to the collection and administration of the taxes imposed by chapter 1 of such Code on the incomes of individuals (or relating to civil or criminal sanctions with respect to such collection and administration) shall apply to the collection and administration of qualified State individual income taxes (as defined in section 6362 of such Code and the regulations thereunder) as if such taxes were imposed by chapter 1 of chapter 24.

(86 Stat. 944, 26 U.S.C. 6364; and 68A Stat. 917, 26 U.S.C. 7805)

[T.D. 7577, 43 FR 59360, Dec. 20, 1978]

§ 31.6402(a)–1 Credits or refunds.

(a) *In general.* For regulations under section 6402 of special application to credits or refunds of employment taxes, see §§ 31.6402(a)–2, 31.6402(a)–3, and 31.6414–1, for regulations under section 6402 of general application to credits or refunds, see §§ 301.6402–1 and 301.6402–2 of this chapter (Regulations on Procedure and Administration). For provisions relating to credits of employment taxes which constitute adjustments without interest, see §§ 31.6413(a)–1 and 31.6413(a)–2.

(b) *Period of limitation.* For the period of limitation upon credit or refund of taxes imposed by the Internal Revenue Code of 1954, see § 301.6511(a)–1 of this chapter (Regulations on Procedure and

Administration). For the period of limitation upon credit or refund of any tax imposed by the Internal Revenue Code of 1939, see the regulations applicable with respect to such tax.

§ 31.6402(a)–2 Credit or refund of tax under Federal Insurance Contributions Act or Railroad Retirement Tax Act.

(a) *Claim by person who paid tax to district director*—(1) *In general.* Any person who pays to the district director more than the correct amount of—

(i) Employee tax under section 3101, or employer tax under section 3111, of the Federal Insurance Contributions Act,

(ii) Employee tax under section 3201, employee representative tax under section 3211, or employer tax under section 3221, of the Railroad Retirement Tax Act,

(iii) Any such tax under a corresponding provision of prior law, or

(iv) Interest, addition to the tax, additional amount, or penalty with respect to any such tax,

may file a claim for refund of the overpayment (except to the extent that the overpayment must be credited pursuant to § 31.3503–1, or may claim credit for such overpayment, in the manner and subject to the conditions stated in this section and § 301.6402–2 of this chapter (Regulations on Procedure and Administration). If credit is claimed pursuant to this section, the amount thereof shall be claimed by entering such amount as a deduction on a return filed by the person making the claim. The return on which the credit is claimed must be on a form which is prescribed for use, at the time of the claim, in reporting tax which corresponds to the tax overpaid. If credit is taken pursuant to this section, a claim on Form 843 is not required, but the return on which the credit is claimed shall have attached as a part thereof a statement which shall constitute the claim for credit, setting forth in detail the grounds and facts relied upon in support of the credit, designating the return period in which the error was ascertained, and setting forth such other information as may be required by the regulations in this subpart and by the instructions relating to the return. No refund or credit of employee tax under the Federal Insurance Contributions Act shall be allowed if for any reason (for example, an overcollection of employee tax having been inadvertently included by the employee in computing a special refund—see § 31.6413(c)–1 the employee has taken the amount of such tax into account in claiming a credit against, or refund of, his income tax, or if so, such claim has been rejected.

(2) *Statements supporting employers' claims for employee tax.* (i) Every claim filed by an employer for refund or credit of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, collected from an employee shall include a statement that the employer has repaid the tax to such employee or has secured the written consent of such employee to allowance of the refund or credit. The employer shall retain as part of his records the written receipt of the employee showing the date and amount of the repayment, or the written consent of the employee, whichever is used in support of the claim.

(ii) Every claim filed by an employer for refund or credit of employee tax under section 3101, or a corresponding provision of prior law, collected from an employee in a calendar year prior to the year in which the credit or refund is claimed, also shall include a statement that the employer has obtained from the employee a written statement *(a)* that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and *(b)* that the employee will not claim refund or credit of such amount. The employer shall retain the employee's written statement as part of the employer's records.

(b) *Claim by employee*—(1) *In general.* If more than the correct amount of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, is collected by an employer from an employee and paid to the district director, the employee may file a claim for refund of the overpayment if (i) the employee does not receive reimbursement in any manner from the employer and does not authorize the employer to file a claim and receive refund or credit, (ii) the overcollection cannot be corrected under § 31.3503–1, and (iii) in the case of employee tax under section 3101 or a corresponding provision of prior law, the employee has not taken the overcollection into account in claiming a credit against, or refund of, his income tax, or if so, such claim has been rejected. See § 31.6413(c)–1.

(2) *Statements supporting employee's claim.* (i) Each employee who makes a claim under subparagraph (1) of this paragraph shall submit with such claim a statement setting forth *(a)* the extent, if any, to which the employer has reimbursed the employee in any manner for the overcollection, and *(b)* the amount, if any, of credit or refund of such overpayment claimed by the employer or authorized by the employee to be claimed by the employer. The employee shall obtain such statement, if possible, from the employer, who should include in such statement the fact that it is made in support of a claim against the United States to be filed by the employee for refund of employee tax paid by such employer to the district director. If the employer's statement is not submitted with the claim, the employee shall make the statement to the best of his knowledge and belief, and shall include therein an explanation of his inability to obtain the statement from the employer.

(ii) Each individual who makes a claim under subparagraph (1) of this paragraph for refund of employee tax under section 3101, or a corresponding provision of prior law, also shall submit with such claim a statement setting forth whether the individual has taken the amount of the overcollection into account in claiming a credit against, or refund of, his income tax, and the amount, if any, so claimed (see § 31.6413(c)–1).

(c) *Statements to accompany employers' and employees' claims under the Federal Insurance Contributions Act.* Whenever a claim for credit or refund of employee tax under section 3101, employer tax under section 3111, or either such tax under a corresponding provision of prior law, is made with respect to remuneration which was erroneously reported on a return or schedule as wages paid to an employee, such claim shall include a statement showing (1) the identification number of the employer, if he was required to make application therefor, (2) the name and account number of such employee, (3) the period covered by such return or schedule, (4) the amount of remuneration actually reported as wages for such employee, and (5) the amount of wages which should have been reported for such employee. No particular form is prescribed for making such statement, but if printed forms are desired, the district director will supply copies of Form 941c or Form 941c PR, whichever is appropriate, upon request.

§ 31.6402(a)–3 Refund of Federal unemployment tax.

Any person who pays to the district director more than the correct amount of—

(a) Tax under section 3301 of the Federal Unemployment Tax Act or a corresponding provision of prior law, or

(b) Interest, addition to the tax, additional amount, or penalty with respect to such tax,

may file a claim for refund of the overpayment, in the manner and subject to the conditions stated in § 301.6402–2 of this chapter (Regulations on Procedure and Administration). See § 31.6413(d) and the corresponding section of prior law for provisions which bar the allowance or payment of interest on the amount of any refund based on credit allowable for contributions paid under the unemployment compensation law of a State.

§ 31.6404(a)–1 Abatements.

For regulations under section 6404 of general application to the abatement of taxes, see § 301.6404–1 of this chapter (Regulations on Procedure and Administration). Every claim filed by an employer for abatement of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, shall be made in the manner and subject to the conditions stated in paragraphs (a) (2) and (c) of § 31.6402(a)–2, as if the claim for abatement were a claim for refund.

§31.6413(a)–1 Repayment by employer of tax erroneously collected from employee.

(a) *Before employer files return*—(1) *Employee tax under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act.* (i) If an employer—

(a) During any return period collects from an employee more than the correct amount of tax under section 3101 or section 3201, or a corresponding provision of prior law,

(b) Repays the amount of the overcollection to the employee before the return for such period is filed with the district director, and

(c) Obtains and keeps as part of his records the written receipt of the employee showing the date and amount of the repayment,

the employer shall not report on any return or pay to the district director the amount of the overcollection.

(ii) Any overcollection not repaid to and receipted for by the employee as provided in paragraph (a)(1)(i) of this section shall be reported and paid to the district director with the return for the return period in which the overcollection was made. Such return shall be accompanied by a statement explaining the overcollection, setting forth the account number (if known) and name of the individual from whom the overcollection was made, and showing the total amount overcollected from and not repaid to the individual. If the employer is not required to make a return for such period, the employer nevertheless shall furnish to the district director a statement as described in the preceding sentence, on or before the date fixed for filing a return for such period, and shall pay the amount of the overcollection with such statement.

(2) *Income tax withheld from wages.* (i) If an employer—

(a) During any return period collects from an employee more than the correct amount of tax under section 3402,

(b) Repays the amount of the overcollection to the employee before the return for such period is filed with the district director and before the end of the calendar year in which the overcollection was made, and

(c) Obtains and keeps as part of his records the written receipt of the employee showing the date and amount of the repayment,

the employer shall not report on any return or pay to the district director the amount of the overcollection.

(ii) Any overcollection not repaid to and receipted for by the employee as provided in subdivision (i) of this subparagraph shall be reported and paid to the district director with the return for the return period in which the overcollection was made.

(b) *After employer files return*—(1) *Employee tax under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act.* (i) If an employer collects from any employee and pays to the district director more than the correct amount of employee tax under section 3101 or section 3201, or a corresponding provision of prior law, and if the error is ascertained within the applicable period of limitation on credit or refund, the employer shall repay or reimburse the employee in the amount thereof prior to the expiration of the return period following the return period in which the error is ascertained and prior to the expiration of such limitation period. This subparagraph has no application in any case in which an overcollection is made the subject of a claim by the employer for refund or credit, and the employer elects to secure the written consent of the employee to the allowance of the refund or credit under the procedure provided in paragraph (a)(2)(i) of §31.6402(a)–2.

(ii) If the amount of an overcollection is repaid to an employee, the employer shall obtain and keep as part of his records the written receipt of the employee, showing the date and amount of the repayment. If, in any calendar year, an employer repays or reimburses an employee in the amount of an overcollection of employee tax under section 3101, or a corresponding provision of prior law, which was collected from the employee in a prior calendar year, the employer shall obtain from the employee and keep as part of his records a written statement *(a)* that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and *(b)* that the employee will not claim refund or credit of such amount. See §31.6413(c)–1.

(iii) If the employer does not repay the employee the amount overcollected, the employer shall reimburse the employee by applying the amount of the overcollection against the employee tax which attaches to wages or compensation paid to the employee prior to the expiration of the return period following the return period in which the error is ascertained and prior to the expiration of the applicable period of limitation on credit or refund. If the amount of the overcollection exceeds the amount so applied against such employee tax, the excess amount shall be repaid to the employee as required by this subparagraph.

(iv) For purposes of this subparagraph, an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(v) For the period of limitation upon credit or refund of taxes imposed by the Internal Revenue Code of 1954, see § 301.6511(a)–1 of this chapter (Regulations on Procedure and Administration). For the period of limitation upon credit or refund of any tax imposed by the Internal Revenue Code of 1939, see the regulations applicable with respect to such tax.

(2) *Income tax withheld from wages.* (i) If, in any return period in a calendar year, an employer collects from any employee more than the correct amount of tax under section 3402, and the employer pays the amount of such overcollection to the district director, the employer may repay or reimburse the employee in the amount thereof in any subsequent return period in such calendar year.

(ii) If the amount of the overcollection is repaid to the employee, the employer shall obtain and keep as part of his records the written receipt of the employee, showing the date and amount of the repayment. If the employer does not repay the amount of the overcollection, the employer may reimburse the employee by applying the amount of the overcollection against the tax under section 3402 which otherwise would be required to be withheld from wages paid by the employer to the employee in the calendar year in which the overcollection is made.

§ 31.6413(a)–2 Adjustment of overpayments.

(a) *Taxes under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act*—(1) *Employee tax.* After an employer repays or reimburses an employee in the amount of an overcollection, as provided in paragraph (b)(1) of § 31.6413(a)–1, the employer may claim credit for such amount in the manner, and subject to the conditions, stated in § 31.6402(a)–2. Such credit shall constitute an adjustment, without interest, if the amount thereof is entered on a return for a period ending on or before the last day of the return period following the return period in which the error was ascertained. No credit or adjustment in respect of an overpayment shall be entered on a return after the filing of a claim for refund of such overpayment.

(2) *Employer tax.* If an employer pays more than the correct amount of employer tax under section 3111 or section 3221, or a corresponding provision of prior law, the employer may claim credit for the amount of the overpayment in the manner, and subject to the conditions, stated in § 31.6402(a)–2. Such credit shall constitute an adjustment, without interest, if the amount thereof is entered on the same return on which the employer adjusts, pursuant to paragraph (a)(1) of this section, a corresponding overpayment of employee tax.

(b) *Income tax withheld from wages.* If, pursuant to paragraph (b)(2) of § 31.6413(a)–1, an employer repays or reimburses an employee in the amount of an overcollection of tax under section 3402, the employer may adjust the overcollection, without interest, by entering the amount thereof as a deduction on a return of tax under section 3402, filed by the employer for any return period in the calendar year in which the employer repays or reimburses the employee. The return on which the adjustment is entered as a deduction shall have attached thereto a statement explaining the adjustment, designating the return period in which the error occurred, and setting forth such other information as is required by the regulations in this subpart and by the instructions relating to the return.

§31.6413(a)–3 Repayment by payor of tax erroneously collected from payee.

(a) *In general*—(1) *Erroneous withholding under section 3406 of the Internal Revenue Code.* If a payor or broker withholds under section 3406 from a payee in error or withholds more than the proper amount of the tax under section 3406, the payor or broker may refund the amount erroneously withheld as provided in section 6413 and this section. A payor or broker will be considered to have withheld erroneously under section 3406 only if the amount is withheld because of an error by the payor or broker (e.g., an error in flagging or identifying an account that is subject to withholding under section 3406). The payor or broker may, in its discretion, treat the amount withheld as an amount erroneously withheld and refund it to the payee if—

(i) The payor or broker requires a payee described in §31.3406(g)–1(a) or described in a provision of the Internal Revenue Code requiring the reporting of a payment subject to withholding under section 3406 to certify that it is an exempt recipient, the payee fails to make the required certification, and the payor or broker subsequently withholds under section 3406 from a payment to the payee;

(ii) The payor or broker does not require the payee to certify concerning its exempt status and the payor or broker withholds under section 3406;

(iii) The payor or broker withholds under section 3406 from a payee after the payee provides a taxpayer identification number or required certification (including the documentation described in §1.1441–1(e)(1)(ii), 1.6045–1(g)(3), or 1.6049–5(c) of this chapter) to the payor, but before the payor or broker treats the number or required certification as having been received under §31.3406(e)–1(b); or

(iv) The amount is withheld because a payor imposed backup withholding on a payment made to a person because the payee failed to furnish the documentation described in §1.1441–1(e)(1)(ii) of this chapter and the payee subsequently furnishes, completes, or corrects the documentation. The documentation must be furnished, completed, or corrected prior to the end of the calendar year in which the payment is made and prior to the time the payor furnishes a Form 1099 to the payee with respect to the payment for which the withholding erroneously occurred.

(2) For purposes of paragraph (a)(1) of this section (other than erroneous withholding occurring under the circumstances described in paragraph (a)(1)(iv) of this section), if a payor or broker withholds because the payor or broker has not received a taxpayer identifying number or required certification and the payee subsequently provides a taxpayer identifying number or a required certification to the payor, the payor or broker may not refund the amount to the payee.

(b) *Refunding amounts erroneously withheld*—(1) *Time and manner.* If a payor or broker withholds under section 3406 from a payee in error (including withholding more than the correct amount, as described in paragraph (a) of this section), the payor or broker may refund the amount erroneously withheld to the payee if the refund is made prior to the end of the calendar year and prior to the time the payor or broker furnishes a Form 1099 to the payee with respect to the payment for which the erroneous withholding occurred. If the amount of the erroneous withholding is refunded to the payee, the payor or broker must—

(i) Keep as part of its records a receipt showing the date and amount of refund and must provide a copy of the receipt to the payee (a canceled check or an entry in a statement is sufficient, provided that the check or statement contains a specific notation that it is a refund of tax erroneously withheld);

(ii) Not report on a Form 1099 as tax withheld any amount which the payor or broker has refunded to a payee; and

(iii) Not deposit the amount erroneously withheld if the payor or broker has not deposited the amount of the tax prior to the time that the refund is made to the payee.

(2) *Adjustment after the deposit of the tax*—(i) *In general.* Except as provided in paragraph (b)(2)(ii) of this section, if the amount erroneously withheld has been deposited prior to the time that the refund is made to the payee, the

payor or broker may adjust any subsequent deposit of the tax collected under chapter 24 of the Internal Revenue Code that the payor or broker is required to make in the amount of the tax that has been refunded to the payee.

(ii) *Erroneous withholding from a payee that is a foreign person.* Where a payor withholds in error from a payee that is a nonresident alien or foreign person, as described in paragraph (a)(1)(iv) of this section, the payor may refund some or all of the amount subject to backup withholding under section 3406. A refund may be paid in accordance with the requirements of this paragraph (b)(2)(ii) where the documentation is furnished, completed, or corrected prior to the end of the calendar year in which the payment is made and prior to the time the payor furnishes a Form 1099 to the payee with respect to the payment for which the withholding erroneously occurred. The amount of the refund will be the amount erroneously withheld less the amount of tax required to be withheld, if any, under chapter 3 of the Internal Revenue Code and the regulations under that chapter. With respect to the amount of the payment to the foreign person and the amount of tax required to be withheld under chapter 3 of the Internal Revenue Code (and the regulations thereunder), returns must be made in accordance with the requirements of § 1.1461–1 (b) and (c) of this chapter.

[T.D. 8637, 60 FR 66133, Dec. 21, 1995, as amended by T.D. 8734, 62 FR 53494, Oct. 14, 1997]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 31.6413(a)–3 was amended in paragraph (a)(1)(ii) by removing the language ''or'' at the end of the paragraph; in paragraph (a)(1)(iii), by removing the parenthetical ''(including the certification relating to foreign status described in § 1.6049–5(b)(2)(iv) of this chapter or § 1.6045–1(g)(1) of this chapter)'' and adding in its place ''(including the documentation described in § 1.1441–1(e)(1)(ii), 1.6045–1(g)(3), or 1.6049–5(c) of this chapter)''; in paragraph (a)(1)(iii) by removing the period at the end of the paragraph and adding ''; or'' in its place; by adding paragraph (a)(1)(iv); and by revising paragraphs (a)(2) and (b)(2), effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000. For the convenience of the user, the superseded text is set forth as follows:

§ 31.6413(a)–3 Repayment by payor of tax erroneously collected from payee.

(a) * * * (1) * * *

(2) *Limitations.* For purposes of paragraph (a)(1) of this section, if a payor or broker withholds because the payor or broker has not received a taxpayer identification number or required certification and the payee subsequently provides a taxpayer identification number or a required certification to the payor, the payor or broker may not refund the amount to the payee.

(b) * * *

(2) *Adjustment after the deposit of the tax.* For purposes of paragraph (b)(1) of this section, if the amount erroneously withheld has been deposited prior to the time that the refund is made to the payee, the payor or broker may adjust any subsequent deposit of the tax collected under chapter 24 of the Internal Revenue Code that the payor or broker is required to make in the amount of the tax that has been refunded to the payee.

* * * * *

§ 31.6413(b)–1 Overpayments of certain employment taxes.

For provisions relating to the adjustment of overpayments of tax imposed by section 3101, 3111, 3201, 3221, or 3402, see § 31.6413(a)–2. For provisions relating to refunds of tax imposed by section 3101, 3111, 3201, or 3221, see §§ 31.6402(a)–1 and 31.6402(a)–2. For provisions relating to refunds of tax imposed by section 3402, see §§ 31.6402(a)–1 and 31.6414–1.

§ 31.6413(c)–1 Special refunds.

(a) *Who may make claims*—(1) *In general.* (i) If an employee receives wages, as defined in section 3121(a), from two or more employers in any calendar year:

(a) After 1954 and before 1959 in excess of $4,200,

(b) After 1958 and before 1966 in excess of $4,800,

(c) After 1965 and before 1968 in excess of $6,600,

(d) After 1967 and before 1972 in excess of $7,800,

(e) After 1971 and before 1973 in excess of $9,000,

(f) After 1972 and before 1974 in excess of $10,800,

(g) After 1973 and before 1975 in excess of $13,200, or

(h) After 1974 in excess of the contribution and benefit base (as determined under section 230 of the Social Security Act) which is effective with respect to such year,

the employee shall be entitled to a special refund of the amount, if any, by which the employee tax imposed by section 3101 with respect to such wages and deducted therefrom (whether or not paid) exceeds the employee tax with respect to the amount specified in *(a)* through *(h)* of this subdivision for the calendar year in question. Employee tax imposed by section 3101 with respect to tips reported by an employee to his employer and collected by the employer from funds turned over by the employee to the employer (see section 3102(c)) shall be treated, for purposes of this paragraph, as employee tax deducted from wages received by the employee. If the employee is required to file an income tax return for such calendar year (or for his last taxable year beginning in such calendar year) he may obtain the benefit of the special refund only by claiming credit as provided in §1.21–2 of this chapter (Income Tax Regulations).

(ii) The application of this subparagraph may be illustrated by the following examples:

Example 1. Employee A in the calendar year 1968 receives taxable wages in the amount of $5,000 from each of his employers, B, C, and D, for services performed during such year (or at any time after 1936), or a total of $15,000. Employee tax (computed at 4.4 percent, the aggregate employee tax rate in effect in 1968) is deducted from A's wages in the amount of $220 by B and $220 by C, or a total of $440. Employer D pays employee tax in the amount of $220 without deducting such tax from A's wages. The employee tax with respect to the first $7,800 of such wages is $343.20. A is entitled to a special refund of $96.80 ($440 minus $343.20). The $5,000 of wages received from employer D and the $220 of employee tax paid with respect thereto have no bearing in computing A's special refund since such tax was not deducted from his wages.

Example 2. Employee E in the calendar year 1968 performs services for employers F and G, for which E is entitled to wages of $7,800 from each employer, or a total of $15,600. On account of such services, E in 1967 received an advance payment of $1,800 of wages from F; and in 1968, receives wages in the amount of $6,000 from F and $7,800 from G. Employee tax was deducted as follows: In 1967, $79.20 ($1,800 $\times$ 4.4 percent, the aggregate employee tax rate in effect in 1967) by employer F; and in 1968, $264.00 ($6,000 $\times$ 4.4 percent, the aggregate employee tax rate in effect in 1968) by employer F, and $343.20 ($7,800 $\times$ 4.4 percent) by employer G. Thus, E in the calendar year 1968 received $13,800 in wages from which $607.20 of employee tax was deducted. The amount of employee tax with respect to the first $7,800 of such wages received in 1968 is $343.20. E is entitled to a special refund of $264.00 ($607.20 minus $343.20). The $1,800 advance of wages received in 1967 from F, and the $79.20 of employee tax with respect thereto, have no bearing in computing E's special refund for 1968, because the wages were not received in 1968. Such amounts could not form the basis for a special refund unless E during 1967 received from F and at least one more employer wages totaling more than $6,600.

(2) *Federal employees.* For purposes of special refunds of employee tax, each head of a Federal agency or of a wholly owned instrumentality of the United States who makes a return pursuant to section 3122 (and each agent designated by a head of a Federal agency or instrumentality who makes a return pursuant to such section) is considered a separate employer. For such purposes, the term ''wages'' includes the amount which each such head (or agent) determines to constitute wages paid an employee, but not in excess of the amount specified in paragraph (a)(1)(i) *(a)* through *(h)* of this section for the calendar year in question. For example, if wages received by an employee during calendar year 1974 are reportable by two or more agents of one or more Federal agencies and the amount of such wages is in excess of $13,200 the employee shall be entitled to a special refund of the amount, if any, by which the employee tax imposed with respect to such wages and deducted therefrom exceeds the employee tax with respect to the first $13,200 of such wages. Moreover, if an employee receives wages during any calendar year from an agency or wholly owned instrumentality of the United States and from one or more other employers, either private or governmental, the total amount of such wages shall be taken into account for purposes of the special refund provisions.

(3) *State employees.* For purposes of special refunds of employee tax, the

term ''wages'' includes such remuneration for services covered by an agreement made pursuant to section 218 of the Social Security Act, relating to voluntary agreements for coverage of employees of State and local governments, as would be wages if such services constituted employment (see § 31.3121(a)–1, relating to wages); the term ''employer'' includes a State or any political subdivision thereof, or any instrumentality of any one or more of the foregoing; and the term ''tax'' or ''tax imposed by section 3101'' includes an amount equivalent to the employee tax which would be imposed by section 3101 if such services constituted employment. The provisions of paragraph (a)(1) of this section are applicable whether or not any amount deducted from an employee's remuneration as a result of an agreement made pursuant to section 218 of the Social Security Act has been paid pursuant to such agreement. Thus, the special refund provisions are applicable to amounts equivalent to employee tax deducted from employees' remuneration by States, political subdivisions, or instrumentalities by reason of agreements made under section 218 of the Social Security Act. Moreover, if during any calendar year an employee receives remuneration for services covered by such an agreement and during the same calendar year receives wages from one or more other employers, either private or governmental, the total amount of such remuneration and wages shall be taken into account for purposes of the special refund provisions.

(4) *Employees of certain foreign corporations.* For purposes of special refunds of employee tax, the term ''wages'' includes such remuneration for services covered by an agreement made pursuant to section 3121(l), relating to agreements for coverage of employees of certain foreign corporations, as would be wages if such services constituted employment (see § 31.3121(a)–1, relating to wages); the term ''employer'' includes any domestic corporation which has entered into an agreement pursuant to section 3121(l); and the term ''tax'' or ''tax imposed by section 3101'' includes, in the case of services covered by an agreement entered into pursuant to section 3121(l), an amount equivalent to the employee tax which would be imposed by section 3101 if such services constituted employment. The provisions of paragraph (a)(1) of this section are applicable whether or not any amount deducted from the employee's remuneration by reason of such agreement has been paid to the district director. Thus, the special refund provisions are applicable to amounts equivalent to employee tax deducted from employees' remuneration by reason of agreements made under section 3121(l). A domestic corporation which enters into an agreement pursuant to section 3121(l) shall, for purposes of this paragraph, be considered an employer in its capacity as a party to such agreement separate and distinct from its identity as an employer employing individuals on its own account (see section 3121(l)(9)). If during any calendar year an employee receives remuneration for services covered by such an agreement and during the same calendar year receives wages for services in employment, the total amount of such remuneration and wages shall be taken into account for purposes of the special refund provisions. For provisions relating to agreements entered into under section 3121(l), see the regulations in part 36 of this chapter (Regulations on Contract Coverage of Employees of Foreign Subsidiaries).

(5) *Governmental employees in American Samoa.* For purposes of special refunds of employee tax, the Governor of American Samoa and each agent designated by him who makes a return pursuant to section 3125(b) (see § 31.3125) is considered a separate employer. For such purposes, the term ''wages'' includes the amount which the Governor (or any agent) determines to constitute wages paid an employee, but not in excess of the amount specified in paragraph (a)(1)(i) *(a)* through *(h)* of this section for the calendar year in question. For example, if wages received by an employee during calendar year 1974 are reportable by two or more agents pursuant to section 3125(b) and the total amount of such wages is in excess of $13,200, the employee shall be entitled to a special refund of the amount, if any, by which the employee

tax imposed with respect to such wages and deducted therefrom exceeds the employee tax with respect to the first $13,200 of such wages. Moreover, if an employee receives wages during any calendar year from the Government of American Samoa, from a political subdivision thereof, or from any wholly-owned instrumentality of such government or political subdivision and from one or more other employers, either private or governmental, the total amount of such wages shall be taken into account for purposes of the special refund provisions.

(6) *Governmental employees in the District of Columbia.* For purposes of special refunds of employee tax, the Commissioner of the District of Columbia (or, prior to the transfer of functions pursuant to Reorganization Plan No. 3 of 1967 (81 Stat. 948), the Commissioners of the District of Columbia) and each agent designated by him who makes a return pursuant to section 3125(c) (see §31.3125) is considered a separate employer. For such purposes, the term ''wages'' includes the amount which the Commissioner (or any agent) determines to constitute wages paid an employee, but not in excess of the amount specified in paragraph (a)(1)(i) *(a)* through *(h)* of this section for the calendar year in question. For example, if wages received by an employee during calendar year 1974 are reportable by two or more agents pursuant to section 3125(c) and the total amount of such wages is in excess of $13,200 the employee shall be entitled to a special refund of the amount, if any, by which the employee tax imposed with respect to such wages and deducted therefrom exceeds the employee tax imposed with respect to such wages and deducted therefrom exceeds the employee tax with respect to the first $13,200 of such wages. Moreover, if an employee receives wages during any calendar year from the Government of the District of Columbia or from a wholly-owned instrumentality thereof and from one or more other employers, either private or governmental, the total amount of such wages shall be taken into account for purposes of the special refund provisions.

(b) *Claims for special refund*—(1) *In general.* An employee who is entitled to a special refund under section 6413(c) may claim such refund under the provisions of this section only if the employee is not entitled to claim the amount thereof as a credit against income tax as provided in §1.31–2 of this chapter (Income Tax Regulations). Each claim under this section shall be made with respect to wages received within one calendar year (regardless of the year or years after 1936 during which the services were performed for which such wages are received), and shall be filed after the close of such year.

(2) *Form of claim.* Each claim for special refund under this section shall be made on Form 843, in accordance with the regulations in this subpart and the instructions relating to such form. In the case of a claim filed prior to April 15, 1968, the claim shall be filed with the district director for the internal revenue district in which the employee resides or, if the employee does not reside in any internal revenue district, with the District Director, Baltimore, Md. 21202. Except as provided in paragraph (b) of §301.6091–1 (relating to hand-carried documents), in the case of a claim filed after April 14, 1968, the claim shall be filed with the service center serving such internal revenue district. However, in the case of an employee who does not reside in any internal revenue district and who is outside the United States, the claim shall be filed with the Director of International Operations, U.S. Internal Revenue Service, Washington, D.C. 20225, unless the employee resides in Puerto Rico or the Virgin Islands, in which case the claim shall be filed with the Director of International Operations, U.S. Internal Revenue Service, Hato Rey, P.R. 00917. The claim shall include the employee's account number and the following information with respect to each employer from whom he received wages during the calendar year: (i) The name and address of such employer, (ii) the amount of wages received during the calendar year to which the claim relates, and (iii) the amount of employee tax collected by the employer from the employee with respect to such wages. Other information may be required but should be submitted only upon request.

(3) *Period of limitation.* For the period of limitation upon special refund of employee tax imposed by section 3101, see § 301.6511(a)–1 of this chapter (Regulations on Procedure and Administration).

(c) *Special refunds with respect to compensation as defined in the Railroad Retirement Tax Act*—(1) *In general.* In the case of any individual who, during any calendar year after 1967, receives wages (as defined by section 3121(a)) from one or more employers and also receives compensation (as defined by section 3231(e)) which is subject to the tax imposed on employees by section 3201 or the tax imposed on employee representatives by section 3211 such compensation shall, solely for purposes of applying section 6413(c)(1) and this section with respect to the hospital insurance tax imposed by section 3101(b), be treated as wages (as defined by section 3121(a)) received from an employer with respect to which the hospital insurance tax imposed by section 3101(b) was deducted. For purposes of this section, compensation received shall be determined under the principles provided in chapter 22 of the Code and the regulations thereunder (see section 3231(e) and § 31.3231(e)–1). Therefore, compensation paid for time lost shall be deemed earned and received for purposes of this section in the month in which such time is lost, and compensation which is earned during the period for which a return of taxes under chapter 22 is required to be made and which is payable during the calendar month following such period shall be deemed to have been received for purposes of this section during such period only. Further, compensation is deemed to have been earned and received when an employee or employee representative performs services for which he is paid, or for which there is a present or future obligation to pay, regardless of the time at which payment is made or deemed to be made.

(2) *Example.* The application of this paragraph may be illustrated by the following example.

Example. Employee A rendered services to X during 1973 for which he was paid compensation at the monthly rate of $650 which was taxable under the Railroad Retirement Tax Act. A was paid $550 by X in January 1973 which was earned and deemed received in December 1972 and $650 in January of 1974 which was earned and deemed received in December of 1973. A also earned and received wages in 1973 from employer Y, which were subject to the employee tax under the Federal Insurance Contributions Act, in the amount of $6,000. A paid hospital insurance tax on $13,800 ($7,800 compensation from X including $650 earned and deemed received in December 1973 but paid in January 1974 and not including $550 paid in January 1973 but earned and deemed received in December 1972, $6,000 compensation from Y) received or deemed received or earned in 1973. For purposes of the hospital insurance tax imposed by section 3101(b), these amounts are all wages received from an employer in 1973. Therefore, A is entitled to a special refund for 1973 under section 6413(c) and this section of $30 (1.0%×$13,800—1.0%×$10,800).

[T.D. 6516, 25 FR 13032, Dec. 20, 1960, as amended by T.D. 6950, 33 FR 5359, Apr. 4, 1968; T.D. 6983, 33 FR 18020, Dec. 4, 1968; T.D. 7374, 40 FR 30954, July 24, 1975]

§ 31.6414–1 Credit or refund of income tax withheld from wages.

(a) *In general.* Any employer who pays to the district director more than the correct amount of—

(1) Tax under section 3402 or a corresponding provision of prior law, or

(2) Interest, addition to the tax, additional amount, or penalty with respect to such tax,

may file a claim for refund of the overpayment or may claim credit for such overpayment, in the manner and subject to the conditions stated in this section and § 301.6402–2 of this chapter (Regulations on Procedure and Administration). If credit is claimed pursuant to this section, the amount thereof shall be claimed by entering such amount as a deduction on a return of tax under section 3402 filed by the employer. If credit is taken pursuant to this section, a claim on Form 843 is not required, but the return on which the credit is claimed shall have attached as a part thereof a statement, which shall constitute the claim for credit, setting forth in detail the grounds and facts relied upon in support of the credit, and showing such other information as is required by the regulations in this subpart and by the instructions relating to the return. No refund or credit to the employer shall be allowed under this section for the amount of any overpayment of tax which the employer deducted or withheld from an employee.

(b) *Period of limitation.* For the period of limitation upon credit or refund of taxes imposed by the Internal Revenue Code of 1954, see §301.6511(a)–1 of this chapter (Regulations on Procedure and Administration). For the period of limitation upon credit or refund of any tax imposed by the Internal Revenue Code of 1939, see the regulations applicable with respect to such tax.

§31.6652(c)–1 Failure of employee to report tips for purposes of the Federal Insurance Contributions Act.

(a) *In general.* In the case of failure by an employee to furnish, pursuant to the provisions of section 6053(a), to his employer a report of tips received by him in the course of his employment, which constitute wages (as defined in section 3121(a)), there shall be paid by the employee, in addition to the tax imposed by section 3101 with respect to the amount of tips which he so failed to report, an amount equal to 50 percent of such tax. The additional amount imposed for such failure shall be paid in the same manner as tax upon notice and demand by the district director.

(b) *Reasonable cause.* Payment of an amount equal to 50 percent of the tax imposed by section 3101 with respect to the tips which the employee failed to report will not be required if it is established to the satisfaction of the district director or the director of the regional service center that such failure was due to reasonable cause and not due to willful neglect. An affirmative showing of reasonable cause must be made in the form of a written statement, containing a declaration that it is made under the penalties of perjury, setting forth all the facts alleged as a reasonable cause. An employee's reluctance to disclose to his employer the amount of tips received by him will not establish that the employee's failure to report tips to his employer was due to reasonable cause and not due to willful neglect.

[T.D. 7001, 34 FR 1005, Jan. 23, 1969]

§31.6674–1 Penalties for fraudulent statement or failure to furnish statement.

Any person required to furnish a statement to an employee under the provisions of section 6051 or 6053(b) is subject to a civil penalty for willful failure to furnish such statement in the manner, at the time, and showing the information required under such section (or §31.6051–1 or §31.6053–2), or for willfully furnishing a false or fraudulent statement to an employee. The penalty for each such violation is $50, which shall be assessed and collected in the same manner as the tax imposed on employers under the Federal Insurance Contributions Act. See section 7204 for criminal penalty.

[T.D. 7001, 34 FR 1006, Jan. 23, 1969]

§31.6682–1 False information with respect to withholding.

(a) *Civil penalty.* If any individual makes a statement under section 3402 (relating to income tax collected at source) which results in a lesser amount of income tax actually deducted and withheld than is properly allowable under section 3402 and, at the time the statement was made, there was no reasonable basis for the statement, the individual shall pay a penalty of $500 for the statement. There was a reasonable basis for a statement of the number of exemptions an individual claimed on a Form W–4, if the individual properly completed the Form W–4 by taking into account only allowable amounts for items which are allowable and by computing the number of exemptions in accordance with the instructions on the Form W–4. This penalty is in addition to any criminal penalty provided by law. This penalty may be assessed at any time after the statement is made, until the expiration of the applicable statute of limitations.

(b) *Deficiency procedures not to apply.* The civil penalty imposed by section 6682 may be assessed and collected without regard to the deficiency procedures provided by Subchapter B of Chapter 63 of the Code.

[T.D. 7963, 49 FR 28706, July 16, 1984]

§ 31.7805–1 Promulgation of regulations.

In pursuance of section 7805 of the Internal Revenue Code of 1954, the foregoing regulations are hereby prescribed. (See § 31.0–3 of subpart A of the regulations in this part relating to the scope of the regulations.)

§ 31.9999–0 Effective dates.

In general, the provisions of §§ 35a.9999–1, 35a.9999–2, 35a.9999–3, 35a.9999–3A, 35a.9999–4, and 35a.9999–5 of this chapter apply before January 1, 1997. The provisions of those sections remain applicable after December 31, 1996, and before January 1, 1999, however, for purposes of § 301.6724–1 of this chapter, relating to due diligence safe harbor, and for international transactions, including transactions involving a foreign payee, a foreign payor, a foreign office of a U.S. bank or broker, or a payment from sources without the United States. See §§ 31.3406–0 through 31.3406(i)–1 of this chapter for rules that apply to other transactions after December 31, 1996.

[T.D. 8734, 62 FR 53494, Oct. 14, 1997, as amended by T.D. 8804, 63 FR 72189, Dec. 31, 1998]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 31.9999–0 was added, effective Oct. 14, 1997, through Jan. 1, 1999. At 63 FR 72183, 72189, Dec. 31, 1998, the effective date was extended until Jan. 1, 2000, and ''January 1, 1999'' was removed and ''January 1, 2000'' was added, effective Jan. 1, 2000.

PART 32—TEMPORARY EMPLOYMENT TAX REGULATIONS UNDER THE ACT OF DECEMBER 29, 1981 (PUB. L. 97–123)

AUTHORITY: 95 Stat. 1662 and 1663, 26 U.S.C. 3121(a) and 3231(e)(4); 68A Stat. 917, 26 U.S.C. 7805.

§ 32.1 Social security taxes with respect to payments on account of sickness or accident disability.

(a) *General rule.* Notwithstanding the provisions of § 31.3121(a)(2)−1(a)(2), the amount of any payment on or after January 1, 1982, made to, or on behalf of, an employee or any of his dependents on account of sickness or accident disability is not excluded from the term ''wages'' as defined in section 3121(a)(2)(B) unless such payment is—

(1) Received under a workmen's compensation law, or

(2) Made by a third party pursuant to a contractual agreement between the employer and third party entered into prior to December 14, 1981, but then only if—

(i) The third party's coverage for that employee's group ceases prior to March 1, 1982,

(ii) No third party payment is made to such employee under that contract after February 28, 1982, and

(iii) The cessation of the third party's coverage for that employee's group indefinitely terminates the contractual relationship between the third party and the employer as to sickness and accident disability benefits for that employee's group.

See section 3121(a)(4) and § 31.3121(a)(4)−1 for the exclusion from the term ''wages'' of any payment on account of sickness or accident disability made after the expiration of 6 calendar months following the last calendar month in which the employee worked.

(b) *Examples.* The application of the provisions of subparagraph (2) of paragraph (a) may be illustrated by the following examples:

Example 1. Company Q enters into a contract on August 31, 1981, with Insurance Company R to provide sickness and accident disability payments to Q's employees. The contract expires on February 28, 1982. On March 1, 1982, Q enters into a new contract with R to provide sickness and accident disability payments to Q's employees. Payments made by R pursuant to the contract expiring February 28, 1982, are included in ''wages'' as defined in section 3121(a)(2)(B).

Example 2. Company S enters into a contract on November 15, 1981, with Insurance

Company T to provide sickness and accident disability payments to S's employees. The contract expires on February 15, 1982, and is not renewed. A, one of S's employees, has been receiving sickness payments from T since December 1, 1981. T makes its final payment to A on February 22, 1982. The payments made by T to A pursuant to its contract with S are not included in ''wages'' as defined in section 3121(a)(2)(B).

(c) *Workmen's compensation laws.* (1) For purposes of paragraph (a)(1) of this section, a payment made under a workmen's compensation law does not include a payment made pursuant to a State temporary disability insurance law.

(2) If an employee receives a payment on account of sickness or accident disability which is not made under a workmen's compensation law and which must be repaid if the employee receives a workmen's compensation award with respect to the same period of absence from work, such payment is not excluded from the term ''wages'' as defined in section 3121(a)(2)(B).

(d) *Sickness or accident disability.* For purposes of paragraph (a) of this section, a payment made on account of sickness or accident disability includes any payment for personal injuries or sickness includible in gross income under section 105(a) and the regulations thereunder and thus does not include—

(1) Any amount which is expended for medical care as described in section 105(b) and § 1.105–2,

(2) Any payment which is unrelated to absence from work as described in section 105(c) and § 1.105–3, or

(3) Any payment or a portion thereof which is attributable to a contribution by the employee as determined in paragraphs (d) and (e) of § 1.105–1.

A payment made on account of sickness or accident disability does not include any payment which is excludable from gross income under section 104(a) (2), (4), or (5).

An employee who elects to reduce his compensation or to forgo an increase in his compensation under a salary reduction agreement with an employer will not be deemed to have made employee contributions to the sickness or accident disability plan or system if the employee is not subject to income or social security taxes on the reduction in compensation.

A tax which is paid by an employee to fund a State temporary disability insurance program is considered a contribution by the employee for purposes of paragraph (d)(3) of this section.

(e) *Payments by third parties.* (1) Any third party making a payment on account of sickness or accident disability which payment is not excluded from the term ''wages'' under paragraph (a) of this section shall be treated as the employer with respect to such wages, except as provided in subparagraphs (2) and (3) of this paragraph. Accordingly, such third party must withhold from such payment the tax imposed on the employee by section 3101, pay the tax imposed on employers by section 3111, deposit such taxes pursuant to section 6302 and § 31.6302(c)–1(a), and provide the receipts required by section 6051 and §§ 31.6051–1 and 31.6051–2.

(2) If any third party who is treated as the employer solely by reason of the applicability of subparagraph (1) of this paragraph promptly—

(i) Withholds the tax imposed on the employee by section 3101,

(ii) Deposits such tax pursuant to section 6302 and § 31.6302(c)–1(a), and

(iii) Notifies the employer for whom services are normally rendered of the amount of the wages paid on which tax was withheld and deposited,

then the employer (and not the third party) shall be required to pay the tax imposed by section 3111 and to comply with the requirements of section 6051 and §§ 31.6051–1 and 31.6051–2 with respect to the wages. For purposes of subdivision (ii) of this subparagraph, the taxes described in subdivision (i) shall be treated by the third party as if included in the term ''taxes'' as defined in § 31.6302(c)–1(a)(1)(iii). For purposes of subdivision (iii) of this subparagraph, the notice must be provided by the third party within the time required for the deposit of the tax under subdivision (ii) of this subparagraph. For the purpose of providing the notice, the rules of section 7502(a), relating to timely mailing being treated as timely filing, shall apply. The employer, if notified pursuant to subdivision (iii) of this subparagraph by a third party who has complied with the requirements of subdivisions (i) and (ii) of this subparagraph, must deposit the tax imposed by section 3111 in accordance with § 31.6302(c)–1(a). For purposes of § 31.6302(c)–1(a)(1)(iii)(*b*), with respect to the employer for whom services are normally rendered the term ''taxes'' shall not include any tax imposed on employers by section 3111 that is required to be paid by a third party under subparagraph (1) of this paragraph until the employer receives notification from the third party under subdivision (iii) of this subparagraph (2).

(3) A third party making a payment on account of sickness or accident disability to an employee as agent for the employer or making such a payment directly to the employer shall not be treated as the employer under subparagraph (1) with respect to such payment unless the agency agreement so provides. The determining factor as to whether a third party is an agent of the employer is whether the third party bears any insurance risk. If the third party bears no insurance risk and is reimbursed on a cost plus fee basis, the third party is an agent of the employer even if the third party is responsible for making determinations of the eligibility of individual employees of the employer for payments on account of sickness or accident disability. If the third party is paid an insurance premium and not reimbursed on a cost plus fee basis, the third party is not an agent of the employer, but the third party is treated as the employer as provided in subparagraph (1) of this paragraph (e).

(4) In order to avoid overpayment of taxes which would result from paying taxes—

(i) On remuneration which exceeds the annual contribution and benefit base (as described in section 3121(a)(1)),

(ii) With respect to a period of time which exceeds the 6-calendar-month period described in section 3121(a)(4), or

(iii) On a payment or a portion thereof which is attributable to a contribution by the employee,

the third party may request information from the employer as to the total wages earned by the employee for the calendar year in which the third party is making payments, as to the last date on which the employee worked for the employer during such year, and as to the amount of any contribution by the employee. Except if the third party has reason not to believe any information supplied by the employer as the result of a request made pursuant to the preceding sentence, the third party may rely on such information in complying with the requirements of subparagraphs (1) and (2) of this paragraph (e). The third party may not rely on representations of the employee as to the information which may be requested of the employer in complying with the requirements of subparagraphs (1) and (2) of this paragraph (e).

(5) The application of the provisions of this paragraph may be illustrated by the following examples:

Example 1. Pursuant to an agreement with Company U, Insurance Company V makes payments on account of sickness or accident disability to U's employees. Such payments are not made under a workmen's compensation law. U reimburses V for all such payments and pays V a fee for its expenses of administering the payments. V is not treated as the employer with respect to such payments.

Example 2. Pursuant to an agreement with Company W, Insurance Company X indemnifies W for the amount of any payments which W must make to an employee on account of sickness or accident disability. Such payments are not made under a workmen's compensation law. X makes its indemnity payments directly to W. W makes the payments to its employees. X is not treated as the employer with respect to such payments.

Example 3. Pursuant to an agreement with Company Y (which is not an agency agreement described in subparagraph (3) of this § 32.1(e)), Insurance Company Z makes payments on account of sickness or accident disability to Y's employees. Such payments are not made under a workmen's compensation law. Z does not notify Y of the amount of such payments. Z is treated as the employer with respect to such payments.

(f) *Penalties and interest on payments made from January 1, 1982, to June 30 1982.* No penalty under section 6656(a) or interest under section 6601 will be assessed for the failure to make timely payments to the tax imposed by section 3101 or section 3111 on payments made on account of sickness or accident disability, which payments of tax are made after December 31, 1981, and before July 1, 1982, to the extent that the failure is due to reasonable cause and not willful neglect.

(g) *Special rules.* (1) For purposes of subdivision (iii) of paragraph (e)(2), the last employer for whom the employee worked prior to becoming sick or disabled or for whom the employee was working at the time he became sick or disabled shall be deemed to be the employer for whom services are normally rendered, provided that such employer made contributions on behalf of such employee to the plan or system under which the employee is being paid.

(2) The application of the provisions of subparagraph (1) of this paragraph (g) may be illustrated by the following examples:

Example 1. B is employed by Company M. B becomes sick and is absent from work for 3 months. While B is absent from work, he receives sick pay from Insurance Company N pursuant to a plan established by M and to which M has made contributions on behalf of B. M is the employer for whom services are normally rendered by B.

Example 2. C is employed by Company O and is also employed on a part-time basis by Company Q. C becomes sick while at work at Q's place of business. C is absent from work for 3 months. While C is absent from work he receives sick pay from Insurance Company P pursuant to a plan established by O and to which O has made contributions on behalf of C. O is the employer for whom services are normally rendered by C.

Example 3. D is a member of a labor union whose members receive health and welfare benefit payments from a trust fund which is supported by the contributions of the various employers who employ the labor union's members. D has been employed by Company R for 4 days when he becomes sick and is absent from work for 3 months. While D is absent form work he receives sick pay from his union's trust fund to which R has made contributions on D's behalf. R is the employer for whom services are normally rendered by D.

(3) For purposes of paragraph (e) of this section, in the case of payments on account of sickness or accident disability made to employees by a third party insurer pursuant to a contract of insurance with a multiemployer plan which is obligated to make payments on account of sickness or accident disability to such employees pursuant to a collectively bargained agreement, if the third party insurer making the payments complies with the requirements of subdivisions (i) and (ii) of subparagraph (2) of paragraph (e) and notifies the plan of the amount of wages paid on which tax was withheld and deposited within the time required for notification of the employer under subparagraph (2) of paragraph (e), then the plan (and not the third party insurer) shall be required to pay the tax imposed by section 3111 and to comply with the requirements of section 6051 and §§31.6051–1 and 31.6051–2 with respect to such payments unless, within 6 business days of the receipt of such notification, the plan notifies the employer for whom services are normally rendered of the amount of the wages on which tax was withheld and deposited. If the plan provides such notice to the employer, the employer (and not the plan) shall be required to pay the tax imposed by section 3111 and to comply with the requirements of section 6051 and §§31.6051–1 and 31.6051–2 with respect to the wages.

[T.D. 7823, 47 FR 29225, July 6, 1982, as amended by T. D. 7867, 48 FR 793, Jan. 7, 1983]

§32.2 Railroad retirement taxes with respect to payments on account of sickness or accident disability.

(a) *General rule.* Notwithstanding the provisions of §31.3231(e)–1(a)(3)(i), the amount of any payment on or after January 1, 1982, made to, or on behalf of, an employee or any of his dependents on account of sickness or accident disability is not excluded from the term ''compensation'' as defined in section 3231(e)(1) (for purposes of applying sections 3201(b) and 3221(b) (and so much of section 3211(a) as relates to the rates of the taxes imposed by sections 3101 and 3111)) unless such payment is—

(1) Received under a workmen's compensation law,

(2) Received as a benefit under the Railroad Retirement Act of 1974,

(3) Made after the expiration of 6 calendar months following the last calendar month in which such employee worked,

(4) Made by a third party pursuant to a contractual agreement between the employer and third party entered into prior to December 14, 1981, but then only if—

(i) The third party's coverage for that employee's group ceases prior to March 1, 1982,

(ii) No third party payment is made to such employee under that contract after February 28, 1982, and

(iii) The cessation of the third party's coverage for that employee's group terminates indefinitely the contractual relationship between the third party and the employer as to sickness and accident disability benefits for that employee's group; or

(5) Made under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

The 6-calendar-month provision described in subparagraph (3) of this paragraph shall be applied in a manner comparable to the 6-calendar-month provision described in § 31.3121(a)(4)–1.

(b) *Examples.* The application of the provisions of subparagraph (4) of paragraph (a) may be illustrated by the following examples:

Example 1. Company Q enters into a contract on August 31, 1981, with Insurance Company R to provide sickness and accident disability payments to Q's employees. The contract expires on February 28, 1982. On March 1, 1982, Q enters into a new contract with R to provide sickness and accident disability payments to Q's employees. Payments made by R pursuant to the contract expiring February 28, 1982, are included in ''compensation'' as defined in section 3231(e)(1).

Example 2. Company S enters into a contract on November 15, 1981 with Insurance Company T to provide sickness and accident disability payments to S's employees. The contract expires on February 15, 1982, and is not renewed. A, one of S's employees, has been receiving sickness payments from T since December 1, 1981. T makes its final payment to A on February 22, 1982. The payments made by T to A pursuant to its contract with S are not included in ''compensation'' as defined in section 3231(e)(1).

(c) *Workmen's compensation laws.* (1) For purposes of paragraph (a)(1) of this section, a payment made under a workmen's compensation law does not include a payment made pursuant to a State temporary disability insurance law.

(2) If an employee receives a payment on account of sickness or accident disability which is not excluded from the term ''compensation'' under paragraph (a) (1) or (2) of this section and which must be repaid if the employee receives a workmen's compensation award with respect to the same period of absence from work, such payment is not excluded from the term ''compensation'' as defined in section 3231(e)(1).

(d) *Sickness or accident disability.* For purposes of paragraph (a) of this section, a payment made on account of sickness or accident disability includes any payment for personal injuries or sickness includible in gross income under section 105(a) and the regulations thereunder and thus does not include—

(1) Any amount which is expended for medical care as described in section 105(b) and § 1.105–2,

(2) Any payment which is unrelated to absence from work as described in section 105(c) and § 1.105–3, or

(3) Any payment or a portion thereof which is attributable to a contribution by the employee as determined in paragraphs (d) and (e) of § 1.105–1.

A payment made on account of sickness or accident disability does not include any payment which is excludable from gross income under section 104(a) (4) or (5).

An employee who elects to reduce his compensation or to forgo an increase in his compensation under a salary reduction agreement with an employer will not be deemed to have made employee contributions to the sickness or accident disability plan or system if the employee is not subject to income or railroad retirement taxes on the reduction in compensation.

A tax which is paid by an employee to fund a State temporary disability insurance program is considered a contribution by the employee for purposes of paragraph (d)(3) of this section.

(e) *Payments by third parties.* (1) Any third party making a payment on account of sickness or accident disability which payment is not excluded from the term ''compensation'' under paragraph (a) of this section shall be treated as the employer with respect to such compensation, except as provided in subparagraphs (2) and (3) of this paragraph. Accordingly, such third party must withhold from such payment the tax imposed on the employee by section 3201 and the tax imposed on the employee representative by section 3211, if applicable, pay the tax imposed on employers by section 3221, deposit such taxes pursuant to section 6302 and § 31.6302(c)–2(a), and provide the receipts required by section 6051 and §§ 31.6051–1 and 31.6051–2.

(2) If any third party who is treated as the employer solely by reason of the applicability of subparagraph (1) of this paragraph promptly—

(i) Withholds the tax imposed on the employee by section 3201 and the tax imposed on the employee representative by section 3211, if applicable,

(ii) Deposits such tax pursuant to section 6302 and § 31.6302(c)–2(a), and

(iii) Notifies the employer for whom services are normally rendered of the amount of the compensation paid on which tax was withheld and deposited,

then the employer (and not the third party) shall be required to pay the tax imposed by section 3221 and to comply with the requirements of section 6051 and §§ 31.6051–1 and 31.6051–2 with respect to the compensation. For purposes of subdivision (ii) of this subparagraph, the tax described in subdivision (i) shall be treated by the third party as if included in the employee tax described in § 31.6302(c)–2(a)(1)(i). For purposes of subdivision (iii) of this subparagraph, the notice must be provided by the third party within the time required for the deposit of the tax under subdivision (ii) of this subparagraph. For the purpose of providing the notice, the rules of section 7502(a), relating to timely mailing being treated as timely filing, shall apply. The employer, if notified pursuant to subdivision (iii) of this subparagraph by a third party who has complied with the requirements of subdivisions (i) and (ii) of this subparagraph, must deposit the tax imposed by section 3221 in accordance with § 31.6302(c)–(2)(a). For purposes of § 31.6302(c)–2(a)(1)(ii), with respect to the employer for whom services are normally rendered the term ''taxes'' shall not include any tax imposed on employers by section 3111 that is required to be paid by a third party under subparagraph (1) of this paragraph until the employer receives notification from the third party under subdivision (iii) of this subparagraph (2).

(3) A third party making a payment on account of sickness or accident disability to an employee as agent for the employer or making such a payment directly to the employer shall not be treated as the employer under subparagraph (1) with respect to such payment unless the agency agreement so provides. The determining factor as to whether a third party is an agent of the employer is whether the third party bears any insurance risk. If the third party bears no insurance risk and is reimbursed on a cost plus fee basis, the third party is an agent of the employer even if the third party is responsible for making determinations of the eligibility of individual employees of the employer for payments on account of sickness or accident disability. If the third party is paid an insurance premium and not reimbursed on a cost plus fee basis, the third party is not a agent of the employer, but the third party is treated as the employer as provided in paragraph (1) of this paragraph (e).

(4) In order to avoid overpayment of taxes which would result from paying taxes—

(i) On remuneration which exceeds one-twelfth of the annual contribution and benefit base (as described in section 3121(a)(1)) each month,

(ii) With respect to a period of time which exceeds the 6-calendar-month period described in subparagraph (3) of paragraph (a) of this section, or

(iii) On a payment or a portion thereof which is attributable to a contribution by the employee,

the third party may request information from the employer as to the total wages earned by the employee for the calendar month in which the third party is making payments, as to the last date on which the employee worked for the employer, and as to the amount of any contribution by the employee. Except if the third party has reason not to believe any information supplied by the employer as the result of a request made pursuant to the preceding sentence, the third party may rely on such information in complying with the requirements of subparagraphs (1) and (2) of this paragraph (e). The third party may not rely on representations of the employee as to the information which may be requested of the employer in complying with the requirements of subparagraphs (1) and (2) of this paragraph (e).

(5) The application of the provisions of this paragraph (e) may be illustrated by the following examples:

Example 1. Pursuant to an agreement with Company U, Insurance Company V makes payments on account of sickness or accident disability to U's employees. Such payments are not made under a workmen's compensation law, the Railroad Retirement Act of 1974, or the Railroad Unemployment Insurance Act for days of sickness. U reimburses V for all such payments and pays V a fee for its expenses of administering the payments. V is not treated as the employer with respect to such payments.

Example 2. Pursuant to an agreement with Company W, Insurance Company X indemnifies W for the amount of any payments which X must make to an employee on account of sickness or accident disability. Such payments are not made under a workmen's compensation law, the Railroad Retirement Act of 1974, or the Railroad Unemployment Insurance Act for days of sickness. X makes its indemnity payments directly to W. W makes the payments to its employees. X is not treated as the employer with respect to such payments.

Example 3. Pursuant to an agreement with Company Y (which is not an agency agreement described in subparagraph (3) of this § 32.2(e)), Insurance Company Z makes payments on account of sickness or accident disability to Y's employees. Such payments are not made under a workmen's compensation law, the Railroad Retirement Act of 1974, or the Railroad Unemployment Insurance Act for days of sickness. Z does not notify Y of the amount of such payments. Z is treated as the employer with respect to such payments.

(f) *Penalties and interest on payments made from January 1, 1982 to June 30, 1982.* No penalty under section 6656(a) or interest under section 6601 will be assessed for the failure to make timely payments of the tax imposed by section 3201, 3211, or 3221 on payments made on account of sickness or accident disability, which payments of tax are made after December 31, 1981, and before July 1, 1982, to the extent that the failure is due to reasonable cause and not willful neglect.

(g) *Special rules.* (1) For purposes of subdivision (iii) of paragraph (e)(2), the last employer for whom the employee worked prior to becoming sick or disabled or for whom the employee was working at the time he became sick or disabled shall be deemed to be the employer for whom services are normally rendered, provided that such employer made contributions on behalf of such employee to the plan or system under which the employee is being paid.

(2) The application of the provisions of subparagraph (1) of this paragraph (g) may be illustrated by the following examples:

Example 1. B is employed by Company M. B becomes sick and is absent from work for 3 months. While B is absent from work, he receives sick pay from Insurance Company N pursuant to a plan established by M and to which M has made contributions on behalf of B. M is the employer for whom services are normally rendered by B.

Example 2. C is employed by Company O and is also employed on a part-time basis by Company Q. C becomes sick while at work at Qs place of business. C is absent from work for 3 months. While C is absent from work, he receives sick pay from Insurance Company P pursuant to a a plan established by O and to which O has made contributions on behalf of C. O is the employer for whom services are normally rendered by C.

Example 3. D is a member of a labor union whose members receive health and welfare benefit payments from a trust fund which is supported by the contributions of the various employers who employ the labor union's members. D has been employed by Company R for 4 days when he becomes sick and is absent from work for 3 months. While D is absent from work he receives sick pay from his union's trust fund to which R has made contributions on D's behalf. R is the employer for whom services are normally rendered by D.

(3) For purposes of paragraph (e) of this section, in the case of payments on account of sickness or accident disability made to employees by a third party insurer pursuant to a contract of insurance with a multiemployer plan which is obligated to make payments on account of sickness or accident disability to such employees pursuant to a collectively bargained agreement, if the third party insurer making the

payments complies with the requirements of subdivisions (i) and (ii) of subparagraph (2) of paragraph (e) and notifies the plan of the amount of compensation paid on which tax was withheld and deposited within the time required for notification of the employer under subparagraph (2) of paragraph (e), then the plan (and not the third party insurer) shall be required to pay the tax imposed by section 3221 and to comply with the requirements of section 6051 and §§ 31.6051–1 and 31.6051–2 with respect to such payments unless, within 6 business days of the receipt of such notification, the plan notifies the employer for whom services are normally rendered of the amount of the compenation on which tax was withheld and deposited. If the plan provides such notice to the employer, the employer (and not the plan) shall be required to pay the tax imposed by section 3221 and to comply with the requirements of section 6051 and §§ 31.6051–1 and 31.6051–2 with respect to the compensation.

[T.D. 7823, 47 FR 29225, July 6, 1982, as amended by T. D. 7867, 48 FR 793, Jan. 7, 1983]

PART 34—[RESERVED]

PART 35—TEMPORARY EMPLOYMENT TAX AND COLLECTION OF INCOME TAX AT SOURCE REGULATIONS UNDER THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982

AUTHORITY: 26 U.S.C. 6047(e), 96 Stat. 625; 26 U.S.C. 7805; 68A Stat. 917; and sec. 334(e) (5) and (6) of the Tax Equity and Fiscal Responsibility Act of 1982 (96 Stat. 623).

§ 35.3405–1 Questions and answers relating to withholding on pensions, annuities, and certain other deferred income.

The following questions and answers relate to withholding on pensions, annuities, and other deferred income under section 3405 of the Internal Revenue Code of 1954, as added by section 334 of the Tax Equity and Fiscal Responsibility Tax Act of 1982 (Pub. L. 97–248) (TEFRA):

a. In general.
b. Periodic payments.
c. Nonperiodic distributions.
d. Notice and election procedures.
e. Reporting and recordkeeping.

A. IN GENERAL

a–1. Q. How did TEFRA change the law on withholding requirements for pensions, annuities, and other deferred income?

A. TEFRA amended the Internal Revenue Code to impose withholding requirements on designated distributions paid after December 31, 1982. Further, although under prior law individuals could elect to have Federal income tax withheld from certain pension and annuity payments, TEFRA requires withholding on all designated distributions unless the payee elects not to have withholding apply.

a–2. Q. What type of payment is a designated distribution that is subject to the new withholding rules?

A. A designated distribution is any distribution or payment from or under an employer deferred compensation plan, an individual retirement plan (as defined in section 7701(a)(37)), or a commercial annuity. However, a designated distribution does not include any portion of a distribution which it is reasonable to believe is not includible in the gross income of the payee. For rules concerning when it is reasonable to believe that all or part of a distribution is not includible in the gross income of the recipient, see questions a–24 through a–33. In addition, a payment or distribution that is treated as wages under section 3401(a) is not a designated distribution subject to the new withholding rules. For examples of these payments, see questions a–18 through a–23.

a–3 Q. What is an employer deferred compensation plan for purposes of the new withholding rules?

A. An employer deferred compensation plan is any pension, annuity, profit-sharing, stock bonus, or other plan that defers the receipt of compensation.

a–4. Q. What is a commercial annuity for purposes of the new withholding rules?

A. A commercial annuity is an annuity, endowment, or life insurance contract issued by an insurance company licensed to do business under the laws of any State. See, also, question f–21.

a–5. Q. When does the new law take effect?

A. In general, withholding is required on any designated distribution made after December 31, 1982. In the case of periodic payments beginning before January 1, 1983, the first payment after December 31, 1982 is treated as the first periodic payment for purposes of the withholding requirements. The Secretary has authority to delay (but not beyond June 30, 1983) the application of these withholding provisions to any payor if the payor can establish that it is impossible to comply with these provisions without undue hardship. Additionally, no penalty will be imposed for failure to withhold on periodic payments if the failure occurs before July 1, 1983, and if a good faith attempt is made to comply.

Procedures for requesting a delay in implementation of the withholding provisions are under consideration.

a–6. Q. What effect does the new law have on the old law provisions relating to withholding of tax from annuity payments by request?

A. If payment is part of a designated distribution, the rules of section 3402(o) (relating to voluntary withholding on certain payments) do not apply. Therefore, a payee receiving amounts that are subject to withholding under the new provisions described in this regulation may not choose to use the voluntary withholding system of section 3402(o) with respect to those amounts. Also, if a payee had a fixed amount withheld by request, a different amount will probably be withheld when the new provisions take effect unless the rule provided in question a–7 applies. However, section 3402(o) will continue to apply to annuity payments that are not designated distributions, to sick pay, and to supplemental unemployment benefits.

a–7. Q. If a recipient of a pension or annuity has previously elected voluntary withholding under section 3402(o), is the Form W–4P effective for withholding on payments after December 31, 1982?

A. Yes, if the plan administrator or payor wishes to honor it; the Form W–4P can be treated by the plan administrator or payor as an election to withhold the flat dollar amount specified on the form if the payee, is notified of his right to elect out of withholding and if he is notified that his previously filed W–4P will remain effective unless he elects out of withholding or files a new withholding certificate. If these requirements are met the plan administrator or payor may treat the Form W–4P as a voluntary withholding agreement under section 3402(p). See, also, section 3402(i). These amounts withheld should be reported in the same manner as amounts withheld under section 3405.

a–8. Q. What amount of Federal income tax will be withheld from designated distributions?

A. The amount to be withheld by any payor (or, in certain cases, a plan administrator) depends upon whether the payment is a periodic payment, a non-periodic distribution other than a qualified total distribution, or a qualified total distribution. However, the maximum amount to be withheld cannot exceed the sum of the amount of money and the fair market value of property (other than employer securities as defined in section 402(a)(3)) received in the distribution.

a–9. Q. What is a periodic payment?

A. A periodic payment is an annuity or similar periodic payment whether paid by a licensed life insurance company, a financial institution, or a plan. The term ''annuity'' means a series of payments payable over a period greater than one year and taxable under section 72 as amounts received as an annuity, whether or not the payments are variable in amount.

a–10. Q. How will federal income tax be withheld from a periodic payment?

A. In the case of a periodic payment, amounts are withheld as if the payment were a payment of wages by an employer to the employee for the appropriate payroll period. If the payee has not filed a withholding certificate, the amount to be withheld is calculated by treating the payee as a married individual claiming three withholding allowances.

For additional questions and answers concerning periodic payments, see part b.

a–11. Q. How will Federal income tax be withheld from a ''qualified total distribution?''

A. A ''qualified total distribution'' means any designated distribution which it is reasonable to believe is made within one taxable year of the payee, is made from or under a qualified plan described in section 401(a) or section 403(a), and consists of the balance to the credit of the employee under the plans. For additional questions and answers concerning qualified total distributions, see part c. The amount to be withheld on qualified total distributions will be determined under tables prescribed by the Secretary that approximate the tax that would be imposed under section 402(e) if the payee elected to treat the distribution as a lump sum distribution within the meaning of section 402(e)(4)(A). See, in this respect, question c–8.

a–12. Q. What amount of Federal income tax will be withheld from a designated distribution that is not a periodic payment or a qualified total distribution?

A. If a designated distribution is not a periodic payment or a qualified total distribution, the amount to be withheld is computed by multiplying the amount of the designated distribution by 10 percent.

a–13. Q. Who must withhold?

A. Generally, the payor of a designated distribution must withhold, and is liable for payment of, the tax required to be withheld. However, in the case of a distribution from a plan described in section 401(a) (relating to pension, profit-sharing, and stock bonus plans), section 403(a) (relating to certain annuity plans), or section 301(d) of the Tax Reduction Act of 1975 (relating to certain employee stock ownership plans, sometimes called ''TRASOP's''), the plan administrator must withhold, and is liable for payment of, the withheld tax unless he directs the payor to withhold the tax and furnishes the payor with any information that may be required by the Secretary in forms or regulations. This provision applies to qualified plans as well as once qualified plans that are no longer qualified. For a description of the material that the plan administrator must furnish to the payor, see question e–3.

a–14. Q. Who is a plan administrator?

A. Under section 414(g), the plan administrator is the person specifically designated as the plan administrator by the terms of the plan or trust. If the plan or trust does not specifically designate the plan administrator (as provided in § 1.414(g)–1(a) of the Income Tax Regulations), then the plan administrator is generally determined as follows:

(1) In the case of a plan maintained by a single employer, the employer is the plan administrator.

(2) In the case of a plan maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives who maintain the plan is the plan administrator.

(3) In the case in which (1) or (2) does not apply, the person actually responsible for the control, disposition, or management of the assets is the plan administrator.

a–15. Q. If a bank trustee, regulated investment company, or insurance company makes a periodic payment to a payee solely at the direction of an employer sponsored individual retirement account (IRA), is the bank trustee, regulated investment company or insurance company a payor subject to the pension withholding provisions?

A. Yes. the term ''payor'' generally means the person actually paying the annuity or other payment (even if the person is acting as an agent). Because this is not a payment from a plan described in section 401(a) or 403(a), responsibility for withholding is on the bank trustee, regulated investment company, or insurance company and not on the employer who sponsors the account.

a–16. Q. If a bank trustee transfers plan funds to the employer who sponsors a plan described in section 401(a) and the employer makes the designated distributions, is the employer a payor?

A. Yes. The employer is a payor because it acts as an agent for the bank trustee. Even though the plan administrator has transferred liability to the bank trustee under section 3405(c)(2), the transfer of funds to the employer does not relieve the bank trustee of its liability for withholding because the rule on transfer of liability only applies to plan administrators. Therefore, if the employer fails to withhold on designated distributions, either the employer or the bank trustee may be liable for failure to withhold. Note, however, that the plan administrator could transfer liability for withholding to the employer as payor under section 3405(c)(2). See, in this respect, questions e–2 and e–3.

a–17. Q. Do the withholding provisions apply to annuities paid from an employer deferred compensation plan, an individual retirement plan, or a commercial annuity to the surviving spouse or other beneficiary of a deceased payee?

A. Yes.

a–18. Q. Do these withholding provisions apply to designated distributions under all nonqualified employer deferred compensation plans?

A. No. The withholding provisions relating to pensions and annuities do not apply to any amounts that are wages without regard to these provisions. Wages to which the general wage withholding rules apply mean any remuneration paid by an employer for services performed by an employee unless the amount paid falls within one of the exceptions of section 3401(a). For example, wages do not include remuneration paid to, or on behalf of, an employee or beneficiary from or to a trust qualified under section 401(a) and tax-exempt under section 501(a). There is no exception for contributions to, or benefits paid from, some nonqualified plans. In general, any contributions to, or benefits from, a nonqualified plan that are taxable under section 83 are subject to wage withholding at the time that they are includible in the recipient's gross income.

a–19. Q. Do these withholding provisions apply to designated distributions from a bond purchase plan described in section 405(a)?

A. Yes. Although a bond purchase plan is not a qualified plan, section 3402(a) does not apply to contributions to, or distributions from, such a plan. Therefore, designated distributions from a bond purchase plan are subject to the new withholding rules of section 3405. Similarly, the new withholding rules apply to designated distributions of an individual retirement bond described in section 409 or from an annuity plan described in section 403(a). For purposes of the withholding provisions of section 3405, a designated distribution from a bond purchase plan described in section 405(a) or an individual retirement bond described in section 409 occurs when an individual redeems a bond.

a–20. Q. Do these withholding provisions apply to designated distributions from a tax-sheltered annuity described in section 403(b)?

A. Yes. Section 31.3401(a)–1(b)(1)(i) of the Employment Tax Regulations provides that there is no withholding required under the wage withholding provisions to the extent that any amounts are taxable under the rules of section 72 or 403. Because designated distributions are not subject to the general wage withholding provisions, the new provisions of section 3405 apply to these designated distributions.

a–21. Q. An employer maintains a nonqualified deferred compensation plan such as a supplemental executive retirement (''top hat'') plan. Payments under the plan are made in the form of a single sum payment at retirement. Amounts paid at retirement are includible in income as compensation in the year received. Must the payor withhold on these amounts according to the rules in section 3405?

A. No. Section 3405(d)(1)(B)(i) provides that a designated distribution on which withholding is required does not include amounts that are wages without regard to the rules of section 3405. Therefore, withholding on payments that are includible in income as compensation are based on the rules for withholding on wages contained in section 3402.

a–22. Q. Do the withholding provisions of section 3405 apply to a retirement plan maintained by a State or local government on behalf of its employees?

A. Yes. A retirement plan maintained by a State or local government on behalf of its employees is a plan that defers the receipt of compensation. The fact that a plan deferring the receipt of compensation is maintained by a governmental unit does not make the withholding provisions inapplicable.

Thus, annuity payments and other distributions under the Federal Civil Service Retirement System or under the plan of any State or municipality are subject to withholding.

a–23. Q. Are payments from a state or local plan of deferred compensation described in section 457 subject to the withholding requirements of section 3405?

A. No. Amounts paid from a plan described in section 457 are paid from a plan that defers the receipt of compensation. However, amounts paid from a deferred compensation plan described in section 457 are wages under section 3401(a). Therefore, the general wage withholding rules, not the special rules of section 3405, apply to these payments.

a–24. Q. An individual retires and begins receiving periodic payments under a commercial annuity contract that was distributed to him from a contributory qualified plan. The insurance company is the payor and is liable for withholding because the plan administrator has transferred liability under the rules of section 3405(c)(2). Must the payor determine whether the employee's investment in the contract is recoverable within three years?

A. Yes. Under section 72(d), if the annuity payments during the first three years equal or exceed the amount contributed by the employee to the plan, no amounts are includible in income until the employee's contributions are recovered. Because the application of section 72(d) may affect the extent to which it is reasonable to believe that amounts are not includible in income and, therefore, not subject to withholding, the payor must determine whether section 72(d) applies to the annuity payments. As a general rule, the information necessary to determine the employee's investment in the contract must be provided to the payor by the plan administrator. See, however, questions a–27 and a–33.

a–25. Q. If the payor in question a–24 determines that the employee's investment in the contract is not recoverable within 3 years, must the payor compute the exclusion ratio under section 72(b) to calculate the amount of each payment that is not includible in gross income?

A. Yes. The operation of section 72(b) affects the extent to which it is reasonable to believe that amounts are not includible in gross income. Therefore, the payor must compute the exclusion ratio to determine what portion of each payment is subject to withholding under section 3405. As a general rule, the information necessary to determine the employee's exclusion ratio must be provided to the payor by the plan administrator. See, however, questions a–27 and a–33.

a–26. Q. In questions a–24 and a–25, may the payor (i.e., the insurance company) rely on the information furnished by the plan administrator to determine the amounts that are includible in gross income?

A. In the absence of information to the contrary supplied by the payee, the payor may rely on the information furnished by the plan administrator. See, with respect to the plan administrator's duty to report to the payor, questions e–2 and e–3.

a–27. Q. What is the result in questions a–24 and a–25 if the plan administrator fails to provide the payor with any information concerning the amount of employee contributions?

A. Until the earlier of December 31, 1983, or the date on which the plan administrator provides the payor with information concerning the amount of employee contributions, it is reasonable for the payor to assume that the employee's investment in the annuity contract is zero unless the payor has independent specific knowledge of the amount of employee contributions. Additionally, if the payee notifies the payor of the amount of employee contributions, the payor must compute the taxable portion of the payment based on the information supplied by the payee. If the plan administrator fails to provide the payor with this information on or before December 31, 1983, the plan administrator will be liable for failure to withhold and pay the tax due. See questions e–2 through e–5 for rules on the plan administrator's ability to transfer liability for withholding to the payor. See also question a–33 with respect to the plan administrator's failure to provide the necessary information prior to December 31, 1983.

a–28. Q. If a beneficiary receives the balance to the credit of an employee from an annuity described in section 403(b) on *account of the employee's death, is it reasonable to believe that the $5,000 death benefit exclusion of section 101(b) is not includible in gross income?*

A. Yes. Although the amount of the death benefit exclusion allowable may be limited by section 101(b)(2)(B)(iii), the payor, for withholding purposes, may use the maximum death benefit exclusion ($5,000) in computing the amount of the distribution that is subject to withholding. See also, in this respect, question c–3.

a–29. Q. What is the appropriate treatment of a distribution (whether periodic or nonperiodic) that includes employer securities?

A. Employer securities are significant in the calculation of amounts subject to withholding in two respects. First, the maximum amount to be withheld cannot exceed the sum of the amount of money plus the fair market value of property received, *except* employer securities. In other words, a payor will not be forced to dispose of employer securities in order to meet withholding tax liability. Thus, for example, if an individual receives a distribution from a stock bonus plan that includes $1,000 worth of employer stock and $5 in cash for payment of fractional shares of stock, all of the cash, but none of the stock, may be retained by the payor to satisfy the withholding obligation. Second, under certain circumstances, the net unrealized appreciation in employer securities is not includible in gross income. See, in this respect, the rules of sections 402(a)(1) and 402(e)(4)(J).

a–30. Q. Is it reasonable to believe that all net unrealized appreciation from employer securities is not includible in gross income in the case of a qualified total distribution?

A. Yes. Although a qualified total distribution may include a distribution that is not a lump sum distribution, it is reasonable to believe that all net unrealized appreciation from employer securities is not includible in gross income.

a–31. Q. Is it reasonable to believe that a distribution is not includible in gross income if the distribution consists of employee contributions from a plan described in section 401(a) and the amount distributed is not specifically designated as accumulated deductible employee contributions?

A. Yes. Employee contributions to a plan described in section 401(a) are not deductible from gross income when contributed unless they are deductible employee contributions under section 72(o)(5). Unless the payor has specific knowledge that employee contributions distributed from a plan described in section 401(a) are accumulated deductible employee contributions, it is reasonable to assume that the amounts are excludible from gross income in the year when received.

a–32. Q. In the case of disability payments paid under a noncontributory plan to a disability retiree who has not attained age 65, is it reasonable to believe that all amounts paid to the payee are includible in gross income?

A. Yes. Whether or not all or part of the disability payments paid under a noncontributory plan to a permanently disabled retiree who has not attained age 65 are includible in gross income depends on the adjusted gross income of the taxpayer and on whether the taxpayer is permanently and totally disabled. In this situation, it is reasonable for the payor to assume that all amounts paid to the payee are includible in gross income unless the payor has specific independent knowledge that all or part of the periodic payments are not includible in gross income. Additionally, if the payee notifies the payor of the amount excludible from gross income, the payor must compute the taxable portion of the payment based on information provided by the payee.

a–33. Q. In the case of a periodic payment, is it reasonable to believe that all amounts paid to the payee are includible in gross income?

A. Yes. As an alternative to the general rule that a designated distribution does not include amounts which it is reasonable to believe are not includible in gross income, the payor of any periodic payment may assume that the entire amount of the payment is includible in gross income. The wage withholding tables must be used without adjustment for the fact that Federal income tax is being withheld on the gross amount. If the payor uses this alternative method of calculating the amount of the designated distribution, he must include with the notice of the election not to have withholding apply the following additional statements:

(1) Tax will be withheld on the gross amount of the payment even though the payee may be receiving amounts that are not subject to withholding because they are excludible from gross income;

(2) This withholding procedure may result in excess withholding on the payment; and

(3) The payee may adjust the allowances claimed on the withholding certificate if he wants a lesser amount withheld from each payment or he may provide the payor with the information necessary to calculate the taxable portion of each payment.

This alternative will not apply to periodic payments made after the earlier of December 31, 1983, or the date on which the plan administrator supplies the payor with the information necessary to calculate the taxable portion of the distribution.

See, also, questions e–3, e–4, and e–5.

a–34. Q. May the payor rely on a plan administrator's computation of the amount to be withheld?

A. Yes. Although the plan administrator is not required to compute the amount to be withheld in order to transfer liability for withholding to the payor, the plan administrator may provide such information to the payor, and the payor may rely on such computations unless the payor knows or has reason to know that the computations are incorrect.

a–35. Q. Under the plans of certain States, individuals may receive payments from more than one retirement system, such as payments from the state's teacher's retirement plan and from the state's regular retirement plan. Must these payments be aggregated for purposes of providing a single notice and election to a payee or for purposes of determining whether the floor on withholding tax (i.e., $5,400 for a married individual claiming three allowances) has been reached?

A. No. However, if it is feasible to aggregate payments under more than one retirement system, the payor is permitted to do so for these purposes.

a–36. Q. If a payment is made by one check to more than one beneficiary, such as a surviving spouse and a minor child, how is the amount to be withheld computed?

A. The payor may compute the withholding on a payment made by one check to more than one beneficiary as if the payment were made to only one beneficiary. In this case, the payor must base withholding for the total amount of the designated distribution on the withholding certificate of the payee to whom the election was sent.

Alternatively, if each payee files a withholding certificate and the payor knows the amount of the payment of which each payee is entitled, the payor may determine the amount to be withheld with respect to each payee. If the payor does not know the amount of the payment to which each payee is entitled, he may treat the payment as being made pro-rata to each payee. If only one withholding certificate is received, the payor must base withholding for the total amount of the designated distribution on the withholding certificate of one of the payees, such as the surviving spouse's certificate. Thus, if notice of the election not to have withholding apply is supplied to each payee at the times required in section 3405(c) (10) and only one payee makes the election or files a certificate, the payor must assume that the election or filing was made by the payee on behalf of the other payees.

a–37. Q. If a payor makes an error in computing the amount of a designated distribution that is subject to withholding, must the payor make a retroactive correction of the error?

A. No, provided the error was a reasonable one. Thus, if a payor either underwithholds or overwithholds because the amount of the designated distribution (*i.e.*, the taxable portion of the payment) was incorrectly calculated, no retroactive make-up is required if one of the following applies: (1) The payor reasonably relied on information furnished by the plan administrator (including the computation of the amount to be withheld), (2) the payor relied on a payee's representations on the withholding certificate, (3) the payor reasonably relied on the rules of this regulation, or (4) the payor made a mathematical error in computations. However, if the amount of the designated distribution is correctly computed, but the payor makes an error in applying the withholding tables, the normal rules concerning failure to withhold and pay the tax will apply.

B. WITHHOLDING ON PERIODIC PAYMENTS

b–1. Q. Is the payor of periodic payments required to aggregate such payments with a payee's compensation to determine the amount of tax to be withheld under section 3405(a)(1)?

A. No. Although the payor must withhold from any periodic payment the amount that has to be withheld if the payment were a payment of wages by an employer to an employee for a payroll period, the amount to be withheld under section 3405(a)(1) is calculated separately of any amounts that actually are wages to the payee for the same period.

b–2. Q. Can either the percentage method (section 3402(b)) or the wage bracket method (section 3402(c)) be used to determine the withholding liability on a periodic payment?

A. Yes. Withholding on a periodic payment is accomplished by treating the payment as if it were wages. Therefore, unless the employee has elected not to have withholding apply, any method of withholding that is an appropriate method for withholding on wages is also an appropriate method for withholding on periodic payments. Refer to the Employer's Tax Guide (Circular E) and Publication 493, Alternative Tax Withholding Methods and Tables for the general procedures on withholding, deposit, payment, and reporting of Federal income tax withheld. Note, however, that any specific procedures contained in this regulation take precedence over any contrary rules in Circular E and Publication 493.

b–3. Q. Do rules similar to those for wage withholding applly to the filing of a withholding certificate for periodic payments?

A. Yes. Unless the rules of section 3405 specifically conflict with the rules of section 3402, the rules for withholding on periodic payments will parallel the rules for wage withholding. Thus, if a withholding certificate is filed by a payee, it will generally take effect as provided in section 3402(f)(3) for certificates filed to replace existing certificates. If a withholding certificate is furnished by a payee on or before the date on which payments commence, it takes effect with respect to payments made more than 30 days after the certificate is furnished, unless the payor elects to make it effective at an earlier date. If a withholding certificate is furnished by a payee after the date on which payments commence, it takes effect with respect to payments made on or after the status determination date (January 1, May 1, July 1, or October 1) that is at least 30 days after the date the certificate is filed, unless the payor elects to make it effective at an earlier date. If no withholding certificate is filed, the amount withheld is determined as if the payee were a married person claiming three withholding allowances.

b–4. Q. If no withholding certificate has been filed and the payor is aware that the payee is single, is it still appropriate to base withholding on a married individual claiming three allowances?

A. Yes. If no withholding certificate is filed, the payor is not required or permitted to base withholding on the amount of allowances the payee actually is entitled to claim. Thus, the payor must base withholding on the rates for a married person with three withholding allowances.

b–5. Q. May a payor determine whether payments to an individual are subject to withholding based on the amount of the first periodic payment for the year?

A. No. Periodic payments can vary during a calendar year because of make-up of past due payments, variable rates of payments, or cost-of-living adjustments, so that withholding based on the first payment within a year may be an inaccurate measure of withholding on total payments for the year. Therefore, the amount to be withheld is determined each payment period in the same manner as applies to withholding on wages. See, in this respect, Circular E and the regulations under section 3402.

b–6. Q. If a payment period is specified as by the terms of a commercial annuity contract, must this period be used as the appropriate period for determining the amount to be withheld?

A. Yes. Similarly, if the payment period is designated in a plan administrator's report or on an individual retirement account payout schedule agreed to by payor and payee, this period must be used as the appropriate payment period.

b–7. Q. If the payor received no report from the plan administrator or beneficiary concerning the payment period, but knows the frequency of payments, can the known frequency be used as the appropriate payment period?

A. Yes. However, if no report is received and the payor has no knowledge of the frequency of payments, then he must treat the distribution as a nonperiodic distribution. Therefore, a distribution cannot be a periodic payment unless the frequency of payments is known. See, in this respect, questions b–8 and c–2. For rules concerning the plan administrator's failure to provide this information, see questions e–2 and e–3.

b–8. Q. If a payee receives a one-time payment that is a make-up payment resulting from an insurance company's incorrect calculation of a monthly annuity amount, is the one-time payment part of a series of periodic payments?

A. Yes. Because the one-time payment is a catch-up of prior amounts due as periodic payments, it is treated as part of a series of periodic payments. These payments are treated for withholding purposes in a manner similar to the treatment of supplemental wage payments in §31.3402(g)–1 of the Employment Tax Regulations.

C. Withholding on Nonperiodic Distributions

c–1. Q. Must an individual receive a lump-sum distribution within the meaning of section 402(e)(4) to have a qualified total distribution?

A. No. A ''qualified total distribution'' is any distribution that (i) is a designated distribution, (ii) is reasonable to believe is made within one taxable year of the recipient, (iii) is made under a plan described in section 401(a) or 403(a), and (iv) consists of the balance to the credit of the employee under such plan. Thus, a distribution from a plan described in section 401(a) that does not meet the requirements (such as the minimum 5-year period of participation in section 402(e)(4)(H)) for a lump sum distribution within the meaning of section 402(e)(4) may still be a qualified total distribution for purposes of withholding.

c–2. Q. If a class year plan permits annual withdrawal of participants' vested amounts, are these withdrawals considered periodic payments?

A. No. A class year plan is a plan under which amounts contributed by an employer for a year become vested a number of years (*e.g.*, five years) after the year in which the amounts are contributed. Generally, class year plans permit withdrawals each year of amounts that have vested during the year. However, these distributions are not made with respect to an established frequency of payments, so the withdrawals must be treated as nonperiodic distributions, subject to withholding at the 10 percent rate.

c–3. Q. If a beneficiary receives the balance to the credit of a payee from an annuity contract on account of the payee's death, is this final payment a nonperiodic distribution?

A. Yes. The lump sum death benefit in this situation is a one-time payment that cannot be characterized as a periodic payment. The payment may be a qualified total distribution if the requirements of section 3405(c)(4) are satisfied, but otherwise it will be treated as a nonperiodic distribution other than a qualified total distribution.

c–4. Q. Is it permissible to assume that an individual is a calendar year taxpayer for purposes of determining whether a distribution is a ''qualified total distribution?''

A. Yes, unless the payor or plan administrator has reason to believe that the payee is not a calendar year taxpayer. The payor or plan administrator has reason to believe that the payee is not a calendar year taxpayer if the payee tells the payor or plan administrator that he is not a calendar year taxpayer.

c–5. Q. Is a distribution of accumulated deductible employee contributions with earnings that is paid on account of an employee's separation from service treated as a qualified total distribution?

A. Yes. As long as the other requirements for a qualified total distribution are met, a distribution of accumulated deductible employee contributions with earnings is eligible for withholding at the rate applicable to qualified total distributions even though the distribution could never be a lump sum distribution. Because accumulated deductible employee contributions are treated separately in determining whether a distribution is a qualified total distribution, the answer would be the same even if the recipient received none (or a portion) of the vested employer contributions in his account.

c–6. Q. What is meant by the ''balance to the credit'' of an employee under a plan described in section 401(a) or 403(a)?

A. In general, the balance to the credit of an employee includes any amount credited to the employee under the plan on the date the distribution commences. The balance to the credit of an employee includes an amount credited after the date the distribution commences if it is attributable to services performed before that date or is attributable to earnings on an amount credited to the employee before that date. Additionally, the balance to the credit of an employee includes any amount payable as an annuity with respect to the employee under the plan. Amounts that have been placed in a separate account for the funding of medical benefits under section 401(h) or amounts that are forfeitable under the plan are not included in the balance to the credit of an employee. Finally, accumulated deductible employee contributions (within the meaning of section 72(o)(5)(B)) are not included in the balance to the credit of an employee for the purposes of determining whether a distribution is a ''qualified total distribution.''

c–7. Q. Can a payor rely on a plan administrator's report in determining whether a distribution consists of the balance to the credit of an employee under a plan?

A. Yes. If the plan administrator does not inform the payor that the distribution consists of the balance to the credit of the employee, the payor may not assume that the distribution is a qualified total distribution and must treat the distribution as a nonperiodic distribution that is not a qualified total distribution. However, the payor may rely on the payee's representations that a distribution does consist of the balance to the credit of the employee under the plan.

c–8. Q. What table must be used to calculate the amount to be withheld from a ''qualified total distribution?''

A. The table to be used for withholding on ''qualified total distributions'' will be published by the Secretary in the near future.

D. NOTICE AND ELECTION PROCEDURES

d–1. Q. May a payee elect not to have Federal income tax withheld from a designated distribution?

A. Yes. Withholding is not required on any periodic payment or nonperiodic distribution if the payee elects not to have withholding apply. If the payee makes this election, it is effective until revoked. The payor is required to provide each payee with notice of the right to elect not to have withholding apply and of the right to revoke the election.

d–2. Q. In the case of a designated distribution made on account of the death of an employee, who makes the election not to have withholding apply?

A. The election may be made by the beneficiary of plan benefits specified by the decedent in accordance with plan procedures or, if there is no designated beneficiary, by the beneficiary specified under the terms of the plan. If there is not a designated beneficiary and the terms of the plan do not specify a beneficiary, then the election may be made by the executor or the personal representative of the decedent.

d–3. Q. Who is required to provide notice to the payee of the payee's right not to have withholding apply?

A. Section 3405(d)(10)(B) requires the payor to provide notice to the payee of the payee's right to elect not to have withholding apply. Thus, even if the plan administrator has failed to transfer liability for withholding to the payor, the payor must provide notice to the payees.

d–4. Q. When must notice of the right to elect not to have withholding apply be given for periodic payments?

A. In the case of periodic payments, notice of the election must be provided not earlier than six months before the first payment and not later than when making the first payment. However, even if notice is provided at a date before the first payment,notice must also be given when making the first payment. Thereafter, notice must be provided at least once each calendar year of the right to make the election and to revoke the election.

d–5. Q. Must notice of the right to elect not to have withholding apply be provided to those payees whose annual payments are less than $5,400?

A. Yes. However, under the statute, notice is only required to be provided when making the first payment. Therefore, a payor may provide notice to a payee with annual payments less than $5,400 by indicating to the payee when making the first payment that no Federal income tax will be withheld unless the payee chooses to have withholding apply by filing a withholding certificate, if the payor also provides information concerning where a withholding certificate may be obtained.

d–6. Q. Must notice of the right to elect not to have withholding apply be provided in the same manner to all payees?

A. No. If the payor provides notice to all payees when making the first payment, the payor may, in addition, provide earlier notice as provided in section 3405(d)(10)(B)(i)(I) to selected groups of payees, such as those payees whose annual payments are over $5,400.

d–7. Q. Must notice be attached to the first payment to satisfy the requirement that notice be provided ''when making'' the first payment?

A. No. Because many payees utilize electronic funds transfer to deposit their pension or annuity checks, notice does not have to be attached physically to the check.

d–8. Q. If a payee utilizes electronic funds transfer and notice is mailed directly to the payee at the same time the check is issued, is the notice requirement satisfied even though the payee receives the notice fifteen days after the check is deposited?

A. Yes. Although it is desirable that the notice reach the payee immediately prior to or concurrent with receipt of the check, the notice requirement is deemed to be satisfied if the payee receives the notice within 15 days before or after receipt of the first payment.

d–9. Q. When is the payor required to notify the payee of his right to elect not to have withholding apply to a nonperiodic distribution?

A. Section 3405(d)(10)(B)(ii) requires that notice must be provided to the payee at the time of a nonperiodic distribution. Since notice provided at the time of the distribution could result in delay of receipt of the benefit check if the payee elects out of withholding, notice for nonperiodic distributions should be given not earlier than six months prior to the distribution and not later than the time that will give the payee reasonable time to elect not to have withholding apply and to reply to the payor with the election information. What is reasonable time depends upon the facts and circumstances of each case.

d–10. Q. What is a ''reasonable time'' for notice with respect to a nonperiodic distribution from a qualified plan?

A. The ''reasonable time'' requirement is satisfied with respect to a nonperiodic distribution if the notice is included in the basic claim for benefits application that is provided to the participant by the plan administrator.

d–11. Q. If the payor of a periodic payment provides notice of the election not to have withholding apply within the time specified by section 3405(d)(10)(B)(i)(I), may the payor specify a time prior to distribution by which the election must be made?

A. Yes. The election not to have withholding apply is generally given effect as provided in section 3402(f)(3) for a certificate filed to replace an existing certificate. However, the payor may require that the election is made up to 30 days before the first payment to be effective for the first payment. See question b–3.

d–12. Q. If the payor of a nonperiodic distribution provides notice of the election not to have withholding apply within a reasonable time prior to the distribution, may the payor specify a time prior to distribution by which the election must be made?

A. No. The payee has the right to make or revoke an election at any time prior to the distribution. Therefore, the payor may place a deadline on the time to elect without delaying payment of the distribution, but must accept any election or revocation made up to the time of distribution.

d–13. Q. What is a ''reasonable time'' for notice with respect to a distribution from an individual retirement account?

A. A payor may provide notice of the election not to have withholding apply at the time the beneficiary requests a withdrawal from his individual retirement account. This rule also applies to distributions from bank sponsored prototype plans and other plans that permit withdrawals on request.

d–14. Q. If notice is provided to a payee prior to the first payment of a periodic payment, why must it also be provided at the time of the first payment or distribution?

A. Section 3405(d)(10)(B)(i)(II) of the Internal Revenue Code requires such notice. In addition, because the payee has the right to make an election or to revoke a prior election at any time prior to the beginning of the payment period, notice must be provided when making the first payment in order to offer the payee ample opportunity to make or revoke an election not to have withholding apply even if the election will not be effective until later payments.

d–15. Q. If a payee who has been receiving periodic payments is rehired by the same employer, has his benefits suspended, and then recommences receiving periodic payments, must notice again be provided to the payee?

A. Yes. Upon recommencement of benefits, the first payment thereafter is treated as the first payment for purposes of the notice requirements.

d–16. Q. Must a payor provide notice if it is reasonable to believe that the entire amount payable is excludible from the payee's gross income?

A. No. Amounts which it is reasonable to believe are not includible in gross income are not designated distributions. Therefore, no notice is required of the ability to elect not to have withholding apply.

d–17. Q. If the payor of a periodic payment under a qualified plan knows that an employee's investment in an annuity contract will be recovered within three years, must he provide notice of the right to elect out of withholding at the time the first payment is made?

A. No. The first payment is not a designated distribution, and, therefore, is not a periodic payment subject to the notice requirements of section 3405(d)(10)(B)(i). There is no withholding obligation until the employee's investment in the contract is recovered because those amounts that equal the investment in the contract are not includible in gross income and, therefore, are not designated distributions. Therefore, the first payment after the employee's investment in the contract is recouped is the first payment for purposes of the notice requirements.

d–18. Q. What information concerning the election not to have withholding apply must be provided by the payor to the payee?

A. Notice to a payee must contain the following information:

(1) Notice of the payee's right to elect not to have withholding apply to any payment or distribution and how to make that election,

(2) Notice of the payee's right to revoke such an election at any time and a statement that the election remains effective until revoked,

(3) A statement to advise payees that penalties may be incurred under the estimated tax payment rules if the payments of estimated tax are not adequate and sufficient tax is not withheld from the payment or distribution.

In the event that the payor does not know what part of a distribution is includible in gross income and treats these payments as provided in question a–33, the following additional statements must be included with the notice:

(1) Tax will be withheld on the gross amount of the payment even though the payee may be receiving amounts that are not subject to withholding because they are excludible from gross income,

(2) This withholding procedure may result in excess withholding on the payment, and

(3) The payee may adjust his allowances claimed on the withholding certificate if he wants a lesser amount withheld from each payment or he may provide the payor with the information

necessary to calculate the taxable portion of each payment.

d–19. Q. Is there any information that, although not required, it is desirable to include in the notice to payees?

A. It is desirable to include a statement in the notice to payees that the election not to have withholding apply is prospective only and that any election made after a payment or distribution to the payee is not an election with respect to that payment or distribution.

d–20. Q. May the plan administrator provide the notice to payees on behalf of the payor?

A. The plan administrator may provide notice on behalf of the payor. However, the payor has sole responsibility for providing this notice whether or not the plan administrator has shifted liability for withholding to the payor, and if the plan administrator fails to provide adequate notice, the payor is responsible.

d-21. Q. Is there a sample notice that can be used to satisfy the notice requirement for periodic payments?

A. Yes. Any payor who uses the following sample notice is deemed to satisfy the notice requirement if notice is timely provided:

Notice of Withholding on Periodic Payments

Beginning on January 1, 1983, the [pension] OR [annuity] payments you receive from the [insert name of plan or company] will be subject to Federal income tax withholding unless you elect not to have withholding apply. Withholding will only apply to the portion of your [pension] OR [annuity] payment that is already included in your income subject to Federal income tax and will be like wage withholding. Thus, there will be no withholding on the return of your own nondeductible contributions to the [plan] OR [contract].

You may elect not to have withholding apply to your [pension] OR [annuity] payments by returning the signed and dated election [manner may be specified] to [insert name and address]. Your election will remain in effect until you revoke it. You may revoke your election at any time by returning the signed and dated revocation to [insert appropriate name or address]. Any election or revocation will be effective no later than the January 1, May 1, July 1, or October 1 after it is received, so long as it is received at least 30 days before that date. You may make and revoke elections not to have withholding apply as often as you wish. Additional elections may be obtained from [insert name and address].

If you do not return the election by [insert date], Federal income tax will be withheld from the taxable portion of your [pension] OR [annuity] payments as if you were a married individual claiming three withholding allowances. As a result, no Federal income tax will be withheld if the taxable portion of your annual [pension] OR [annuity] payments are less than $5,400.

If you elect not to have withholding apply to your [pension] OR [annuity] payments, or if you do not have enough Federal income tax withheld from your [pension] OR [annuity] payments, you may be responsible for payment of estimated tax. You may incur penalties under the estimated tax rules if your withholding and estimated tax payments are not sufficient.

d–22. Q. Is there sample language that may be used to elect not to have withholding apply or to revoke a prior election not to have withholding apply?

A. Yes. A payee may elect not to have withholding apply or revoke a prior election in any manner that clearly shows the payee's intent. The following language would suffice:

Election for Recipients of Periodic Payments

Instructions: Check Box A if you do not want any Federal income tax withheld from your [pension] OR [annuity]. Check Box B to revoke an election not to have withholding apply. Return the signed and dated election to [insert name and address].

Even if you elect not to have Federal income tax withheld, you are liable for payment of Federal income tax on the taxable portion of your [pension] OR [annuity]. You also may be subject to tax penalties under the estimated tax payment rules if your payments of estimated tax and withholding, if any, are not adequate.

A ☐ I do not want to have Federal income tax withheld from my [pension] OR [annuity].

B ☐ I want to have Federal income tax withheld from my [pension] OR [annuity].

Signed: ______________________________
(Name)

Date: ______________________________

Return your completed election to: [insert name and address]

d–23. Q. May the payee's election be combined with a withholding certificate?

A. Yes. The payor may provide a single statement for the payee to fill out and return that would enable the payee to elect not to have withholding apply or to revoke a previous election and, at the same time, would enable the payee to claim the number of withholding allowances and, also, the dollar amount the payee wants withheld.

d–24. Q. Will a notice mailed to the last known address of the payee fulfill the notice requirement of section 3405(d)(10)(B)?

A. Yes.

d–25. Q. Is there a sample notice that can be used to satisfy the notice requirement for nonperiodic distribution?

A. Yes. Any payor who uses the following sample notice is deemed to satisfy the notice requirement if notice is timely provided:

Notice of Withholding on Distributions or Withdrawals From Annuities, IRA's, Pension, Profit Sharing, Stock Bonus, and Other Deferred Compensation Plans

The [distributions] OR [withdrawals] you receive from the [insert name of plan or company] are subject to Federal income tax withholding unless you elect not to have withholding apply. Withholding will only apply to the portion of your [distribution] OR [withdrawal] that is included in your income subject to Federal income tax. Thus, for example, there will be no withholding on the return of your own nondeductible contributions to the [plan] OR [contract].

You may elect not to have withholding apply to your [distribution] OR [withdrawal] payments by signing and dating the attached election and returning it [manner may be specified] to [insert name and address].

If you do not return the election by [insert date] receipt of your payments may be delayed. If you do not respond by the date your [distribution] OR [withdrawal] is scheduled to begin, Federal income tax will be withheld from the taxable portion of your [distribution] OR [withdrawal]. [Insert information on rates if desired].

If you elect not to have withholding apply to your [distribution] OR [withdrawal] payments, or if you do not have enough Federal income tax withheld from your [distribution] OR [withdrawal], you may be responsible for payment of estimated tax. You may incur penalties under the estimated tax rules if your withholding and estimated tax payments are not sufficient.

d–26. Q. Is there sample language that may be used for payees of nonperiodic distributions to elect not to have withholding apply?

A. Yes. A payee of a nonperiodic distribution may elect not to have withholding apply in any manner that clearly shows the payee's intent. The following language would suffice:

Election For Payees of Nonperiodic Payments

Instructions: If you do not want any Federal income tax withheld from your [distribution] OR [withdrawal], sign and date this election and return it to [insert name and address].

Even if you elect not to have Federal income tax withheld, you are liable for payment of Federal income tax on the taxable portion of your [distribution] OR [withdrawal]. You also may be subject to tax penalties under the estimated tax payment rules if your payments of estimated tax and withholding, if any, are not adequate.

I do not want to have Federal income tax withheld from my [distribution] OR [withdrawal].

Signed: ______________________________

(Name)

Date: ______________________________

Return your completed election to: [insert name and address]

d–27. Q. If the payor provides notice prior to making the first payment, can an abbreviated notice be used to satisfy the notice requirement of section 3405(d)(10)(B)(i)(II)?

A. Yes. It is permissible to provide with the payment a statement that the payee has the right to elect out of withholding. For example, the following sample notice could be used to satisfy the notice requirement if the payor has provided notice previously:

If Federal income taxes have been withheld from the [pension] OR [annuity] payments you are receiving and if you do not wish to have taxes withheld, you should notify [insert name and address]. However, if you elect not to have withholding apply to your [pension] OR [annuity] payments, or if you do not have enough Federal income tax withheld from your [pension] OR [annuity] payment, you may be responsible for payment of estimated tax. You may incur penalties under the estimated tax rules if your withholding and estimated tax payments are not sufficient.

If Federal income taxes are not being withheld from your [pension] OR [annuity] payment because you have elected not to have withholding apply and if you wish to revoke that election and have Federal income taxes withheld from your [pension] OR [annuity] payments, you should notify [insert name and address].

d–28. Q. Must an employee who receives a distribution from a plan described in section 401(a) that includes amounts attributable to employer contributions and to accumulated deductible employee contributions make two elections not to have withholding apply?

A. No. Although accumulated deductible employee contributions are treated separately in determining whether a distribution is a qualified total distribution, an employee needs to make only one election not to have withholding apply to any distributions occurring at the same time from or under the same plan. However, the plan administrator could require the employee to make separate elections with respect to the distributions.

d–29. Q. If the administrator of a plan described in section 401(a) makes a qualified total distribution to an employee out of funds contained in two or more trusts, must the employee make a separate election not to have withholding apply with respect to the distribution from each trust?

A. No. The fact that a plan may use several trusts does not eliminate treatment of the distribution as a single qualified total distribution for which only one election is necessary.

d–30. Q. Is it permissible to provide notice to persons already in pay status on January 1, 1983, in a newsletter of the plan administrator?

a. Yes, provided that this notice is received by the payee within 15 days of the payee's receipt of the first periodic payment after December 31, 1982, and such notice provides the means to make an election and instructions for electing not to have withholding apply. It is desirable that payees be afforded the maximum opportunity to make the election provided by section 3405(a)(2). Payors are encouraged to give payees notice of their election opportunities at least 30 days before the first periodic payment after December 31, 1982.

d–31. Q. Is it permissible to provide the annual notice required by section 3405(d)(10)(B)(i)(III) on January 1, 1984, December 31, 1985, and January 1, 1986?

A. No. The annual notice required by section 3405(d)(10)(B)(i)(III) should be provided at approximately the same time each calendar year.

d–32. Q. Under what circumstances may an election made with respect to a nonperiodic distribution apply to subsequent distributions?

A. Generally, any election not to have withholding apply to a nonperiodic distribution may apply to any subsequent payment or distribution from or under the same plan or arrangement. However, the payor must still provide notice of the election and revocation procedures upon each subsequent distribution and must include the statement concerning liability for payment of estimated tax if the payee does not have withholding applied.

d–33. Q. How may a payee who intends to make a qualifying rollover (as defined in section 402(a)(5) or section 408(d)(3)) of a distribution elect not to have Federal income tax withheld from the distribution?

A. The payee may elect not to have withholding apply by making the election on the form provided by the payor. Alternatively, if the payee directs the payor to pay over the distribution to a qualified plan or an individual retirement account, the payor may treat this direction as an election not to have withholding apply.

d–34. Q. If a payee claims more than 14 withholding allowances on a withholding certificate, must the payor remit a copy of the withholding certificate to the Internal Revenue Service?

A. No. Because a payee may, at any time, elect out of withholding, the rules of §31.3402(f)(2)–1(g) of the Employment Tax Regulations do not apply. Therefore, a payee may claim more than 14 allowances and the payor need not remit the withholding certificate to the Internal Revenue Service.

E. REPORTING AND RECORDKEEPING

e–1. Q. If designated distributions are made from or under a plan described in section 401(a), who has responsibility for making the returns and reports required by section 6047(e)?

A. Generally, the plan administrator, as defined in section 414(g), is responsible for maintaining the records and making the reports required by section 6047(e). However, if the plan administrator fails to keep the required records and make the required reports, the employer maintaining the plan is responsible for the reports and returns.

e–2. Q. How may a plan administrator of a plan described in section 401(a) or 403(a) transfer his duty to withhold to a payor?

A. A plan administrator of a plan described in section 401(a) or 403(a) may transfer the liability for withholding by (1) directing the payor in writing to withhold the tax and (2) providing the payor with any required information. This direction is presumed to remain in effect until the plan administrator revokes it in writing.

e–3. Q. What information must the plan administrator provide to the payor in order to transfer his liability for withholding?

A. The general rule is that the plan administrator must provide the payor with all information necessary to compute correctly the withholding tax liability. To satisfy this requirement, the plan administrator must explicitly inform the payor of the information that would be reportable on the Form W-2P or 1099R or that such information is not applicable to a particular payee or to any payments under the plan. For example, if the plan administrator is silent with respect to any employee contributions, he has not satisfied his reporting obligation even if there are no employee contributions to the plan. Thus, the plan administrator is expected to provide the payor with the following minimum information:

(1) The name, address, and social security number of the payee and the payee's spouse or other beneficiary if applicable,

(2) The existence and amount of any employee contributions,

(3) The amount of accumulated deductible employee contributions, if any,

(4) The payee's cost basis in any employer securities and the current fair market value of the securities,

(5) The existence and amount of any premiums paid for the current cost of life insurance that were previously includible in income,

(6) A statement of the reason (*e.g.*, death, disability, retirement) for the payment or distribution,

(7) The date on which payments commence and the amount and frequency of payments,

(8) The age of the payee and of the payee's spouse or designated beneficiary if applicable, and

(9) Any other information required by Form W–2P or 1099R.

If, prior to December 31, 1983, the plan administrator fails to provide the payor with the information required in items (2) through (5) the payor is liable for withholding. However, the payor may withhold on the payment as if all amounts are includible in gross income. See question a–33.

e–4. Q. If, after December 31, 1983, the plan administrator does not notify the payor of the amount of employee contributions with respect to one payee, has withholding liability shifted to the payor?

A. Yes. The plan administrator satisfies the requirements of question e–3 as to the information that must be supplied to the payor so long as the failure to provide the required information occurs on an infrequent basis or the plan administrator informs the payor in writing that he has made a good faith effort to supply all the required information but the amount of employee contributions as to a particular payee is unavailable.

e–5. Q. If, after December 31, 1983, the plan administrator fails to supply the payor with any information concerning the existence or amount of any employee contributions, has withholding liability shifted to the payor?

A. No. The plan administrator has not satisfied his reporting obligation as required in question e–3 as to employee contributions even if there are no employee contributions unless he affirmatively states that there are no employee contributions or states that the reporting of this item is not applicable in determining the payee's tax liability.

e–6. Q. Is it permissible to satisfy the requirements of section 6047(e) by maintaining records necessary to provide the information contained on Form W–2P and 1099R?

A. Section 6047(e) will be satisfied if, in addition to the information necessary to complete Forms W–2P and 1099R, the following information is maintained:

(1) Payee's date of birth (if known), and date of spouse's or designated

beneficiary's birth (if applicable and known);

(2) Plan administrator's name, address, and employer identification number (EIN);

(3) Plan's name and identification number and sponsor's name, address, and EIN; and

(4) Date on which payments commence and amount and frequency of payments.

e–7. Q. If the interim method of withholding on periodic payments (i.e., withholding on the gross amount) is used, must the employer, plan administrator, or issuer of any contract still maintain the information required by Form W–2P?

A. Yes. Even if this interim method is used, the recipient must be provided with the information that will enable him to determine his tax liability and adjust his claimed exemptions or claim a credit or refund.

e–8. What events trigger the reporting requirements of section 6047(e)?

A. Reporting is required any time there is a designated distribution to which section 3405 applies. Therefore, the old law rule that distributions of less than $600 per year do not require reporting no longer applies. Additionally, an exchange of insurance contracts under which any designated distribution (including a tax-free exchange under section 1035) may be made is a reportable event even though a designated distribution does not occur. To insure proper reporting when a designated distribution is made under the new contract, it is anticipated that the issuer of the contract to be exchanged will provide the information necessary to compute the amount to be withheld to the policyholder and to the issuer of the new contract.

e–9. Q. Will the reporting requirement be satisfied if Form W–2P or Form 1099R is filed?

A. Yes. In the absence of other forms or regulations, the reporting requirement is satisfied if Form W–2P or Form 1099R is filed with respect to each payee.

e–10. Q. How should the payor or plan administrator remit payments of amounts withheld under section 3405?

A. The payor or plan administrator must deposit the amount withheld under section 3405 with a Federal Reserve Bank or an authorized financial institution in accordance with the provisions of § 31.6302(c)–1(a)(1)(i) of the Procedure and Administration Regulations, which provides the procedures for depositing employment taxes. For purposes of applying these procedures to amounts withheld under section 3405, the term ''taxes'' as defined in § 31.6302(c)–1(a)(1)(iii) includes the income tax withheld under section 3405 with respect to designated distributions. A payor or plan administrator who remits these amounts in accordance with those rules must report the amounts deposited on the same Form 941 or 941E, whichever is appropriate, that he uses to report the employment taxes he had deposited under § 31.6302(c)–1(a)(1)(i).

F. OTHER

f–1. Q. If a plan administrator or other payor distributes property other than cash to payees, is it permissible to use the value of the property as of the last preceding valuation date to determine the amount of Federal income tax that must be withheld from each distribution?

A. Yes. In many situations, the plan administrator or payor will not be able to determine the value of property to be distributed as of the date of distribution without delaying payment to the payee. In these cases, the plan administrator or payor may determine the value of the property to be distributed as of the last preceding valuation date prior to the date of distribution, as long as the valuation is made at least once each year. If the most recent valuation date occurred within the 90 days immediately preceding the date of distribution, the next most recent valuation date may be used.

f–2. Q. How is withholding accomplished if a payee receives only property other than employer securities?

A. A payor or plan administrator must satisfy the obligation to withhold on distributions of property other than employer securities even if this requires selling all or part of the property and distributing the cash remaining after Federal income tax is withheld. However, the payor or plan administrator may instead permit the payee to remit to the payor or plan administrator sufficient cash to satisfy the withholding obligation. Additionally, if a distribution of property other than cash includes property that is not includible in a designated distribution, such as the distribution of U.S. Savings Bonds or an annuity contract, such property need not be sold or redeemed to meet any withholding obligation.

f–3. Q. If a designated distribution includes cash and property other than employer securities, is it permissible to satisfy the withholding obligation with respect to the entire distribution by using the cash distributed, provided the cash distributed is sufficient to satisfy the withholding obligation?

A. Yes, as long as there is sufficient cash to satisfy the withholding obligation for the entire distribution. There is no requirement that tax be withheld from each type of property in portion to its value.

f–4. Q. If a loan from a qualified plan is treated as a distribution under section 72(p), is the amount of the loan subject to withholding under section 3405?

A. Yes. If, and to the extent that, the loan is treated as a distribution when made, withholding is accomplished by withholding tax from the amount of the loan that is treated as a distribution. Thus, for example, if a loan of $12,000 that must be repaid within 5 years is made to a common law employee with a vested account balance of $5,000, $2,000 is treated as a distribution under section 72(p), and the payor or plan administrator must withhold tax from the $2,000.

f–5. Q. Is a loan that is treated as a distribution under section 72(p) a nonperiodic distribution other than a qualified total distribution?

A. Yes.

f–6. Q. Must a payor or plan administrator withhold tax on a nonperiodic distribution (including a qualified total distribution) if the amount of the distribution is less than $200?

A. No. However, all amounts received within one taxable year of the payee from the payor or plan administrator under the same plan or arrangement must be aggregated for purposes of determining whether the $200 floor is reached. If the payor or plan administrator does not know at the time a first payment of $200 or less is made whether there will be additional payments during the year for which aggregation is required, the payor or plan administrator need not withhold from the first payment. If distributions are made within one taxable year under more than one plan of an employer, the plan administrator or payor may, but need not, aggregate the distributions for purposes of determining whether the $200 floor is reached.

f–7. Q. If a nonperiodic distribution (including a qualified total distribution) to a payee will be less than $200, must the payor provide notice to the payee of the right to elect not to have withholding apply?

A. No.

f–8. Q. How is withholding accomplished if a qualified total distribution is paid in installments during one taxable year of the payee?

A. Withholding can be accomplished on a qualified total distribution that is paid in installments within one taxable year by either one of the following methods:

Under Option 1, the tax on the first installment is calculated under the qualified total distribution table. The tax on each subsequent installment is calculated by finding the tax under the table on the cumulative amount of the installments for the year and subtracting the amount of tax already withheld from the tax due with respect to the cumulative amount of the installments.

Under Option 2, the payor or plan administrator can withhold the tax on all installments except the final installment at a 10 percent rate. The tax on the final installment may be calculated by finding the tax under the qualified total distribution table on the cumulative amount of the installments for the year and subtracting the amount of tax already withheld from the installments. Option 2 may be used even if the amount of the tax that should be withheld from the final installment under the qualified total distribution tables exceeds the amount of the final installment. The plan administrator or payor will not be subject to penalties under section 6651 with respect to the difference between the tax that should have been withheld from the final installment under the qualified total distribution tables and the amount of the final installment.

The effect of these alternatives is illustrated by the following example:

An individual receives within one taxable year the balance to his credit under a plan described in section 401(a) or 403(a). The balance to his credit is paid in three installments of $1,000, $10,000, and $60,000. The amount of tax to be withheld from the installments may be calculated under Option 1 or Option 2.

Option 1—Withholding on each installment computed by finding tax under qualified total distribution tables on the cumulative amount of the distribution and subtracting the tax already withheld.

I.:	
1. Amount of installment 1	$1,000
2. Withholding obligation on installment 1	50
II.:	
1. Amount of installments 1 and 2	11,000
2. Withholding obligation on installments 1 and 2	550
3. Withholding paid on installment 1	50
4. Withholding obligation on installment 2 (2 minus 3)	500
III.:	
1. Amount of installments 1, 2, and 3	71,000
2. Withholding obligation on installments 1, 2, and 3	9,580
3. Withholding paid on installments 1 and 2	550
4. Withholding obligation on installment 3 (2 minus 3)	9,030
Total withholding obligation	9,580

Option 2—Withholding computed by withholding at 10 percent rate for all but the final installment. Withholding on the final installment computed by finding tax under qualified total distribution table for the cumulative amount of the distribution and subtracting the amount of tax already withheld:

I.:	
1. Amount of installment 1	$1,000
2. Withholding obligation on installment 1	100
II.:	
1. Amount of installment 2	10,000
2. Withholding obligation on installment 2	1,000
III.:	
1. Amount of installments 1, 2, and 3	71,000
2. Withholding obligation on installments 1, 2, and 3	9,580
3. Withholding paid on installments 1 and 2	1,100
4. Withholding obligation on installment 3 (2 minus 3)	8,480
Total withholding obligation	9,580

f–9. Q. A plan described in section 401 (a) invests in life insurance contracts for its participants. Each year the current cost of the life insurance element (PS 58 cost) is taxable to the participants under section 72. Is withholding required on this amount even though there is no amount actually distributed to the participant?

A. No. Because the PS 58 costs are not distributed or deemed to be distributed, they are not designated distributions for which withholding is required.

f–10. Q. The plan administrator or payor of a plan described in section 401 (a) has been properly reporting distributions on a multiple contract basis for purposes of section 72. How should the plan administrator or payor determine the amount of each payment that is includible in gross income for withholding purposes?

A. In the absence of revenue rulings or regulations to the contrary, the plan administrator or payor of a plan that properly reports distributions on a multiple contract basis should use that method to determine the taxable portion of a payment for withholding purposes.

f–11. Q. The plan administrator or payor of a plan described in section 401 (a) has been reporting distributions on a multiple contract basis for purposes of section 72 and has properly switched to the single contract method for reporting distributions. How should the plan administrator or payor determine the amount of each payment that is includible in gross income for withholding purposes?

A. If a plan has properly switched from the multiple contract basis to the single contract basis for reporting distributions, the plan administrator or payor may assume that all amounts prior to the year of switch were reported by the payees on a multiple contract basis. Therefore, for example, in the case of an individual whose annuity payments have not commenced prior to the date of the switch to a single contract basis, the payee's investment in the contract can be assumed to have been recovered on a multiple contract basis prior to the year of the switch and on a single contract basis thereafter for purposes of determining the amount of each payment that is includible in gross income for withholding purposes. This rule applies even though payees may have amended their income tax returns for prior years to report all payments on a single contract basis.

f–12. Q. If a plan that makes payments subject to the withholding and notice requirements of section 3405 makes separate payments to the same individual as a retired participant and as a surviving spouse of a retired participant, must the two payments be aggregated for withholding purposes?

A. No, unless the payor wishes to aggregate them.

f–13. Q. An insurance company makes payments under certain variable annuity contracts. The Investment Company Act of 1940 (section 22(e)) applies to these variable annuity contracts and requires that the insurance company make a payout within 7 days after a payee requests a withdrawal from his contract. Under these circumstances, how may notice be provided to a payee of his right to elect out of withholding for a nonperiodic distribution?

A. In this situation, the insurance company has only seven days in which to notify a payee of his right to elect out of withholding. It is not feasible for the insurance company to secure an election in writing unless the payee supplies the written election at the time he requests a withdrawal. Therefore, the notice and election can be provided in the following manner: (1) The insurance company may mail a notice to a payee on the day the request for withdrawal is received and (2) the notice may specify that unless the payee calls the company at a toll-free telephone number supplied on the notice within seven days of the date the request was received, the company will withhold from the distribution. Notice provided in this manner is deemed to satisfy the ''reasonable time'' requirement of question d–9. Insurance companies that encounter this problem are encouraged to supply an election form to a payee at the time an annuity contract is purchased. If a payee supplies an election with the request for withdrawal, notice still must be given but the insurance company may honor the election received if no other communication is received after notice is provided to the payee.

f–14. Q. If an individual receives periodic payments from two or more plans of one member of a controlled group of corporations, separate periodic payments from two members of a controlled group of corporations out of one plan, or periodic payments from separate plans of two members of a controlled group, must the periodic payments be aggregated for withholding purposes?

A. No, unless the plan administrator or payor wishes to aggregate the payments. Section 414(b) does not require that plans of a controlled group of corporations be aggregated for withholding purposes. The same rule applies to a group of trades or businesses under common control or an affiliated service group described in section 414 (c) or (m).

f–15. Q. How is withholding appplied to a designated distribution from an individual retirement account (IRA) described in section 408(a) that is payable upon demand even though payments are scheduled to be made over a period certain greater than one year?

A. Distributions from IRAs that are payable upon demand are not periodic payments taxable under section 72 because they do not constitute annuity contracts within the meaning of section 408(d)(2). Therefore, designated distributions from an IRA that are payable upon demand are treated as nonperiodic distributions subject to withholding at the 10% rate even if the distributions are paid over a period certain.

f–16. Q. Under the rules of section 72, a portion of certain payments that may vary because of investment experience, cost of living indices, or similar criteria is treated as not received as an annuity. For withholding purposes, must these amounts be treated as nonperiodic distributions even though part of each payment is a periodic payment?

A. No. For withholding purposes, amounts will be considered periodic payments even though a portion of each payment is treated as an amount not received as an annuity under § 1.72–2(b)(3) of the Income Tax Regulations.

f–17. Q. Is the payor of distributions under a funded nonqualified deferred compensation plan that are payable as an annuity and taxable under section 72 required to withhold under section 3405?

A. Yes. Section 31.3401(a)–1(b)(1)(i) of the Employment Tax Regulations provides that any amounts received as an annuity and taxable under section 72 are excepted from the general definition of wages. Therefore, to the extent that section 402(b) requires that distributions from nonqualified plans which are received as an annuity are taxable under the rules of section 72, section 3405 will apply. See, however, question a–18 for the rules relating to distributions from a nonqualified deferred compensation plan that are taxable under section 83. Therefore, whether the payor or plan administrator of a nonqualified plan is required to withhold under section 3402 or section 3405 depends upon what section of the Code governs the taxation of amounts contributed or distributed.

f–18. Q. Are amounts paid in connection with a partial or complete surrender or upon the maturity or endowment of a commercial annuity subject to the new withholding rules?

A. Yes. Amounts paid in connection with a partial or complete surrender or upon the maturity or endowment of a commercial annuity are subject to the new withholding rules to the extent that they are designated distributions. Thus, withholding is required on the complete or partial surrender of an annuity, life insurance or endowment contract to the extent they are designated distributions.

f–19. Q. Are amounts paid in connection with a partial surrender of a commercial annuity periodic payments?

A. Generally, no. Unless the amount paid in connection with the partial surrender is one of a series of payments payable over a period of greater than one year and taxable under section 72 as an amount received as an annuity, the amount paid is not a periodic payment.

f–20. Q. Are amounts paid in connection with a partial or complete surrender of an annuity contract subject to the new withholding rules?

A. Yes. Amounts paid in connection with a partial or complete surrender of an annuity contract are subject to the new withholding rules to the extent that they are designated distributions.

f–21. Q. Is it reasonable to believe that amounts distributed in connection with a commercial annuity that was acquired on or before August 13, 1982, or are otherwise described in section 72(e)(5), which are not treated as amounts received as an annuity under section 72, will not be includible in the gross income of the recipient?

A. Generally, yes. Under the rules of section 72(e) prior to the passage of TEFRA, amounts not received as an annuity were not taxable until the investment in the contract was recovered. Thus, for distributions that are not received as an annuity under a commercial annuity contract acquired on or before August 13, 1982, it is reasonable to believe that amounts distributed are not includible in the payee's gross income to the extent they represent unrecovered investment in the contract. The special transitional rule of question a–33, available for plan administrators, may be used until December 31, 1983, by payors of commercial annuities who lack records with regard to the payee's unrecovered investment in the contract.

f–22. Q. For commercial annuity contracts entered into after August 13, 1982, which are not described in section 72(e)(5), is it reasonable to believe that amounts distributed, which are not amounts received as an annuity under section 72, are not includible in gross income?

A. Generally, no. TEFRA amended section 72(e) to provide that amounts not received as an annuity will be includible in gross income until all earnings or other amounts that are not part of the investment in the contract have been distributed. Thus, it is not reasonable to believe that amounts distributed in connection with a commercial annuity contract entered into after August 13, 1982, are excludible from gross income until all earnings or other amounts that are not part of the investment in the contract have been distributed. This new rule does not apply to distributions from commercial annuities described in section 72(e)(5). Question f–21 provides the proper rule with respect to distributions from commercial annuities described in section 72(e)(5).

f–23. Q. Is it reasonable to believe that amounts involved solely in connection with an exchange of commercial annuities under section 1035 of the Code will not be includible in the gross income of the recipient?

A. Yes. Designated distributions include only amounts that it is reasonable to believe are includible in the gross income of the recipient. In the case of a commercial annuity exchange under section 1035 in which no cash or other property is exchanged, it is reasonable to believe that no portion is includible in the gross income of a recipient. An annuity exchange includes an exchange of annuity, endowment, or life insurance contracts issued by a life insurance company licensed to do business under the laws of any State. Thus, such exchanges are not subject to the withholding rules of section 3405. However, see question e–8 concerning recordkeeping requirements with respect to the nontaxable exchange of commercial annuity contracts under section 1035.

f–24. Q. Is it reasonable to believe that amounts distributed in connection with a surrender of a life insurance or endowment contract, or in connection with an exchange of life insurance or endowment contracts in which cash or other property is distributed, will not be includible in gross income?

A. Generally, no. Amounts distributed in connection with the surrender of a life insurance or endowment contract, or in connection with an exchange of life insurance or endowment contracts in which cash or other property is distributed are includible in income to the extent that the amount received exceeds the policyholder's investment in the contract. However, if a life insurance or endowment contract issued before August 13, 1982, is surrendered within ten years of the date of its issuance, or is exchanged within ten years of the date of its issuance, the payor may assume that no amounts are includible in the gross income of the policyholder if the cash or other property received by the policyholder in connection with the surrender or exchange of the life insurance or endowment contract does not exceed $10,000. If a life insurance or endowment contract issued before August 13, 1982, is surrendered or exchanged ten years or more after the date of its issuance, the payor may assume that no amounts are includible in the gross income of the policyholder if the cash or other property received by the policyholder in connection with the surrender or exchange of the life insurance or endowment contract does not exceed $5,000. If the payor utilizes the special rule in the two preceding sentences, the payor must notify the policyholder, at the time described in question d–4, that all or part of the amount distributed may be includible in the policyholder's gross income. See question f–23 for additional rules concerning certain exchanges of annuity contracts.

f–25. Q. Do the requirements of section 3405(d)(10), relating to the time at which notice must be provided, also apply to the time at which an election out of withholding may be made?

A. Generally, yes. For example, an individual may not at commencement of employment execute an election out of withholding to be honored by a plan administrator or payor when the individual terminates employment and receives a distribution from a deferred compensation plan. See, however, question f–13 for a special rule applicable to certain annuity contracts.

f–26. Q. If a payor provided notice prior to January 1, 1983, but failed to include all of the information required by question d–18, may the abbreviated notice of question d–27 be supplied when making the first payment?

A. Yes, as long as the abbreviated notice contains all of the information required by question d–18 that was not supplied with the earlier notice.

f–27. Q. When must notice of the right to elect not to have withholding apply be given as to designated distributions from an individual retirement account (IRA) described in section 408(a) that is payable on demand even though payments are scheduled to be made over a period greater than one year?

A. Under question f–15, designated distributions from an IRA that are payable upon demand are treated as nonperiodic distributions subject to withholding at the 10 percent rate even if the distributions are paid over a certain period. Section 3405(d)(10)(B)(i) requires the payor of a nonperiodic distribution to transmit to the payee notice, at the time of the distribution or at such earlier time as may be provided in regulations, of the right to elect not to have withholding apply. If distributions from an IRA have begun and are scheduled to be made at quarterly or more frequent intervals, then, in lieu of providing a notice at the time of each distribution, the payor may furnish a blanket notice applicable to all such distributions that are expected to be made to the payee from the account during a calendar year. Such a blanket notice must be furnished at a reasonable time before the first payment made in the calendar year to which the notice relates, except that a blanket notice relating to distributions from an IRA during 1983 may be made by the later of October 1, 1983, or the date of the first designated distribution from the IRA.

G. DELAY PROCEDURES

g–1. Q. When does the new law take effect?

A. In general, withholding is required on any designated distributions made after December 31, 1982.

g–2. Q. Is there a penalty for failure to withhold under section 3405 on designated distributions made after December 31, 1982?

A. Yes. In general, section 6651 governs the failure to file a return and to withhold tax under section 3405.

g–3. Q. Are there any circumstances under which the withholding and notice requirements of section 3405 may be delayed to a date later than January 1, 1983?

A. Yes. The Secretary has authority to delay, but not beyond June 30, 1983, the application of these withholding provisions to any payor or plan administrator if the payor or plan administrator can establish that he is unable to comply with these provisions without undue hardship.

g–4. Q. Under what circumstances may a payor or plan administrator who is experiencing undue hardship in complying with section 3405 delay implementation of the notice and withholding requirements?

A. For those payors and plan administrators who experience undue hardship in complying with the provisions of section 3405, the withholding and notice requirements of section 3405 may be delayed so long as undue hardship exists up to July 1, 1983.

g–5. Q. Must approval be obtained from the Internal Revenue Service to be entitled to the delay referred to in question g–4 if the delay will be no later than April 1, 1983?

A. No. If a payor or plan administrator can establish that undue hardship would result if required to comply with the provisions of this section before April 1, 1983, prior approval from the Internal Revenue Service is not required and should not be requested. For purposes of this delay up to April 1, 1983, undue hardship will be presumed to exist, in the absence of bad faith, as long as the payor or plan administrator can establish that at least one of the conditions listed in question g–6 is present. The payor or plan administrator should prepare and retain a statement of undue hardship as described in question g–9 and should maintain any documents necessary to support the representations made in that statement.

g–6. Q. What constitutes undue hardship?

A. For purposes of these delay procedures, the term ''undue hardship'' generally means more than an inconvenience or increased costs to the payor or plan administrator. In the case of a payor or plan administrator who complies with the notice and withholding requirements of section 3405 on or before April 1, 1983, undue hardship will be presumed to exist if one or more of the following conditions is present:

(1) The payor or plan administrator encounters significant delay or other substantial difficulty in obtaining authorization for funds to develop forms, to mail notices, to process responses, to develop new computer programs, or to obtain and train personnel to implement withholding.

(2) The payor or plan administrator incurs substantial increases in unbudgeted costs to develop forms, to mail notices, to process responses, to develop new computer programs, or to obtain and train personnel.

(3) There is difficulty in obtaining trained personnel, including professional or semi-professional individuals, whose skills are necessary to implement withholding.

(4) Training new or present employees or hiring new employees to implement withholding would cause substantially increased costs or would disrupt

the payor's or plan administrator's operations, and such disruption or increased costs would not occur if withholding were implemented at a later date.

(5) Plan benefits change due to a collective bargaining agreement concluded between October 1, 1982, and April 1, 1983.

(6) A payor who provided notice prior to January 1, 1983, receives a substantial number of inquiries from payees. These inquiries indicate the payees' lack of understanding of the new withholding provisions and the payor cannot answer all questions and receive responses by January 1, 1983.

(7) The payor or plan administrator is unable to implement withholding on account of the occurrence of an event, such as fire, flood, earthquake, explosion, or strike, beyond the control of the payor or plan administrator.

(8) The payor or plan administrator is scheduled to install a new data processing hardware package or system between December 1, 1982, and July 1, 1983, that will be used for the process of pension withholding.

An examble of a circumstance not considered as resulting in undue hardship would be changes in the withholding tables effective July 1, 1983.

The following examples illustrate situations in which an undue hardship that will permit delay in implementation of the notice and withholding provisions exists:

Example 1. A is the payor and plan administrator of a deferred compensation plan that is the subject of a collective bargaining agreement. The collectively bargained plan has fewer than 100 participants receiving annuity payments. All of A's available budget is scheduled to be used to pay plan benefits and administrative costs, and no funds are available to implement the new withholding requirements. A must obtain authorization to expend funds to implement withholding. Meetings at which A can obtain such authorization are held August 1 and February 1 of each year. After obtaining authorization on February 1, 1983, A will need to develop and mail withholding notices and elections, process responses and determine the amount to be withheld from each payee's annuity payment. A can implement withholding on April 1, 1983, without substantially disrupting its operations, but earlier implementation would disrupt its normal operations. Under these facts, A experiences undue hardship until at least April 1, 1983, as a result of the circumstances described in items (1) and (4) of question g–6.

Example 2. B, a bank, is a payor of pensions and annuities under plans described in section 401(a). The plan administrators of all these plans have transferred liability to B for withholding under section 3405. After T.D. 7839, relating to withholding from pensions, annuities and other deferred income, was published in the Federal Register on October 14, 1982, B determines that the withholding provisions can be implemented before April 1, 1983, on a reasonaable schedule, without substantial increases in costs or disruption of daily bank operations, according to the following schedule:

(a) B's counsel analyzes regulations and reports requirements to operations personnel; operations personnel develop new Forms, which are reviewed and revised by management and legal personnel; new forms are printed; personnel begin reprogramming computers, 8 weeks (Dec 9, 1982).

(b) Forms distributed to branch offices, 1 week (Dec 16, 1982).

(c) Forms mailed to payees, 1 week (Dec 23, 1982).

(d) Time allowed for response to mailing of notices, answering questions, mailing follow-up notices to payees, 6 weeks (Feb 3, 1983).

(e) Withholding calculated and entered into payment system, 6 weeks (Mar 17, 1983).

Total: 22 weeks.

Implementation is scheduled to begin March 17, 1983. Implementation prior to March 17, 1983, would substantially increase costs and would disrupt B's operations.

Under these facts, B experiences undue hardship under item (4) of question g–6, up to March 17, 1983, the scheduled date of implementation.

g–7. Q. If a payor or plan administrator qualifies for the delay described in question g–5, is there a procedure for requesting an additional delay up to July 1, 1983?

A. Yes. However, any request made for this additional delay will be considered on a case-by-case basis. It is anticipated these requests will be carefully scrutinized and generally will be granted only in circumstances where the payor or plan administrator can reasonably expect that more than one of the conditions described in question g–6 will exist on or after April 1, 1983, and up to July 1, 1983.

g–8. Q. How may a payor or plan administrator request this additional delay of up to 3 months for undue hardship?

A. The payor or plan administrator may request an additional delay of up to 3 months by filing in duplicate a written statement of undue hardship signed under penalties of perjury with the director of the service center where the payor or plan administrator files Form 941 or Form 941E. This written request must state on the envelope and at the top of the letter ‘‘PENSION WITHHOLDING: Undue Hardship’’ and must include all the information required in a statement of undue hardship as described in question g–9.

g–9. Q. What information must the statement of undue hardship include?

A. The statement of undue hardship must include the following information:

(1) The name, address, and taxpayer indentification number of the payor or plan administrator.

(2) A complete statement of the facts upon which the payor is relying to show why a delay beyond April 1, 1983, is warranted. This statement must include as many of the conditions of undue hardship listed in question g–6 as pertain to the payor or plan administrator.

(3) A schedule or plan of implementation showing dates on which the payor will implement the provisions of this section, with no date later than July 1, 1983. This schedule should provide a complete timetable that includes such items as development of forms, mailing of notices, time for responses, programming computers, and calculation of withholding.

(4) An explanation of the steps taken which demonstrate the payor’s or plan administrator’s good faith attempt to comply with these notice and withholding requirements.

g–10. Q. When must the plan administrator or payor file this request for delay and statement of undue hardship?

A. Payors or plan administrators must file the statement of undue hardship on or before March 1, 1983. However, no request for delay may be filed with the Internal Revenue Service before January 1, 1983.

g–11. Q. Who must request the delay?

A. The delay should be requested by the payor or plan administrator who is actually liable for withholding. Therefore, generally the payor should request the delay. However, in the case of a distribution from a plan described in section 401(a), section 403(a), or section 301(d) of the Tax Reduction Act of 1975, the plan administrator is liable for withholding and should request the delay unless the plan administrator has transferred liability for withholding to the payor under section 3405(c).

g–12. Q. If a plan administrator has not yet transferred liability for withholding under section 3405(c) or has inadequately transferred liability, and the payor requests a delay, will the request for delay be treated as if the plan administrator had requested it?

A. Yes.

g–13. Q. If a plan administrator and a payor both file requests for delay and statements of undue hardship with respect to the same plan, will there be two separate three-month extensions?

A. No. A request for delay will delay the effective date only up to three months and in no case will it extend it past July 1, 1983.

g–14. Q. What are the consequences for failure to file the request for delay and statement of undue hardship in a timely manner?

A. If the request for delay and statement of undue hardship are not filed in a timely manner, the payor or plan administrator will not be entitled to any delay beyond the delay to which he may be entitled under question g–5. This rule will not apply in the case of an event such as strike, fire, flood, earthquake, or explosion that occurs after March 1, 1983, if compliance with the withholding provisions would have been possible absent the occurrence of the event.

g–15. Q. Will a payor or plan administrator receive a response from the Internal Revenue Service as to whether a delay after April 1, 1983, has been granted?

A. Yes. Since these requests for delay will be reviewed on a case-by-case basis, the payor or plan administrator will receive a response by April 1, 1983, as to whether or not a requested delay has been granted. If the request for delay is denied by the director of the service center, the payor or plan administrator is required to begin withholding by the later of April 1, 1983, or 10 days from the date on the response.

No penalties will be imposed under section 6651 for failure to withhold between April 1, 1983, and the day 10 days from the date on the response.

g–16. Q. If the director of the service center grants a delay up to July 1, 1983, must the payor or plan administrator retain a copy of the response from the Internal Revenue Service?

A. Yes. In addition, the payor or plan administrator must attach a copy of the response to the first Form 941 or 941E filed after the response is received.

g–17. Q. If a plan administrator or payor begins withholding before April 1, 1983, or July 1, 1983, can the payee request a refund from the plan administrator or payor of the amounts withheld?

A. No. Because plan administrators and payors are required to comply with the withholding and notice requirements as soon as they no longer experience undue hardship, they cannot refund any amounts withheld to a payee, except as provided in the regulations under section 6413 (in the case of a mistake by the payor or plan administrator).

g–18. Q. If a payor or plan administrator properly files the statement of undue hardship and receives a delay as provided in question g–7, will withholding from payments made after the delay period be required to make up for amounts that would have been withheld if there had been no delay granted?

A. No. No catch-up withholding is required for plan administrators or payors who are entitled to a delay up to April 1, 1983, as provided in question g–5 or granted a delay up to July 1, 1983, as provided in question g–7. However, if a payor or plan administrator who is entitled to a delay up to April 1, 1983, as provided in question g–5, is not granted a delay up to July 1, 1983, but is unable to implement withholding until July 1, 1983, despite a good faith effort to comply, no penalties will be imposed under section 6651 if the payor or plan administrator withholds between July 1, 1983, and December 31, 1983, both the amounts required to be withheld during that period and the amounts that should have been withheld between April 1, 1983, and June 30, 1983.

g–19. Q. If a payor or plan administrator does not receive and is not otherwise entitled to a delay under these regulations, will withholding from future payments be required to make up for amounts that would have been withheld if there had been no delay?

A. Yes, to the extent possible. An example of a situation in which a payor or plan administrator would not be able to withhold enough from subsequent payments to satisfy pre-July 1, 1983, withholding obligations is one where the recipient of a single life annuity died on July 1, 1983, before the payor or plan administrator began to withhold income tax from the annuity. In addition, a payor or plan administrator would not be able to satisfy the pre-July 1, 1983, withholding requirements if the payee elects out of withholding before all of the make-up withholding has been accomplished.

g–20. Q. What are the consequences if the payor or plan administrator cannot establish undue hardship and does not comply on January 1, 1983?

A. In general, if the payor or plan administrator cannot establish undue hardship and fails to withhold beginning January 1, 1983, the payor or plan administrator will be liable for the tax that should have been withheld and, in addition, the penalties provided in section 6651 will apply. However, the payor or plan administrator will not be liable for penalties for failure to file a return and for failure to pay the tax if a good faith effort is made to comply, and if, to the extent possible, withholding from post-implementation payments is sufficient to satisfy the pre-implementation withholding obligation. Whether the payor or plan administrator has made a good faith effort to comply depends on the facts and circumstances of each case. The facts and circumstances that will be considered include, but are not limited to, those conditions listed in question g–6.

g–21. Q. If a payor or plan administrator is required to make up amounts that should have been withheld, must he withhold from the first subsequent payment the entire amount that should have been previously withheld?

A. No. A payor or plan administrator may withhold a proportional amount out of each subsequent payment made before January 1, 1984.

g–22. Q. Will the notice requirements of section 3405 apply before July 1, 1983, with respect to recipients of periodic payments that total less than $5400 per year?

A. No.

g–23. Q. Will the notice and withholding requirements of section 3405 apply before July 1, 1983, with respect to payments to nonresident alien individuals?

A. No.

g–24. Q. Does a payor or plan administrator who requested a delay prior to the publication of these procedures in the FEDERAL REGISTER *need to resubmit the request in light of these procedures?*

A. Yes. In order to be entitled to a delay, payors and plan adminstrators must follow the procedures required by these temporary regulations.

g–25. Q. Will the notice and withholding requirements of section 3405 apply before January 1, 1984, with respect to the exchange or complete or partial surrender of a commercial annuity under which the recipient had not irrevocably chosen, prior to January 1, 1984, to receive payments in the form of an annuity?

A. In the case of the exchange or complete or partial surrender of a commercial annuity under which the recipient had not irrevocably chosen, prior to January 1, 1984, to receive payments in the form of an annuity, the application of the notice and withholding provisions of this section may be delayed, so long as undue hardship exists, up to January 1, 1984. Prior approval from the Internal Revenue Service is not required for such delay, and should not be requested. For purposes of this delay, undue hardship will be presumed to exist, in the absence of bad faith, so long as the payor can establish that at least one of the conditions in question g–6 is present. The payor should prepare and retain a statement of undue hardship as described in question g–9 and should maintain any documents necessary to support the representations made in that statement.

[T.D. 7839, 47 FR 45868, Oct. 14, 1982; 47 FR 47241, Oct. 25, 1982; as amended by T.D. 7858, 47 FR 54066, Dec. 1, 1982; 47 FR 57021, Dec. 22, 1982; T.D. 7904, 48 FR 35091, Aug. 3, 1983; 48 FR 36449, Aug. 11, 1983]

PART 35a—TEMPORARY EMPLOYMENT TAX REGULATIONS UNDER THE INTEREST AND DIVIDEND TAX COMPLIANCE ACT OF 1983

Sec.

AUTHORITY: 26 U.S.C. 7805; §35a.3406–2 also issued under 26 U.S.C. 3406(c)(3)(D) and 3406(i).

§35a.3406–2 Imposition of backup withholding for notified payee underreporting of reportable interest or dividend payments.

(a) *Requirement that a payor backup withhold due to a notified payee underreporting*—(1) *In general.* Except as otherwise provided in paragraph (a)(5) of this section, backup withholding under section 3406(a)(1)(C) applies to any reportable interest or dividend payment (as defined in section 3406(b)(2) and paragraph (a)(4) of this section) made to a payee, if the Internal Revenue Service or a broker (as defined in section 3406(h)(5) and paragraph (a)(7) of this section and pursuant to section 3406(d)(2)(B)(ii)(III)) notifies a payor (as defined in section 3406(h)(4) and in paragraph (a)(6) of this section) that the payee is subject to backup withholding due to a notified payee underreporting (as defined in paragraph (a)(2) of this section). The payor is required under section 3406(c)(4) and paragraph (c)(1) of this section to inform the payee that backup withholding under section 3406(a)(1)(C) has begun. The requirements for the notice that a payor must send to a payee are set forth in paragraph (c) (2) and (3) of this section. The period for which backup withholding is required due to a notified payee underreporting is described in section 3406(e)(3)(A) and in paragraph (e) of this section. See section 3406(c)(3) and paragraph (g) of this section for the rules regarding how a payee may obtain a determination from the Internal Revenue Service that withholding under section 3406(a)(1)(C) be stopped or not started.

(2) *Definition of notified payee underreporting.* The term ''notified payee underreporting'' means that the Internal Revenue Service has—

(i) Determined that there was a payee underreporting as defined in paragraph (a)(3) of this section,

(ii) Mailed at least four notices to the payee (over a period of at least 120 days) with respect to the underreporting as prescribed in paragraph (f)(1) of this section, and

(iii) Assessed any deficiency attributable to the underreporting in the case of any payee who has filed a return.

(3) *Definition of a payee underreporting.* The term ''payee underreporting'' means that the Internal Revenue Service has determined, for a taxable year, that—

(i) A payee failed to include in his return of tax under chapter 1 of the Internal Revenue Code for such year any portion of a reportable interest or dividend payment required to be shown on such tax return, or

(ii) A payee may be required to file a return for such year and to include a reportable interest or dividend payment in such return, but failed to file such return.

See paragraph (a)(5) of this section for certain payments to be taken into account in determining whether there is payee underreporting even though those payments may not be defined as reportable interest or dividend payments in paragraph (a)(4) of this section or even though backup withholding under section 3406(a)(1)(C) may not apply to such payments.

(4) *Definition of a reportable interest or dividend payment*—(i) *In general.* See section 3406(b)(2), A–2 of § 35a.9999–1, A–5 of § 35a.9999–3, and A–15 of § 35a.9999–2 for the definition of reportable interest or dividend payment.

(ii) *Exceptions*—(A) *Patronage dividends.* Patronage dividends are treated as reportable interest or dividend payments for purposes of backup withholding under section 3406(a)(1)(C) only if 50 percent or more of the reportable amount is paid in money or by qualified check (as defined in section 1388(c)(4)), and then only to the extent that the payment is in money or by qualified check. See the second paragraph in A–10 of § 35a.9999–3 for an example of how this rule applies.

(B) *Window payments.* Pursuant to section 3406(b)(7), window payments as defined in A–42 of § 35a.9999–1 and A–9 of § 35a.9999–2 are not treated as reportable interest or dividend payments for purposes of backup withholding under section 3406(a) (1)(C).

(5) *Reportable interest or dividend payments excluded from backup withholding.* The following reportable interest or dividend payments are not subject to backup withholding:

(i) *Certain dividends.* Certain dividend payments as defined in A–9 of § 35a.9999–3.

(ii) *Minimal payments.* Minimal payments as defined in A–19 of § 36a.9999–2 if the payor elects not to impose backup withholding on such amounts.

(iii) *Original issue discount.* Original issue discount as defined in section 1273, unless there is a payment in cash. See A–15 of § 35a.9999–2.

(iv) *Payments subject to other withholding.* Payments already subject to withholding under another provision of the Internal Revenue Code.

Reportable minimal payments (to the extent reported on an information return), patronage dividends, original issue discount, and window payments shall be taken into account in determining whether underreporting (as defined in paragraph (a)(3) of this section) has occurred, even though those payments may not be defined as reportable interest or dividend payments under paragraph (a)(4) of this section or even though backup withholding under section 3406(a)(1)(C) may not apply to such payments.

(6) *Definition of payor.* See section 3406(h)(4), A–41 of § 35a.9999–1, and A–1 of § 35a.9999–3 for the definition of payor. The term payor includes a broker who holds an instrument in street name.

(7) *Definition of broker.* See section 3406(h)(5) for the definition of broker.

(b) *Notice to payors and brokers regarding backup withholding*—(1) *Notice from the Internal Revenue Service.* The Internal Revenue Service will notify—

(i) Payors to begin backup withholding on reportable interest or dividend payments due to a notified payee underreporting pursuant to section 3406(a)(1)(C); and

(ii) Brokers pursuant to section 3406(c)(5) that a payee is subject to backup withholding under section 3406(a)(1)(C).

(2) *Notice from a broker.* A broker who receives a notice from the Internal Revenue Service that a payee is subject to backup withholding due to a notified payee underreporting and through whom the payee subsequently acquires a readily tradable instrument (as defined in section 3406(h)(6)) with respect to which the broker is not the payor is required to notify the payor of that instrument that the payee is subject to backup withholding under section 3406(a)(1)(C) in the time and manner provided in A–41 of § 35a.9999–1.

(3) *Accounts subject to backup withholding.* (i) *In general.* After receiving notice from the Internal Revenue Service or from a broker, as provided in section 3406(d)(2)(B) and paragraphs (b)(1)(i) and (2) of this section, that a payee is subject to backup withholding under section 3406(a)(1)(C), payors are required to withhold 20 percent of all reportable interest or dividend payments subject to backup withholding made with respect to all accounts of the payee.

(ii) *Joint accounts.* Payors are required to withhold on joint accounts if the payee subject to backup withholding under section 3406(a)(1)(C) is the first person listed on the account at the time the payor receives the notice to begin backup withholding. Backup withholding shall continue to apply to reportable interest and dividend payments made to that account even if the order of the names on the account is subsequently changed, provided that the name of the payee subject to backup withholding remains on the account.

(iii) *Exception.* Payors are not requied to withhold on reportable interest or dividend payments made with respect to an account of the payee that could not be located with reasonable care. The payor will be considered to have exercised reasonable care if the payor uses the name and taxpayer identification number (or names and taxpayer identification numbers if a joint return was filed by the payees) provided on the notice from the Internal Revenue Service or from a broker as prescribed in paragraphs (b) (1)(i) and (2) of this section and in certain circumstances identified in this paragraph (b)(3)(iii) any account numbers provided by the Internal Revenue Service in locating all accounts of a payee or payees. If a payee uses a different name on an account than the name stated on the notice from the Internal Revenue Service or from a broker (for instance, due to marriage or adoption) and the payor can associate both names with the payee using records kept in the ordinary course of business, the payor will be treated as exercising reasonable care if the payor uses both names to locate accounts of the payee. If the taxpayer identification number is not provided to the payor or broker by the Internal Revenue Service, or if the taxpayer identification number provided by the Internal Revenue Service does not match the taxpayer identification number of the payee on the records that the payor or broker maintains in the ordinary course of business, the payor or broker is required to use any account numbers provided by the Internal Revenue Service to identify the payee and the payee's taxpayer identification number. This information must be used by the payor to locate other accounts of the payee and by the broker to locate the payors with respect to whom the payee subsequently acquires a readily tradable instrument through that broker.

(c) *Notice from payors of backup withholding due to a payee underreporting*—(1) *In general.* A payor is required under section 3406(c)(4) to notify the payee in accordance with paragraph (c)(2) of this section that backup withholding has begun because of a notified payee underreporting. Payors who are notified by a broker that a payee is subject to backup withholding under section 3406(a)(1)(C) are also required to send the notice in accordance with paragraph (c)(2) of this section. As a result, the notice requirements provided in A–39 of § 35a.9999–1 and in the appendix to § 35a.9999–2 shall not apply to those payors notified by a broker that a payee is subject to backup withholding under section 3406(a)(1)(C). The payor must send the notice required by paragraph (c)(2) of this section to the payee no later than 15 days after the date that the payor makes the first payment subject to backup withholding under section 3406(a)(1)(C). The payor must send the notice of backup withholding by first-class mail to the payee at his last known address. Rules similar to the rules in A–17, A–18, A–19, and A–20 of § 35a.9999–1 shall apply to the requirement to provide notice by first-class mail.

(2) *Form of the notice to the payee with respect to notified payee underreporting.* The notice to the payee required by paragraph (c)(1) of this section must state—

(i) That the Internal Revenue Service has given notice that the payee has underreported reportable interest or dividends;

(ii) That, as a result of such underreporting, the payor is required under section 3406(a)(1)(C) of the Internal Revenue Code to withhold 20 percent of reportable interest and dividend payments made to the payee no later than the close of the day 30 days after the date that the payor received the notice;

(iii) The date that the payor received the notice to begin backup withholding under 3406(a)(1)(C);

(iv) That the payee must obtain a determination from the Internal Revenue Service in order to stop the backup withholding under section 3406(a)(1)(C); and

(v) That while he is subject to backup withholding due to payee underreporting, the payee may not certify to a payor making reportable interest or dividend payments (or to a broker acquiring a readily tradable instrument for the payee) that he is not subject to backup withholding under section 3406(a)(1)(C). See section 3406(a)(1)(D) for the backup withholding rules with respect to a payee's failure to make the certification under section 3406(a)(1)(D).

(3) *Exceptions.* A notice provided to a payee on or before April 23, 1987, will be deemed to satisfy the provisions of paragraph (c)(2) of this section if it informs the payee that the payor has been instructed by the Internal Revenue Service to start backup withholding on reportable interest or dividend payments to the payee. If a payor who has started backup withholding due to notified payee underreporting on or before April 23, 1987, has not provided adequate notice to the payee on or before April 23, 1987, then the payor must provide notice to the payee in the manner prescribed in paragraph (c)(2) of this section by the date that is 45 days after April 23, 1987.

(d) *Notice to stop backup withholding*—(1) *In general.* The Internal Revenue Service will provide written certification to the payee that backup withholding is to stop and will notify the payors who were contacted pursuant to paragraph (b) of this section to stop withholding after the Internal Revenue Service makes a determination under paragraph (g) of this section that backup withholding with respect to a payee should stop. The Internal Revenue Service will also notify the brokers who were contacted pursuant to paragraph (b) of this section that the payee is no longer subject to backup withholding under section 3406(a)(1)(C) and that the brokers are no longer obligated to provide notices to payors under paragraph (b)(2) of this section. A broker who receives certification under this section from the Internal Revenue Service is not required to provide the certification to any payors to which the broker has previously provided the notice required under paragraph (b)(2).

(2) *Date notice to stop withholding will be provided*—(i) *Underreporting corrected or bona fide dispute.* If the Internal Revenue Service makes a determination as set forth in paragraph (g)(1) (ii) or (iv) of this section during the 12-month period ending on October 15, of any calendar year, the Internal Revenue Service will provide the certification or notice required by paragraph (d)(1) of this section no later than December 1 of such calendar year.

(ii) *No underreporting or undue hardship.* If the Internal Revenue Service makes a determination as set forth in paragraph (g)(1) (i) or (iii), the Internal Revenue Service will provide the notices required by paragraph (d)(1) of this paragraph no later than the 45th day after the day on which the Internal Revenue Service makes its determination.

(e) *Period during which withholding is required*—(1) *In general.* Upon receiving notice from the Internal Revenue Service after April 23, 1987, to begin backup withholding under section 3406(a)(1)(C) or notification from a broker stating that the payee is subject to backup withholding under section 3406(a)(1)(C), the payor must impose backup withholding on all reportable interest and dividend payments made to the payee during the period beginning after the close of the 30th day after the day on which the payor receives the notice provided in paragraph (b) (1)(i) or (2) of this section and ending as of the close of the day before the stop date (as described in paragraph (e)(2) of this section). Pursuant to section 3406(e)(5)(C), the payor may elect to begin backup withholding at any time during the 30-day period described in this paragraph.

(2) *Stop date*—(i) *Underreporting corrected or bona fide dispute.* In the case of a determination that the underreporting has been corrected or that a bona fide dispute exists (as defined in paragraphs (g)(1)(ii) or (iv) of this section), the stop date is—

(A) January 1 following the 12-month period ending on October 15th of any calendar year in which the determination has been made or, if later,

(B) The day that is 30 days after the earlier of—

(*1*) The date on which the payor receives written notification from the Internal Revenue Service (under paragraph (d)(2) of this section) that withholding is to stop; or

(*2*) The date on which the payor receives a copy of the written certification provided to the payee by the Internal Revenue Service that withholding is to stop.

(ii) *No underreporting or undue hardship.* In the case of a determination that no payee underreporting occurred or that an undue hardship exists or could exist (as defined in paragraph (g)(1)(i) or (iii) of this section), the stop date is that date specified in paragraph (e)(2)(i)(B) of this section.

(iii) *Payor election to shorten or eliminate grace period.* The payor with respect to any payee may elect to determine the stop date without regard to the grace period provided in section 3406(e)(5)(B) (*i.e.*, without regard to the words ‘‘the day that is 30 days after’’ in paragraph (e)(2)(i)(B) of this section) or by substituting a shorter grace period.

(iv) *Examples.* The provisions of paragraph (e)(2)(i) may be illustrated by the following examples:

Example 1. The Internal Revenue Service makes a determination by October 15, 1987, that any underreporting with respect to A has been corrected. X, a payor who has been notified to backup withhold on payments of interest to A due to notified payee underreporting, receives written notice from the Internal Revenue Service on December 1, 1987, informing X that A is no longer subject to backup withholding under section 3406(a)(1)(C) and that X must stop backup withholding as of the close of December 31, 1987, or if later, the earlier of the close of the day 30 days after receipt of the notice from the Internal Revenue Service or receipt of the copy of the written certification provided to the payee by the Internal Revenue Service. The stop date, as provided in paragraph (e)(2)(i)(A) of this section, is January 1, 1988, and the payor must stop backup withholding as of the close of December 31, 1987.

Example 2. Assume the same facts as in *Example 1* except that X, due to a change of address or for other reasons, does not receive the notice from the Internal Revenue Service to stop backup withholding until December 15, 1987. In addition, A does not provide X with a copy of the certification that was provided to A by the Internal Revenue Service until December 15, 1987. The stop date, as provided in paragraph (e)(2)(i)(B) of this section, is January 14, 1988 (30 days after December 15, 1987), because that date is later than January 1, 1988. However, if a payor elects pursuant to section 3406(e)(5)(C) and paragraph (e)(2)(iii) of this section to determine the stop date without regard to that 30-day grace period, the stop date is January 1, 1987.

Example 3. Assume the same facts as in *Example 2* except that on December 10, 1987 (rather than on December 15, 1987), A provides X with a copy of the certification from the Internal Revenue Service. The stop date, as provided in paragraph (e)(2)(i)(B) of this section, is January 9, 1988 (30 days after December 10, 1987), because that date is earlier than January 14, 1988 (30 days after the day X received notice from the Internal Revenue Service), but later than January 1, 1988.

(f) *Notice to payees from the Internal Revenue Service*—(1) *Notice period.* After the Internal Revenue Service determines that a payee underreporting exists as defined in paragraph (a)(3) of this section, the Internal Revenue Service, pursuant to section 3406(c)(1)(B), will mail to the payee at least four notices over a period of at least 120 days (hereafter referred to as the ''notice period'') before payors and brokers will be notified that the payee is subject to backup withholding due to a notified payee underreporting as provided in paragraph (b)(1) of this section. The notices may be incorporated with other notices provided to the payee by the Internal Revenue Service.

(2) *Payee subject to withholding.* After the Internal Revenue Service provides the notices described in paragraph (f)(1) of this section, the Internal Revenue Service will send the notices required by paragraph (b) of this section unless—

(i) A payee obtains a determination under paragraph (g) of this section, or

(ii) In the case of a payee who has filed a tax return, the Internal Revenue Service has not assessed the deficiency attributable to the underreporting.

(3) *Disclosure of names of payors and brokers.* The Internal Revenue Service pursuant to section 3406(c)(5) may require a payee subject to backup withholding due to a notified payee underreporting to disclose the names of all of his payors of reportable interest or dividend payments and the names of all of the brokers with whom the payee has accounts which may involve reportable interest or dividend payments. To the extent required in the request from the Internal Revenue Service, the payee shall also provide his account numbers and other information necessary to identify the payee's accounts.

(4) *Backup withholding certification.* Once a payee receives a final notice from the Internal Revenue Service notifying him that his reportable interest or dividend payments are subject to backup withholding due to notified payee underreporting under section 3406(a)(1)(C), the payee shall not certify to any payor or broker, under penalties of perjury, that he is not subject to backup withholding under section 3406(a)(1)(C). See paragraph (k)(2) of this section for the penalties that will apply to a payee who makes a false certification. The payee may not make the certification until the payee receives the certification provided in paragraph (d)(1) of this section from the Internal Revenue Service advising the payee that he is no longer subject to backup withholding under section 3406(a)(1)(C) (as provided in A–33 of §35a.9999–1). See A–37 of §35a.9999–1 for the rule applicable to a payor who makes reportable interest or dividend payments to a payee who fails to certify that he is not subject to backup withholding due to notified payee underreporting.

(g) *Determination by the Internal Revenue Service that backup withholding should not start or should be stopped*—(1) *In general.* A payee may prevent backup withholding from starting or stop it once it has started if, for the taxable year with respect to which there is a notified payee underreporting and any other taxable payee—

(i) Shows that there was no payee underreporting (as provided in paragraph (g)(2) of this section);

(ii) Corrects any payee underreporting (as provided in paragraph (g)(3) of this section);

(iii) Shows that backup withholding will cause or is causing an undue hardship (as defined in paragraph (g)(4) of this section) and that it is unlikely that the payee will underreport interest or dividend payments again; or

(iv) Shows that a bona fide dispute exists as to whether any underreporting has occurred (as provided in paragraph (g)(5) of this section).

(2) *No underreporting.* A payee may show that no underreporting of interest or dividends exists by presenting receipts or other satisfactory documentation to the Internal Revenue Service showing that all taxes relating to such payments were reported and paid timely or evidence showing that the payee did not have to file a return for the taxable year in question or that the underreporting determination is based upon a factual, clerical, or other mistake.

(3) *Correcting any payee underreporting*—(i) *Before issuance of a statutory notice of deficiency.* Before a statutory notice of deficiency is issued to a payee pursuant to section 6212, the payee may correct underreporting by filing a return if one was not previously filed and paying taxes, penalties, and interest due with respect to any underreported interest or dividend payments.

(ii) *After issuance of a statutory notice of deficiency.* After a statutory notice of deficiency is issued to a payee, the payee may correct underreporting at any time by filing a return if one was not previously filed and paying the entire deficiency and any other taxes including penalties and interest attributable to any payee underreporting of interest or dividend payments. Thus, for example, a payee may correct underreporting after assessment of a deficiency by paying the entire assessment with respect to that deficiency and any other taxes including penalties and interest attributable to any payee underreporting of interest or dividend payments for other taxable years.

(4) *Undue hardship.* A determination of undue hardship will be based on the overall impact to the payee of having 20 percent of reportable interest and dividend payments withheld. Factors that will be considered in determining whether backup withholding causes undue hardship include, but are not limited to, the following:

(i) Whether estimated tax payments, and other credits for current tax liabilities, or amounts withheld on employee wages or pensions, in addition to backup withholding, would cause significant over-withholding;

(ii) The payee's health, including the payee's ability to pay foreseeable medical expenses;

(iii) The extent of the payee's reliance on interest and dividend payments to meet necessary living expenses and the existence, if any, of other sources of income;

(iv) Whether other income of the payee is limited or fixed (*e.g.*, social security, pension, and unearned income);

(v) The payee's ability to sell or liquidate stocks, bonds, bank accounts, trust accounts, or other assets, and the consequences of doing so;

(vi) Whether the payee reported and timely paid the most recent year's tax liability, including interest and dividend income; and

(vii) Whether the payee has filed a bankruptcy petition with the United States Bankruptcy Court.

In addition to the above factors, the Internal Revenue Service must conclude that it is unlikely that any payee underreporting will occur again.

(5) *Bona fide dispute.* The Internal Revenue Service may make a determination under this paragraph if there is a dispute between the payee and the Internal Revenue Service on a question of fact or law that is material to a determination under paragraph (g)(1)(i) and, based upon all the facts and circumstances, the Internal Revenue Service finds that the dispute is asserted in good faith by the payee and there is a reasonable basis for the payee's position. See the example provided in paragraph (j)(2)(ii) of this section for an illustration of this provision.

(h) *Requests for determinations*—(1) *In general.* A payee may request a determination under one or more of the provisions of paragraph (g) of this section. Following its review of a request for a determination under paragraph (g) of this section, the Internal Revenue Service will either provide the payee with a written certification as prescribed in paragraph (d) of this section if the evidence presented warrants the requested determination or will provide the payee with a written notice informing him that a determination was not made.

(2) *Determinations made during the notice period.* In general, if a determination is made during the notice period as defined in paragraph (f)(1) of this section, then the payee will not be subject to backup withholding due to a notified payee underreporting with respect to any taxable year for which a determination was made.

(3) *Determinations made after the notice period.* If a determination is made after the notice period, as defined in paragraph (f)(1) of this section, the Internal Revenue Service will provide a notice to payors and brokers, and a certification to the payee as provided in paragraph (d)(1) of this section.

(i) [Reserved]

(j) *Payees filing a joint return*—(1) *In general.* For purposes of section 3406(a)(1)(C), if payee underreporting is found to exist with respect to a joint return filed by a husband and wife, then the provisions of this section shall apply to the payees collectively. As a result, both payees will be subject to backup withholding on accounts in their individual names as well as accounts in their joint names. Either or both payees may satisfy the criteria for a determination that no payee underreporting exists, that the underreporting has been corrected, or that a bona fide dispute exists (as provided in paragraphs (g)(1) (i), (ii), or (iv) of this section). Both payees, however, must satisfy the criteria for a determination that backup withholding will cause or is causing undue hardship (as provided in paragraph (g)(1)(iii) of this section).

(2) *Exceptions*—(i) *Innocent spouse.* A spouse who files a joint return may obtain a determination that withholding should stop or not start with respect to payments made to his or her individual accounts, if the spouse—

(A) Shows that he or she did not underreport income because he or she is an innocent spouse as described in section 6013(e), or

(B) Shows that there is a bona fide dispute as to whether he or she is an innocent spouse and hence did not underreport income.

(ii) *Example.* The provisions of paragraph (j)(2)(i) may be illustrated by the following example:

Example. H and W filed a joint return in 1986 on which H failed to include $2,000 of interest income. In 1987, the Internal Revenue Service determined that a payee underreporting exists with respect to H and W for the 1986 tax year. After properly notifying H and W of the underreporting and assessing the tax, the Internal Revenue Service sent notices to payors to begin backup withholding on the joint and individual accounts of H and W and to brokers informing them that H and W are subject to backup withholding under section 3406(a)(1)(C) on their joint and individual accounts. W claims that she is an innocent spouse and requests a determination that she did not underreport interest or dividend income so that her individual accounts will not be subject to backup withholding.

The Internal Revenue Service questions her status as an innocent spouse. If the Internal Revenue Service determines, based upon all the facts and circumstances, that there is a reasonable basis for W's claim to be an innocent spouse and that the claim is made in good faith, W will have a bona fide dispute with the Internal Revenue Service. Consequently, the individual accounts of W will not be subject to further backup withholding due to a notified payee underreporting as provided in paragraph (g)(5) of this section.

The Internal Revenue Service will notify payors to stop backup withholding under section 3406(a)(1)(C) and brokers that W is no longer subject to backup withholding under section 3406(a)(1)(C) on W's individual accounts. Backup withholding will not restart on those accounts unless the Internal Revenue Service ultimately determines that W is not an innocent spouse. In that event the Internal Revenue Service will notify the payors to start backup withholding under section 3406(a)(1)(C) and the brokers that W is subject to backup withholding under section 3406(a)(1)(C) with respect to the individual accounts of W.

(iii) *Divorced or legally separated payee.* A payee who, at the time of the request for a determination under paragraph (g) of this section, is divorced or legally separated under state law may obtain a determination that undue hardship exists (or would exist) under paragraph (g)(1)(iii) of this section with respect to reportable interest and dividend payments made to his or her individual accounts if the divorced or legally separated payee satisfies the criteria for a determination under paragraph (g)(4) of this section.

(k) *Penalties*—(1) *Failure to withhold.* See A–2 of § 35a.9999–3 for rules relating to penalties applicable to a payor who fails to withhold on reportable interest and dividend payments made to a payee subject to backup withholding.

(2) *False certification*—(i) *Criminal penalty under section 7205(b).* If any individual willfully makes a false certification under section 3406(d) (1) or (2), then that individual shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(ii) *Civil penalty under section 6682*—(A) *In general.* In addition to any criminal penalty provided by law, if any individual makes a statement under section 3406 which results in a decrease in the amounts deducted and withheld under chapter 24 of the Internal Revenue Code and, as of the time the statement was made, there was no reasonable basis for the statement, the individual shall pay a penalty of $500 for the statement. The penalty is due upon notice and demand and pursuant to section 6682 collection is not subject to the deficiency procedures of subchapter B of chapter 63 of the Internal Revenue Code. See section 6682.

(B) *Waiver of penalty.* The payee may obtain a waiver (in whole or part) of the penalty imposed under section 6682(a) and paragraph (k)(2)(ii)(A) of this section if it is established to the satisfaction of the Internal Revenue Service that the taxes imposed under subtitle A of the Internal Revenue Code with respect to the payee for the taxable year in which the false certification was made are equal to or less than the sum of—

(*1*) The credits against taxes allowed by part IV of subchapter A of chapter 1 of the Internal Revenue Code, and

(*2*) The payments of estimated tax which are considered payments on account of such taxes.

(C) *Procedure for seeking a waiver.* To request a waiver under section 6682(b) and paragraph (k)(2)(ii)(B) of this section, the payee must submit to the Internal Revenue Service a written statement with supporting documents to establish all the facts necessary in order to obtain the waiver. The statement must be signed by the person that otherwise would be subject to the penalty imposed by section 6682(a) and paragraph (k)(2)(ii)(A) of this section and must contain a declaration that it is made under penalties of perjury.

(3) *Delay of assessment.* If a payee institutes or maintains a suit with the United States Tax Court primarily to delay assessment and the payee's position is frivolous or groundless, or the payee unreasonably failed to pursue available administrative remedies, the court may award up to $5,000 in damages under section 6673. The damages will be assessed against and collected from the payee in the same manner as the underlying tax.

(l) *Effective Date.* This section is effective until December 31, 1996.

[T.D. 8137, 52 FR 13432, Apr. 23, 1987, as amended at 60 FR 66134, Dec. 21, 1995; 61 FR 11308, Mar. 20, 1996]

§ 35a.9999–0 Effective date.

See § 31.9999–0 of this chapter for applicability dates for §§ 35a.9999–1 through 35a.9999–5.

[T.D. 8734, 62 FR 53494, Oct. 14, 1997]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 35a.9999–0 was added, effective Oct. 14, 1997, through Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was extended until Jan. 1, 2000.

§ 35a.9999–1 Questions and answers concerning the due diligence requirement and the certification requirements in connection with backup withholding and other related issues.

The following questions and answers principally concern the due diligence exception to the penalty on payors of reportable interest or dividend payments for failure to provide the payee's correct taxpayer identification number on certain information returns and the certification requirements in connection with backup withholding under the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369):

IN GENERAL

Q–1. What payors are subject to the new due diligence requirement with respect to their obligation to provide payees' correct *taxpayer identification numbers on information returns?*

A–1. Payors of reportable interest or dividend payments are subject to the new due diligence requirement.

Q–2. What is a reportable interest or dividend payment?

A–2. A reportable interest or dividend payment is a payment of interest, dividends, or patronage dividends that is of a kind, and to a payee, that is subject to information reporting.

IMPOSITION OF PENALTY FOR FAILURE TO PROVIDE A CORRECT TAXPAYER IDENTIFICATION NUMBER

Q–3. Is a payor subject to a penalty for failure to provide a correct taxpayer identification number on an information return with respect to a reportable interest or dividend payment if the payee has certified, under penalties of perjury, that the taxpayer identification number furnished to the payor is the payee's correct number, the payor provided that number on an information return, and the number is later determined not to be the payee's correct number?

A–3. No. A payor is not subject to a penalty for failure to provide the payee's correct taxpayer identification number on an information return, if the payee has certified, under penalties of perjury, that the taxpayer identification number provided to the payor was his correct number, and the payor included such number on the information return.

Q–4. Is a payor subject to a penalty for failure to provide a correct taxpayer identification number on an information return if the payee does not certify, under penalties of perjury, that the taypayer identification number provided to the payor is correct, and the number is later determined not to be the payee's correct number?

A–4. A payor is subject to a penalty if the taxpayer identification number of a payee provided on an information return is determined not to be the payee's correct number, unless the payor exercised due diligence in soliciting the payee's correct taxpayer identification number and in furnishing such number on the information return. See A–51 of § 35a.9999–3 for the general rule for the actions that a payor of an account or instrument that is not a pre-1984 account (as defined in A–34 of § 35a.9999–1 and A–20 of § 35a.9999–3) must take to exercise due diligence under section 6676(b).

DUE DILIGENCE DEFINED FOR PRE-1984 ACCOUNTS AND INSTRUMENTS

Q–5. In order for a payor of a reportable interest or dividend payment to be considered to have exercised due diligence in furnishing the correct taxpayer identification number of a payee with respect to a pre-1984 account or instrument, what actions must the payor take?

A–5. First, by the applicable date provided in A–6, the payor must send a separate mailing by first-class mail to any payee who has not previously certified, under penalties of perjury, that the taxpayer identification number furnished to the payor is the payee's correct number. This mailing must contain a notice that: (1) Informs the payee what a taxpayer identification number is, (2) advises the payee that he must provide a correct taxpayer identification number to the payor, (3) states that if the payee has not furnished a correct taxpayer identification number to the payor the payee may be subject to a $50 penalty and that payments to the payee may be subject to backup withholding starting on January 1, 1984, and (4) advises the payee how to provide a correct taxpayer identification number to the payor. The form of the notice is described in A–7. The payor must also include in the mailing a postage-prepaid reply envelope and a certification form on which the payee may certify, under penalties of perjury, that he is furnishing his correct taxpayer identification number to the payor. The specific requirements for the form of this certification are set forth in A–9 and A–10.

Second, in the case of a pre-1984 account or instrument for which the payee has provided no taxpayer identification number or for which the taxpayer identification number provided is obviously incorrect (*i.e.*, contains an incorrect number of digits), the payor must have commenced backup withholding on payments made after December 31, 1983.

Third, the payor must use the same care in processing taxpayer identification numbers provided by payees that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

Fourth, the payor must send a mailing in each year subsequent to 1983 to payees who have not by that time provided a taxpayer identification number under penalties of perjury. This mailing need not be sent separately from other mail to the payee. This mailing also need not contain a postage-prepaid reply envelope. The payor is required to process responses to this mailing in the same manner described in the preceding paragraph. See A–7A of this section for the rule for nonseparate annual mailings. See A–56 of this section for the actions that payors who failed to exercise due diligence as described in A–5 and A–6 and the related questions and answers on due diligence under this section on all or part of their pre-1984 accounts or instruments may take to be relieved of the penalty otherwise due under section 6676(b).

Q–6. In order to be considered to have exercised due diligence in soliciting the payee's taxpayer identification number, by what date must the payor send the separate mailing described in A–5 to a payee who has not previously provided his correct taxpayer identification number to the payor under penalties of perjury?

A–6. The separate mailing must be made on or before December 31, 1983, unless the payor complies with the alternative procedure set forth in the following two paragraphs.

A payor may defer the separate mailing referred to above, *Provided,* That the payor: (1) Sends a separate mailing by December 31, 1983, to all payees who have not furnished a taxpayer identification number to the payor or who have furnished an obviously incorrect number; (2) sends a mailing, which need not be separate from other mail, on or before December 31, 1983, to all other payees who have not previously provided their taxpayer identification numbers to the payor under penalties of perjury; and (3) sends, on or before March 31, 1984, a separate mailing to all payees who have not by that date certified under penalties of perjury that their taxpayer identification numbers provided to the payor are correct.

The separate and nonseparate mailing required in 1983 and the separate mailing required on or before March 31, 1984, must include the notice, certification form, and postage-prepaid reply envelope as required in A–5. Any separate mailing made in 1984 pursuant to the prior paragraph does not replace a 1984 nonseparate mailing that is otherwise required by the fourth paragraph of A–5.

Q–7. In what form should the payor notify the payee of the information set forth in A–5 and solicit the payee's correct taxpayer identification number, in order to satisfy the due diligence requirement with respect to a pre-1984 account or instrument?

A–7. The notice will satisfy the requirement of A–5 if it is conspicuous and contains language substantially similar to the following:

IMPORTANT NEW TAX INFORMATION

Under the Federal income tax law, you are subject to certain penalties as well as withholding of tax at a 20 percent rate if you have not provided us with your correct social security number or other taxpayer identification number. Please read this notice carefully.

You (as a payee) are required by law to provide us (as payor) with your correct taxpayer identification number. If you are an individual, your taxpayer identification number is your social security number. If you have not provided us with your correct taxpayer identification nunber, you may be subject to a $50 penalty imposed by the Internal Revenue Service. In addition, interest, dividends, and other payments that we make to you may be subject to backup withholding starting on January 1, 1984.

Backup withholding is different from the 10 percent withholding on interest and dividends that was repealed in 1983. If backup withholding applies, a payor is required to withhold 20 percent of interest, dividends, and other payments made to you. Backup withholding is not an additional tax. Rather, the tax liability of persons subject to backup withholding will be reduced by the amount of tax withheld. If withholding results in an overpayment of taxes, a refund may be obtained.

Enclosed is a postage-prepaid reply envelope in which you may return the enclosed form to furnish us your correct name and taxpayer identification number. Please sign the form and return to us.

SUBSEQUENT YEAR'S MAILING

Q–7A. In order for a payor of reportable interest or dividend payments to be considered to have exercised due diligence in soliciting a taxpayer identification number of a payee with respect to a pre-1984 account or instrument, what information is the payor required to include in the subsequent year's mailing (nonseparate annual mailings) described in the fourth paragraph of A–5 of § 35a.9999–1 to a payee who has not provided the payor with a certification, under penalties of perjury, that his taxpayer identification number is correct?

A–7A. The payor is required to include (1) an appropriately modified copy of the notice described in A–7 of § 35a.9999–1, (2) a Form W–9 or acceptable substitute form for the payee to provide a correct taxpayer identification number, and (3) a reply envelope (self-addressed) for the payee to return the Form W–9 or acceptable substitute form. However, for those subsequent mailings described in A–5 or A–6 made before the 1988 calendar year, the mailings should, but are not required to, contain the reply envelope.

Q–7B. In order to be considered to have exercised due diligence in soliciting the payee's certified taxpayer identification number, by what date must the payor of reportable interest or dividends mail the subsequent year's mailing described in the fourth paragraph of A–5 and in A–7A of this section to a payee of a pre-1984 account who has not certified, under penalties of perjury, that his taxpayer identification number is correct?

A–7B. The payor may send the mailing at any time during each year that a nonseparate annual mailing is required, but in no event later than December 31 of such year. Section 7503 shall apply in determining the time for sending the subsequent year's mailing if December 31 falls on a Saturday, Sunday, or a legal holiday.

Q–8. In order to be considered to have exercised due diligence, is a payor required to request the payee to return the form certifying that the taxpayer identification number provided to the payor is correct?

A–8. The payor may request the payee to sign and return the form irrespective of whether the taxpayer identification number shown for the payee is the payee's correct taxpayer identification number. Alternatively, the payor may request that the payee return the form only in the event that the taxpayer identification number shown for the payee is incorrect, or if no taxpayer identification number is shown. If the payor uses the alternative instruction described in the preceding sentence, the payor may make suitable changes to the last paragraph of the notice prescribed in A–7.

If, however, the payee does not return the form certifying his taxpayer identification number under penalties of perjury, the payor is required in each subsequent year to request the payee to provide his correct taxpayer identification number under penalties of perjury (until the payee so certifies his taxpayer identification number).

Q–9. What form may the payee use to certify that the taxpayer identification number provided to the payor is correct?

A–9. The Internal Revenue Service is currently preparing Form W–9 on which a payee may certify his taxpayer identification number under penalties of perjury. Form W–9 will be available in mid October upon request to any Internal Revenue Service district director.

Q–10 May a payor use a substitute form instead of Form W–9 for a payee to certify, under penalties of perjury, that the taxpayer identification number provided to the payor is correct?

A–10. Yes. A substitute form must include space for the payee to provide his name, address, and taxpayer identification number. The form also must include space for the payee to certify under, penalties of perjury, that he is furnishing his correct taxpayer identification number to the payor. The wording of the certification must be substantially similar to the following: ''Under penalties of perjury, I certify that the number shown on this form is my correct taxpayer identification number.'' If a payor uses a substitute form, the payor must provide either the Internal Revenue Service's instructions for Form W–9 or the substance of those instructions on or with the substitute form.

A signed copy of the Form 4029 or Form 8812 which contains the payee's name, address, and taxpayer identification number is deemed to be a substitute Form W–9 signed under penalties of perjury with respect to such number. However, the penalties associated with the penalties of perjury statement will not apply with respect to the taxpayer identification number on such form.

Q–11. In order to satisfy the due diligence requirement for pre-1984 accounts and instruments, is a payor required to send the mailing or mailings described in A–5 and A–6 to a payee who has previously furnished a taxpayer identification number to the payor, but who has not certified under penalties of perjury that the number provided to the payor is his correct taxpayer identification number?

A–11. Yes. A payor must send the mailing or mailings as required in A–5 and A–6 to any payee of a reportable interest or dividend payment who has not previously certified under penalties of perjury that the taxpayer identification number provided to the payor is the payee's correct number.

Q–12. May a payor satisfy the due diligence requirement by sending the separate mailings described in A–5 and A–6 with other mail the payor sends to the payee?

A–12. No. The separate mailing soliciting a certificate providing the payee's correct taxpayer identification number under penalties of perjury must not include any other communication to the payee. No material may be included in the separate mailing to the payee other than the notice, certification form and instructions, and postage-prepaid reply envelope.

Q–13. What action must a payor take with respect to accounts opened, or instruments acquired, subsequent to the date on which the payor prepares its list of payees for a mailing required in 1983 but prior to January 1, 1984?

A–13. The payor is required to send the mailing otherwise required to be made by December 31, 1983, to the payees of such accounts and instruments not later than January 31, 1984, unless the payee has previously provided his taxpayer identification number to the payor under penalties of perjury.

Q–14. If a payor makes no reportable interest or dividend payments to a payee with respect to an account or instrument during 1983, so that the payor is not required to make a 1983 information return with respect to the payee, is the payor nevertheless required to send the mailing or mailings to the payee as provided in A–5 and A–6?

A–14. The payor must *either:* (1) Send the mailing or mailings in the manner and within the time periods provided in A–5 and A–6 or (2) send the separate mailing described in A–5 to the payee not later than October 1 of the year in which a payment to the payee with respect to the account or instrument first becomes reportable, or, if later, within 30 days after such reportable payment occurs. Thus, if payments to the payee aggregate less than $10 in 1983, so that no 1983 information return is required, the payor need not make the mailing or mailings described in A–5 and A–6 within the time period provided in A–6; the payor must, however, make the separate mailing described in A–5 to the payee in the first year that payments to the payee aggregate $10 or more.

Q–15. If the payor has obtained a certificate, signed under penalties of perjury, setting forth the payee's taxpayer identification number within the applicable time period in A–6, must the payor nevertheless make the mailing or mailings described in A–5 and A–6 to the payee in order to be considered to have exercised due diligence in obtaining the payee's correct taxpayer identification number?

A–15. No. The mailing requirement applies only to a payee from whom the payor has not previously received a taxpayer identification number certified under penalties of perjury.

Q–16. May a payor obtain the form containing the payee's taxpayer identification number, signed under penalties of perjury, through a solicitation for such certification, in addition to the mailing or mailings required by A–5 and A–6, contained in a regular mailing to the payor's customers?

A–16. Yes. Such a certification may be obtained by a solicitation contained in a regular business mailing, by a request in person to a payee, or otherwise.

SPECIAL RULES RELATING TO THE DUE DILIGENCE REQUIREMENT FOR PRE-1984 ACCOUNTS AND INSTRUMENTS

Q–17. Is a payor considered to have exercised due diligence in soliciting the correct taxpayer identification number with respect to pre-1984 accounts and instruments if the payor sends the required mailings to the last known address of the payee?

A–17. Yes.

Q–18. Is a payor required to send the required mailing or mailings to a payee's last known address in a case where other mailings to that address have been returned to the payor because the address was incorrect and no new address has been provided to the payor?

A–18. No. In such a situation, the payor is required to handle the required mailings in the same manner that he handles other correspondence to the payee.

Q–19. Is a payor required to send the mailing or mailings to the payee of an account or instrument with respect to which there is currently a ''do not mail'' or a ''stop mail hold'' instruction pursuant to which the payor does not send any mail to the payee?

A–19. No. A payor must, however, handle all required mailings in the same manner that the payor handles other correspendence with the payee.

Q–20. Is a payor required to send mailings to all payees listed on a joint account or jointly held instrument?

A–20. No. A payor is required to send mailings only to the first person listed on an account or instrument because the taxpayer indentification number of that person is the one required to be provided on an information return.

Q–21. If a payor has a Form W–6 or W–7 exemption certificate, relating to the now-repealed 10 percent withholding on interest and dividends, signed by a payee, must the payor send the mailings to the payee?

A–21. Generally, yes. The Internal Revenue Service Forms W–6 and W–7 did not contain a certification, under penalties of perjury, that the taxpayer identification number furnished by the payee was correct. If, however, the payor utilized a substitute Form W–6 or W–7 on which a payee certified under penalties of perjury in the manner provided on Form W–9 or in A–10 that the taxpayer identification number furnished to the payor was the payee's correct number, the payor is not required to send mailings to the payee.

Q–22. Is a payor of reportable interest or dividends required to send mailings to a corporation or other exempt recipient?

A–22. No. A payment of interest to a corporation or other exempt recipient described in § 1.6049–4(c)(1)(ii) of the Income Tax Regulations generally is not subject to information reporting. Thus, mailings to such recipients are not required. Although a payment of dividends or patronage dividends to a corporation and certain other exempt recipients generally is subject to information reporting, payors are not required to send mailings to persons described in § 31.3452(c)–1 (b) through (p) of the Income Tax Regulations in order to satisfy the due diligence requirement. A payee shall be considered an exempt recipient for the purpose of this rule if (1) the payee could be treated as an exempt recipient without the requirement of filing an exemption certificate under § 31.3452(c)–1 (b) through (p) of the Income Tax Regulations or (2) the payee has provided the payor with a certificate, signed under penalties of perjury, stating that the payee is an exempt recipient described in one or more paragraphs of § 31.3452(c)–1 (b) through (p) of the Income Tax Regulations. Form W–9 may be used for the purpose of making this certification. Alternatively, the payor may provide the payee with a substitute form for such certification, provided that the form conforms generally to Form W–9 and the instructions related to exempt recipients.

Q–23. Is a payor required to send mailings to a payee with respect to an account established under the Uniform Gift to Minors Act?

A–23. Yes. The law requires that the social security number of the minor be provided to the payor with respect to accounts established under the Uniform Gift to Minors Act. If the minor does not have a social security number, the minor may obtain one by filing a Form SS–5 with a Social Security Administration Office. The form certifying that the minor's social security number provided is correct may be signed by the custodian of the Uniform Gift to Minors Act account.

Q–24. Is a payor required to send mailings to a payee where the account is held as a club account, bowling league account, recreation account, or other informal account?

A–24. Yes. The law requires that the taxpayer identification number of the organization be provided to the payor. If the club, league, or other informal association does not have an employer identification number, one may be obtained by filing a Form SS–4 with an Internal Revenue Service Center.

Q–25. Must the payee sign and return to the payor the form certifying the payee's correct taxpayer identification number under penalties of perjury in order for the payor to satisy the due diligence requirement?

A–25. No. The determination of whether the payor exercised due diligence in soliciting the payee's correct taxpayer identification number does not depend upon whether the payee signs and returns the form certifying his correct taxpayer identification number. If, however, the payee does not provide his taxpayer identification number to the payor under penalties of perjury, the payor is required to continue to solicit a certified taxpayer identification number from the payee in each year subsequent to 1983 until the payee has provided a certified taxpayer identification number. Such subsequent annual solicitations need not be made, however, in a separate mailing.

REQUIREMENT OF BACKUP WITHHOLDING

Q–26. If a payee does not provide a taxpayer identification number to the payor what action is a payor required to take?

A–26. Starting January 1, 1984, the payor is required to commence backup withholding with respect to reportable payments to payees who have not provided a taxpayer identification number to the payor. If an individual payee does not have a social security number, he may obtain one by filing Form SS–5 with a Social Security Administration Office. Other payees may obtain an employer identification number by filing Form SS–4 with an Internal Revenue Service Center.

Q–27. Is a payor of reportable interest or dividends required to impose backup withholding with respect to payments made after December 31, 1983, to a payee of an account that existed, or an instrument that was held by the payee, on December 31, 1983, if the payee has not provided the payor with a written certification under penalties of perjury that the taxpayer identification number furnished is correct?

A–27. No. A payor of reportable interest or dividends that are paid with respect to an account or instrument existing on December 31, 1983, is not required to impose backup withholding starting on January 1, 1984, simply because the payee has failed to certify his taxpayer identification number under penalties of perjury.

Q–28. Is a payor required to impose backup withholding with respect to a reportable interest or dividend payment made on or after January 1, 1984, if the taxpayer identification number furnished by the payee does not contain the proper number of digits?

A–28. Yes. A payor shall treat the payee as having failed to furnish a taxpayer identification number if the number provided does not contain the proper number of digits. The proper number of digits is nine for both the social security number and the employer identification number.

Q–29. Is a payor of reportable interest or dividend payments required to impose backup withholding on a payment made to an exempt recipient?

A–29. No. A payor is not required to withhold on a payment made to a person described in §31.3452(c)–1 (b) through (p) of the Income Tax Regulations. A payee shall be considered an exempt recipient for purposes of this rule if (1) he may be treated as an exempt recipient without the requirement of filing an exemption certificate under the cited regulation or (2) the payee has provided the payor with a certificate, signed under penalties of perjury, stating that a payee is an exempt recipient described in one or more paragraphs of the cited regulation. Form W–9 may be used for the purpose of making this certification. Alternatively, the payor may provide the payee with a substitute form for such certification, provided that the substitute form conforms generally to

Form W–9 and the instructions related to exempt recipients. A payor may in any case require an exempt recipient not otherwise required to file a certificate as to his status as an exempt recipient to file such a certificate, and may treat an exempt recipient who fails to file such a certificate as a person who is not exempt. A payor may require a separate certificate for each account or instrument maintained by an exempt recipient. A payor may require that any certification that a payee is an exempt recipient be made only on the substitute form provided by the payor; in that case, the payor must comply with the pertinent portions of § 31.3452(f)–1(b)(2) of the Income Tax Regulations relating to the procedures that a payor must follow upon receipt of an unacceptable form.

Q–30. Is a payor required to impose backup withholding on a pension or annuity distribution made on or after January 1, 1984, if the payee has not provided his taxpayer identification number to the payor?

A–30. If pension withholding under section 3405 applies to a pension or annuity distribution and the payee does not make an election not to have pension withholding apply under that section, backup withholding does not apply. If, however, the payee makes such election under section 3405 or pension withholding does not otherwise apply, and the payee does not provide his taxpayer identification number to the payor (or the taxpayer identification number provided is obviously incorrect), the payor is required to withhold 20 percent of any payment to the payee to which section 6041 applies, unless the conditions of the following paragraph are satisfied.

If the annual distributions to a payee total $5,400 or less (in which case withholding under section 3405 generally is not required), and if the payor has no social security number for the payee (or the social security number provided is obviously incorrect), the payor shall not impose backup withholding until the first payment made after June 30, 1984. By that date, the payee will have been able to obtain a social security number and provide it to the payor, in which case no amounts will be withheld.

Q–31. In determining whether a payee has failed to provide a taxpayer identification number with respect to an account that was in existence or an instrument held on December 31, 1983, so that backup withholding is imposed starting January 1, 1984, within what period of time just a taxpayer identification number provided by a payee be treated as having been received?

A–31. A payor must process a taxpayer identification number within 30 days after the payor receives the taxpayer identification number from the payee. Thus, for example, if a payor has no taxpayer identification number for a payee, and the payee provides his taxpayer identification number to the payor on December 15, 1983, the payor must process the number not later than January 14, 1984. As a result, the payor would be authorized to commence backup withholding with respect to payments made to the payee commencing January 1, 1984, but backup withholding must cease by January 14, 1984. The payor also is authorized to treat the taxpayer identification number as having been received at any time after it is provided, so that backup withholding need not be commenced in the circumstance outlined above.

CERTIFICATION REQUIREMENTS FOR ACCOUNTS OPENED AND INSTRUMENTS ACQUIRED AFTER 1983

Q–32. What actions must a payor take with respect to accounts that are opened or instruments acquired on or after January 1, 1984, in order to avoid imposing backup withholding on reportable interest or dividend payments?

A–32. In order to avoid imposing backup withholding with respect to accounts that are opened or instruments acquired on or after January 1, 1984, a payor of reportable interest or dividend payments must obtain a certification from the payee, signed under penalties of perjury, (1) that the taxpayer identification number provided to the payor is the payee's correct number and (2) that the payee is not subject to backup withholding due to notified payee underreporting. The form for these certifications is prescribed in A–35 and A–36.

Q–33. What payees can make the certification that they are not subject to backup withholding due to notified payee underreporting?

A–33. Any payee who has not been notified that he is subject to backup withholding as a result of notified payee underreporting can make the certification under the law. In addition, a payee who was subject to backup withholding due to notified payee underreporting may certify that he is not subject to backup withholding due to notified payee underreporting if the Service has provided the payee with written certification that backup withholding due to notified payee underreporting has terminated.

Q–34. Under what circumstances will an account be considered to have been in existence, or an instrument be considered to have been held, before January 1, 1984 (a ''pre-1984 account'')?

A–34. An account that is in existence before January 1, 1984, will be considered a pre-1984 account, irrespective of whether additional deposits are made to the account on or after January 1, 1984. In addition, if shares of a corporation are held before January 1, 1984 (or considered held before such date by operation of this rule), and additional shares are received by the holder, irrespective of whether such shares are received by reason of a stock dividend, as a result of an infusion of new cash, or otherwise, the new shares received will be considered a pre-1984 account, in the discretion of the payor. Where an account is opened, or an instrument is acquired automatically on the maturity or termination of an account that was in existence or instrument held before January 1, 1984 (or considered to have been in existence or held before such date by operation of this rule), without the participation of the payee, the new account or instrument will be considered a pre-1984 account, in the discretion of the payor. For purposes of the preceding sentence, a payee shall not be considered to have participated in the acquisition of the new account or instrument solely by reason of the failure to exercise a right to withdraw funds on maturity or termination of the old account or instrument. Where a discount instrument with a maturity not exceeding one year (a ''short-term instrument'') is acquired upon the maturity of a short-term instrument, the participation of the payee in the acquisition of the newly-acquired instrument shall not be taken into account, and the new instrument shall be considered to have been acquired automatically, with respect to instruments acquired prior to January 1, 1985. In the case of insurance policies in effect on December 31, 1983, the election of a dividend accumulation option pursuant to which interest is paid, or the creation of an ''account'' in which proceeds of a policy are held for the policy beneficiary, may, in the payor's discretion, be treated as a pre-1984 account.

Q–35. What form may a payee of reportable interest or dividends use to certify under penalties of perjury, that the taxpayer identification number provided to the payor is correct and that he is not subject to backup withhholding due to notified payee underreporting?

A–35. A payee may use Internal Revenue Service Form W–9 for both required certifications.

Q–36. May a payor of reportable interest or dividends or a broker provide a substitute form for a payee to certify under penalties of perjury that his taxpayer identification number is correct and that he is not subject to backup withholding due to notified payee underreporting?

A–36. Yes. A payor or broker may use a substitute form provided the language of the certification is substantially similar to the following: ''Under penalties of perjury, I certify (1) that the number shown on this form is my correct taxpayer identification number and (2) that I am not subject to backup withholding either because I have not been notified that I am subject to backup withholding as a result of a failure to report all interest or dividends, or the Internal Revenue Service has notified me that I am no longer subject to backup withholding.'' A payor or broker may use separate substitute forms to have the payee certify under penalties of perjury that (i) his taxpayer identification number is correct, provided the language is substantially similar to the certification in A–10 and (ii) he is not subject to backup withholding due to notified payee underreporting provided the language is substantially similar to clause (2) of the preceding sentence. A payor or broker also may incorporate both required certifications into other business forms, customarily used, such as account signature cards, provided the required certifications are clearly set forth.

If a payor or broker uses a single substitute form for both certifications, which does not follow the Form W–9 format, the form must contain an instruction to the payee that he must strike out the language certifying that the payee is not subject to backup withholding due to notified payee underreporting if he has been notified that he is subject to backup withholding due to notified payee underreporting, and the payee has not received a notice from the Internal Revenue Service advising him that backup withholding has terminated. If the payor or broker requires that the payee make the certification on a substitute form provided by the payor, the payor or broker may refuse to accept certifications (including certifications provided on Form W–9) that are not made on the form or forms provided by the payor or broker. If the payor or broker refuses to accept the form provided by the payee, the payor or broker then must comply with the pertinent portions of § 31.3452(f)–1(b)(2) of the Income Tax Regulations related to the procedures that a payor must follow upon receipt of an unacceptable form.

Q–37. With respect to reportable interest or dividends that are paid on an account opened or an instrument acquired on or after January 1, 1984, if a payee fails to certify, under penalties of perjury, (1) that the number furnished is his correct taxpayer identification number, and (2) that he is not subject to backup withholding due to notified payee underreporting, what action is a payor required to take?

A–37. A payor is required to withhold 20 percent of any reportable interest or dividend payment on such an account or instrument if either of the certifications specified is not provided. See A–4 of § 35a.9999–1 and the answers under § 35a.9999–3 beginning with A–51 for the actions that a payor of an account or instrument that is not a pre-1984 account must take to exercise due diligence and thereby avoid a penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number.

Q–38. Is a payor ever required to withhold more than 20 percent of a payment?

A–38. No. Irrespective of how many conditions exist which cause backup withholding to apply, a payor is required to withhold only 20 percent of a payment until all of the conditions no longer apply.

Q–39. Is a payor required to send a notice to the payee when the payor commences backup withholding?

A–39. In general, no. However, a payor of a readily tradable instrument that is not acquired directly from the payor must notify the payee that backup withholding has commenced, or will commence. The notice must be sent to the payee not later than 15 days after the payor makes the first payment to the payee that is subject to backup withholding. The notice must explain the steps the payee must take to stop backup withholding. The text of this notice will be provided in a regulation to be issued in the near future.

Q–40. Do special rules apply to payments made with respect to readily tradable instruments?

A–40. Yes. Special backup withholding rules apply with regard to readily tradable instruments when (1) the payee did not acquire the instrument directly from the issuer of the instrument and (2) a broker does not hold the instrument as nominee for the payee (*i.e.*, in street name). Under the special rules, a payor is required to impose backup withholding only if (1) the payor does not receive the payee's taxpayer identification number, or (2) the payor is notified by a broker that the payee failed to make the required certifications (described in A–32) to the broker and the payee did not make the certifications to the payor. When the payee acquires the instrument directly from the issuer of the instrument or when a broker holds the instrument as nominee for the payee, the rules applicable to payors apply.

Q–41. What rules apply to brokers?

A–41. When a broker is a payor (*i.e.*, the broker holds the instrument in street name), the regular rules for payors apply. If a broker is not the payor with respect to an instrument, different rules apply to the broker depending on whether the payee's account with the broker is treated as a ''post-1983 account.''

A ''post-1983 account'' is any account other than an account established prior to January 1, 1984, through which, during 1983, the broker either bought or sold an instrument for the payee or acted as nominee for the payee. (Both the determinations of (1) whether an account or instrument is treated as a post-1983 account of the payor for purposes of the payor's due diligence requirements (see A–34) and (2) when backup withholding applies to an instrument are made without regard to whether the instrument is acquired through a post-1983 account of a broker.)

When a readily tradable instrument is acquired through a ''post-1983 account'' and the broker is not the payor of the instrument, the broker must (1) obtain the certifications (described in A–32) from the payee but only once with respect to each account, (2) furnish the payee's taxpayer identification number to the payor, and (3) notify the payor to impose backup withholding if the payee failed to make either of the required certifications to the broker. The broker is required to give the information required by clauses (2) and (3) of the prior sentence to the payor in connection with the transfer instructions for the acquisition. The notice under clause (3) shall state that: ''The [named payee] is subject to backup withholding under sections 3406(a)(1)(A), 3406(a)(1)(B), 3406(a)(1)(C), or 3406(a)(1)(D) of the Internal Revenue Code [circle whichever section applies].'' A magnetic media, machine readable, or other similar notice substantially to the same effect also may be employed. After the transfer instructions are transmitted, the broker is not required to seek a missing taxpayer identification number or missing certification or to give any further notices with regard to the acquisition of the instrument.

When a readily tradable instrument is acquired through an account that is not a ''post-1983 account'' and the broker is not the payor of the instrument, the broker's sole responsibility is to furnish the payee's taxpayer identification number to the payor (unless the broker has been notified that the payee is subject to backup withholding under section 3406 (a)(1)(B) or (a)(1)(C) of the Internal Revenue Code).

WINDOW TRANSACTIONS PRE-1984 INSTRUMENTS

Q–42. Is a payor required to exercise due diligence in soliciting the taxpayer identification number of a payee with respect to the following payments (''window transactions''): Redemptions of United States savings bonds, and payments upon interest coupons, commercial paper, and banker's acceptances?

A–42. No. The due diligence requirements do not apply to such payments. Thus, the certification requirements set forth in A–32 do not apply to such transactions. A payor is required to withhold 20 percent with respect to such payments only if the payee does not provide his taxpayer identification number to the payor. Payors remain obligated, however, to make an information return with respect to window transactions.

Q–42A. Is a payor on a pre-1984 instrument in a window transaction subject to a penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number with respect to that transaction?

A–42A. No. However, see A–42 in this section which provides, in part, that a payor is required to backup withhold if a payee fails to provide a taxpayer identification number (*i.e.,* there is a missing taxpayer identification number). See A–66 of §35a.9999–3 for the actions that payors of post-1983 window transactions, as defined in A–42B, must take to avoid a penalty under section 6676(b).

POST-1983 INSTRUMENTS

Q–42B. Is a payor required to treat an instrument that is negotiated in a window transaction (as defined in A–42 of §35a.9999–1 and A–9 of §35a.9999–2) after December 23, 1987, as an instrument acquired after December 31, 1983?

A–42B. Yes. A window transaction occurring on or after December 23, 1987, will be considered made with respect to an instrument acquired after December

31, 1983, regardless of when the instrument was issued by the payor or acquired by the payee. See A–66 of § 35a.9999–3 for the actions that payors must take to avoid a penalty under section 6676(b) with respect to a post-1983 window transaction.

Q–43. Will a payor be allowed to furnish an information return to the payee with respect to a window transaction at the time the obligation or instrument is presented?

A–43. Yes. A payor may furnish an information return to the payee at the time of the transaction or any time prior to January 31 of the year following the calendar year in which the transaction occurs. In general, however, the payor must provide information returns with respect to window transactions to the Internal Revenue Service on magnetic tape, in accordance with section 6011(e)(2) of the Internal Revenue Code, effective for transactions after December 31, 1983.

SEPARATE FORM 1099

Q–44. Is a payor of interest, dividends, or patronage dividends paid in 1983 required to send a separate official Form 1099 to a payee?

A–44. No. A payor of interest, dividends, or patronage dividends paid in 1983 is not required to send a separate official Form 1099 to a payee. A payor may satisfy his obligation to furnish the required statement to the recipient by sending the statement with other business correspondence to the payee, such as a monthly statement.

Q–45. Is a payor of interest, dividends, or patronage dividends paid after January 1, 1984, required to send a separate official Form 1099 to a payee?

A–45. Yes. For payments made in 1984 and subsequent years, a payor is required to provide an official Form 1099 to a payee either in a separate mailing or in person. Payors also may use a substitute Form 1099 which contains provisions substantially similar to those of the prescribed form if the payor complies with all revenue procedures relating to substitute Form 1099 in effect at the time.

Q–46. Is a payee required to attach Form 1099 to his tax return?

A–46. No.

MISCELLANEOUS

Q–47. In what manner is a payor required to remit to the Internal Revenue Service amounts withheld from any reportable payment?

A–47. A payor must deposit amounts withheld under the backup withholding provisions with a Federal Reserve Bank or an authorized financial institution in accordance with the deposit rules of § 31.6302(c)–1(a)(1)(i) of the Income Tax Regulations that apply to an employer with respect to employment taxes. The payor of a reportable payment may elect, however, in accordance with the instructions provided with Form 941, to deposit such amounts separately from social security taxes and income tax withheld from wages. Thus, a payor may treat amounts withheld under section 3406 separately from amounts withheld from wages for purposes of determining when to remit the withheld amounts from any reportable payment. If, however, the payor elects to aggregate the amount withheld from wages with the amounts withheld under section 3406, the payor may do so. Regardless of the manner in which the payor elects to treat the withheld amounts for purposes of determining the time within which such amounts are required to be deposited, a payor must report the amounts withheld under section 3406 on the same Form 941 that the payor uses to report the employment taxes deposited.

Q–48. May a payor refuse to open an account for, or issue an instrument to a person on or after January 1, 1984, if the person fails to furnish his taxpayer identification number to the payor under penalties of perjury?

A–48. Yes. If the payor refuses to open an account or issue an instrument because the person fails to provide his taxpayer identification number under penalties of perjury, the payor will not be in violation of the Internal Revenue Code. If, however, the payor allows a person who has not provided his taxpayer identification number under penalties of perjury to open an account or acquire an instrument, the payor is required to impose backup withholding with respect to any interest or dividend payments thereafter made with respect to such account or instrument (unless the payee thereafter provides his taxpayer identification number certified under penalties of perjury). The payor is not permitted, however, to refuse to open an account or to issue an instrument if the payee fails to certify under penalties of perjury, that the payee is not subject to backup withholding due to notified payee underreporting. See A–4 of § 35a.9999–1 and the answers under § 35a.9999–3 beginning with A–51 for the actions that a payor of an account or instrument that is not a pre-1984 account or instrument must take to exercise due diligence and thereby avoid a penalty under section 6676(b) or filing an information return with a missing or an incorrect taxpayer identification number.

Q–49. May a payor treat a certificate respecting a taxpayer identification number as valid if it is signed by a person other than the payee?

A–49. In certain instances, yes. A certificate may be signed by any person who, under the pertinent portions of sections 6061, 6062, 6063, and 6065 of the Internal Revenue Code and the regulations thereunder, is authorized to sign a declaration under penalties of perjury on behalf of the payee.

Q–50. What procedures must a payor follow in order to demonstrate that it has exercised due diligence in furnishing the correct taxpayer identification number of a payee, as required in A–5?

A–50. A payor is not required to retain a copy of the communication sent to each individual payee or to prove that the communication was sent to a particular payee. Instead, payors must establish the existence of procedures that are reasonably calculated to insure that each person required to receive a mailing as prescribed in A–5, in fact received such mailing, and that the payor exercised reasonable care in processing responses to such mailings.

SPECIAL RULES FOR ACCOUNTS, INSTRUMENTS AND TRANSACTIONS OF FOREIGN PERSONS

Q–51. Is a payor required to send the mailing or mailings described in A–5 and A–6 to foreign persons?

A–51. Generally no. A payor is required to send the mailing or mailings described in A–5 and A–6 to any payee to whom the payor makes a payment that is subject to information reporting. Generally, a payment of interest to a foreign person is not subject to information reporting. See §1.6049–5 (b) (2) and (3) of the Income tax Regulations for the procedures to determine whether a payee of interest is a foreign person. See § 1.6042–3(b) (1), 2, and (3) and § 1.6044–3(c) of the Income Tax Regulations concerning exceptions from the information reporting requirements for payments of dividends and patronage dividends by and to certain foreign persons.

Q–52. Is a payor required to send the mailing or mailings described in A–5 and A–6 to foreign persons with respect to pre-1984 accounts and instruments if payments on those accounts and instruments would not have been reportable payments but for the fact that the foreign person failed to provide the penalty of perjury statement described in § 1.6049–5(b)(2)(iv) of the Income Tax Regulations?

A–52. A payor need not send the mailing or mailings described in A–5 and A–6 to a payee who has not previously provided the penalty of perjury statement described in § 1.6049–5(b)(2)(iv) of the Income Tax Regulations if (1) the payor sends a separate mailing to the payee on or before December 31, 1983, requesting the required penalty of perjury statement and (2) the payor has evidence in its records that the payee is a foreign person (provided that the payor has no actual knowledge that such evidence is false). If the payor has sent a nonseparate mailing on or before December 31, 1983, requesting the required penalty of perjury statement, the payor may send the separate mailing referred to in clause (1) on or before March 31, 1984. The separate mailing, whether sent in 1983 or 1984, must be by first-class mail, or by airmail if sent to a foreign address, and must contain a notice describing the penalty of perjury statement set forth in § 1.6049–5(b)(2)(iv) and advising the payee that backup withholding may commence if the statement is not provided. The payor also must provide a reply envelope and a form on which the payee may make the statement described in § 1.6049–5(b)(2)(iv) under penalties of perjury. Neither the separate nor nonseparate mailing is required if the payor has received the required penalty of perjury statement from the payee.

The rules of A–18 and A–19 relating to a ''do not mail'' or ''stop mail hold'' instruction and to payees for whom the payor has no address, shall apply. The other evidence referred to in clause (2) above on which the payor may rely for treating a payee as a foreign person includes a written statement from the payee that he is neither a resident nor a citizen of the United States or an affidavit from an employee of the payor stating that he knows that, or the payee has represented orally that, he is a foreign person. The mere fact that the payee has provided an address outside the United States is insufficient evidence to establish that the payee is a foreign person for this purpose.

Q–53. Is a payor required to commence backup withholding on January 1, 1984, on payments with respect to accounts and instruments described in A–52 if the foreign person failed to provide the penalty of perjury statement described in § 1.6049–5(b)(2)(iv) of the Income Tax Regulations?

A–53. The payor need not commence backup withholding with respect to such payments made before July 1, 1984, provided that the payor (1) made the separate mailing described in A–52 before December 31, 1983, or has made the nonseparate mailing described in A–52 before December 31, 1983, and sends a separate mailing to those payees who have not provided the required statement by March 31, 1984, and (2) has in its records the evidence described in A–52 that the payee is a foreign person.

Q–54. Do the backup withholding provisions apply to payments of interest within the United States by a payor that is an international organization or by a person acting in its capacity as a paying agent for such organization?

A–54. No, provided the international organization is in organization of which the United States is a member and which enjoys immunity or exemption from any liability or obligation to pay, withhold, or collect tax pursuant to an international agreement having full force and effect in the United States.

Q–55. Is a broker required to impose backup withholding with respect to transactions effected for pre-1984 accounts if the customer is an exempt foreign person who fails to provide the broker with the penalty of perjury statement described in § 1.6045–1(g)(1) of the Income Tax Regulations?

A–55. With respect to such transactions effected before July 1, 1984, a broker is not required to impose backup withholding if (1) the broker sends a separate mailing to the customer on or before December 31, 1983, requesting the penalty of perjury statement described in § 1.6045–1(g)(1) of the Income Tax Regulations and (2) the broker has evidence in his records that the customer is a foreign person (provided that the broker has no actual knowledge that such evidence is false). If the payor sent a nonseparate mailing on or before December 31, 1983, requesting the required penalty of perjury statement, the payor may send the separate mailing on or before March 31, 1984. The separate mailing, whether made in 1983 or 1984, must be by first-class mail, or by airmail if sent to a foreign address, and must contain a notice describing the required penalty of perjury statement and advising the customer that backup withholding may commence if the statement is not provided. The broker must also include in the mailing a reply envelope and provide a form on which the customer may make the required penalty of perjury statement. Neither the separate nor nonseparate mailing is required if the payor has received the penalty of perjury statement from the customer.

The rules of A–18 and A–19 relating to ''do not mail'' or a ''stop mail hold'' instructions, and to payees for whom the payor has no address shall apply. The other evidence referred in clause (1) above on which the broker may rely for treating a customer as as foreign person may include a written statement from the customer that he is neither a resident nor a citizen of the United States or an affidavit from an employee of the broker stating that he knows that, or the customer has orally represented that, he is a foreign person. The mere fact that the customer has provided an address outside the United States is insufficient evidence to establish that the customer is a foreign person for this purpose.

NONASSESSMENT OF THE PENALTY BY ADMINISTRATIVE DISCRETION

Q–56. Is a payor of a pre-1984 account or instument who did not undertake the mailings in accordance with A–5 and A–6 and the related questions and answers on due diligence under this section liable for the penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number for all years in which the payor did not have a certified Form W–9 or acceptable substitute form from a payee?

A–56. Yes. The payor is liable for the penalty under section 6676(b) for each year the payor files an information return with a missing or an incorrect taxpayer identification number for a pre-1984 account or instrument if the payor has not exercised due diligence as described in A–5 and A–6 and in the related questions and answers on due diligence under this section or obtained a certified taxpayer identification number from the payee. However, in its administrative discretion the Internal Revenue Service will not impose the penalty on a payor for an information return filed for calendar years after 1987 if the payor makes or has made a separate mailing of the type described in A–5 (as applicable under such Q and A) on or before June 30, 1988, and makes or has made the nonseparate mailing described in A–5 (as applicable under such Q and A) in each year subsequent to the year of the separate mailing claimed as the basis for administrative relief. Such separate and nonseparate mailings must be made with respect to all pre-1984 accounts or instruments of payees to whom the payor will make a reportable payment in 1988 or a subsequent calendar year if such payees have not previously certified, under penalties of perjury, that the taxpayer identification number furnished to the payor is the payee's correct taxpayer identification number or established the payee's foreign status (under § 1.6049–5(b)(2)(iv)) with respect to interest payments or under Q and A 36 of § 35a.9999–3 with respect to dividend payments). If a reportable payment will not be made to a pre-1984 account or instrument in 1988, the mailing with respect to the account or instrument may be made, in the discretion of the payor, by (1) June 30, 1988, or (2) the later of October 1 of the calendar year in which the payment to the account or instrument is subsequently reportable or within 30 days after such reportable payment occurs.

A payor will not be ineligible for administrative relief under this Q/A–56 with respect to a calendar year (for those accounts for which mailings were made as described in this A–56) due to a failure to make a mailing with respect to a *de minimis* number of accounts. A *de minimis* number of accounts is the lesser of 5,000 accounts or one percent (or less) of the total number of accounts for which a mailing should have been made under this Q/A–56. In addition, a payor will not be ineligible for administrative relief with respect to a calendar year (for those accounts for which mailings were made as described in this A–56) due to an inadvertent failure to make a mailing for a few accounts that could not be located using reasonable care.

In its administrative discretion, the Internal Revenue Service will not impose the penalty under section 6676(b) on those *de minimis* accounts or on those accounts that could not be located using reasonable care in any calendar year for which a payor undertakes a mailing, as described in Q–5 in this section, with respect to *all* such accounts.

The rules described in A–5 and the related questions and answers on due diligence under this section shall apply, to the extent not inconsistent with this Q and A 56, as shall the rules described in A–8, A–9, A–10, A–11, A–12, A–14, A–15, and A–16. Further, the special rules in A–17, A–18, A–19, A–20, A–21, A–22, A–23, A–24, and A–25 also shall apply to the mailing described in A–56 of this section.

In order to receive administrative relief each year, a payor must make a written statement, under penalties of perjury, affirmatively showing to the satisfaction of the district director or the director of the Internal Revenue Service Center that the person otherwise liable for such penalty fulfilled the requirements of this paragraph. A payor should make the request from the Internal Revenue Service ninety days before the due date of the Form

8210. A payor will remain liable for any applicable penalties under section 6676(b) for years prior to 1988.

[T.D. 7916, 48 FR 45362, Oct. 4, 1983, as amended by T.D. 7922, 48 FR 53111, Nov. 25, 1983; T.D. 8163, 52 FR 44873, Nov. 23, 1987; T.D. 8248, 54 FR 14350, Apr. 11, 1989]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 35a.9999–1 was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000.

§ 35a.9999–2 Questions and answers concerning due diligence and issues in connection with backup withholding.

The following questions and answers principally concern the backup withholding requirement with respect to reportable payments and the due diligence exception to the penalty on payors of reportable interest and dividend payments for failure to provide a payee's correct taxpayer identification number on certain information returns. These requirements are issued under the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369):

DUE DILIGENCE

Q–1. If a payor of reportable interest or dividends does not send the mailing or mailings described in A–5 and A–6 of § 35a.9999–1 of the Temporary Employment Tax Regulations, issued under the Interest and Dividend Tax Compliance Act of 1983, T.D. 7916 (''§ 35a.9999–1''), to all payees who have not certified under penalties of perjury that their taxpayer identification numbers are correct, will a payor be considered to have exercised due diligence with respect to a payee to whom the payor sends the required mailing or mailings?

A–1. Yes. Due diligence applies on a payee-by-payee basis. For example, if a payor sends the separate mailing described in A–5 of § 35a.9999–1 by December 31, 1983, only to certain payees, the payor will be considered to have exercised due diligence with respect to the payees to whom the mailing was sent. However, the payor will not be considered to have exercised due diligence with respect to those payees to whom the payor did not send the required mailing or mailings.

A penalty for failure to provide a correct taxpayer identification number will not be imposed merely because the payor fails to send the required mailing or mailings. Rather, a penalty will be imposed only in the case of an information return filed by a payor of reportable interest or dividends if the required mailing or mailings were not sent to the payee and the payor fails to include a taxpayer identification number or includes an incorrect number on the return filed with respect to the payee.

Q–2. Does the due diligence standard apply to reportable payments other than reportable interest or dividends?

A–2. No. The due diligence standard does not apply to payments reportable under sections 6041, 6041A(a), 6045, or 6050A. Thus, payors of these other reportable payments are not required to send the mailings described in A–5 and A–6 of § 35a.9999–1.

Q–3. Do the rules of section 7503 of the Internal Revenue Code, regarding the time for performance of an act where the last day to perform the act falls on Saturday, Sunday, or a legal holiday, apply to the time limits for the mailings described in A–5, A–6, A–52, A–53, and A–55 of § 35a.9999–1?

A–3. Yes. For example, a mailing that must be sent on or before Saturday, December 31, 1983, will be considered timely if sent on or before Tuesday, January 3, 1984.

Q–4. Are trustees, custodians, or other fiduciaries subject to the due diligence standard?

A–4. The due diligence standard does not apply to a trustee, custodian, or other fiduciary, unless such person is a payor of reportable interest or dividends. A trustee, custodian, or other fiduciary is not a payor of reportable interest of dividends simply because the trustee, custodian, or fiduciary receives a payment of reportable interest or dividends. If a trust is considered a payor of reportable interest or dividends under A–20, below, however, the due diligence standard applies.

Q–5. Is a payor required to send the mailings described in A–5 and A–6 of § 35a.9999–1 by first-class mail, if it is the practice of the payor not to send correspondence to the payee by first-

class mail, but rather to deliver personally, or to use intra-office mail to communicate with the payee?

A–5. No. A payor may send the mailing or mailings by first-class mail, by personal delivery, or by intra-office mail, provided that the mailing or mailings are delivered by the same method used by the payor in sending account activity and balance information and other correspondence to the payee.

Q–6. Must a payor affix postage to the return envelope to satisfy the requirement of including a postage-prepaid reply envelope in the mailings described in A–5 and A–6 of §35a.9999–1?

A–6. The requirement that a payor must include a postage-prepaid reply envelope will be satisfied by the use of a ‘‘postage-prepaid envelope,’’ a ‘‘business reply mail envelope,’’ or by affixing the required postage to a self-addressed reply envelope. (A ‘‘business reply mail envelope’’ involves an arrangement in which postage is charged only when a customer returns the reply envelope.)

Q–7. Must a payor who sends the mailings described in A–5 and A–6 of §35a.9999–1 to a foreign address affix postage to the reply envelope?

A–7. No. A payor is required to include only a self-addressed reply envelope in a mailing to a foreign address. A payor is not required to affix postage to a reply envelope included in a mailing to a foreign address, regardless of whether the payee is a United States citizen, a United States resident, or a non-resident alien.

Q–8. Will a payor who sends the mailings described in A–5, A–6, A–52, A–53, and A–55 of §35a.9999–1 violate the separate mailing requirement if the payor sends both a form W–9 (or substitute form) and a Form W–8 (or substitute form) in the same mailing?

A–8. No. The payor may include in any separate mailing both a solicitation of the payee's taxpayer identification number (Form W–9) and a solicitation of a certification of the payee's foreign status (Form W–8).

Q–9. Do ‘‘window transactions,’’ as defined in Q–42 of §35a.9999–1, include payments on Treasury bills and other instruments not in definitive form?

A–9. No. Because Treasury bills are not in definitive form, payments upon Treasury bills are not treated as window transactions. Similarly, payments upon other instruments not in definitive form are not treated as window transactions. The special rules for window transactions set forth in A–42 of §35a.9999–1 thus apply only to redemptions of United States savings bonds, and to payments upon interest coupons, commercial paper, and banker's acceptances, if such instruments are in definitive form. The due diligence requirements set forth in A–5 and A–6 of §35a.9999–1 are thus applicable to payors of payments on Treasury bills and other instruments not in definitive form, if those instruments are considered to have been acquired before 1984, and mature after December 31, 1983. In addition, the certification requirements set forth in A–32 of §35a.9999–1 and all other relevant backup withholding requirements apply to payments on Treasury bills and other instruments not in definitive form.

REQUIREMENT OF BACKUP WITHHOLDING

Q–10. Does backup withholding apply to reportable payments other than reportable interest and dividend payments?

A–10. Yes. Backup withholding also applies to payments that are subject to reporting under sections 6041(a) or (b), 6041A(a), and 6045, and to certain payments reportable under section 6050A (‘‘other reportable payments’’). Backup withholding applies to other reportable payments, other than payments reportable under section 6045, only if: (1) The payee fails to furnish a taxpayer identification number to the payor; or (2) the Internal Revenue Service notifies the payor that the taxpayer identification number furnished by the payee is not correct. Except in the case of payments reportable under section 6045, a payee of other reportable payments is not required to make any certifications under penalties of perjury, unless the payee seeks to claim the exemption from withholding while waiting for receipt of a taxpayer identification number (as explained in A–18, below). See A–12 and A–13, below, for rules regarding the application of backup withholding to transactions subject to reporting under section 6045.

Q–11. Under what circumstances is a payor of payments reportable under section 6041 or section 6041A(a) required to impose backup withholding?

A–11. A payor is required to withhold on reportable payments under sections 6041 and 6041A(a) only if: (1) A payee is subject to backup withholding under A–10, above, (*i.e.,* the payee fails to furnish a taxpayer identification number to the payor or the Internal Revenue Service notifies the payor that the taxpayer identification number furnished by the payee is not correct); and (2) any one of the following three conditions is satisfied: (a) Reportable payments to the payee aggregate $600 or more during the calendar year; (b) the payor was required to file an information return under section 6041 or section 6041A(a), whichever is applicable, with respect to that payee for the preceding calendar year (*i.e.,* payments subject to reporting under section 6041 or section 6041A(a), whichever is applicable, aggregated $600 or more to the payee for the preceding calendar year); or (c) the payor was required to impose backup withholding on payments made to the payee during the preceding calendar year (and the payments subject to backup withholding were of a type reportable under section 6041 or section 6041A(a), whichever is applicable).

If a payor pays amounts aggregating $600 or more to a payee during a calendar year (condition (a) above), the amount subject to withholding is: (1) The amount of the payment that causes the aggregate payments to the payee during the calendar year to total $600 or more (assuming that the payor made no payments during the preceding calendar year that were subject to either reporting under section 6041 or section 6041A(a), whichever is applicable, or backup withholding); and (2) the amount of any additional payments of a type subject to reporting under section 6041 or section 6041A(a), whichever is applicable, made to the payee before the payee provides a taxpayer identification number to the payor or after the Internal Revenue Service notifies the payor that the taxpayer identification number furnished by the payee is not correct. For example, if a payor made payments of $200 each on March 31 1984, June 30, 1984, and September 30, 1984, to a payee, which were reportable under section 6041, the payments on March 31 and June 30 would not be subject to backup withholding, because the $600 threshold would not have been reached as a result of making either of those payments (assuming that payments made to the payee during 1983 did not aggregate $600 or more and were thus not subject to reporting). However, the payor would be required to withhold 20 percent of the $200 payment made on September 30, if the payee did not furnish a taxpayer identification number to the payor, or the Internal Revenue Service notified the payor that the number provided by the payee is incorrect, prior to the payment date (September 30). If the payor made a $50 payment of a type reportable under section 6041, on December 31, 1984, to the same payee, the payor would be required to withhold 20 percent of the $50 payment, if the payee had not provided a taxpayer identification number, or the Internal Revenue Service notified the payor that the number provided by the payee is incorrect, prior to the date of payment (December 31).

If, in the preceding calendar year, a payor was required to file an information return with respect to payments to the payee under section 6041 or section 6041A(a) (condition (b) above), or a payor is required to impose backup withholding with respect to payments of a type that were reportable under such sections (condition (c) above), the payor is required to withhold 20 percent of any payment of a type reportable under section 6041 or section 6041A(a) made to the payee during the following year, regardless of the amount of the payment, if, prior to the date of the payment, the payee fails to provide a taxpayer identification number to the payor, or the Internal Revenue Service notifies the payor that the number provided by the payee was not correct. Assume, for example, that a payor made reportable payments under section 6041 to a payee that aggregated $600 or more during 1983, so that the payor was required to file an information return with respect to the payments for 1983. If the payor paid $300 to the payee on January 31, 1984, and the payment was of a type reportable under section 6041, the payor would be required to withhold 20 percent of the $300 payment, if, prior to January 31, 1984, the payee did not provide a taxpayer identification number to the payor, or the Internal Revenue Service notified the payor that the number provided by the payee was not correct. Moreover, because payments during 1984 to the payee, of a type subject to reporting under section 6041, would be subject to backup withholding, the payor would be required to withhold 20 percent of any payment of a type reportable under section 6041 that was made to the payee in 1985, unless the payee provided a taxpayer identification number prior to the payment date, or corrected the number provided, if the payor was notified by the Service that the previous number was not correct.

In making the determination of whether payments to a payee aggregate $600 or more during a calendar year or whether condition (b) or condition (c) applies to a payee, the payor must aggregate and take into account payments of the same kind made to the same payee. Payments that are reportable under section 6041 are not required to be aggregated with payments reportable under section 6041A(a). Payors may, in their discretion, aggregate: (1) Payments not of the same kind to the same payee, reportable under section 6041 and 6041A(a), and (2) payments reportable under section 6041 with payments reportable under section 6041A(a).

Q–12. Does backup withholding apply to gross proceeds subject to reporting under section 6045?

A–12. Yes. Backup withholding applies to gross proceeds reportable by brokers, if the customer does not furnish a taxpayer identification number to the broker in the manner required, or the Internal Revenue Service notifies the broker that the number furnished by the customer was incorrect. With respect to a post-1983 account (as defined in A–41 of § 35a.9999–1), the taxpayer identification number provided by a customer must be certified under penalties of perjury. With respect to all other accounts, the customer's taxpayer identification number is not required to be certified under penalties of perjury. For example, if a customer who had no prior relationship with a broker opens an account, arranges for the broker to sell readily tradable securities for $100 during 1984, and the sale is required to be reported under section 6045, the gross proceeds of the sale are subject to backup withholding, if the customer does not provide: (1) His taxpayer identification number to the broker and certify it under penalties of perjury; or (2) an awaiting TIN certification (described in A–18, below).

Special rules governing backup withholding with respect to commodity futures contracts, margin account transactions, and short sale transactions will be issued in the near future.

Q–13. Does backup withholding apply to barter exchanges that are subject to reporting under section 6045?

A–13. Yes. If the barter exchange is required to report an exchange under section 6045, it is required to impose backup withholding if a member of the barter exchange does not provide a taxpayer identification number in the manner required or the Internal Revenue Service notifies the barter exchange that the number provided by the member is incorrect. With respect to an account or ongoing relationship established between a barter exchange and a member after December 31, 1983, the member is required to provide a taxpayer identification number to the barter exchange under penalties of perjury. With respect to all other accounts, the member's number is not required to be certified under penalties of perjury.

Q–14. What action is a payor of reportable interest or dividends required to take with respect to payments made on a readily tradable instrument held by a payee, if: (1) Additional readily tradable instruments of the same issue are purchased by the same payee, (2) it is the practice of the payor to combine in one account all the readily tradable instruments of the same issue owned by the same payee (and to make a single aggregate payment with respect to all readily tradable instruments of the same issue included in the account), and (3) certain of the readily tradable instruments of the same issue owned by the payee are subject to backup withholding *and others are not subject to backup withholding?*

A–14. If it is the practice of a payor to combine in one account all readily tradable instruments of the same issue owned by a payee and if certain of those instruments are subject to backup withholding and others are not subject to backup withholding, the payor is required to withhold 20 percent of the aggregate payment made with respect to all the instruments in the account. If it is not the practice of the payor to combine in one account all readily tradable instruments of the same issue owned by a payee, the payor is required only to withhold 20 percent of the payment made on the instrument or instruments with respect to which the payee is subject to backup withholding.

For example, assume that a payee, prior to 1984, held a readily tradable instrument and that a taxpayer identification number had been provided to the payor. Assume further, during 1984: (1) The payee acquired another readily tradable instrument of the same issue through a post-1983 brokerage relationship, (2) the broker notified the payor that the payee failed to certify that he was not subject to backup withholding due to notified payee underreporting, and (3) the payor, in accordance with its customary practice, combined in one account both readily tradable instruments of the same issue owned by the payee and made an aggregate payment with respect to both instruments in the account. In this circumstance, the payor would be required to withhold 20 percent of the aggregate payment made with respect to both of the instruments of the same issue owned by the payee.

Q–15. Does backup withholding apply to original issue discount?

A–15. Yes. Original issue discount is treated as a payment of interest reportable under section 6049. Thus, original issue discount is subject to backup withholding in the same circumstances in which backup withholding applies to an actual payment of interest. In determining the timing and amount of original issue discount subject to backup withholding, rules consistent with § 31.3455(b)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations shall apply. Thus, the amount to be withheld is limited to the amount of cash paid.

Q–16. If an exempt recipient files a Form W–9 (or a substitute form) in order to be exempt from backup withholding, may the payor rely on the form if the payee fails to include its taxpayer identification number on the form?

A–16. No. A Form W–9 (or substitute form) may be relied upon by a payor only if it includes the payee's taxpayer identification number. Thus, if the Form W–9 (or substitute form) provided by the payee does not contain a taxpayer identification number, the payor must withhold 20 percent of all payments made to the payee. If, however, the payor treats the payee as an exempt recipient under A–29 of § 35a.9999–1 and § 31.3452(c)–1 (b) through (p) of the Employment Taxes and Collection of Income Tax at Source Regulations without requiring the payee to file a Form W–9 (or substitute form), the payor is not required to withhold, even though the payee has not furnished a taxpayer identification number to the payor. This exception, however, is not available to barter exchanges subject to reporting under section 6045.

Q–17. In determining whether a payee failed to provide a taxpayer identification number to a payor, within what period of time must a payor treat a taxpayer identification number or an ''awaiting TIN certification'' (as defined in A–18, below) provided by a payee as having been received?

A–17. As provided in A–31 of § 35a.9999–1, a payor is required to process a taxpayer identification number within 30 days after the payor receives the taxpayer identification number from the payee. Thus, for example, if a payor of a payment reportable under section 6041 or section 6041A(a) receives a taxpayer identification number on January 16, 1984, the payor must process the number on or before February 15, 1984. As a result, the payor should commence backup withholding with respect to payments made to the payee after January 16, 1984, if the payee were subject to backup withholding under A–10 and A–11, above, but the payor must cease backup withholding by February 15, 1984. The payor may, however, treat the taxpayer identification number as having been received at any time within 30 days after it is provided, so that backup withholding in the example outlined above would not have to be imposed on any payment if the payor processed the number prior to making the payment.

A payor also has 30 days after delivery by a payee of an awaiting TIN certification (as defined in A–18, below) to treat the certificate as having been received.

EXCEPTIONS TO BACKUP WITHHOLDING

Q–18. Is a payor required to impose backup withholding during a period when a payee is waiting for receipt of a taxpayer identification number?

A–18. In general, if a payee does not provide a taxpayer identification number to a payor, the payor must withhold 20 percent of all payments made to the payee on or after January 1, 1984. However, the payee will not be subject to backup withholding for a period of 60 days, if the payee is waiting for receipt of a taxpayer identification number. In order to be entitled to the 60 day exemption, the payee must comply with the requirements of this A–18.

A payee shall be treated as if he provided a certified taxpayer identification number for a period of 60 days following the day the payor receives a certificate signed under penalties of perjury (an ''awaiting TIN certification''). (See A–17, above, for rules related to the day on which an awaiting TIN certification may be treated as having been received.) If the payor does not receive a taxpayer identification number within 60 days after the payee delivers the awaiting TIN certification to the payor, the payor must withhold 20 percent of all payments made to the payee, until the payee provides a taxpayer identification number to the payor. The awaiting TIN certification must contain statements: (1) That the payee has not been issued a taxpayer identification number, (2) that the payee has applied for a number or intends to apply for a number in the near future, and (3) that the payee understands that if the payee does not provide a taxpayer identification number to the payor within 60 days, the payor is required to withhold 20 percent of any payments made thereafter to the payee until a number is provided. Language that is substantially similar to the following will satisfy this requirement:

I certify, under penalties of perjury, that a taxpayer identification number has not been issued to me, and that I mailed or delivered an application to receive a taxpayer identification number to the appropriate Internal Revenue Service Center or Social Security Administration Office (or I intend to mail or deliver an application in the near future). I understand that if I do not provide a taxpayer identification number to the payor within 60 days, the payor is required to withhold 20 percent of all reportable payments thereafter made to me until I provide a number.

The foregoing certification, at the discretion of the payor, may be included on the same form as the certifications required by A–32 of § 35a.9999–1.

The payor may use Form W–9, as currently issued by the Internal Revenue Service, to satisfy the requirements of this A–18. If the Form W–9 is used, the payee should write ''Applied For'' in the space reserved for the taxpayer identification number. The payor also should inform the payee, in supplemental instructions or orally, ''that if a taxpayer identification number is not received by the payor within 60 days, the payor is required to withhold 20 percent of all reportable payments thereafter made to the payee until the payor receives a number from the payee.'' Future editions of the Form W–9 will contain the supplemental instruction.

A payee who seeks to qualify for the 60 day exemption from backup withholding also must certify, under penalties of perjury, that the payee is not subject to backup withholding due to notified payee underreporting, when required to do so by A–32 of § 35a.9999–1 or A–12 or A–13, above. Thus, a payee who establishes an account or acquires an instrument after December 31, 1983, will be subject to backup withholding irrespective of whether the payee certifies that the payee is waiting for receipt of a taxpayer identification number, if the payee fails to make the certification described in A–32 of § 35a.9999–1 or A–12 or A–13, above, concerning notified payee underreporting.

When a payee who opens an account or acquires an instrument after December 31, 1983, and who qualifies for this 60 day exemption furnishes a taxpayer identification number to the payor, the payee is required to certify under penalties of perjury, in accordance with A–32 of § 35a.9999–1 or A–12 or A–13, above, that the taxpayer identification number provided is correct. If no such certification is provided, the payor must institute backup withholding.

A special rule is provided for accounts that are established, or instruments that are acquired (in the case of reportable interest or dividend payments) or relationships established (in the case of other reportable payments) before January 1, 1984. All payees of such accounts, instruments, or relationships will be treated as if they are waiting for receipt of a taxpayer identification number, without any action on their part, until January 16, 1984. The payor must withhold 20 percent of any payment made after January 16, 1984, unless: (1) The payee has certified, as required by this A–18, that the payee is waiting for receipt of a taxpayer identification number or (2) the payor receives a taxpayer identification number from the payee. If, however, a payor has been provided with a Form W–9 (or substitute form) with an ''Applied For'' designation, by a payee of an account, instrument, or relationship established before January 1, 1984, the form will be valid for 60 days, notwithstanding the fact that the supplemental instruction referred to above was not provided to the payee.

Assume, for example, that the payee of an account established before January 1, 1984, delivered an awaiting TIN certification to the payor on December 30, 1983 and the payor processed the certification that day. The payor should not impose backup withholding on payments made to the payee prior to February 29, 1984, because the payee is treated under this A–18 as having provided a taxpayer identification number during that period. If the payor did not receive a number from the payee prior to February 29, the payor would be required to withhold 20 percent of any payment made to the payee on or after February 29, and before the payee provided a number. (See A–17, above, however, for the rules relating to the date on which the payor may be treated as having received the awaiting TIN certification or a taxpayer identification number.) As another example, assume that a payee of an account established before January 1, 1984, delivered an awaiting TIN certification to the payor on January 12, 1984 and processed it that day. The payor should not impose backup withholding on payments made between January 1 and January 12, because the payee would be treated during that period as if he had provided a taxpayer identification number under the rule set forth above. Moreover, backup withholding would not apply to payments made during the 60 days following January 12, because the payee on that date delivered an awaiting TIN certification. Backup withholding would begin only if the payor had not received a taxpayer identification number within that 60 day period. (See A–17, above, however, for the rules relating to the dates on which the payor may be treated as having received the certificate or the taxpayer identification number.)

The 60 day exemption applicable when a payee provides an awaiting TIN certification applies to payments made on readily tradable instruments only if the instrument is acquired directly from the payor (including a broker that holds the instrument in street name), unless the payee provides an awaiting TIN certification directly to the payor. Thus, if a broker opens a new account after 1983 and acquires a readily tradable instrument for a payee who has no taxpayer identification number, and the instrument is not held in street name, the broker must advise the payor that the payee failed to provide a taxpayer identification number under penalties of perjury, regardless of whether an awaiting TIN certification is provided to the broker. The payor in such a situation, however, must include in the notice sent to a payee (as required by A–39 of § 35a.9999–1) a statement informing the payee that, if the payee does not have a taxpayer identification number, the payee will be exempt from backup withholding for a period of 60 days following the payor's receipt of an awaiting TIN certification, provided that the payee signs an awaiting TIN certification and returns it to the payor. (See A–17, above, for the rules relating to the date on which the payor may be treated as having received the certificate.) An awaiting TIN certification, in a form permitted by this A–18, should be included with the notice. The form of the notice described in A–39 of § 35a.9999–1 and this A–18 is set forth in the Appendix to this temporary regulation.

Neither the 60 day exemption nor the special presumption applicable to accounts, instruments, and relationships established before January 1, 1984 applies to window transactions, as defined a A–9, above, and Q–42 of § 35a.9999–1. Therefore, a payor is required to withhold 20 percent of any window transaction payment whenever a payee of such a payment does not provide a taxpayer identification number of the payor. See A–56, A–57, A–58 and A–59 of § 35a.9999–3 for the actions that a payor must take to exercise due diligence after December 31, 1987, for an account with respect to which the payor received an awaiting–TIN certification to avoid a penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number. Payors will remain liable for any applicable penalties under section 6676 for years prior to 1988.

Q–19. Are payors required to withhold on payments that are less than $10, or that, if determined on an annualized basis, would be less than $10 (a ''minimal payment'')?

A–19. A payor of reportable interest or dividends has the option not to withhold on minimal payments, or, alternatively, to withhold on payments of any amount. The principles of § 31.3452(d)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations shall be utilized in determining whether a reportable interest or dividend payment may be treated as a minimal payment with respect to which backup withholding is not required.

The annualization requirement of § 31.3452(d)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations shall not apply to window transaction payments. A payor may choose not to withhold on any window transaction payment that is less than $10. However, all window transaction payments made at the same time must be aggregated.

The $10 minimal payment exception does not apply to other reportable payments (*i.e.*, payments other than reportable interest or dividends), except payments reportable under section 6045. Payments reportable under section 6045, like reportable interest and dividends, are subject to backup withholding, at the payor's option, only if the reportable amount exceeds $10. The annualization rule of § 31.3452(d)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations is inapplicable to payments reportable under section 6045.

Q–20. Are beneficiaries of trusts or estates subject to backup withholding on distributions from the trust or estate?

A–20. A beneficiary of a trust or estate is subject to backup withholding only if the trust or estate is a payor of a reportable payment. If a trust or estate receives a payment of interest, dividends or any other reportable amount, and if the trust or estate is not a grantor trust (and thus reports receipt of the reportable amount on a Form 1041 (see § 1.671–4 of the Income Tax Regulations)), distributions by the trust or estate to the beneficiaries will not be considered to be a payment of interest, dividends or other reportable amounts.

Special rules are provided, however, with respect to trusts when a grantor is considered the owner of all or a portion of the trust (and there are included in computing the grantor's tax liability those items of income attributable to that portion of the trust) (a ''grantor trust''). The special rules applicable to such trusts do not affect payors of payments made to a grantor trust. Rather, the payments to the trust are subject to the general rules of backup withholding. Payments between a grantor trust and its grantors, however, are subject to the special rules, which differ depending on the number of grantors.

If a trust has ten or fewer grantors, payments of interest, dividends or other reportable amounts (except gross proceeds reportable under section 6045) made to the trust are considered payments of the same kind made by the trust (as payor) to each grantor (as payee), in proportion to each grantor's ownership ot the trust. Each grantor of such a trust is treated as having received his or her proportionate share of the reportable payment on the day the payment is received by the trust. Accordingly, any reportable payments made to the trust are treated as reportable payments made by the trust to the grantor or grantors and are subject to all applicable backup withholding requirements. If, for example, a grantor of a trust having 10 or fewer grantors had not provided a taxpayer identification number to the trust in the manner required, the trustee would be required to withhold and remit 20 percent of the reportable payment. In addition, the trustee of a grantor trust having ten or fewer grantors, established on or after January 1, 1984, may not certify either that the trust is not subject to backup withholding due to notified payee underreporting or that the taxpayer identification number provided is correct, unless each grantor has furnished the trustee with such a certification signed under penalties of perjury. See Q/A-54 of §35a.9999-3 which revises the rule in this paragraph.

If a grantor trust has more than ten grantors, the trustee is required to treat payments of interest, dividends or other reportable payments (except gross proceeds reportable under section 6045) made to the trust as payments of the same kind made by the trust to each grantor, in an amount equal to the distribution made by the trust to each grantor, on the date on which the distribution to the grantor is paid or credited. The trust is thus treated as a payor of the same types of payments received by the trust, for the purpose of the backup withholding requirements. The trustee of such a trust is required to withhold 20 percent of amounts paid or credited to any grantor who is subject to backup withholding if: (1) The grantor fails to provide a taxpayer identification number to the trust, (2) the grantor fails to provide a certification required by A–32 of §35a.9999–1, (3) the trust is required to impose backup withholding under the special rules applicable to readily tradable instruments (A–40 of §35a.9999–1), or (4) the Internal Revenue Service notifies the trustee that the grantor provided an incorrect taxpayer identification number. If the reportable amount of the distribution is greater than the amount distributed, the trustee may, in its discretion subject the entire reportable amount to backup withholding.

For example, if a grantor trust having 100 grantors received a reportable interest payment of $1,000,000, which was of a type reportable under section 6049, and made a cash distribution of $900 to each grantor (after deducting certain expenses), the trustee would be required to withhold 20 percent of the $900 payment made to any grantor who was subject to backup withholding. Similarly, if a grantor trust having 100 grantors received an oil royalty payment of $100,000, which was of a type reportable under section 6041, and the trust made a cash distribution of $8,000 to each grantor (after deducting certain production related taxes and expenses), the trustee would be required to withhold 20 percent of the $8,000 payment made to any payee who had not provided a taxpayer identification number to the trust. Because the certifications required by A–32 of §35a.9999–1 do not apply to payments of a type reportable under section 6041, grantors of the trust would not be subject to backup withholding if they failed to make such certifications.

In addition, the trustee of a grantor trust having more than ten grantors may certify that the trust's taxpayer identification number is correct and that the trust is not subject to backup withholding due to notified payee underreporting, without regard to the status of the individual grantors of the trust.

Q–21. Are reportable payments made to exempt recipients subject to backup withholding?

A–21. Answer 29 (A–29) of §35a.9999–1 provides that a payor of reportable interest of dividends is not required to withhold on payments made to exempt recipients. Backup withholding also is not required with respect to any other reportable payment made to an exempt recipient described in §31.3452(c)–1 (b) through (p) of the Employment Taxes and Collection of Income Tax at Source Regulations, except in the case of (1) payments with respect to barter exchange transactions reportable under section 6045, and (2) payments reportable under sections 6041, 6041A, and 6050A. A middleman, however, shall include only a nominee or custodian known generally in the investment community as a nominee or listed in the most recent publication of the American Society of Corporate Secretaries, Inc. Nominee List. The exempt recipients described in this A–21 shall also be so treated for purposes of § 1.6045–1(c)(3)(i) of the Income Tax Regulations.

FOREIGN PERSONS

Q–22. Will a form relating to exemptions for foreign persons be issued by the Internal Revenue Service?

A–22. The Service is currently preparing Form W–8, on which a payee may sign, under penalties of perjury, the statement described in § 1.6049–5(b)(2)(iv) and § 1.6045–1(g)(1) of the Income Tax Regulations, whichever is applicable. See A–51, A–52 and A–55 of § 35a.9999–1 for other requirements. The Form W–8, however, may not be available prior to the time that payors intend to make the mailing or mailings required by A–52 or A–55 of § 35a.9999–1. Accordingly, payors should use the substitute form described in § 1.6049–5(b)(2)(iv) or § 1.6045–1(g)(1), whichever is applicable, on which a payee may make the certifications concerning the payee's foreign status and provide his name, address, and taxpayer identification number (if any). If a payor sends a substitute Form W–9 to a payee, the payor may incorporate the required foreign status certification on the substitute Form W–9.

RECORD RETENTION

Q–23. Under what circumstances are payors required to retain the documents they receive from payees?

A–23. With respect to a pre-1984 account or instrument (as defined in A–34 of § 35a.9999–1) or any brokerage relationship that is not a post-1983 account (as defined in A–41 of § 35a.9999–1), the payor is not required to retain either: (1) A form on which a payee certified concerning the correctness of a taxpayer identification number, or (2) an awaiting TIN certification, if the payor can establish the existence of procedures that are reasonably calculated to ensure that a payee who so certified is accurately identified in the payor's records. With respect to all other accounts or instruments, however, payors are required to retain all certification documents in the same manner and for the same period of time that the payor retains other account-creation or instrument-purchase documents.

APPENDIX

The notice required by A–39 of § 35a.9999–1 and A–18, above, shall be substantially in the form provided below:

Recently, you purchased [identify security acquired]. Because of the existence of one or more of the following conditions, payments of interest, dividends, and other reportable amounts that are made to you will be subject to backup withholding of tax at a 20 percent rate: [specify the condition or conditions applicable]

(1) You failed to provide a taxpayer identification number, or failed to provide such number under penalties of perjury, in connection with the purchase of the acquired security. (An individual's taxpayer identification number is his social security number.)

(2) The taxpayer identification number that you provided is not your correct number.

(3) You are subject to backup withholding due to notified payee underreporting (section 3406(a)(1)(C) of the Internal Revenue Code).

(4) You failed to certify that you are not subject to backup withholding due to notified payee underreporting (section 3406(a)(1)(D) of the Internal Revenue Code).

If condition (1) or (2) applies, you may stop withholding by providing your taxpayer identification number on the enclosed Form W–9, signing the form, and returning it to us. If you do not have a taxpayer identification number, but have (or will soon) apply for one, you may so indicate on the Form W–9; in that case, you will not be subject to withholding for a period of 60 days, but you must provide us with your taxpayer identification number promptly after you receive it in order to avoid withholding after the end of the 60-day period. Certain persons, described on the enclosed Form W–9, are exempt from withholding. Follow the instructions on that form if applicable to you.

If condition (3) applies, and you do not believe you are subject to withholding due to notified payee underreporting, please contact your local Internal Revenue Service office.

If condition (4) applies, you may stop withholding by certifying on the enclosed Form W–9 that you are not subject to backup withholding due to notified payee underreporting, signing the form, and returning it to us.

If more than one condition applies, you must remove *all applicable conditions to stop withholding.*

Please address any questions concerning this notice to:

[Insert Payor Identifying Information]

(Do not address questions to the broker who purchased the securities for you.)

[T.D. 7922, 48 FR 53106, Nov. 25, 1983, as amended by T.D. 7929, 48 FR 56342, Dec. 20, 1983; 49 FR 9417, Mar. 13, 1984; T.D. 8163, 52 FR 44874, Nov. 23, 1987; T.D. 8248, 54 FR 14350, Apr. 11, 1989]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 35a.9999–2 was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000.

§ 35a.9999–3 Questions and answers concerning backup withholding.

The following questions and answers principally concern the backup withholding requirement with respect to reportable payments. These requirements are issued under the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369):

IN GENERAL

Q–1. Who has the legal obligation to withhold on reportable payments made to a payee who is subject to backup withholding?

A–1. The person required to withhold (the payor) is the person who is required by the applicable provision to make an information return with respect to a payment under section 6041, 6041A(a), 6042, 6044, 6045, 6049, or 6050A. For example, in the case of a person who has a paying agent making a reportable payment to a payee, the paying agent is not the payor but is merely an agent for the principal (payor). In the case of a payment which is collected on behalf of, or for the account of, a payee, the payor (''middleman'') is the person collecting or receiving the payment, irrespective of whether he is acting as the agent of the payee, or as agent for the issuer of the instrument. For example, a payee may establish a custodial account with a financial institution or brokerage firm where instruments are held for the benefit of the payee. The interest or dividends may be paid to a nominee of the financial institution or brokerage firm. The financial institution or brokerage firm will, in turn, credit the payee's custodial account. The financial institution or brokerage firm is the payor since it receives and credits payment to the payee's account and is required to make an information return showing such payment to the payee. See A–20 of § 35a.9999–2 for special rules related to grantor trusts.

Q–2. What consequences result if a payor fails to withhold on payments made to a payee who is subject to backup withholding?

A–2. A payor is subject to the same requirements and penalties for failing to impose backup withholding as an employer making a payment of wages. Consequently, under section 3403 and § 31.3403–1 of the Employment Taxes and Collection of Income Tax at Source Regulations, a payor is liable for the tax whether or not the payor withholds the tax from a payee who is subject to backup withholding. A payor may be relieved of liability for the tax which was required to be withheld if the payor can show that the tax has been paid by the payee, as provided in section 3402(d) and § 31.3402(d)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations. In addition to liability for the tax, a payor who fails to withhold when required may be subject to civil penalties under section 6651 (addition to the tax for failure to pay any tax required to be shown on the payor's return), section 6656 (penalty for failure to make deposit of taxes) and section 6672 (penalty for failure to collect and pay over tax) and to criminal penalties under section 7201 (penalty for willfully attempting to evade or defeat any tax or the payment of any tax), section 7202 (penalty for willful failure to collect or pay over any tax), and section 7203 (penalty for willful failure to pay tax). The fact that a payor shows that the tax has been paid by the payee will not relieve the payor of liability for any civil or criminal penalty. The payor is not liable to any person for any withheld amount. The payor will only be liable to the United States for the tax which was required to be withheld as provided in § 31.3403–1 of the Employment Taxes and Collection of Income Tax at Source Regulations.

REQUIREMENT TO WITHHOLD

Q–3. Is a payor required to withhold if the taxpayer identification number furnished by a payee is an ''obviously incorrect number''?

A–3. Yes. As provided in A–28 of § 35a.9999–1, a payee shall be treated as having failed to furnish a taxpayer identification number to the payor if the number furnished is obviously incorrect. An obviously incorrect number is any taxpayer identification number that does not contain nine digits or a number that includes one or more alpha characters.

Q–4. When are payments considered to be paid and thus subject to backup withholding?

A–4. With respect to reportable interest or dividends, backup withholding applies when the payor pays interest, dividends, or patronage dividends to a payee who is subject to backup withholding. Amounts are paid when they are credited to the account of or set apart for the payee. Amounts are not considered paid solely because they may be withdrawn by the payee, so long as they are not credited to the payee's account, until either actual withdrawal or a specified crediting date.

Amounts are considered paid, however, upon withdrawal or crediting. If a bank credits interest on savings accounts only on the last day of each month or when the account is closed, then backup withholding applies at the time interest is paid on the last day of each month and when the account is closed.

When bonds are sold between interest payment dates, the portion of the sales price representing interest accrued to the date of sale is not considered to be a payment of interest for purposes of section 6049, but will be considered a reportable payment under section 6045. Therefore, if the gross proceeds of the sale are subject to backup withholding under A–12 of § 35a.9999–2, 20 percent of the sales price, including the portion representing accrued interest, will be subject to backup withholding.

In the case of stock for which the record date is earlier than the payment date, the dividend is considered paid on the payment date. For example, if a corporation declares a dividend on September 1 to the record holders as of September 12, and the dividends are payable on October 12, backup withholding applies on October 12 (the payment date). In the case of a corporate reorganization, if a payee is required to exchange stock held in the former corporation for stock in the new corporation before the dividends which have been paid with respect to the stock in the new corporation will be provided to the payee, the dividend is considered paid on the payment date without regard to when the payee actually exchanges the stock and receives the dividend.

If a payor (such as a money market fund) computes interest or dividends daily but credits the interest or dividends on the last day of each month, then backup withholding applies on the last day of each month. If a payor computes *and* credits interest or dividends daily, backup withholding applies daily.

With respect to any reportable payment other than reportable interest or dividends, backup withholding applies at the time the payment is made or in the case of a transaction reportable under section 6045 when the amount subject to backup withholding is determined. Except in the case of forward contracts, regulated futures contracts, and security short sales, the amount subject to backup withholding in the case of a transaction reportable under section 6045 is determined on the date of the sale or exchange. See § 1.6045–1 (d)(4) and (f)(3) of the Income Tax Regulations (and Announcement 88-6, 1988-3 I.R.B. 52) for the applicable sale or exchange date and A–23 through A–25 and A–27 for special rules applicable to forward contracts, regulated futures contracts, security short sales, and issuer payment of debt securities. The date by which the payor is required to make an information return is irrelevant for purposes of determining when the payment is made and thus subject to backup withholding.

In the case of a middleman required to withhold tax, rules similar to § 31.3453(b)–1 (b) of the Employment Taxes and Collection of Income Tax at Source Regulations shall apply. In the case of a United States savings bond, see § 1.6049–4(d)(9) of the Income Tax Regulations.

PAYMENTS AND AMOUNTS SUBJECT TO BACKUP WITHHOLDING

Q–5. Is interest paid on a mortgage escrow account with a financial institution or interest earned on certain premiums paid with respect to an insurance policy, subject to backup withholding?

A–5. Yes. Both a payment of interest to a mortgage escrow account with a financial institution and a payment that represents an increment in value of ''advance premiums,'' ''prepaid premiums,'' or ''premium deposit funds'' which is applied to the payment of premiums due on an insurance policy, or is made available for withdrawal by the policyholder, are subject to reporting under section 6049 and thus are subject to backup withholding.

Q–6. If a payor imposes a penalty for premature withdrawal of funds deposited in a time savings account, certificate of deposit, or similar class of deposit, is the payor required to calculate the tax to be withheld on the amount of the reportable interest payment (not reduced by any penalty)?

A–6. No. A payor may, at its option, take into account any penalty it actually imposes on a payee when it calculates the amount to be withheld. If the payor chooses to take the penalty into account, the amount subject to backup withholding would be the amount of interest the payee actually receives. The gross amount of the payment, however, is subject to information reporting.

Q–7. If a payor is able to estimate the portion of a distribution which is not a dividend, is the payor nevertheless required to impose backup withholding on the gross amount of the distribution?

A–7. If the payor is unable to determine the portion of a distribution which is a dividend, backup withholding applies to the entire amount of the distribution. If a payor is able reasonably to estimate the portion of the distribution which is not a dividend, however, backup withholding does not apply to such portion. A payor making a payment all or a portion of which may not be a dividend may use previous experience to estimate the portion of such payment which is not a dividend. An estimate of the portion of a distribution which is not a dividend shall be considered reasonable if the estimate does not exceed the proportion of the distributions made by the payor during the most recent calendar year for which Forms 1099 and 1087 were required to be filed which was not reported by the payor as a dividend.

Q–8. Are dividends which are reinvested in stock of the company subject to backup withholding?

A–8. Dividends which are reinvested pursuant to a qualified plan in stock of a public utility are not subject to backup withholding. For this purpose, the amount of the reinvested dividend paid to any person, the identity of the recipient, and whether the recipient makes the election required by section 305(e)(2)(B) are irrelevant. All other reinvested dividends are subject to backup withholding.

Backup withholding shall apply to the amount of any dividend available to the shareholder, or credited to the shareholder's account. At the discretion of the payor, backup withholding need not be applied: (1) To any excess of the fair market value of the shares of stock received by the shareholder or credited to the shareholder's account over the purchase price of such shares (including additional shares acquired by the shareholder at a discount in connection with the dividend distribution) or (2) to any fee which is paid by the payor in the nature of a broker's fee for purchase of the stock or service charge for maintenance of the shareholder's account. The payor must, however, treat such excess amounts and fees on a consistent basis for each calendar year. Thus, the payor is not required to impose backup withholding on any amount in excess of the actual cash value of the dividend declared which the payee would have received had the payee not been a participant in the dividend reinvestment plan.

Q–9. Are there any payments of dividends that are not subject to backup withholding?

A–9. Yes. Backup withholding does not apply to—

(i) Any amount treated as a taxable dividend by reason of section 302 (relating to redemptions of stock).

(ii) Any amount treated as a taxable dividend by reason of section 306 (relating to disposition of certain stock).

(iii) Any amount treated as a taxable dividend by reason of section 356 (relating to receipt of additional consideration in connection with certain reorganizations).

(iv) Any amount treated as a taxable dividend by reason of section 1081(e)(2) (relating to certain distributions pursuant to an order of the Securities and Exchange Commission).

(v) Any amount which is an exempt-interest dividend, as defined in section 852(b)(5)(A), of a regulated investment company.

(vi) Any amount paid or treated as paid during a year by a regulated investment company, provided that the payor reasonably estimates, as provided in A–7, that 95 percent or more of all dividends paid or treated as paid during the year are exempt-interest dividends.

(vii) Any dividend that is reinvested pursuant to a qualified plan in stock of a public utility as provided in A–8.

The foregoing exceptions do not apply to backup withholding on gross proceeds reportable under section 6045.

Q–10. What amount of a payment reportable under section 6044 is subject to backup withholding?

A–10. If a payee fails to provide his taxpayer identification number or, for relationships with or memberships in a cooperative that are established after December 31, 1983, fails to provide a taxpayer identification number under penalties of perjury, the amount subject to backup withholding is any amount subject to reporting under section 6044, but only to the extent that the payment is made in money or by qualified check (as defined in section 1388(c)(4)). Thus, the payor shall withhold 20 percent of the amount paid in money or by qualified check to a payee who has failed to provide a taxpayer identification number in the manner required. For example, if a cooperative pays a patronage dividend of $2,000, consisting of $200 in cash, $300 by a qualified check and $1,500 in a qualified written notice of allocation, the amount subject to backup withholding is $500 (the amount paid in money and by qualified check). Thus, if the payee failed to provide a taxpayer identification number in the manner required, the cooperative would be required to withhold 20 percent of the $500.

If a payee (whose relationship with or membership in a cooperative was established after December 31, 1983) fails to certify that the payee is not subject to backup withholding due to notified payee underreporting, the amount subject to backup withholding is the amount of any payment reportable under section 6044 that is paid in money or by qualified check, but only if 50 percent or more of the reportable amount is paid in money or by qualified check. Therefore, in the case where there has been a payee certification failure, if a payment is made 50 percent or more in cash and by qualified check, the payor is required to withhold 20 percent of the amount of the cash and qualified check. If less than 50 percent of the payment is paid in cash or by qualified check, no amount is subject to backup withholding. For example, if a cooperative pays a patronage dividend consisting of $350 in cash, $250 by a qualified check, and $400 in a qualified written notice of allocation, 20 percent of $600 (the amount paid in money and by qualified check) is required to be withheld if there is a payee certification failure. If $100 were paid in cash, $250 by a qualified check, and $650 in a qualified written notice of allocation, however, the payment would not be subject to backup withholding even though there is a payee certification failure because less than 50 percent of the patronage dividend is paid in cash or by qualified check.

Q–11. If a payor makes a reportable payment in property (other than money), is the payor required to impose backup withholding?

A–11. Yes. In the case of a payment that is made in property, backup withholding applies to the fair market value of the property determined on the date of payment except in the case of certain payments subject to reporting under section 6050A.

Q–12. If the payor is required to withhold on a payment made in property, in what manner may the payor withhold?

A–12. The payor may withhold on the principal amount being deposited with the payor, or the payor may withhold from another account or source maintained by the payor for the payee. The account or source from which such tax is withheld must be payable to at least one of the persons listed on the account subject to backup withholding. If the account or source is not payable solely to the same person or persons listed on the account subject to backup withholding, then the payor must obtain a written statement from all other persons to whom the account or source is payable authorizing the payor to withhold the tax from such account or source. The payor electing to withhold from an alternative source may determine the account or source from which the tax is to be withheld. The payor is liable for any tax that is required to be withheld if the recipient of the payment is subject to backup withholding. A payor may not withhold from an alternative source except with respect to payments in property.

AMOUNTS SUBJECT TO REPORTING UNDER SECTION 6041 OR 6041A(A)

Q–13. Under what circumstances will a payment of a type subject to information reporting under section 6041 be exempt from backup withholding?

A–13. An information return is not required to be made with respect to payments described in § 1.6041–3 of the Income Tax Regulations and, therefore, such payments are not subject to backup withholding. In addition, payments otherwise reportable under section 6041 that are made to the following persons will not be subject to backup withholding:

(i) An organization exempt from taxation under section 501(a), or an individual retirement plan,

(ii) The United States,

(iii) A State, the District of Columbia, a possession of the United States, or any political subdivision of any of the foregoing,

(iv) A foreign government or political subdivision of a foreign government,

(v) An international organization,

(vi) Any wholly owned agency or instrumentality of any person described in (ii), (iii), (iv), or (v), or

(vii) A foreign central bank of issue.

The provisions of § 31.3452(c)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations shall apply for the purpose of determining whether a payee to whom a payment is made is subject to information reporting and backup withholding. For example, during 1984, payor K, in the course of its trade or business makes a payment of rent of $700 to R Inc. for the use of premises owned by R Inc. Under § 1.6041–3(c) of the Income Tax Regulations payments to a corporation are not subject to information reporting (except in the case of certain payments not relevant here). Under § 31.3452(c)–1(b)(2) of the Employment Taxes and Collection of Income Tax at Source Regulations, K may treat R Inc. as a corporation because its name contains the unambiguous expression of corporate status, ''Inc.'' Because the payment of rent to R Inc. is not subject to information reporting, it is not subject to backup withholding. If, however, K made the payment of rent to S Company, K would not be authorized to treat S Company as a corporation because ''company'' is not an unambiguous expression of corporate status. *See* § 31.3452(c)–1(b)(2) of the Employment Taxes and Collection of Income Tax at Source Regulations. Accordingly, K would be required to make an information return with respect to the payment under sections 6041 and withhold 20 percent of the payment to S Company, if S Company did not furnish a taxpayer identification number to K.

Q–14. Do the exceptions under section 6041 and the regulations thereunder apply to payments subject to reporting under section 6041A(a)?

A–14. For purposes of both information reporting and backup withholding, the exceptions under section 6041 shall apply to payments of a type reportable under section 6041A until regulations are issued under section 6014A; the rules of A–13 shall apply to such payments. Thus, in general, payments of the type reportable under section 6041A(a) that are made to corporations or general agents are not subject to information reporting or backup withholding. (See A–15 relating to payments to certain medical corporations.)

Q–15. Does backup withholding apply to a payment reportable under section 6041 or section 6041A(a) that is paid to a corporation engaged in providing medical and health care services or engaged in the billing and collection of payments in respect of medical and health care services (other than certain tax-exempt or governmental facilities described in § 1.6041–3(c) (1) and (2) of the Income Tax Regulations)?

A–15. Yes. Such amounts are subject to information reporting under section 6041 and 6041A(a) and thus are subject to backup withholding. The exception from backup withholding for payments to exempt recipients (described in A–21 of § 35a.9999–2) does not apply in the case of payments that are subject to reporting under sections 6041, 6041A(a) or 6050A.

Q–16. Does backup withholding apply to oil royalty payments that are subject to reporting under section 6041 or effective for royalty payments made after December 31, 1986, section 6050N?

A–16. Backup withholding does not apply to an oil royalty payment if windfall profit tax is actually withheld under section 4986. If windfall profit tax is not actually withheld from the oil royalty payment (because, for example, payment is made with respect to "exempt royalty oil" (as defined in section 4993(f)), the oil royalty payment is subject to backup withholding. The amount subject to backup withholding is the amount the payee receives (*i.e.*, the gross proceeds less production related taxes such as State severance tax). The payor shall not be liable to any person other than the United States for the amount of tax withheld.

Q–17. Does backup withholding apply to net commissions paid to an unincorporated special agent with respect to insurance policies that are subject to reporting under section 6041?

A–17. Backup withholding does not apply to commissions reportable with respect to such an unincorporated special agent, provided that no cash is actually paid by the payor to the special agent.

Q–18. Does backup withholding apply to "designated distributions" (as defined in section 3405(d)(1)) if the distribution is not subject to reporting under section 6041?

A–18. No. As specified in A–30 of § 35a.9999–1, backup withholding applies only to distributions from pensions, annuities, or other plans of deferred compensation that are subject to reporting under section 6041. Thus, the following distributions are among those exempt from backup withholding because they are not subject to reporting under section 6041: (1) Distributions from an individual retirement account (subject to reporting under sections 408(i) and 6047(d)); (2) distributions from an owner-employee plan (subject to reporting under section 6047(b)); (3) certain surrenders of life insurance contracts (subject to reporting under section 6047(e)); and (4) distributions from a qualified bond purchase plan (subject to reporting under section 6047(c)).

Q–19. Does backup withholding apply to payments of gambling winnings that are subject to reporting under section 6041?

A–19. Backup withholding does not apply to any portion of reportable gambling winnings with respect to which tax is actually withheld under section 3402(q). In any case in which the reportable gambling winnings are not withheld upon under section 3420(q), backup withholding applies. Thus, gambling winnings reportable under section 6041 are subject to backup withholding if the payee does not furnish a taxpayer identification number and the payment is not withheld upon under section 3402(q). Answer 11 of §35a.9999–2 does not apply to gambling winnings. Thus, the payor is not required to determine whether any of the three conditions specified therein applies with respect to the payee.

For purposes of information reporting and backup withholding, (1) the reportable gambling winnings is the amount paid with respect to the amount of the wager reduced, at the option of the payor, by the amount of the wager, and (2) amounts paid with respect to identical wagers are treated as paid with respect to a single wager for purposes of calculating the amount of proceeds from a wager. The determination of whether amounts paid with respect to a single wager are identical shall be made under the rules of § 31.3402(q)–(1,)(c)(1)(ii) of the Employment Taxes and Collection of Income Tax at Source Regulations. In addition, until further regulations are issued, gambling winnings in excess of $600 are reportable only if the payout is based on betting odds of 300 to 1, or higher. The applicability of the odds requirement to information reporting and backup withholding is being studied by the Service and is subject to change in further regulations. Notwithstanding the odds requirement, winning from bingo, keno, and slot machines are subject to backup withholding if reportable under § 7.6041–1 of the temporary Income Tax Regulations.

DEFINITION OF A PRE-1984 ACCOUNT

Q–20. Under what circumstances is an account or instrument treated as a pre-1984 account?

A–20. Answer 34 of § 35a.9999–1 describes generally the accounts and instruments that are treated as a pre-1984 account. In addition, the purchase of additional shares in a credit union, where a prime account existed before 1984, shall be considered a pre-1984 account. If funds taken from one account, in existence prior to January 1, 1984, are used to create a new account on or after such date, however, the new account generally does not constitute a pre-1984 account. For example, with respect to a disposition of shares in a mutual fund and the purchase of shares of another fund within a group of mutual funds which occurs after December 31, 1983, the shares acquired in the second fund are not treated as a pre-1984 account unless the payee owned shares in the second fund prior to January 1, 1984.

If a shareholder is enrolled before January 1, 1984, in a dividend reinvestment program to purchase additional shares of the corporation sponsoring the program, the shares acquired through the program are considered a pre-1984 account, in the discretion of the payor. In the case of a qualified employee trust that distributes instruments in kind, any instrument distributed from the trust will be considered a pre-1984 account with respect to employees who were participants in the plan before January 1, 1984. Similarly, when a payor offers participants in a plan the opportunity to purchase stock of the payor after a specified time using the money that the payee invested during that period of time, the stock so purchased after December 31, 1983, shall be considered a pre-1984 account with respect to participants in the plan who either owned shares or invested money in the plan before January 1, 1984.

An instrument with respect to which a broker is the payor is a pre-1984 account if the brokerage account in which the instrument is held is not a ‘‘post-1983 account.’’ Answer 41 of § 35a.9999–1 describes generally the manner of determining whether a brokerage relationship is a post-1983 account. In addition, a brokerage relationship will not be treated as a post-1983 account if (i) a broker redeems or repurchases securities which were acquired by the seller prior to January 1, 1984, and (ii) either (A) the issuer of the securities is the broker obligated to make an information return under section 6045 or (B) the broker was obligated during 1983 to redeem the securities.

BROKERAGE ACCOUNTS AND TRANSACTIONS

Q–21. Does backup withholding apply to bonds the interest from which is exempt from taxation under section 103?

A–21. Interest on a tax-exempt obligation is not reportable under section 6049 if the payee provides a written certification to the payor (other than the issuer) that interest on the obligation is exempt from tax. See § 1.6049–5(b)(1)(ii) of the Income Tax Regulations. If the interest is not reportable under section 6049, it is not subject to backup withholding. A broker, however, is required to report the gross proceeds of a sale of a tax-exempt bond (including redemption of the bond at maturity) under section 6045. Thus, the gross proceeds from the sale of such a bond are subject to backup withholding. Any accrued and unpaid tax-exempt interest included in the sales proceeds is not reportable under

§ 1.6045–1(d)(3) of the Income Tax Regulations. Accordingly, backup withholding is not required with respect to the portion of the proceeds of the sale that represents accrued tax-exempt interest.

Q–22. Does backup withholding apply to a redemption of a share in a mutual fund?

A–22. Generally, yes. A redemption of shares of a mutual fund (other than a redemption at an issue price described in § 1.6045–1(c)(3)(iv) of the Income Tax Regulations) is a reportable payment under section 6045, and thus the gross proceeds are subject to backup withholding if the fund is considered a broker or a broker is otherwise involved.

Q–23. What amounts are subject to backup withholding upon the disposition of forward contracts or regulated futures contracts?

A–23. If a customer is subject to backup withholding with respect to an account containing forward contracts or regulated futures contracts, the broker must withhold 20 percent of the following amounts:

(i) All cash or property withdrawn from the account by the customer during the year. A withdrawal includes the use of money or property in the account to purchase any property other than property acquired in connection with the closing of a contract. For this purpose, the acceptance of a warehouse receipt or other taking delivery to close a contract is in connection with the closing of a contract only if the property acquired is disposed of by the close of the seventh trading day following the trading day that the customer takes delivery under the contract. In addition, the making delivery to close a contract is in connection with the closing of a contract only if the broker is able to determine that the property used to close the contract was acquired no earlier than the seventh trading day prior to the trading day on which delivery is made. Cash withdrawals do not include repayments of debt incurred in connection with a making or taking delivery that meets the requirements of the preceding three sentences. A withdrawal also does not include payments of variation margin, commissions, fees, a transfer of cash from the account to another futures account that is subject to the rules of this A–23, or cash withdrawals traceable to dispositions of property other than futures (not including profit on the contract separately reportable under § 1.6045–1(c)(5)(i)(*b*) of the Income Tax Regulations).

(ii) The amount of cash in the account available for withdrawal by the customer at the relevant year-end (as described in § 1.6045–1(c)(5) of the Income Tax Regulations).

The payor must include the amount withheld and the amounts subject to withholding, in addition to the amounts otherwise reportable under section 6045, on the Form 1099–B filed with respect to a customer who is subject to backup withholding. The determination of whether the customer is subject to backup withholding should be made at the time of (1) the cash or property withdrawals or (2) the relevant year-end, whichever is applicable.

Q–24. What amount is subject to backup withholding with respect to security sales made through a margin account?

A–24. The amount subject to backup withholding in the case of a security sale made through a margin account (as defined in 12 CFR Part 220 (Regulation T)) is the gross proceeds (as defined in § 1.6045–1(d)(5) of the Income Tax Regulations) on such sale. The amount required to be withheld with respect to such a sale, however, is limited to the amount of cash available for withdrawal by the customer immediately after the settlement of the sale. For this purpose, the amount available for withdrawal by the customer does not include amounts required to satisfy margin maintenance under: Regulation T, rules and regulations of the National Association of Securities Dealers and national securities exchanges, and generally applicable self-imposed rules of the margin account carrier. Thus, for example, if the broker forces a customer sale to meet the requirements of Regulation T (a maintenance call), none of the proceeds of such a sale are subject to backup withholding (except to the extent of the fractional amount of the last share sold which exceeds the amount needed to meet the Regulation T margin requirement).

Q–25. What amount is subject to backup withholding with respect to security short sales?

A–25. The amount subject to backup withholding with respect to a short sale of securities is ordinarily the gross proceeds (as defined in § 1.6045–1(d)(5) of the Income Tax Regulations) on such short sale. At the option of the broker, however, the amount subject to backup withholding may be the gain upon the closing of the short sale (if any) and the obligation to withhold can be deferred until the closing. A broker may use this alternative method of determining the amount subject to backup withholding with respect to a short sale only if at the time the short sale is initiated the broker expects that the amount of gain realized upon the closing of the short sale will be determinable from the broker's records. If, due to events unforeseen at the time the short sale was initiated, the broker is unable to determine the basis of the property used to close the short sale, the property shall be assumed to have a basis of zero. The determination of whether a short seller is subject to backup withholding shall be made on the date (1) of the initiation or closing, as the case may be, or (2) that the initiating or closing, as the case may be, is entered on the broker's books and records.

Q–26. How does backup withholding apply to foreign currency contracts (as defined in section 1256(g))?

A–26. In general, brokers shall report with respect to foreign currency contracts in accordance with the rules for reporting with respect to regulated futures contracts (see § 1.6045–1(c)(5)). For purposes of § 1.6045–1(c)(5)(i)(*b*) of the Income Tax Regulations realized profit (or loss) from a foreign currency contract is determined—

(1) In the case of making or taking delivery, by comparing the contract price to the spot price for the contract currency at the time and place specified in the contract, and

(2) In the case of a closing by entry into an offsetting contract, by comparing the contract price to the price of the offsetting contract.

For purposes of § 1.6045–1(c)(5)(i) (*c*) and (*d*), unrealized profit in a foreign currency contract is determined by comparing the contract price to the broker's price for similar contracts at the close of business of the relevant year. Appropriate additions will be made to § 1.6045–1(c) of the Income Tax Regulations in the near future. For rules determining the amount subject to backup withholding under § 1.6045–1(c)(5), see A–23.

Q–27. When does backup withholding apply to payments arising as a result of the retirement or redemption of a debt security subject to reporting under section 6045?

A–27. With respect to the retirement or redemption of a debt security before January l, 1988, backup withholding applies on the sale date under § 1.6045–1(d)(4) of the Income Tax Regulations. Additionally, a broker that is also the obligor on a debt security may elect to apply backup withholding on the payment date.

With respect to the retirement or redemption of a debt security after December 31, 1987, backup withholding applies on the date the ‘‘sale’’ is entered on the books of the broker. Additionally, a broker that is also the obligor on a debt security may elect to apply backup withholding on the payment date if later than the ‘‘sale’’ date.

A broker must determine whether backup withholding applies on the same date (either the date entered on the books of the broker or the payment date) for all similarly situated payees receiving payments on the same type of debt security.

SPECIAL RULES WITH RESPECT TO READILY TRADABLE INSTRUMENTS

Q–28. Do special rules apply if an account or instrument is acquired directly from the payor or reportable interest or dividends after December 31, 1983?

A–28. Yes. Special rules apply depending on the manner in which the instrument is acquired. In the case of a readily tradable instrument acquired directly from the payor by means of electronic transmission (*e.g.,* telephone or wire transfer), the payee, at the payor's option, shall be given 30 days after such acquisition to provide the certifications required in A–32 of § 35a.9999–1, before the payor is required to impose backup withholding on the reportable interest or dividends, *Provided* That the payee furnishes a taxpayer identification number to the payor at the time of the acquisition. If the payee withdraws any of the interest or dividends before the certifications are received, however, the payor must withhold 20 percent of the reportable amounts. For purposes of the preceding sentence, all cash withdrawals in an amount up to the reportable amounts are assumed to be interest or dividends. In addition, the payor must commence withholding on all reportable interest or dividends in connection with the instrument or account 30 days after the acquisition, if the payee has not provided the required certifications to the payor by such date.

The special rule described in the preceding paragraph shall also supply to acquisitions that are effected before January 1, 1985, by mail communication. With respect to accounts or instruments acquired by mail or after January 1, 1985, the payor is required to impose backup withholding on the reportable interest or dividend payments if the payee has not provided the required certifications at the time that the first reportable payment is made.

Q–28A. Do special rules apply if a broker sells securities for a customer pursuant to a telephone instruction, in circumstances in which the customer failed to provide a certified taxpayer identification number as required by A–12 of § 35a.9999–2?

A–28A. Yes. The customer, at the payor's option, shall be given 30 days after the date of the sale to furnish a certification as required by A–12 of § 35a.9999–2, provided that (1) the payee furnishes his taxpayer identification number before the sale and (2) the customer does not withdraw the proceeds of the sale prior to the time the required certification is provided (or backup withholding is applied). For purposes of the preceding sentence, an investment of the cash proceeds of the sale in other property shall be considered a withdrawal by the customer; however, investment in other property shall be permitted if, at all times, at least 20 percent of all gross proceeds reportable under section 6045 are held in cash by the broker. If the customer does not provide the required certification within 30 days after the date of the sale, the broker must withhold 20 percent of all reportable gross proceeds on the 31st day after the date of the sale.

Q–28B. Will transition rules apply to backup withholding on gross proceeds reportable by brokers under section 6045?

A–28B. Yes. The following transition rules will apply until April 1, 1984. First, for purposes of backup withholding on gross proceeds reportable by brokers, the penalties of perjury certification required by A–12 of § 35a.9999–2 (for post-1983 accounts) may be waived, at the broker's option, until April 1, 1984. A customer who opens an account after December 31, 1983, and who consummates a sale prior to April 1, 1984, will not be subject to backup withholding, provided that the customer furnishes a taxpayer identification number to the broker prior to the sale. The gross proceeds from sales made through post-1983 accounts after March 31, 1984, however, will be subject to backup withholding if the customer does not provide a taxpayer identification number certified under penalties of perjury. See A–28A for special rules applicable when a sale is made pursuant to a telephone instruction.

Second, until April 1, 1984, the gross proceeds from a sale made through a pre-1984 account, by a customer who has not provided a taxpayer identification number, will not be subject to backup withholding, at the broker's option, *Provided* that (1) the customer furnishes his number to the broker within 30 days after the date of the sale, and (2) the customer does not withdraw the proceeds of the sale prior to the time his taxpayer identification number is furnished to the broker (or backup withholding is applied). For purposes of the preceding sentence, an investment of the cash proceeds shall be considered a withdrawal by the customer; however, investment of the proceeds in other property shall be permitted if, at all times during the 30-day period, at least 20 percent of all gross proceeds reportable under section 6045 are held in cash within the customer's account by the broker. If the customer does not furnish his taxpayer identification number within 30 days after the date of sale, the broker must withhold 20 percent of all reportable gross proceeds on the 31st day after the date of the sale.

If, with respect to forward contracts, regulated futures contracts, security short sales, or issuer payment of debt securities, the broker applies backup withholding on a date other than the sale date (see A–23 through A–25 and A–27), the rules of this A–28B shall apply as if any date on which the broker determines whether backup withholding applies were a sale date.

Q–29. If a readily tradable instrument is transferred in a transaction between parties unrelated to the payor of the instrument without the assistance of a broker, is the transferee required to certify either the correctness of the taxpayer identification number or that the transferee is not subject to backup withholding due to notified payee underreporting?

A–29. No. Certification is not required in the case of a transfer of a readily tradable instrument between parties unrelated to the payor if the parties act without the assistance of a broker.

Q–30. If a bond in bearer form is redeemed by the obligor after December 31, 1983, is the payee required to certify under penalties of perjury the correctness of the payor's taxpayer identification number?

A–30. Yes. The redemption of such an obligation is subject ot reporting under section 6045 if a broker is otherwise involved. However, the reedemption of an interest coupon is considered a window transaction as provided in A–42 of § 35a.9999–1, so the payee is not required to certify the correctness of the taxpayer identification number.

FOREIGN TRANSACTIONS

Q–31. What representations must a person make, on a certificate signed under penalties of perjury, to establish that the is an exempt foreign person under § 1.6045–1(g)(1) of the Income Tax Regulations and, consequently, that the gross proceeds of his broker transactions are not section 6045 reportable payments which may be subject to backup withholding?

A–31. In order to be treated as an exempt foreign person under § 1.6045–1(g)(1) of the Income Tax Regulations with respect to transactions effected by a broker during a calendar year, a customer will only be required to certify to the broker the following: (1) That the foreign person is neither a citizen nor a resident of the United States, (2) that the foreign person has not been, and at the time the statement is furnished reasonably expects not to be, present, in the United States for a period aggregating 183 or more days during the calendar year, and (3) that the foreign person is not, and at the time the statement is furnished reasonably expects not to be, engaged in a United States trade or business with respect to which any gain derived from transactions effected by the broker during that calendar year is effectively connected. In lieu of making the certifications in (2) or (3) of the preceding sentence, the person may instead certify that he is a beneficiary of an income tax treaty to which the United States is a party and pursuant to which gains from his broker transactions are exempt from Federal income taxation. A person may make this latter certification only if all conditions to the exemption provided by the treaty are actually satisfied.

In accordance with the foregoing, the Service will amend § 1.6045–1(g) of the Income Tax Regulations to indicate that a foreign person need make no express representations to a broker concerning the application of section 877 or section 6013 (g) or (h) (although a person with respect to whom a section 6013 (g) or (h) election is in effect may not make the representation in (1) above that he is not a resident of the United States). These amendments will apply with respect to substitute forms prepared by the broker, as well as to the Form W–8 (which is being developed by the Service for use under the requirements both of § 1.6049–5(b)(2)(iv) and § 1.6045–1(g)(1) of the Income Tax Regulations). Subject to A–32, all other provisions of § 1.6045–1(g) of the Income Tax Regulations will remain in effect.

Q–33. With respect to payments of United States source original issue discount on obligations having maturities of six months or less from the date of original issue, must a payor obtain the statement described in § 1.6049–5(b)(2)(iv) of the Income Tax Regulations from a payee who is neither a citizen nor a resident of the United States in order to avoid section

6049 information reporting and the possible application of backup withholding?

A–33. Generally, when making payments of United States source interest or original issue discount to a payee who is a foreign person, the payor need not obtain the certificate described in §1.6049–5(b)(2)(iv) of the Income Tax Regulations since the payor usually either withholds tax on the amounts paid in accordance with subchapter A of chapter 3 of the Code or obtains a Form 1001 from the payee with respect to such payments. See §1.6049–5(b)(2)(i) and (ii) of the Income Tax Regulations. However, as original issue discount on obligations having maturities of six months or less from the date of original issue is not subject to United States tax when paid to a foreign person, there is neither withholding under subchapter A of chapter 3 of the Code nor the receipt of a Form 1001 with respect to such amount. In order to treat original issue discount on obligations having maturities of six months or less from the date of original issue the same under §1.6049–5(b)(2) of the Income Tax Regulations as interest and original issue discount on other obligations, the Service will allow a payee who is a foreign person to substitute a Form 1001 for the statement described in §1.6049–5(b)(2)(iv) of the Income Tax Regulations with respect to original issue discount on obligations having maturities of six months or less from the date of original issue. Despite the substitution of the Form 1001 for the Form W–8 or substitute form prepared by the payor, all other procedures of §1.6049–5(b)(2)(iv) of the Income Tax Regulations will apply.

Section §1.6049–5(b)(2) of the Income Tax Regulations will be amended to reflect the modifications made by this A–33.

Q–34. Are payments of foreign source interest made on deposits outside the United States by a foreign branch of a United States bank reportable payments that may be subject to backup withholding?

A–34. As provided in §1.6049–5(b)(1)(ix) of the Income Tax Regulations, such payments are not required to be reported under section 6049. However, except to the extent such payments are less than $600 in a taxable year or are made to persons who are neither citizens nor residents of the United States, they are subject to information reporting under section 6041(a).

For purposes of section 6041(a), a foreign branch of a United States bank may treat a person as being neither a citizen nor a resident of the United States if the bank has evidence in its records to such effect (provided it does not have actual knowledge that the evidence is false). Such evidence may include a written indication from the payee (e.g., appearing on an account application form) that the payee is neither a citizen nor a resident of the United States. The mere fact, however, that the payee has provided in address outside the United States is insufficient evidence to establish for this purpose that the payee is neither a citizen nor a resident of the United States. For payments made on or before November 20, 1984 on deposit accounts opened on or before August 22, 1984, an affidavit by an employee of the bank stating that the employee knows, or that the payee has represented orally, that the payee is not a U.S. person will be sufficient to establish such foreign status. For all other payments on deposits, the employee's affidavit will be sufficient to establish the payee's foreign status only if the affidavit states that the employee has a reasonable basis, founded on documentary evidence, for believing that the payee is neither a citizen nor a resident of the United States. Foreign source interest payments made on deposits outside the United States by foreign branches of United States banks to United States persons, although reportable payments under section 6041(a), are not subject to backup withholding at this time. However, the issue of whether backup withholding should be applied with respect to payments described in this A–34, as well as the issue of the standard of evidence required to provide foreign status for information reporting purposes, is presently under further consideration. If backup withholding is subsequently determined to be appropriate, or the circumstances in which information reporting is required are changed, such will be provided in future regulations. Such changes, in that case, would apply on a prospective basis only.

The foregoing provisions do not apply, however, with respect to a payment by the branch of interest on a deposit evidenced by a bearer obligation that it has issued in accordance with the procedures of § 1.163–5T(c)(2)(i) (B) or (C) (which include, in the case of § 1.163–5T(c)(2)(i)(C), the requirement that the issuer maintain documentary evidence that demonstrates that the purchaser is either not a United States person, or if it is a United States person, that it is not an individual who is either a citizen or resident of the United States, and that it will comply with section 165(j)(3) (A), (B), or (C) and the regulations thereunder), provided that the branch does not act in the capacity of a custodian, nominee, or other agent of the payee with respect to the obligation. Where the branch is not acting in that capacity with respect to the obligation, it is not subject to the information reporting provisions of section 6041(a) unless it has actual knowledge that the payee is a United States person. Notwithstanding any provision of Q–37 of § 35a.9999–3 to the contrary, a payment of interest on deposits evidenced by obligations issued in accordance with the procedures of § 1.163–5(c)(2)(i) (B) or (C) shall not be considered to be made outside the United States if it is made to a United States address, whether by mail or by electronic transfer.

Q–35. In the case of a payment to joint payees, must a payor obtain the statement described in § 1.6049–5(b)(2)(iv) of the Income Tax Regulations (or other verification of foreign status described in § 1.6049–5(b)(2) (ii) or (iii) of the Income Tax Regulations) with respect to each payee in order for such payment to be exempt from information reporting under § 1.6049–5(b)(1)(vi) of the Income Tax Regulations and from the possible application of backup withholding?

A–35. Yes. In order for a payment to be exempt from information reporting under § 1.6049–5(b)(1)(vi) of the Income Tax Regulations (and in order not to constitute a reportable payment to which backup withholding may apply), the payor must ascertain in accordance with the provisions of § 1.6049–5(b)(2) of the Income Tax Regulations that each payee is a foreign person. A broker similarly must verify the independent status of each person on a joint account as an exempt foreign person in accordance with the provisions of § 1.6045–1(g)(1) of the Income Tax Regulations, and of A–31 and A–32, in order to exempt transactions effected on behalf of such account from section 6045 information reporting and from the possible application of backup withholding.

If the first payee named on the account, but not every joint payee, provides the verification of foreign status referred to in this A–35, backup withholding shall commence unless any one of the joint payees has provided a taxpayer identification number to the payor in the manner otherwise required in §§ 35a.9999–1 and 35a.9999–2. This is contrary to the general rule of section 3406(h)(3), which would require backup withholding to commence unless a taxpayer identification number is obtained from the first payee listed in the payment.

Q–36. In order to avoid information reporting under section 6042 and the possible application of backup withholding, must a payor of United States source dividends to a person having an address outside the United States obtain from such person a statement, signed under penalties of perjury, that the person is neither a citizen nor a resident of the United States?

A–36. No. The regulations under section 6042 exempt from information reporting any United States source dividends that are subject to withholding under section 1441 or section 1442 or that would be subject to such withholding either but for the provisions of a treaty or but for the fact of the application of § 1.1441–4 (a) or (f) of the Income Tax Regulations (relating to income effectively connected with a United States trade or business). See § 1.6042–3(b)(2) of the Income Tax Regulations. The regulations under section 1441 indicate that, absent definite knowledge of the status of a payee, a payor of United States source dividends may determine whether withholding is required under section 1441 (absent the receipt of a Form 4224 evidencing effectively connected income) or whether a payee is entitled to exemption from such withholding under the applicable provisions of a treaty by reference to the address of the payee. See § 1.1441–3(b)(3) of the Income Tax Regulations. Therefore, provided a payor does not have definite knowledge that a payee is a United States person, the payor may treat payments of United States source dividends to a payee with a foreign address as exempt from information reporting under section 6042 and from the possible application of backup withholding. (Note, however, that the use of the address method for purposes of section 1441 is under reconsideration in accordance with the provisions of section 342 of the Tax Equity and Fiscal Responsibility Act of 1982. Future elimination of such a method could impact prospectively on the requirement of backup withholding with respect to dividends).

Payments of dividends to United States persons by a foreign corporation which are not exempt from information reporting under § 1.6042–3(b)(1) (relating to payments by a foreign corporation that is not engaged in business in the United States and that does not have an office or place of business or a fiscal or paying agent in the United States) will nevertheless not be subject to backup withholding beginning January 1, 1984. However, the issue of whether backup withholding should be applied with respect to such payments is presently under further consideration. If backup withholding is determined to be appropriate, such will be provided in future regulations. Backup withholding, in that case, would apply no earlier than July 1, 1984, and would apply on a prospective basis only.

Q–37. With respect to a payment of interest that would be subject to information reporting under section 6049 but for the fact that it is made outside the United States, how is the place of payment to be determined?

A–37. For purposes of the reporting requirements of section 6049 and backup withholding, the place of payment of interest is considered to be the place where the payor or middleman completes the acts necessary to effect payment. The fact that payment is made from an account with a United States office of a United States or foreign bank by means of a draft drawn on the bank or by a wire or other electronic transfer from an account with the United States office of the bank is not alone determinative of the place of payment. Similarly, the fact that payment is made by means of a transfer into an account of the payee witha United States office of a United States or foreign bank, whether by means of a wire or other electronic transfer, is not determinative of the place of payment, unless such office is expressly authorized by the payee to act as agent for collection of the interest or unless the records of such office otherwise reasonably evidence the nature of the funds transferred as interest and the amount of such interest.

Subject to the foregoing provisions concerning the receipt of wire and other electronic transfers, a bank or similar financial institution is generally considered to complete the acts necessary to effect payment of interest on its deposits at the branch or office at which it credits the interest to the account of the payee or at which payment is made in cash. However, in no event shall interest be considered to be paid for purposes of section 6049 at a branch or office of the financial institution unless all the following conditions are met: (1) The branch or office is a permanent place of business which is regularly maintained, occupied, and used to carry on a banking or similar financial business, (2) the business is conducted by at least one employee of the branch or office who is regularly in attendance at such place of business during normal business hours, and (3) the branch or office receives deposits of funds from the public and in addition also engages in one or more of the other activities listed in § 1.864–4(c)(5)(i) of the Income Tax Regulations.

In the case of a coupon bond (including a certificate of deposit with detachable interest coupons), the acts necessary to effect payment of interest are considered to be completed within the United States either if: (1) A coupon is presented to a payor or middleman within the United States (regardless of whether the funds paid are credited to an account of the payee maintained outside the United States); or (2) the coupon is presented at an office of a payor or middleman outside the United States but the interest on the coupon is credited to an account of the payee maintained with another office of the payor or middleman within the United States. The application of the provisions of this A–37 will be illustrated by examples to be published in future regulations.

REFUND OF ERRONEOUSLY WITHHELD AMOUNTS

Q–38. What action should a payor take if the payor erroneously imposes backup withholding?

A–38. If a payor erroneously withholds tax or withholds more than the proper amount of the tax, the payor may refund the amount withheld as provided in section 6413 and A–39. A payor shall be considered to have withheld erroneously only if (1) the amount is withheld because of an error by the payor (*e.g.*, an error in ''flagging'' or identifying an account that is subject to backup withholding), or (2) the Internal Revenue Service directs the payor to refund an amount withheld pursuant to section 3406(a)(1)(C). If the payor requires a payee described in § 31.3452 (c)–(1) (b) through (p) of the Employment Taxes and Collection of Income Tax at Source Regulations (*e.g.*, a corporation) (See T.D. 7880, 1983–1 C.B. 242, 251, Removed by T.D. 7949, 1984–1 C.B. 204) to certify as to its status as exempt from backup withholding, the payee fails to make the required certification, and the payor subsequently withholds the tax from a payment to such payee, the payor may, in its discretion, treat the amount withheld as an amount erroneously withheld and refund it to the payee. The result is the same if the payor does not require such a payee to certify as to its status and the payor withholds.

If a payor withholds from a payee after the payee provides a taxpayer identification number or required certification to the payor but before the payor has processed the number or required certification (*i.e.*, prior to the time that the payor is treated as having received the number or certification under A–17 of § 35a.9999–2), the payor may, in its discretion, treat the amount withheld as an amount erroneously withheld and refund it to the payee. If a payor withholds, however, because the payor has not received a taxpayer identification number or required certification and the payee subsequently provides a taxpayer identification number or the required certification to the payor, the payor may not refund the tax to the payee because the payor properly imposed backup withholding. The amount withheld is a credit against tax that the payee may take into account in computing estimated tax payments and may claim on the payee's income tax return.

Q–39. In what manner should a payor treat erroneously withheld tax?

A–39. If a payor withholds from a payee in error or withholds more than the correct amount of tax, the payor may refund the amount improperly withheld to the payee so long as the refund is made prior to the end of the calendar year and prior to the time the payor furnishes a Form 1099 to the payee with respect to the payment for which the improper withholding occurred. If the amount of the improper withholding is refunded to the payee, the payor shall keep as part of its records a receipt showing the date and amount of refund. For this purpose, a cancelled check or an entry in a statement, a copy of which is provided to the payee by the payor, will suffice for a receipt showing the refund of tax improperly withheld provided that the check or statement contains a specific notation that it is a refund of tax improperly withheld.

If the payor has not deposited the amount of the tax prior to the time that the refund is made to the payee, the payor shall not deposit the amount of the tax improperly withheld. If the amount of the improperly withheld tax has been deposited prior to the time that the refund is made to the payee, the payor may adjust any subsequent deposit of tax collected under chapter 24 of the code which the payor is required to make in the amount of the tax which has been refunded to the payee. A payor shall not report on a Form 1099 as tax withheld any amount of tax which the payor has refunded to a payee.

Q–40. If a ''middleman'' payor of reportable interest or dividends (e.g., a broker holding stock in ''street name'') receives a payment a portion of which was improperly withheld upon prior to payment to *the ''middleman'' payor, what action may the ''middleman'' take?*

A–40. A middleman who receives a payment (referred to as a ''receiving payor'') from which tax has been improperly withheld may seek a refund of the tax withheld by the payor from whom the receiving payor received the payment (referred to as the ''upstream payor'') or, alternatively may obtain a refund of the tax by claiming a credit for the amount of tax withheld by the upstream payor against the deposit of any tax collected under chapter 24 of the Code which the receiving payor is required to withhold and deposit. The receiving payor shall make or credit the gross amount of the payment (including the tax withheld) to its payee as though it had received the gross amount of the payment from the upstream payor and shall withhold the tax if any of the conditions for imposing backup withholding exist with respect to its payee.

WHEN BACKUP WITHHOLDING STOPS

Q–41. When may a payor stop withholding?

A–41. If a payee is subject to backup withholding because the payee failed to furnish a taxpayer identification number in the manner required, the payor is required to withhold until a taxpayer identification number is received from the payee in the manner required. Once the payor receives the payee's taxpayer identification number in the manner required, the payor must stop withholding. See A–17 of § 35a.9999–2 for determining when a payor is treated as having received a taxpayer identification number. The same rule applies with respect to a payee certification failure under section 3406(a)(1)(D). If more than one condition applies for imposing backup withholding, a payor is required to withhold until all of the conditions for imposing backup withholding cease to apply.

CONFIDENTIALITY

Q–42. What use may a payor make of information obtained under the backup withholding rules?

A–42. A payor may use information obtained under the backup withholding rules (including any information with respect to any payee certification failure other than failure to certify the payee's taxpayer identification number) only for the purposes of complying with the backup withholding and information reporting requirements, or to the extent otherwise permitted by the Code. Any other use of this information may subject the payor to civil damages under section 7431 of at least $1,000 plus the cost of the action.

Q–43. May a payor impose a surcharge to cover the cost of backup withholding on an account?

A–43. No. If the payor imposes a surcharge on such an account, the payor is liable to the payee under section 7431 for an unauthorized use of information obtained by the payor under section 3406.

Q–44. If a payor imposes backup withholding on a payee, may the payor use this information in determining whether to extend credit to the payee?

A–44. No. If the payor uses this information in making its decision, the payor is liable to the payee under section 7431 for an unauthorized use of information obtained pursuant to section 3406.

Q–45. If a payor is notified to begin withholding on payments made with respect to a payee and the payor provides notice to the payee of the withholding, has the payor made an unauthorized disclosure under section 7431?

A–45. No. If, for example, a payor receives a notice from a broker of the requirement to withhold with respect to a payee and the payor, pursuant to A–39 of § 35a.9999–1 and A–18 of § 35a.9999–2, provides notice to the payee of such withholding, the payor has no liability to the payee under section 7431.

MISCELLANEOUS

Q–46. If a payor withholds on any payment and the payment is less than the minimum amount for which an information return is required, is the payor required to make an information return and furnish a statement to the recipient?

A–46. Yes. Whenever the payor imposes backup withholding, the payor is required to make an information return regardless of the amount of the payment. The information return shall show the payee's name, address, and taxpayer identification number, the amount of the payment (or aggregate payments to the payee during the calendar year), and the amount of tax withheld. The information return must be provided to the Service no later than February 28 of the year following the calendar year of payment. In addition, the payor is required to furnish a statement to the payee showing the same information, including the amount of tax withheld no later than January 31 of the year following the calendar year of payment.

Q–47. Does backup withholding apply to partnerships?

A–47. Backup withholding generally will apply to a payment to a partnership if the partnership does not provide its correct employer identification number to the payor in the manner required. In addition, the partnership will be required to withhold on all reportable payments that a partnership makes to a payee who is subject to backup withholding. Distributions by a partnership to its partners of their distributive share of partnership income, however, are not reportable payments, so that backup withholding does not apply to such distributions, except to the extent such distributions are reportable under section 6045.

Q–48. May payors require that a separate Form W–9 be filed for each account or instrument held by a payee?

A–48. Yes. See A–29 of § 35a.9999–1. However, a payor at its option, may require a payee to file only one Form W–9 for all accounts or instruments of the payee. For example, a bank may permit a payee to file one Form W–9 for all savings, interest-bearing checking, or other accounts the payee has with the bank. In addition, a payee of a mutual fund that has a common investment advisor or common principal underwriter with other mutual funds will be permitted, in the discretion of the mutual fund, to provide one Form W–9 with respect to shares acquired or owned in any of the funds. The payee must provide the actual Form W-9 or acceptable substitute form to the fund (or payor) in order for this A-48 to apply.

Q–49. Do the general rules for deposit, payment, penalties, and reporting of taxes withheld from wages apply to backup withholding?

A–49. Yes. Section 3406(h)(1) provides generally that payments subject to backup withholding shall be treated as wages. Thus, the general procedures for withholding, deposit, payment, and reporting of Federal tax withheld shall apply to payments subject to backup withholding. For example, section 6205 provides that an employer (payor) who makes an undercollection of income tax required to be withheld shall correct such error for the return period in which the undercollection is ascertained. Accordingly, section 6205 requires the employer (payor) to withhold amounts from subsequent payments to the employee (payee) that should have been withheld from prior payments, whether or not such subsequent payments are subject to withholding. Thus, a payor who does not impose backup withholding when required must withhold from subsequent payment to the payee even though the conditions for imposing backup withholding may not exist at the time the subsequent payment is made to the payee.

Q–50. If a payor uses a single employer identification number to report the tax withheld by all its subsidiaries, must all tax withheld with respect to reportable payments by its subsidiaries be aggregated for purposes of determining when tax withheld by them with respect to reportable payments must be deposited under section 6302?

A–50. Yes. All tax withheld under a single employer identification number with respect to reportable payments must be aggregated for purposes of determining when such tax must be deposited.

DUE DILIGENCE DEFINED FOR ACCOUNTS OPENED AND INSTRUMENTS ACQUIRED AFTER DECEMBER 31, 1983

Before Notification of an Incorrect TIN

Q–51. In order for a payor of a reportable interest or dividend payment (other than in a window transaction) to be considered to have exercised due diligence in furnishing the correct taxpayer identification number of a payee with respect to an account opened or an instrument acquired after December 31, 1983, what actions must the payor take?

A–51. In general, the payor of an account or instrument that is not a pre-1984 account (see A–34 of §35a.9999–1 and A–20 of §35a.9999–3) nor a window transaction (as defined in A–42 of §35a.9999–1 and A–9 of §35a.9999–2) must use a taxpayer identification number provided by the payee under penalties of perjury on information returns filed with the Internal Revenue Service to satisfy the due diligence requirement. Therefore, if, after 1983, a payor permits a payee to open an account without obtaining the payee's taxpayer identification number under penalties of perjury and files an information return with the Internal Revenue Service with a missing or an incorrect taxpayer identification number, the payor will be liable for the $50 penalty for the year with respect to which such information return is filed. However, in its administrative discretion, the Internal Revenue Service will not enforce the penalty with respect to a calendar year if the certified taxpayer identification number is obtained after the account is opened and before December 31 of such year, provided that the payor exercises due diligence in processing such number *i.e.*, the payor uses the same care in processing the taxpayer identification number provided by the payee that a reasonably prudent payor would use in the course of the payor's business in handling account information such as account numbers and balances. See Q/A–73 of this section.

Once notified by the Internal Revenue Service (or a broker) that a number is incorrect, a payor is liable for the penalty for all prior years in which an information return was filed with that particular incorrect number if the payor has not exercised due diligence with respect to such years. See A–56 through A–70A of this section for the exceptions to due diligence. A pre-existing certified taxpayer identification number does not constitute an exercise of due diligence after the Internal Revenue Service or a broker notifies the payor that the number is incorrect if the Internal Revenue Service or a broker notifies the payor on or after January 1, 1989, unless the payor undertakes the actions specified in A–88 of this section.

Q–52. Is a payor as described in A–51 liable for the penalty if the payor obtained a certified taxpayer identification number from a payee but inadvertently processed the name or number incorrectly on the information return?

A–52. Yes. The payor is liable for the penalty unless the payor exercised that degree of care in processing the taxpayer identification number and name and in furnishing it on the information return that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

Payors and Trustees of Certain Grantor Trusts

Q–53. Is a payor of reportable interest or dividend payments to a grantor trust that was established on or after January 1, 1984, and which has ten or fewer grantors, liable for the penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number if the trustee could not provide a certified taxpayer identification number to the payor at the time the account was opened because each grantor had not furnished the trustee with a certified taxpayer identification number under penalties of perjury as provided under A–20 of §35a.9999–2?

A–53. A payor of a post-1983 grantor trust which has ten or fewer grantors is liable for the penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number unless the payor has exercised due diligence or comes within one of the exceptions to due diligence in this section. In general, a payor of a post-1983 grantor trust exercises due diligence by obtaining a certified taxpayer identification number from the payee (trust) as described in A–4 of §35a.9999–1 and A–51 of this section.

Q–54. What are the legal obligations with respect to a grantor trust with ten or fewer grantors under sections 3406 and 6676(b)?

A–54. Backup withholding will apply to a reportable payment to a grantor trust with ten or fewer grantors that was established on or after January 1, 1984, if one of the conditions for imposing backup withholding exists with respect to the trust. The trustee of a grantor trust with ten or fewer grantors may not certify either that the trust is not subject to backup withholding due to notified payee underreporting or that the trust's taxpayer identification number provided by the trustee is correct unless each grantor has furnished the trustee with certifications, signed under penalties of perjury, that the grantor is not subject to backup withholding due to notified payee underreporting and that the grantor's taxpayer identification number provided to the trustee is correct, and the trustee uses such taxpayer identification numbers provided by the grantors on any Form 1041 that is filed by the trustee pursuant to section 671.

Effective June 12, 1989, a trustee of a grantor trust with ten or fewer grantors is not considered a payor for purposes of backup withholding. Therefore, distributions by the trust of amounts to beneficiaries will not be considered payments of reportable amounts subject to backup withholding. With respect to reportable payments (except gross proceeds reportable under section 6045) made prior to the above period, see Q/A–20 of §35a.9999–2 under which a grantor trust with ten or fewer grantors is considered a payor for purposes of backup withholding.

However, a grantor trust with ten or fewer grantors may be a payor under the respective information reporting sections. As such, the trust may be subject to the penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number. No penalty, however, will be imposed on the trust with respect to information returns filed for the 1987 or 1988 calendar year.

Special Rules Under Q/A 28 of §35a.9999–3

Q–55. Is a payor who obtains a taxpayer identification number pursuant to the special rule under A–28 of this section, relating to readily tradable instruments, liable for the penalty under section 6676 (b) for those years in which the payor filed an information return with an incorrect taxpayer identification number if the payor did not obtain a certified taxpayer identification number from the payee within the 30-day grace period provided in A–28 of this section?

A–55. Yes. A payor of a post–1983 account is liable for the penalty under section 6676 (b) for filing an information return with an incorrect taxpayer identification number unless the payor has exercised due diligence. In general, a payor of a post–1983 account exercises due diligence by obtaining a certified taxpayer identification number from the payee as described in A–4 of §35a.9999–1 and A–51 of this section. Thus, the payor described in Q–55 will be liable for the penalty for filing an information return with an incorrect taxpayer identification number if the payee did not provide the required certification to the payor within the 30-day period whether or not the payor backup withholds on the account. The rule described in this answer is effective with respect to information returns filed for the 1988 and subsequent calendar years.

EXCEPTIONS TO DUE DILIGENCE

(1) Awaiting-TIN Certification

Q–56. In general, what actions must a payor who receives an awaiting-TIN certification prior to January 1, 1988 (a ''pre–1988 awaiting-TIN certification''), take to be considered to have exercised due diligence?

A–56. In general, a payor with respect to an account or instrument that is not a pre–1984 account, instrument or relationship nor a window transaction will be considered to have exercised due diligence if the payee has complied with the requirements of A–18 of §35a.9999–2 (exception for a payee who is waiting for receipt of a taxpayer identification number) prior to January 1, 1988, provided that the payor imposes backup withholding if the payee fails to provide a taxpayer identification number in the manner and within the period required by A–18 of §35a.9999–2. This provision applies only with respect to information returns filed for calendar years before 1988.

Q–57. Is a payor who receives an awaiting-TIN certification before January 1, 1988, liable for the penalty under section 6676 (b) for filing an information return with a missing taxpayer identification *number for the 1988 or a later calendar year?*

A–57. A payor who receives a pre–1988 awaiting-TIN certification for an account of a payee and files an information return with a missing taxpayer identification number for the 1988 or a later calendar year with respect to that account will be subject to the penalty under section 6676 (b) unless the payor continues to exercise due diligence by undertaking additional actions described in A–58 below to solicit the payee's taxpayer identification number.

Q–58. What actions must a payor with a pre–1988 awaiting-TIN certification take in order to exercise due diligence after December 31, 1987, so that the payor will not be subject to a $50 penalty for filing an information return with a missing taxpayer identification number for a calendar year after 1987?

A–58. A payor with a pre–1988 awaiting-TIN certification may exercise due diligence after December 31, 1987, by: (1) Continuing to backup withhold on the account, instrument, or relationship until a certified taxpayer identification number is received, (2) sending a mailing before December 31 of each year after 1987, requesting the certified taxpayer identification number from a payee who has not by that time provided a certified TIN, and (3) including a Form W–9 or acceptable substitute form in the mailing for the payee to provide his certified taxpayer identification number. The payor must include a reply envelope (self-addressed) in the mailing. The envelope sent to the payee must contain the following statement in a bold and conspicuous manner: ''Important Tax Document Enclosed.'' The payor may include other information in the mailing. The payor must continue to backup withhold and send the mailing each year until the payor receives a certified taxpayer identification number from the payee or until the account is closed.

Q–59. What actions must a payor take in order to exercise due diligence on an account, instrument or relationship for which the payor receives an awaiting-TIN certification after December 31, 1987 (a ''post–1987 awaiting-TIN certification'') and before July 1, 1988?

A–59. In order to exercise due diligence a payor who receives a post-1987 awaiting-TIN certification from a payee before July 1, 1988, must: (1) Obtain a certified taxpayer identification number from the payee within 60 days after the date that the payor receives the awaiting-TIN certification, and (2) backup withhold on any withdrawals made after the close of 7 business days after the date the awaiting-TIN certification is received and before the earlier of (i) the date that the payor receives a certified taxpayer identification number from the payee, (ii) the date the account is closed, or (iii) the date backup withholding commences on all reportable payments made to the account, instrument, or relationship. For purposes of subsection (ii) in this A–59, a payor is also required to backup withhold on any reportable payment made at the time the account or relationship is closed. For purposes of subsection (2) in this A–59, all cash withdrawals in an amount up to the reportable payments made from the day after the date of receipt of the awaiting-TIN certification to the date of withdrawal are treated as reportable payments. For purposes of this Q/A–59, the term ''cash'' has the same meaning as the term ''cash'' set forth in § 35a.3406–1(d)(1) of T.D. 8163, 52 FR 44867. Thus, a payor who receives a post-1987 awaiting-TIN certification (as described in this Q/A–59) from a payee who does not provide the payor with a certified taxpayer identification number within the 60 days described in A–18 of § 35a.9999–2 is liable for the penalty if reportable payments are paid to the account after the 60 days and the payor files an information return with respect to the account with a missing taxpayer identification number. The payor is liable for the penalty whether or not the payor backup withholds on the reportable payments made after the 60-day period.

However, in its administrative discretion, the Internal Revenue Service will not enforce the penalty for a calendar year against a payor who has properly withheld under this Q/A–59 if the payor (A) obtains the certified taxpayer identification number after the 60-day period (described above) and before December 31 of such calendar year, provided that the payor exercises due diligence in processing such number on the information return filed for such year, *i.e.*, the payor uses the same care in processing the taxpayer identification number provided by the payee that a reasonably prudent payor would use in the course of the payor's business in handling account information such as account numbers and balances (See Q/A–73 of this section), or (B) effective with respect to the 1988 and subsequent calendar years, undertakes an annual mailing as described in Q/A–59A of this section. The 1988 annual mailing must be made between January 1, 1988, and June 12, 1989.

Q–59A. What actions must a payor take in order to exercise due diligence on an account, instrument, or relationship for which the payor receives a post-1987 awaiting-TIN certification on or after July 1, 1988?

A–59A. In order to exercise due diligence a payor who receives a post-1987 awaiting-TIN certification on or after July 1, 1988, may elect on a payee-by-payee basis or in general to: (1) Follow the rules for due diligence as set forth in Q/A–59 above, (2) follow such due diligence rules but apply the definition of the term ''cash'' set forth in § 35a.3406–1(d)(1), or (3) commence backup withholding on the account no later than 7 business days after the date the payor receives the awaiting-TIN certification on reportable payments thereafter made to the account (whether or not the payee makes a cash withdrawal). Under (3) above the payor must backup withhold until the earlier of (i) the date the payor receives a certified taxpayer identification number from the payee. (ii) the date the account is closed, or (iii) the date backup withholding commences on all reportable payments made to the account, instrument, or relationship. In addition with respect to (3), a payor must obtain a certified taxpayer identification number from a payee within 60 days after the date that the payor receives the awaiting-TIN certificate or undertake a mailing each year as described in Q/A–5 and 6 of § 35a.9999–1 (except that the first required mailing may be, but need not be, a separate mailing) soliciting the certified taxpayer identification number from the payee. The payor must make a mailing each year until the earlier of (i) the calendar year that the certified taxpayer identification number is received, or (ii) the calendar year in which the account is closed. However, if the account is closed in December of a calendar year, the mailing must be made after the account is closed and before January 31 of the subsequent calendar year.

Effective August 16, 1988, a payor who has elected to apply subsection (3) above must refund the amounts withheld during the 60-day period in accordance with the procedures described in Q/A–39 of this section if the payor receives the certified taxpayer identification number from the payee on or after August 16, 1988, and within the 60-day period, provided that the payee is not subject to backup withholding under section 3406(a)(1) (C) or (D) during any part of such period. For purposes of the preceding sentence, the amounts withheld are deemed to be withheld erroneously as described in Q/A–39 of this section. If a certified taxpayer identification number is not received by the payor within the 60-day period, the amounts withheld shall not be refunded unless the amounts are erroneously withheld without regard to the rules described in this Q/A–59A. The payor is also required to backup withhold after the 60-day period until the payor receives a certified taxpayer identification number from the payee or the account is closed.

(2) Instruments Acquired From a Broker

Q–60. Under what circumstances will a payor whose readily tradable instrument was acquired by a payee through a broker be considered to have exercised due diligence?

A–60. Generally, a payor will be considered to have exercised due diligence with respect to a readily tradable instrument that is not a pre–1984 account of the payor as described in A–41 of § 35a.9999–1 if the payor uses a taxpayer identification number furnished by a broker. In addition, to exercise due diligence a payor must use the same care in processing the taxpayer identification number and name provided by the broker that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances. A taxpayer identification number acquired from a broker as described in this A–60 will not constitute an exercise of due diligence after the Internal Revenue Service or a broker notifies the payor that the number is incorrect unless the payor undertakes the actions specified in A–88 of this section.

Q–61. Is the payor in A–60 liable for the penalty if the payor obtained the taxpayer identification number and name from a broker but inadvertently processed the number or name incorrectly and thus put an incorrect number on the information return?

A–61. Yes. The payor is liable for the penalty unless the payor exercised that degree of care in processing the certified taxpayer identification number and name and in furnishing it on the information return that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

Q–62. What actions must a payor who was notified by a broker that a payee failed to certify or furnish a taxpayer identification number take to be considered to have exercised due diligence?

A–62. A payor who is notified by a broker that a payee failed to certify or furnish a taxpayer identification number to the broker will be considered to have exercised due diligence if the payor: (1) Imposes backup withholding if the payee did not certify his taxpayer identification number to the payor, (2) provides notice to the payee as provided in A–39 of § 35a.9999–1 and A–18 of § 35a.9999–2, and (3) encloses a postage-paid reply envelope (self-addressed) in the mailing of the notice. A payor described in this A–62 will be liable for the penalty under section 6676(b) for filing an information return with a missing taxpayer identification number for the 1988 or subsequent calendar years unless the payor complies with the procedures described in this A–62 in each such calendar year until the payor receives a certified taxpayer identification number from the payee or until the account is closed. A subsequent mailing is required to contain a reply envelope which may, but is not required to be, postage prepaid. For years prior to 1988, no penalty will be imposed on a payor who has complied with the requirements in this A–62 in the year the payor was notified by a broker.

A payor as described in this A–62 who receives a noncertified taxpayer identification number from a broker may be liable for the penalty under section 6676(b) for the 1988 or subsequent calendar years with respect to which the number provided by a payor on an information return filed with the Internal Revenue Service is determined to be incorrect unless the payor complies with the procedures described in this A–62 in each such calendar year until the payor receives a certified taxpayer identification number from the payee, the account is closed, or the payor undertakes the actions described in A–88 of this section after being notified of the incorrect taxpayer identification number.

(3) Instruments Transferred Without the Assistance of a Broker

Q–63. With respect to an instrument transferred without the assistance of a broker, is a payor liable for the penalty under section 6676(b) if the payor records on its books a transfer of a readily tradable instrument in a transaction in which the payor was not a party?

A–63. Generally, a payor as described in Q–63 will be considered to have exercised due diligence with respect to a readily tradable instrument that is not part of a pre-1984 account with the payor if the payor records on its books a transfer in which the payor was not a party. This exception applies until the calendar year in which the payor receives a certified taxpayer identification number from the payee.

Q–64. Is the payor described in A–63 required to solicit the taxpayer identification number of a payee of an account with a missing TIN in order to be considered as having exercised due diligence in a subsequent calendar year?

A–64. There is no requirement on the payor to solicit the taxpayer identification number in order to be considered to have exercised due diligence in a subsequent calendar year under the rule set forth in A–63.

Q–65. Is a payor as described in Q–63 considered to have exercised due diligence *if the payee provides a taxpayer identification number to the payor (whether or not certified), the payor uses that number on the information return filed for the payee, and the number is later detemined to be incorrect?*

A–65. A payor as described in Q–63 who records on its books a transfer in which it was not a party is considered to have exercised due diligence under the rule set forth in A–63 where the transfer is accompanied with a taxpayer identification number provided that the payor uses the same care in processing the taxpayer identification number provided by a payee that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances. Thus, a payor will not be liable for the penalty if the payor uses the taxpayer identification number provided by the payee on information returns that it files, even if the taxpayer identification number provided by the payee is later determined to be incorrect. However, a payor will not be considered as having exercised due diligence under A–63 after the Internal Revenue Service or a broker notifies the payor that the number is incorrect unless the payor undertakes the actions described in A–88 of this section.

(4) Window Transactions

Q–66. What action must a payor of a post-1983 window transaction (as defined in A–42 and A–42B of § 35a.9999–1 and A–9 of § 35a.9999–2) take to be considered as having exercised due diligence?

A–66. A payor of a post-1983 window transaction shall be considered to have exercised due diligence only if the payor uses the taxpayer identification number provided by the payee on information returns filed with the Internal Revenue Service. If no number is provided, the payor will not be considered to have exercised due diligence.

(5) Undue hardship

Q–67. Is a payor liable for a penalty under section 6676(b) with respect to a post-1983 account or instrument if the payor could have met the due diligence requirements but for the fact that the payor incurred an undue hardship?

A–67. A payor of a post-1983 account or instrument is not liable for a penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number if the Internal Revenue Service determines that the payor could have satisfied the due diligence requirements but for the fact that the payor incurred an undue hardship. An undue hardship is an extraordinary or unexpected event such as the destruction of records or place of business of the payor by fire or other casualty (or the place of business of the payor's agent who under a pre-existing written contract had agreed to fulfill the payor's due diligence obligations under section 6676(b) with respect to the account subject to the penalty and there was no means for the obligations to be performed by another agent or the payor). Undue hardship will also be found to exist if the payor could have met the due diligence requirements only by incurring an extraordinary cost.

Q–68. How does a payor obtain a determination from the Internal Revenue Service that the payor has met the undue hardship exception to the penalty under section 6676(b) for the year with respect to which the payor is subject to the penalty?

A–68. A determination of undue hardship may be established only by submitting a written statement to the Internal Revenue Service signed under penalties of perjury that sets forth all the facts and circumstances that make an affirmative showing that the payor could have satisfied the due diligence requirements but for the occurrnece of an undue hardship. Thus, the statement must describe the undue hardship and make an affirmative showing that the payor either was in the process of exercising or stood ready to exercise due diligence when the undue hardship occurred. A payor may request an undue hardship determination from the district director or the director of the Internal Revenue Service Center where the payor is required to remit the penalty under section 6676(b).

(6) Error in Agency Records

Q–69. Is a payor liable for the penalty under section 6676(b) if the taxpayer identification numnber is incorrect as a result of an intrinsic error in the number records *of the Social Security Administration or Internal Revenue Service?*

A–69. Generally, a payor will not be liable for a penalty under section 6676(b) if a taxpayer identification number is determined to be incorrect as a result of an intrinsic error in the records of the Social Security Administration or the Internal Revenue Service (for instance, because the records of such agencies in the normal course of business should be, but are not, up-to-date at the time the Internal Revenue service makes a determination that a taxpayer identification number is incorrect). The records of the Social Security Administration or the Internal Revenue Service will not be treated as in error if the records contain the name and taxpayer identification number of a person (or business) who subsequently changes his or her name (or business name) and does not communicate the change of name to the Social Security Administration or the Internal Revenue Service before the Internal Revenue Service determines that the taxpayer identification number is incorrect. The burden of proof will be on the payor to substantiate that the records of the Social Security Administration or the Internal Revenue Service are in error. A photocopy of the payee's social security card or the document provided by the Internal Revenue Service issuing the payee's employer identification number (that contains identical information to that on the information return with respect to which the penalty may be imposed) will be sufficient proof to come within this exception.

(7) Exempt Recipients

Q–70. Is a payor liable for the penalty under section 6676(b) if the payor files an information return with a missing or an incorrect taxpayer identification number for an exempt recipient whom the payor determined was exempt at the time of the payment pursuant to the rules under A–29 of § 35a.9999–1?

A–70. A payor is not liable for the penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number if the payee is exempt from information reporting under the applicable information reporting provisions of the Internal Revenue Code.

(8) Life-Insurance Beneficiaries

Q–70A. Under what circumstances will a payor of reportable interest to a beneficiary of a life-insurance contract be considered to have exercised due diligence?

A–70A. Generally, a payor of reportable interest to a beneficiary of a life-insurance contract under which payment to the beneficiary commenced on or before December 31, 1983, will be considered to have exercised due diligence with respect to a calendar year if: the payor (1) uses a taxpayer identification number provided by the payee beneficiary under penalties of perjury as described in Q/A–51 of this section on the information return filed for such year, or (2) undertakes a mailing as described in Q/A 5 or 6 (or Q/A–56) of § 35a.9999–1 prior to or at the time of payment, and (3) backup withholds on the reportable interest paid to the account if no taxpayer identification number has been provided (See Q/A–34 of § 35a.9999–1).

A payor of reportable interest to a beneficiary of a life-insurance contract under which payment to the beneficiary commenced on or after January 1, 1984, will be considered to have exercised due diligence with respect to a calendar year if the payor: (i) uses a taxpayer identification number provided by the payee-beneficiary under penalties of perjury as described in Q/A–51 of this section on the information return filed for such year, or (ii) effective with respect to the 1989 and subsequent calendar years, undertakes a mailing as described in Q/A–5 and 6 of § 35a.9999–1 prior to or at the time of payment.

With respect to payments of reportable interest in calendar years prior to the 1989 calendar year (on a life-insurance contract under which payments to the beneficiary commenced on or after January 1, 1984), a payor will be considered to have exercised due diligence if the payor requested a certified taxpayer identification number from the payee beneficiary prior to, or at the time of, the reportable interest payment provided that at the time of such request the payor had in effect written procedures or policies that required the solicitation of the certified taxpayer identification number of the payee beneficiary prior to or at the time of payment.

CIRCUMSTANCES WHERE DUE DILIGENCE IS NOT SHOWN

Both Pre-1984 and Post-1983 Accounts and Instruments

Q–71. Is a payor liable for the penalty under section 6676(b) if, after the due date of an information return (including extensions of time for filing), the payor files a corrected information return that contains the correct taxpayer identification number?

A–71. Yes. The payor is still liable for the penalty under section 6676(b) for filing an information return with an incorrect or a missing taxpayer identification number. The payor is not liable for the penalty, however, if the payor files a corrected information return with the correct taxpayer identification number before the due date of the return with regard to extensions.

Q–72. Is a payor liable for the penalty under section 6676(b) if the payor has been assessed (or has self-assessed) a $5 penalty under section 6723(a) for the failure to put correct information (which may include an incorrect taxpayer identification number) on an information return?

A–72. Yes. The payor is liable for the penalty under section 6676(b) if the payor files an information return with a missing or an incorrect taxpayer identification number without exercising due diligence, coming within one of the exceptions to due diligence, or coming within the rule described in A–56 of this section, whether or not the payor is liable for or has been assessed the penalty under section 6723(a) with respect to the information return. To the extent that a penalty under sections 6723(a) and 6676(b) is assessed with respect to the same information return, the payor should file for a refund of the penalty under section 6723(a). Thus, with respect to the failure to include the correct taxpayer identification number (a missing or an incorrect taxpayer identification number) on an information return, the provisions under section 6676(b) shall apply and not the provisions under section 6723(a). If the penalty for the intentional failure to include the correct taxpayer identification number on an information return under section 6723(b) is assessed, no penalty shall be assessed under section 6676(b).

Q–73. Is a payor who is not exercising due diligence liable for the penalty under section 6676(b) if the taxpayer identification number is determined to be incorrect because the payor (or his agent) improperly prepared or formatted the information return?

A–73. Yes. A payor who is not satisfying all the due diligence requirements for the account in question is liable for a penalty under section 6676(b) if the taxpayer identification number is determined to be missing or incorrect due to a human, clerical, or processing error on the part of the payor (or the payor's agent) in preparing or formatting the information return. In general, a payor (or his agent) will not be considered to have erroneously prepared or formatted an information return if the payor (or his agent) has complied with all pertinent income tax regulations, revenue rulings, and procedures in effect with respect to information returns.

REVISED DUE DILIGENCE STANDARDS FOR TRANSACTIONS WITH FOREIGN PERSONS

Q–74. What actions must a payor or broker of a pre-1984 account or instrument take to establish due diligence with respect to the penalty under section 6676(b) for filing an information return with a missing taxpayer identification number for the 1984 and subsequent calendar years if payment on the account would not have been a reportable payment under section 6045 or 6049 but for the fact that the foreign person failed to provide the prescribed penalty of perjury statement under § 1.6045–1(g)(1) or under § 1.6049–5(b)(2) (iv) of the Income Tax Regulations?

A–74. The payor or broker will be considered to have exercised due diligence on the account, if—

(1) The payor or broker sent the separate and nonseparate annual mailings to the payee as described in A–5 and A–6 and in the related questions and answers on due diligence in § 35a.9999–1 and imposed backup withholding on the account beginning on January 1, 1984 (or, alternatively, imposed backup

withholding under A–18 of § 35a.9999–2 on payments made on or after January 16, 1984), until the taxpayer identification number is received from the payee, or

(2) The payor or broker sent a separate mailing as described in A–52 or A–55 of § 35a.9999–1 to the payee requesting the required penalty of perjury statement (provided that the payor or broker has evidence in its records that the payee is a foreign person and provided that the payor or broker has no actual knowledge that such evidence is false), commenced backup withholding on payments made on or after July 1, 1984, and sends a nonseparate mailing by December 31 of the 1987 calendar year and each calendar year thereafter until the required penalty of perjury statement is received from the payee, or

(3) The payor or broker sent a mailing as described in A–52 or A–55 of § 35a.9999–1 to the payee requesting the required penalty of perjury statement (provided that the payor or broker has evidence in its records that the payee is a foreign person and has no actual knowledge that such evidence is false), imposed backup withholding on payments made on or after January 1, 1985, and sent an additional mailing as described in A–3 of § 35a.9999–4 during the 1984 and 1987 calendar years and each calendar year thereafter, until the payor or broker receives the required penalty of perjury statement.

Q–75. What actions must a payor or broker of a post-1983 account or instrument take to establish due diligence with respect to the penalty under section 6676(b) for filing an information return with a missing taxpayer identification number for the 1984 and subsequent calendar years when payment on the account would not have been a reportable payment under Code section 6045 or 6049 but for the fact that the foreign person failed to provide any prescribed penalty of perjury statement under § 1.6045–1(g)(1) or under § 1.6049–5(b)(2)(iv) of the Income Tax Regulations?

A–75. Generally, payor or broker will be treated as having satisfied the due diligence requirements with respect to post-1983 account or instrument if at the time the account or instrument was opened or acquired the payor or broker obtained a certified taxpayer identification number from the payee and used that number on the information return that was filed for the particular calendar year that is subject to the penalty. See A–51 of this section for the due diligence requirements for payors of accounts or instruments that are not pre-1984 accounts or instruments.

Q–76. What actions must a payor or broker take to exercise due diligence with respect to an account for which a Form W–8 is no longer in effect so that the payor or broker is not liable for the penalty for filing an information return with a missing taxpayer identification number?

A–76. A payor or broker of a pre-1984 or a post-1983 account or instrument that becomes subject to information reporting because of Form W–8 is no longer in effect may exercise due diligence with respect to such account by (1) sending a separate mailing to the payee before January 1 of the first calendar year that a Form W–8 is no longer in effect (and during which a Form W–9 or its acceptable substitute has not been received) and before December 31 of each such calendar year thereafter requesting the required penalty of perjury statement (Form W–8), and (2) imposing backup withholding on reportable payments made on the account during a year that a Form W–8 is not in effect (and during which a Form W–9 or its acceptable substitute has not been received). (For Forms W–8 that expired in the 1986 calendar year, the payor may make one separate mailing that will satisfy the mailing requirement for both the 1986 and 1987 calendar years. This separate mailing must be made on or before June 30, 1988.) The mailing must be by first-class mail, or airmail if sent to a foreign address, and must contain the Form W–8 and a notice describing the Form W–8 and advising the payee that backup withholding may commence (or has commenced) because the form is not provided. The payor must also include a reply envelope (self-addressed) in the mailing. The rules of A–18 and A–19 shall apply to this rule provided in this A–76.

CLARIFICATION OF THE DUE DILIGENCE STANDARD PRIOR TO BEING NOTIFIED BY THE INTERNAL REVENUE SERVICE THAT A NUMBER IS INCORRECT

Pre-1984 Accounts and Instruments

Q–77. What action must a payor of reportable interest or dividends on a pre-1984 account or instrument take to exercise due diligence so that the payor is not liable for the penalty under section 6676(b) for filing an information return with an incorrect taxpayer identification number?

A–77. A payor of reportable interest or dividends on a pre-1984 account or instrument will be considered to have exercised due diligence in furnishing a taxpayer identification number with respect to a particular calendar year if in such year the payor (1) has made the prescribed yearly mailings as described in A–5 and A–6 and in the related questions and answers on due diligence in § 35a.9999–1 with respect to such account or instrument, or (2) obtained a certified taxpayer identification number from the payee. In addition, to be considered to have exercised due diligence the payor must have used the same care in processing the taxpayer identification number provided by the payee and in furnishing that taxpayer identification number on the information return that is filed for the year that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances. However, see A–56 of § 35a.9999–1 for the circumstances under which the penalty will not be imposed through administrative discretion with respect to information returns filed for the 1988 or subsequent calendar years.

Q–78. Will a payor who filed an information return with an incorrect taxpayer identification number be considered to have exercised due diligence for a particular calendar year with respect to a pre-1984 account or instrument for which the payor did not have a certified taxpayer identification number if, in such calendar year, the payor undertook a mailing as described in A–5 and A–6 and in the related questions and answers on due diligence in § 35a.9999–1 but failed to undertake one or more of the mailings required under A–5 or A–6 of § 35a.9999–1 in an earlier year?

A–78. No. The annual solicitation of the correct taxpayer identification number for a pre-1984 account or instrument is a cumulative requirement. Thus, if the separate mailing or one of the nonseparate annual mailings described under A–5 or A–6 of § 35a.9999–1, respectively, is not undertaken or is undertaken improperly, the payor can never demonstrate due diligence for the particular account or instrument in question through solicitation of the taxpayer identification number. Therefore, the payee is liable for the penalty under section 6676(b) with respect to the year in which the payor failed to make a mailing or makes a mailing improperly and all subsequent years (regardless of whether a mailing is made in a subsequent year) in which a return is filed with an incorrect taxpayer identification number. See A–56 of § 35a.9999–1 for the circumstances under which the penalty will not be imposed through the administrative discretion of the Internal Revenue Service with respect to information returns filed for the 1988 or subsequent calendar years.

Q–79. Can a payor of reportable interest or dividends ever establish due diligence for a pre-1984 account or instrument if the payor missed one of the prescribed annual mailings or if one of the mailings was not undertaken in accordance with A–5 and A–6 and in accordance with the related questions and answers on due diligence described in § 35a.9999–1?

A–79. The payor of a pre-1984 account or instrument who failed to undertake one or more of the annual mailings as described in A–5 and A–6 and in the related questions and answers on due diligence described in § 35a.9999–1 (or undertook those mailings improperly) can establish due diligence by obtaining a certified taxpayer identification from the payee and using that number on the information return. Due diligence will be considered as exercised beginning in the calendar year in which the certified number is received and used on the information return filed for that year. Also, see A–56 of § 35a.9999–1 for the circumstances under which the penalty will not be imposed through the administrative discretion of the Internal Revenue Service.

Q–80. Does a payor who subsequently obtains a certified taxpayer identification number or a Form W–8 on a pre-1984 account or instrument remain liable for the penalty for filing an information return with an incorrect or a missing taxpayer identification number in prior years if the payor did not exercise due diligence in such years by the prescribed mailings, by obtaining a certified taxpayer identification number, or by obtaining a Form W–8 signed under penalties of perjury?

A–80. Yes. Obtaining a certified taxpayer identification number on a pre-1984 account or instrument may be considered an exercise of due diligence only for the year in which the certified number is received and subsequent calendar years.

Q–81. Does the answer in A–80 change with respect to a calendar year if the payor subsequently obtains a certified number from a payee that matches the number used by the payor on a previous information return filed for such year?

A–81. No. The payor remains liable for the penalty for those calendar years with respect to which the payor filed an information return with an incorrect taxpayer identification number without exercising due diligence in such year. The question of whether a payor has exercised due diligence is a year-by-year determination. Due diligence must be exercised in the particular year for which the payor is subject to the penalty.

Q–82. Is a payor of a pre-1984 account or instrument who obtained a noncertified taxpayer identification number from a payee liable for the penalty if the payor undertook all the prescribed annual mailings but inadvertently processed the name or taxpayer identification number incorrectly on the information return?

A–82. Yes. The payor is liable for the penalty unless the payor can show that the payor exercised that degree of care in processing the name and taxpayer identification number and in furnishing it on the information return that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

Q–83. Is a payor of a pre-1984 account or instrument who has a certified taxpayer identification number from a payee liable for the penalty if the payor inadvertently processed the name or taxpayer identification number incorrectly on the information return?

A–83. Yes. The payor is liable for the penalty unless the payor can show that the payor exercised that degree of care in processing the name and taxpayer identification number and in furnishing it on the information return that a reasonably prudent payor would use in handling account information, such as account numbers and balances.

DUE DILIGENCE DEFINED AFTER NOTIFICATION BY THE INTERNAL REVENUE SERVICE THAT A TAXPAYER IDENTIFICATION NUMBER IS INCORRECT

In General

Q–84. Is a payor of a reportable interest or dividend payment liable for the penalty under section 6676(b) in 1989 and subsequent calendar years if the Internal Revenue Service or a broker notifies the payor on or after January 1, 1988, and before the original due date of an information return that a payee's taxpayer identification number is incorrect, and the payor later provides that number on an information return?

A–84. Yes. A payor will be liable for the penalty under section 6676(b) for providing an incorrect taxpayer identification number on an information return for the 1988 and subsequent calendar years if the payor is notified by the Internal Revenue Service on or after January 1, 1988, and before the original due date of an information return that such number is incorrect, unless the payor is exercising due diligence.

Pre-1984 Accounts and Instruments

Q–85. What actions must a payor of a pre-1984 account or instrument take to exercise due diligence to avoid the penalty under section 6676(b) for filing an information return with an incorrect taxpayer indetification number for the 1989 and subsequent calendar years, if the Internal Revenue Service or a broker notifies the payor, on or after January 1, 1989, and before the original due date of such information return, that the payee's taxpayer identification number is incorrect?

A–85. A payor of a pre-1984 account or instrument will not be liable for the penalty if (1) at the time that the payor receives the first notice of an incorrect taxpayer identification number on or after January 1, 1989, the payor is considered to be exercising due diligence as described in A–5 and A–6 and the related questions and answers on due diligence under § 35a.9999–1 or is complying or with the rule described in A–56 and the related questions and answers on due diligence under § 35a.9999–1, (2) the payor sent the notice to the payee in the manner prescribed in § 35a.3406–1(c), (3) if the payor received a Form W–9 or acceptable substitute Form W–9 (including a recertified taxpayer identification number) from the payee before the original due date of an information return (see A–31 under § 35a.9999–1 and § 35a.3406–1(d)(2) as to when a payor may treat a Form W–9 or substitute Form W–9 as being received), the payor used the new name and taxpayer number provided on the Form W–9 or acceptable substitute form on information returns filed after the calendar year in which the number is received, and (4) the payor sends the notice prescribed in § 35a.3406–1(c) in each year subsequent to the year in which the notice was first sent to the payee (who has not by the end of such year provided a certified Form W–9 or acceptable substitute form) until the Internal Revenue Service or a broker sends a second notice (of an incorrect taxpayer identification number for the payee) to the payor within 3 calendar years. If a second notice is sent, due diligence is met according to the rules set forth in A–89 of this section.

Q–86. Is a payor of a pre-1984 account or instrument who is considered to be exercising due diligence through the prescribed annual mailings in A–5 and A–6 (or who is undertaking the actions described in A–56 of § 35a.9999–1) and through the related questions and answers on due diligence under § 35a.999–1 in the year that the Internal Revenue Service notifies the payor of an incorrect taxpayer identification number required to undertake those mailings in addition to mailing the notice required in § 35a.3406–1(c) (or in § 35a.3406–1(f)(2) in the case of the notification of two incorrect taxpayer identification numbers in 3 calendar years)?

A–86. No. A payor of a pre-1984 account or instrument is not required to undertake the mailings prescribed in A–5 and A–6 of § 35a.9999–1 (or A–56 of § 35a.9999–1) in any year in which the payor is also required to send the notice prescribed in § 35a.3406–1(c) (or in § 35a.3406–1(f)(2)). Thus, for example, assume that Payor X pays reportable interest on a pre-1984 account and has undertaken all the prescibed mailings in A–5 and A–6 by December 31, 1989, for the account of Payee A. Also assume that Payor X filed the calendar year 1984 return on February 28, 1985, with respect to Payee A with an incorrect taxpayer identification number and the 1985, 1986, 1987, and 1988 calendar year information returns on February 28, 1986, March 2, 1987, February 29, 1988, and February 28, 1989, respectively, with the same incorrect taxpayer identification number. Payor X has filed neither a Form 8210 for any of these years to remit the penalty under section 6676(b) nor the certification statement set forth in CP2100 (or letter 2137) for calendar years before 1988. In October of 1989 the Internal Revenue Service notifies Payor X that the number set forth on the 1988 calendar year information return (*i.e.,* filed in 1989 with respect to Payee A) was filed with an incorrect taxpayer identification number. Under these facts, Payor X is not liable for the penalty for filing the 1988 information return with an incorrect taxpayer identification number because (1) Payor X filed the 1988 information return before being notified by the Internal Revenue Service of the incorrect taxpayer identification number, and (2) Payor X exercised due diligence in 1988 through the prescribed annual mailing (*i.e.,* Payor X made the separate mailing in 1983 and the nonseparate mailings in 1984, 1985, 1986, 1987, and 1988 with respect to Payee A).

Similarly, Payor X is not liable for the penalty for the 1984, 1985, 1986, and 1987 calendar year information returns filed on February 28, 1985, February 28, 1986, March 2, 1987, and February 29, 1988, respectively.

Payor X will be liable for the penalty, however, for filing the 1989 calendar year information return with the same incorrect taxpayer identification number (*i.e.*, the number that the Internal Revenue Service notified was incorrect) unless Payor X (1) sends the notice information as described in § 35a.3406–1(c), and (2) uses the certified taxpayer identification number that is furnished by the payee, if one is received before the end of 1989, on the information return that is filed for the 1989 calendar year. If Payor X sends the notice described in § 35a.3406–1(c) in the 1989 calendar year, Payor X is not also required to send the mailing described in A–5 and A–6 (or A–56) of § 35a.9999–1 in 19B9. If the payee does not provide a new taxpayer identification number to the payor, the payor must continue to use the existing taxpayer identification number on information returns filed for such payee.

Q–87. Is Payor X in the example in A–86 required to send the notice to Payee A described in § 35a.3406–1 (c) if, earlier in the year, Payor X sent the 1989 annual mailing to Payee A as described in A–5 and A–6 of (or A–56) § 35a.9999–1?

A–87. Yes. Once a payor is notified of an incorrect taxpayer identification number, the payor must send the mailing prescribed in § 35a.3406–1 (c) in order to continue exercising due diligence.

Post-1983 Accounts or Instruments

Q–88. What actions must a payor of a post-1983 account or instrument take to exercise due diligence so as to avoid the penalty for filing an information return with an incorrect taxpayer identification number after being notified by the Internal Revenue Service or a broker on or after January 1, 1989, and before the original due date of such return that the number is incorrect?

A–88. A payor as described in Q–88 of an account or instrument that is a post-1983 account or instrument will not be liable for the penalty for filing an information return with an incorrect taxpayer identification number after the Internal Revenue Service notifies the payor that the number is incorrect if (1) the payor is considered to be exercising due diligence at the time of the notice from the Internal Revenue Service because the payor has a certified taxpayer identification number from the payee or comes within one of the exceptions to due diligence, (2) the payor sent the notice in the manner prescribed in § 35a.3406–1(c), and (3) if the payor received a new certified Form W–9 or acceptable substitute form (which may contain a recertified taxpayer identification number) from the payee in a calendar year prior to the calendar year that is the original due date of an information return, the payor used the new name and taxpayer identification number provided on the Form W–9 or acceptable substitute form on information returns filed after the calendar year in which the taxpayer identification number is received. (See A–31 under § 35a.9999–1 and § 35a.3406–1(d)(2)(ii) as to when a payor may treat a taxpayer identification number as being received.)

In order to continue the exercise of due diligence, the payor must send the notice as described in § 35a.3406–1(c) in each calendar year until the payor obtains a certified taxpayer identification number from the payee or until the Internal Revenue Service sends a second notice (of an incorrect number for the payee) to the payor within 3 calendar years with respect to the account in question in which case due diligence is met according to the rules set forth in A–89 of this section.

DUE DILIGENCE DEFINED AFTER TWO NOTIFICATIONS OF AN INCORRECT TAXPAYER IDENTIFICATION NUMBER WITHIN 3 CALENDAR YEARS

Both Pre-1984 and Post-1983 Accounts and Instruments

Q–89. What actions must a payor take, if the payor is notified twice within 3 calendar years that a payee has provided an incorrect taxpayer identification number, to exercise due diligence so that the payor will not be subject to the penalty for the continued use of that incorrect taxpayer identification number?

A–89. The payor (1) must send the notice to the payee as prescribed in § 35a.3406–1(f)(2), (2) must code all subsequent information returns that are filed in the calendar year after the calendar year in which the second notice is received with the words ‘‘2ND NOTICE’’, and (3) must, if the payor receives from the payee a copy of the notice from the Internal Revenue Service that the payee has provided a correct taxpayer identification number as described in paragraph (h) of § 35a.3406–1, obtain and use such name and taxpayer identification number combination on the information returns that are filed after the calendar year in which the name and number are received.

A payor shall not count any notice received from the Internal Revenue Service or a broker prior to January 1, 1990, as the second of two notices within 3 calendar years. Further, a payor shall treat two or more notices received in a calendar year with respect to a payee as one notice received in that calendar year for that payee. The preceding sentence applies only with respect to a payor who receives such two or more notices under the same payor employer identification number (or social security number). See § 35a.3406–1(f).

PROCEDURAL ITEMS

Q–90. In what year does the liability for the penalty under section 6676(b) arise?

A–90. The liability for the penalty arises on the day following the date that the payor files an information return with an incorrect (or a missing taxpayer identification number) with respect to a calendar year in which the payor failed to exercise due diligence.

Q–91. When must the payor remit the penalty to the Internal Revenue Service?

A–91. The penalty is due by April 1 of the year following the calendar year for which the information return is filed.

Q–92. Will interest accrue on the penalty if it is not timely paid?

A–92. Yes. The interest rate will be determined pursuant to section 6621 of the Internal Revenue Code. For example, assume Bank Y is notified by the Internal Revenue Service in November 1986 that Y filed 1500 information returns with respect to the 1984 calendar year with incorrect taxpayer identification numbers. Y exercised due diligence in 1984 on 1,000 of the accounts for which Y filed information returns with incorrect taxpayer identification numbers. As a result, Y is liable for a $25,000 penalty (500×$50) with respect to the information returns filed for the 1984 calendar year. Further, interest will be charged on the $25,000 beginning April 1, 1985. To the extent Y filed information returns for the calendar year 1985 (or a later calendar year) with those same incorrect taxpayer identification numbers, Y may also be liable for a penalty and interest beginning on April 1, 1986 (or April 1 of the year following such later calendar year), with respect to such information returns.

Q–93. In what manner should a payor remit the penalty to the Internal Revenue Service?

A–93. Generally, the payor shall remit the penalty with a properly executed Form 8210. However, effective for information returns filed for the 1984, 1985, 1986, and 1987 calendar years with missing or incorrect taxpayer identification numbers, the payor may remit the penalty only with the certification statement set forth in CP 2100 and letter 2137 provided by the Internal Revenue Service for notifying payors of missing or incorrect taxpayer identification numbers. The submission to the Internal Revenue Service of the signed certification statement shall constitute the filing of a return. With respect to information returns filed with missing or incorrect taxpayer identification numbers for the 1988 or a later calendar year, the payor must remit the penalty with the Form 8210.

Q–94. What method should the payor use to contest any part of the proposed penalty under section 6676(b)?

A–94. A payor may contest the penalty judicially and administratively. With respect to a judicial contest, each penalty with respect to a return or statement is separable; therefore, a payor may contest its liability for the penalty by paying one such penalty and suing for a refund in a case in which the same issue arises with respect to multiple failures. A payor may also request an administrative appeals conference with the Internal Revenue Service. A request for an appeals conference may be made and granted after the penalty has been imposed by the Internal Revenue Service. The manner for requesting an appeals conference is set forth in Publication 556.

Q–95. When does the period for the statute of limitations on assessment begin to run on the penalty under section 6676(b)?

A–95. The period for the statute of limitations on assessment begins to run on a penalty that is due under section 6676(b) on the date the payor files the respective Form 8210 or, with respect to the penalty due for the 1984, 1985, 1986, and 1987 calendar year information returns, the earlier of the date the payor files the Form 8210 or files the certification statement set forth in CP 2100 and Letter 2137. The period for the statute of limitations on assessment runs for a period of 3 years. See section 6501.

Q–96. May a payor surcharge or pass the penalty on to the account of the payee with respect to which the payor was liable for the penalty under section 6676(b)?

A–96. No. A payor shall not surcharge or otherwise pass the penalty on directly or indirectly to the account of a particular payee. Section 6676 provides for a separate $50 penalty for a payee who fails to provide a correct taxpayer identification number to a payor.

MISCELLANEOUS ITEMS

Q–97. Is a payor of a pre-1984 account or instrument who does not undertake the prescribed mailings in A–5 and A–6 of (or A–56) § 35a.9999–1 but obtained a certified taxpayer indentification number from a payee required to retain a copy of the document containing the certified number in its files?

A–97. No. See Q/A–23 of § 35a.9999–2.

Q–98. If a payor is notified that a payee is subject to backup withholding under both section 3406(a)(1) (B) and (C), with which rules should the payor comply and subject the payee to backup withholding?

A–98. A payor should comply with both provisions. Certain reportable payments that are subject to backup withholding under section 3406 (a)(1)(B) are not subject to backup withholding under section 3406(a)(1)(C). In a case where a reportable payment, such as interest reportable under section 6049, is potentially subject to backup withholding under both provisions, the payor must comply with the notice requirements under both section 3406(A)(1) (B) and (C). The payor should stop backup withholding on the account only when all conditions subjecting the account to backup withholding have been satisfied by the payee. Backup withholding should be stopped according to the provision that applies last to the account in question.

Acquisitions and Mergers

Q–99. Under what circumstance is a taxpayer liable for the penalty under section 6676(b) with respect to another taxpayer?

A–99. A taxpayer will be liable for the penalty under section 6676(b) of another taxpayer if there is a validly enforceable agreement under State law by which the taxpayer agreed to pay the Federal tax liability of the other taxpayer or has guaranteed the payment of such taxpayer's tax liabilities. Alternatively, the penalty may be collectible from the taxpayer as a transferee of property of the other taxpayer pursuant to section 6901 if the liability arises on the liquidation of a partnership or corporation, or on a reorganization within the meaning of section 368(a). See section 6901 and the regulations thereunder. In the latter situation the taxpayer will be liable for any interest on the penalty if the value of the assets transferred exceeds the amount of such penalty, other taxes, related penalties, and interest as precribed under the Internal Revenue Code. However, if the value of such transferred assets is less than the penalty, interest will not be collected from the transferee taxpayer.

Q–100. Is a pre-1984 account or instrument of a payor that is exchanged for an account or instrument of another payor as a result of a merger of the other payor or acquisition of the acounts or instruments of such payor transformed into a post-1983 account or instrument if the merger or acquisition occurs after December 31, 1983?

A–100. No. A pre-1984 account or instrument that is exchanged for another account or instrument pursuant to a statutory merger or the acquisition of accounts or instruments is not transformed into a post-1983 account or instrument because the exchange occurs without the participation of the payee. See A–34 of § 35a.9999–1.

Q–101. May the acquiring taxpayer described in A–100 rely upon the business records and past procedures of the merged payor or the payor whose accounts or instruments were acquired in order to establish that due diligence has been exercised on the acquired pre-1984 and post-1983 accounts or instruments?

A–101. Yes. The acquiring payor may rely upon the business records and past procedures of the merged payor or of the payor whose accounts or instruments were acquired in order to establish due diligence to avoid the penalty under section 6676(b) with respect to information returns that have been or will be filed.

Q–102. If the business records of a merged payor or of a payor whose accounts or instruments were acquired do not disclose whether an account is a pre-1984 or post-1983 account or instrument, how should the payor classify such account or instrument?

A–102. The payor described in Q–102 may presume that such account or instrument is a pre-1984 account or instrument for purposes of backup withholding and due diligence. A payor who so treats such accounts and instruments may comply with the provisions of A–56 of § 35a.9999–1 in the calendar year of such merger or acquisition to obtain relief from the penalty under section 6676(b) with respect to information returns filed for the year following the year of the acquisition or merger and subsequent calendar years. With respect to the requirement to backup withhold on such accounts or instruments with respect to which there is a missing or an obviously incorrect taxpayer identification number, the payor may commence such backup withholding no later than sixty days following the date of the merger or acquisition of such accounts or instruments. A payor who withholds as described under the prior sentence will meet the backup withholding criterion under A–56 § 35a.9999–1. A payor as described in this answer is not required to obtain a determination from the Internal Revenue Service as described in A–56 of § 35a.9999–1.

Q–103. Is a payor required to retain the notice of an incorrect taxpayer identification number described in § 35a.3406–1(b) (1) or (2) that the Internal Revenue Service or a broker sends to the payor?

A–103. Yes. The payor is required to maintain the notices (whether or not such payor imposes backup withholding on the account to which the notice relates or incurs any liability for backup withholding) for a period of four years after the later of (1) the due date of such tax (backup withholding) for the return period to which the notice relates, (2) the date an information return is filed reflecting the final payments that are subject to backup withholding as a result of the notice described in § 35a.3406–1(b) (1) or (2), or (3) the date the tax is paid with respect to the notice. See section 6001 and the regulations issued thereunder for other rules on record retention.

Q–104. Is a payor required to retain the "statement of SSA or IRS contact" (as described in the Appendix to § 35a.3406–1) that a payee has returned to the payor?

A–104. No. A payor is not required to retain the "statement of SSA or IRS contact".

Q–105. Does the rule of A–5 of § 35a.9999–2 which allows a payor to deliver the mailings described in A–5 and A–6 of § 35a.9999–1 in person or by intra-office mail, apply with respect to mailings requesting a penalties of perjury statement from foreign payees described in A–52 and A–55 of § 35a.9999–1?

A–105. Yes. A payor or broker may deliver the mailings requesting the penalties of perjury statement from foreign payees described in A–52 and A–55 of § 35a.9999–1 provided the mailings are delivered by the same method used by the payor or broker in sending account activity and balance information and other correspondence to the payee.

[T.D. 7929, 48 FR 56332, Dec. 20, 1983, as amended by T.D. 7933, 49 FR 63, Jan. 3, 1984; T.D. 7966, 49 FR 33236, Aug. 22, 1984; T.D. 8163, 52 FR 44874, Nov. 23, 1987; T.D. 8248, 54 FR 14351, Apr. 11, 1989]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 35a.9999–3 was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000.

§ 35a.9999–3A Question and answer relating to exemption from backup withholding for certain principal payments made outside the United States by brokers on certain obligations.

The following question and answer concerns the exemption from information reporting and backup withholding for certain principal payments on obligations made outside the United States. The question and answer is issued under the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369):

Q. Are payments of principal on obligations subject to information reporting *under section 6045 or to backup withholding if made outside the United States?*

A. Such payments are not subject to section 6045 information reporting or backup withholding if made with respect to obligations the interest on which would be from sources outside the United States. The determination of whether a payment of principal is made outside the United States for this purpose shall be determined under rules similar to those contained in A–37 of § 35a.9999–3 of the regulations.

[T.D. 7946, 49 FR 7227, Feb. 28, 1984]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 35a.9999–3A was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000.

§ 35a.9999–4T Questions and answers relating to the application of information reporting and backup withholding to payments by foreign offices of United States and foreign brokers and by United States offices of banks and brokers, and other related matters (temporary).

The following questions and answers concern the application of information reporting and backup withholding to payments by foreign offices of United States and foreign brokers and by United States offices of banks and brokers, and other related matters. These questions and answers are issued under the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369):

Q–1. Was a foreign office of a U.S. broker required to commence backup withholding on July 1, 1984, with respect to transactions effected by that office for a foreign customer who has not provided the broker with the penalty of perjury statement described in § 1.6045–1(g)(1) of the regulations?

A–1. Although it has not received a statement described in § 1.6045–1(g)(1), a foreign office of a U.S. broker may treat a cusotmer as an exempt foreign person with respect to a transaction effected by that office for that customer if, in the case of both pre-1984 and post-1983 brokerage accounts, the broker has evidence in its records that the customer is a foreign person (provided the broker does not have actual knowledge that the evidence is false, the customer does not, except in infrequent and isolated circumstances, transmit instructions to the foreign office from within the United States, by mail, telephone, electronic transfer or otherwise, and the customer has not opened an account with a United States office of the broker). Such evidence may include a written indication from the customer (e.g., appearing on an account application form) that the customer is neither a citizen nor a resident of the United States. The mere fact, however that the customer has provided an address outside the United States is insufficent evidence to establish for this purpose that the customer is neither a citizen nor a resident of the United States. For payments made on or before November 20, 1984 on brokerage accounts opened on or before August 22, 1984, an affidavit by an employee of the broker stating that the employee knows, or that the customer has represented orally, that the customer is not a U.S. person will be sufficient to establish such foreign status. For all other payments on brokerage accounts, the employee's affidavit will be sufficient to estblish the customer's foreign status only if the affidavit states that the employee has a reasonable basis, founded on documentary evidence, for believing that the cusomter is neither a citizen nor a resident of the United States.

A foreign office of a U.S. broker may also treat a customer as an exempt foreign person with respect to payments made outside the United States on a transaction effected by that office on behalf of that customer if any one of the following conditions is satisfied: (i) During the 12-month period immediately preceding the transaction, the broker has withheld tax on any amount, including interest and dividends, paid to such person under subchapter A of chapter 3 of the Code in accordance with the provisions of chapter 3; (ii) during the 12-month period immediately preceding the transaction another payor or middleman has withheld tax under subchapter A of chapter 3 of the Code in accordance with the provisions of chapter 3 on any amount, including interest and dividends, collected by the broker on behalf of the customer; or (iii) the broker, in accordance with § 1.1441–6 (b) or (c) of the regulations, has received from the customer a Form 1001 (Ownership, Exemption or Reduced Rate Certificate) or special variation thereof that is in effect with respect to any amount, inlcuding interest, that is or may be paid to the customer during the calendar year in which the transaction is effected. (Notwithstanding the foregoing, the Internal Revenue Service is reconsidering the question of whether a broker should be permitted to treat a customer as an exempt foreign person for purposes of either information reporting or backup withholding merely by virtue of the fact that the broker or another person withheld tax under subchapter A of chapter 3 of the Code on any amount collected by the broker on behalf of the customer; any change in this rule will be announced in future regulations and will apply prospectively only).

If the broker does not obtain the statement described in § 1.6045–1(g)(1) and does not otherwise establish in accordance with any of the foregoing procedures that a customer is not a U.S. citizen or resident, the information reporting provisions of section 6045 will apply. However, the issue of whether backup withholding should apply with respect to transactions effected by a foreign office of a U.S. broker, as well as the issue of the standard of evidence required to prove foreign status for information reporting purposes, is still under consideration. Until provided otherwise, backup withholding shall not apply with respect to such transactions. If backup withholding is subsequently determined to be appropriate, or the circumstances in which information reporting is required are changed, such will be provided in future regulations, and such changes will apply on a prospective basis only.

Q–2. Are payments made with respect to transactions effected for a U.S. customer of a foreign office of a foreign broker reportable payments under section 6045 that may be subject to backup withholding?

A–2. A payment made with respect to a transaction effected for a U.S. customer by a foreign office of a foreign broker is subject to information reporting under section 6045 only in the following circumstances: (i) The foreign broker is a controlled foreign corporation within the meaning of section 957(a); or (ii) 50 percent or more of the gross income of the foreign broker from all sources for the 3-year period ending with the close of its taxable year preceding the payment (or for such part of the period that the foreign broker has been in existence) was effectively connected with the conduct of a trade or business within the United States.

For purposes of determining whether a customer is an exempt foreign person, the foreign office of a foreign broker may use the same procedures as used by a foreign office of a U.S. broker. If the foreign broker does not obtain the statement described in § 1.6045–1(g)(1) and does not otherwise establish in accordance with those procedures that a customer is not a U.S. citizen or resident, the information reporting provisions of section 6045 will apply. However, as in the case of foreign offices of United States brokers, the issue of whether backup withholding should be applied with respect to such foreign offices, as well as the issue of the standard of evidence required to prove foreign status for information reporting purposes, is still under consideration. If backup withholding is subsequently determined to be appropriate, or the circumstances in which information reporting is required are changed, such will be provided in future regulations, and such changes will apply on a prospective basis only.

Q–3. Was a U.S. office of a bank or a broker required to commence backup withholding on July 1, 1984, with respect to the pre-1984 account of a foreign payee or customer (other than a payee or customer who may be treated as an exempt recipient) if the bank or broker has not received a taxpayer identification number or the penalty of perjury statement described in § 1.6049–5(b)(2)(iv) or § 1.6045–1(g)(1) from that payee or customer?

A–3. The bank or broker is not required to commence backup withholding with respect to the pre-1984 account of a foreign payee or customer until January 1, 1985, provided, however, that the following conditions are satisfied: (i) The bank or broker has otherwise complied with the requirements of A–52 or A–55 of §35a.9999–1 of the regulations and (ii) the bank or broker sends an additional mailing (which need not be a separate mailing) during calendar year 1984 requesting the payee or customer to provide the requisite statement signed under penalties of perjury. The additional mailing must be by first-class mail, or by airmail if sent to a foreign address, and must contain a notice describing the requisite statement and advising the payee or customer that backup withholding may commence if the statement is not provided. The mailing must include a reply envelope and a form on which the payee or customer may provide the requisite statement. However, no further mailing is required by this A–3 after the bank or broker has received the statement signed by the payee or customer under penalties of perjury. The rules of A–18 of §35a.9999–1 relating to persons for whom the payor has no correct address, the rules of A–19 of §35a.9999–1 relating to ''do not mail'' or ''stop mail hold'' instructions, and the rules of A–52 of §35a.9999–3 relating to the delivery of mailings shall apply with respect to the mailings required by this A–3.

Backup withholding must commence with respect to payments on pre-1984 accounts of foreign payees or customers on or after January 1, 1985, if the bank or broker has received neither a taxpayer identification number nor a statement described in §1.6049–5(b)(2)(iv) or §1.6045–1(g)(1) from the foreign payee or customer.

Q–4. Do the backup withholding provisions apply to a payment in redemption or retirement of an obligation issued by an international organization if the payment is made within the United States by the international organization or by a person acting in its capacity as a paying agent for such organization?

A–4. No, provided the international organization is an organization of which the United States is a member and which enjoys immunity or exemption from any liability or obligation to pay, withhold, or collect tax pursuant to an international agreement having full force and effect in the United States.

Q–5. For purposes of the regulations under §35a.9999–5, under what circumstances is a custodian, nominee or other agent of a payee subject to information reporting or backup withholding with respect to interest or original issue discount paid or collected outside the United States?

A–5. (i) The provisions of Q&A's 2, 3, 4, 5, 6, and 16 of §35a.9999–5 indicate that the payment or collection outside the United States of interest or original issue discount on obligations described therein by a person acting as a custodian, nominee or other agent of the payee with respect to those obligations may be subject to information reporting under section 6049 unless the payee is an exempt recipient or a foreign person.

(ii) For purposes of the provisions described in subdivision (i), a payment or collection of interest or original issue discount outside the United States by a person acting in its capacity as a custodian, nominee or other agent of the payee with respect to such payment or collection is not subject to information reporting under section 6049 by that agent unless the agent is either (A) a United States person, (B) a controlled foreign corporation within the meaning of section 957(a), or (C) a foreign person 50 percent or more of the gross income of which from all sources for the 3-year period ending with the close of its taxable year preceding the collection or payment was effectively connected with its conduct of a trade or business within the United States.

(iii) For purposes of section 6049 and the regulations under §35a.9999–5, an agent (described in subdivision (ii)) of the payee paying or collecting interest or original issue discount outside the United States with respect to an obligation described in §35a.9999–5 may treat the payee as a person who is not a United States citizen or resident if the agent has evidence in its records to such effect (provided it does not have actual knowledge that the evidence is false). Such evidence may include a written indication from the payee (*e.g.*, appearing on an account application form) that the payee is neither a citizen nor a resident of the United States. The mere fact, however, that the payee has provided an address outside the United States is insufficient evidence to establish for this purpose that the payee is neither a citizen nor a resident of the United States. For payments made on or before November 20, 1984, on accounts opened on or before August 22, 1984, an affidavit by an employee of the agent stating that the employee knows, or the payee has represented orally, that the payee is not a U.S. person will be sufficient to establish such foreign status. For all other payments, an affidavit of an employee will be sufficient to establish the foreign status of the payee only if the affidavit states that the employee has a reasonable basis, founded on documentary evidence, for believing that the payee is neither a citizen nor a resident of the United States. (Notwithstanding the foregoing, the issue of the standard of evidence required to prove foreign status for information reporting purposes is still under consideration; any change in such standard would be made in future regulations and would apply on a prospective basis only.)

(iv) Payments described in this Q&A–5 are not subject to information reporting by a custodian, nominee or other agent of the payee under section 6041, if they are exempt from reporting under section 6049. In addition, although payments outside the United States of interest or original issue discount described in this Q&A–5 may be reportable payments as, for example, payments made by foreign offices of U.S. persons to U.S. persons, these payments are not subject currently to backup withholding by the custodian, nominee or other agent of the payee. (However, the issue of whether backup withholding should apply in this case is still under consideration; any change with respect to backup withholding in this regard would be made in future regulations and would apply on a prospective basis only.)

(v) For purposes of Q&A–7 and Q&A–17 of § 35a.9999–5, the question of whether a broker is otherwise subject to information reporting under section 6045 shall be determined in accordance with the provisions of Q&A–1 and Q&A–2 of this § 35a.9999–4.

[T.D. 7966, 49 FR 33237, Aug. 22, 1984, as amended by T.D. 7972, 49 FR 34340, Aug. 29, 1984]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 35a.9999–4T was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000.

§ 35a.9999–5 Questions and answers relating to repeal of 30 percent withholding by section 127 of the Tax Reform Act of 1984 and to the application of information reporting and backup withholding in light of such repeal.

The following questions and answers concern the repeal of 30 percent withholding by section 127 of the Tax Reform Act of 1984 and the application of information reporting and backup withholding in light of such repeal.

(a) *Rules concerning obligations in bearer form.*

Q–1. When will interest qualify as portfolio interest within the meaning of section 871(h)(2)(A) or section 881(c)(2)(A)?

A–1. Interest is portfolio interest within the meaning of section 871(h)(2)(A) or section 881(c)(2)(A) only if it paid with respect to an obligation issued after July 18, 1984, that is in bearer form and described in section 163(f)(2)(B).

Q–2. Is a payment of portfolio interest described in section 871(h)(2)(A) or section 881(c)(2)(A) from sources within the United States subject to information reporting under section 6041 or 6049 or to backup withholding if the payment is made outside the United States?

A–2. Unless an issuer or its agent has actual knowledge that a payee is a United States person, no information reporting under section 6041 or 6049 is required with respect to a payment of U.S. source portfolio interest by the issuer or agent if the payment is made outside the United States. As a payment of U.S. source portfolio interest made outside the United States by the issuer or agent is not subject to information reporting under section 6041 or 6049, it is not a reportable payment within the meaning of section 3406(b)(1) and is not subject to backup withholding by the issuer or its agent. Whether a payment of this interest is considered to be made outside the United States shall be determined for this purpose under the rules of A–37 of § 35a.9999–3 of the regulations. However, notwithstanding the rules of A–37, for purposes of this A–2, payment shall not be considered to be made outside the United States if the interest is paid to a United States address, whether by mail or by electronic transfer. The payment or collection outside the United States of U.S. source portfolio interest on a bearer obligation by a person acting as a custodian, nominee or other agent of the payee with respect to the obligation is subject to information reporting under section 6049 if that person is otherwise required to report amounts paid to or collected on behalf of the payee. For example, a foreign branch of a U.S. bank holding the bearer obligation on behalf of a customer is required to report or backup withhold with respect to the portfolio interest collected for the customer unless the customer is an exempt recipient described in § 1.6049–4(c)(1)(ii) or unless the branch has documentary evidence in its files that the customer is not a citizen or resident of the United States. See, *e.g.*, revised Q–34 of § 35.9999–3.

Q–3. Is a payment of interest from sources outside the United States on an obligation of a issuer that is a United States person or a controlled foreign corporation subject to information reporting under section 6041 or 6049 or to backup withholding if the obligation was issued in accordance with procedures described in § 1.163–5(c)(2)(i) (A) or (B)?

A–3. Unless an issuer or its agent has actual knowledge that a payee is a United States person, no information reporting under section 6041 or 6049 is required with respect to the payment of interest described in Q–3 by the issuer or agent if the payment is made outside the United States. As a payment of interest described in this A–3 is not subject to information reporting under section 6041 or 6049, it is not a reportable payment within the meaning of section 3406(b)(1) and is not subject to backup withholding by the issuer or its agent. Whether a payment of this interest is considered to be made outside the United States shall be determined for this purpose under the rules of A–37 of § 35a.9999–3 of the regulations. However, payment will not be considered to be made outside the United States for purposes of this A–3 if the interest is paid to a United States address by mail or by electronic transfer. In the case of obligations issued prior to September 21, 1984, the foregoing sentence shall apply only with respect to interest paid more than 90 days after August 22, 1984. Notwithstanding any provision to the contrary in § 1.6049–5(b)(1) (vii) or (ix), the payment or collection outside the United States of interest described in this A–3 by a person acting as a custodian, nominee, or other agent of the payee with respect to the obligation is subject to information reporting under section 6049 if that person is otherwise required to report amounts paid to or collected on behalf of the payee. For example, a foreign branch of a U.S. bank holding the bearer obligation on behalf of a customer is required to report or backup withhold with respect to interest described in this A–3 unless the customer is an exempt recipient described in § 1.6049–4(c)(1)(ii) or unless the branch has documentary evidence that the customer is not a citizen or resident of the United States. See, *e.g.*, revised Q–34 of § 35a.9999–3. The provisions of this Q–3 do not apply with respect to interest on obligations described in A–4 or A–5.

Q–4. Is information reporting under section 6041 or 6049 required with respect to interest described in section 861(c) that is paid outside the United States on an obligation that would be a registration-required obligation within the meaning of section 163(f)(2)(A) but for the fact that the obligation is described in section 163(f)(2)(B)?

A–4. Unless the issuer or its agent has actual knowledge that the payee is a United States person, interest described in section 861(c) is not subject to information reporting under section 6041 or 6049 when paid by the issuer or agent outside the United States if the following conditions are met: (i) The obligation with respect to which the interest is paid is in bearer form; (ii) the obligation would be a registration-required obligation within the meaning of section 163(f)(2)(A) but for the fact that it is described in section 163(f)(2)(B); and (iii) the obligation is part of a larger single public offering of obligations. As a payment of interest by the issuer or its agent that meets these requirements is not subject to information reporting under section 6041 or 6049, it is not a reportable payment within the meaning of section 3406(b)(1) and is not subject to backup withholding by the issuer or agent. Whether a payment of this interest is considered to be made outside the United States shall be determined for this purpose under the rules of A–37 of § 35a.9999–3 of the regulations. However, notwithstanding the rules of A–37, for purposes of this A–4, payment shall not be considered to be made outside the United States if the interest is paid to a United States address, whether by mail or by electronic transfer. The payment or collection outside the United States of interest on an obligation described in the foregoing paragraph by a person acting as a custodian, nominee or other agent of the payee with respect to the obligation is subject to information reporting under section 6049 if that person is otherwise required to report amounts paid to or collected on behalf of the payee. For example, a foreign branch of a U.S. bank holding the obligation on behalf of a customer is required to report or backup withhold with respect to this interest collected for the customer unless the customer is an exempt recipient described in § 1.6049–4(c)(1)(ii) or unless the branch has documentary evidence that the customer is not a citizen or resident of the United States. See, *e.q.*, revised Q–34 of §35a.9999–3.

Q–5. Is information reporting under section 6041 or 6049 required with respect to interest described in section 861(c) that is paid outside the United States on an obligation that would be a registration-required obligation but for the fact that it has a maturity (at issue) of not more than one year?

A–5. Unless the issuer or its agent has actual knowledge that a payee is a United States person, no information reporting by the issuer or agent is required with respect to a payment of interest on such an obligation, whether in registered or bearer form, if the following conditions are satisfied: (i) the payment is made outside the United States; (ii) the face amount of the obligation is not less than $500,000 (determined by reference to the spot rate on the date of issuance, in the case of an obligation not denominated in United States dollars); (iii) the obligation satisfies the requirements of section 163(f)(2)(B)(i) and (ii)(I) and the regulations thereunder (as if the obligation would otherwise be a registration-required obligation within the meaning of section 163(f)(2)(A)) (However, an original issue discount obligation with a maturity of 183 days or less from the date of issuance is not required to satisfy the certification requirement of § 1.163–5(c)(2)(i)(D)(3).); (iv) the obligation, if in registered form, is registered in the name of an exempt recipient described in § 1.6049–4(c)(1)(ii); and (v) the obligation contains the following statement (or a similar statement having the same effect): ‘‘By accepting this obligation, the holder represents and warrants that it is not a United States person (other than an exempt recipient described in section 6049(b)(4) of the Internal Revenue Code and the regulations thereunder) and that it is not acting for or on behalf of a United States person (other than an exempt recipient described in section 6049(b)(4) of the Internal Revenue Code and the regulations thereunder).’’ As a payment by the issuer or its agent of interest meeting these requirements is not subject to information reporting under section 6041 or section 6049, it is not a reportable payment within the meaning of section 3406(b)(1) and is not subject to backup withholding by the issuer or agent. Whether a payment of interest is made outside the United States shall be determined for this purpose under the rules of A–37 of § 35a.9999–3 of the regulations. However, notwithstanding the rules of A–37, payment shall not be considered to be made outside the United States for purposes of this A–5 if the interest is paid to a United States address, whether by mail or electronic transfer. The payment or collection outside the

United States of interest on an obligation described in the foregoing paragraph by a person acting as a custodian, nominee or other agent of the payee with respect to the obligation is subject to information reporting under section 6049 if that person is otherwise required to report amounts paid to or collected on behalf of the payee. For example, a foreign branch of a U.S. bank holding the obligation on behalf of a customer is required to report or backup withhold with respect to the interest collected for the customer unless the customer is an exempt recipient described in §1.6049–4(c)(1)(ii) or unless the branch has documentary evidence that the customer is not a citizen or resident of the United States.

Q–6. Is a payment of original issue discount from sources within the United States on an obligation that is payable six months or less from the date of its original issue subject to information reporting under section 6041 or 6049 or backup withholding if it is paid outside the United States?

A–6. Whether original issue discount described in Q–6 is subject to information reporting or backup withholding shall be determined under the same rules as those set forth in A–5 with respect to interest described in section 861(c).

Q–7. Is information reporting under section 6045 required by an issuer or its agent with respect to the redemption or retirement of an obligation described in A–2, –3, –4 or –5?

A–7. An issuer or its agent is not subject to the information reporting requirements of section 6045 with respect to the redemption or retirement of an obligation described in A–2, –3, –4 or –5, provided (i) that the issuer or agent does not have actual knowledge that the payee is a United States person, (ii) that the obligation is presented for retirement or redemption, or payment is otherwise made, at the office of the issuer or its agent outside the United States, and (iii) that if the obligation is in registered form, it is registered in the name of an exempt recipient described in §1.6049–4(c)(1)(ii). The determination of whether a payment is made at the office of the issuer or its agent outside the United States shall be made for this purpose under rules similar to those contained in A–37 of §35a.9999–3 of the regulations. However, notwithstanding the rules of A–37, the provisions of this A–7 shall not apply if payment with respect to the retirement or redemption is made to an address within the United States by mail or electronic transfer. (In the case of obligations described in A–3 and issued prior to September 21, 1984, the foregoing sentence shall apply only with respect to amounts paid more than 90 days after August 22, 1984). As a retirement or redemption by an issuer or its agent that meets the requirements of this A–7 is not subject to reporting under section 6045, it is not a reportable payment within the meaning of section 3406(b)(1) and is not subject to backup withholding by the issuer or its agent. Notwithstanding any provision to the contrary in §35a.9999–3A, a person acting as a custodian, nominee or other agent for a customer with respect to an obligation described in A–2, –3, –4 or –5 that presents such obligation to the issuer or its agent for redemption or retirement, or that otherwise acts as a broker with respect to the obligation, is subject to information reporting under section 6045 if that person is otherwise required to report transactions effected on behalf of the customer. For example, a foreign office of a United States broker presenting an obligation outside the United States for retirement or redemption on behalf of a customer who is an individual is required to report or backup withhold unless the broker has documentary evidence in its files that the customer is a foreign person. See, *e.g.*, revised Q–34 of section 35a.9999–3.

(b) *Rules concerning obligations in registered form.*

Q–8. When will interest qualify as portfolio interest within the meaning of section 871(h)(2)(B) or 881(c)?

A–8. To qualify as portfolio interest described in section 871(h)(2)(B) or 881 (c)(2)(B), the interest must be paid with respect to an obligation (i) that is in registered form (within the meaning of section 163 (f)), issued after July 18, 1984, and (ii) with respect to which the United States person (including a foreign paying agent of an issuer who is a

United States person) who would otherwise be required to deduct and withhold tax from the interest under section 1441 (a) or 1442 (a) receives the statement described in A–9 (or described in A–14, in the circumstances described in A–12) from the beneficial owner or a financial institution described in section 871(b)(4)(B).

Q–9. In order for interest on a registered obligation to qualify as portfolio interest within the meaning of section 871(h)(2)(B) or section 881(c)(2)(B), what form of statement must be provided to a United States person (including a foreign paying agent of an issuer who is a United States person) who would otherwise be required to withhold tax on that interest under section 1441(a) or 1442(a)?

A–9. Interest on a registered obligation may be treated as portfolio interest by a United States person otherwise required to deduct and withhold tax under section 1441(a) or 1442(a) if that person receives a statement that (i) is signed by the beneficial owner under penalties of perjury, (ii) certifies that such owner is not a United States person, or in the case of an individual, that he is neither a citizen nor a resident of the United States, and (iii) provides the name and address of the beneficial owner. The statement may be made, at the option of the person otherwise required to withhold, on a Form W–8 or on a substitute form that is substantially similar to Form W–8. The statement must be prepared, renewed and retained in accordance with the procedures prescribed in § 1.6049–5(b)(2)(iv). If the information provided on the statement changes, the beneficial owner must so inform the person otherwise required to withhold within 30 days of such change. Interest paid on a registered obligation also may be treated as portfolio interest if an appropriate statement is provided to the United States person otherwise required to withhold by a securities clearing organization, a bank, or another financial institution that holds customers' securities in the ordinary course of its trade or business. In such case the statement must be signed under penalties of perjury by an authorized representative of the financial institution and must state (i) that the institution has received from the beneficial owner a Form W–8 or substitute form in accordance with the provisions of § 1.6049–5(b)(2) (iv) or (ii) that it has received from another financial institution a similar statement that it, or another financial institution acting on behalf of the beneficial owner, has received the Form W–8 or substitute form from the beneficial owner. In the case of multiple financial institutions between the beneficial owner and the person otherwise required to withhold, this certificate must be given by each financial institution to the one above it in the chain. No particular form is required for the certificate provided by the financial institutions. However, the certificate must provide the name and address of the beneficial owner, and a copy of the Form W–8 provided by the beneficial owner must be attached. The certificate must be prepared, renewed and retained in accordance with procedures similar to those prescribed in § 1.6049–5(b)(2)(iv). If the information on the Form W–8 changes, the beneficial owner must so notify the financial institution acting on its behalf within 30 days of such changes, and the financial institution must promptly so inform the United States person otherwise required to withhold. This notice also must be given if the financial institution has actual knowledge that the information has changed but has not been so informed by the beneficial owner. In the case of multiple financial institutions between the beneficial owner and the person otherwise required to withhold, this notice must be given by each financial institution to the institution above it in the chain. A United States person otherwise required to deduct and withhold tax under section 1441(a) or section 1442(a) who receives the certificate described in A–9 must make an information return on Form 1042S of the payment with respect to which the certificate described in A–9 is required for the calendar year in which the payment is made. A payment described in the preceding sentence shall be treated as a payment for which there is a requirement to file a Form 1042S within the meaning of § 1.1461–2(c)(1), and thus all the provisions of § 1.1461–2(c) relating to the time and manner of filing the Form

1042S relate to the payment. The certificate described in A–9 received with respect to the payment shall be attached to the Form 1042S required to be filed with respect to the payment. Section 1.1461–2(c) will be amended to conform with the provisions of this paragraph.

Q–10. In the absence of the receipt of a certificate described in A–9 (or a certificate described in A–14 in the circumstances described in A–12) or a Form W–9 (or a substitute form that is substantially similar and completed under penalties of perjury), what United States persons are required to deduct and withhold tax under section 1441(a) or 1442(a) from interest otherwise qualifying as portfolio interest within the meaning of section 871(h)(2)(B) or 881(c)(2)(B)?

A–10. In general, any United States person who is otherwise a withholding agent for purposes of section 1441(a) or 1442(a) is required to deduct and withhold unless the certificate described in A–9 (or a certificate described in A–14 in the circumstances described in A–12) or a Form W–9 (or a substitute form that is substantially similar and completed under penalties of perjury) is received. However, a United States person is not required to withhold under section 1441(a) and 1442(a) regardless of whether the certificate is received under the following circumstances:

(i) The interest is paid to or collected on behalf of an exempt recipient at an address within the United States (other than an exempt recipient who is not a United States person); or

(ii) The interest is paid to a person at an address within the United States, and backup withholding is required with respect to that interest in accordance with the provisions of section 3406 (e.g., because neither a Form W–8 nor a Form W–9 has been received). For purposes of this A–10, an exempt recipient is a person described in § 1.6049–4(c)(1)(ii).

Q–11. Does information reporting under section 6041 or 6049 or backup withholding apply with respect to portfolio interest paid on a registered obligation to a payee who has provided the payor with a Form W–8 or substitute form?

A–11. No. Provided the payor does not have actual knowledge that the payee is a United States person, neither information reporting under section 6041 or 6049 nor backup withholding is required in such case.

Q–12. Is a United States person (including a foreign paying agent of an issuer who is a United States person) who is otherwise required to deduct and withhold tax in accordance with A–10 required to obtain the certificate described in A–9 with respect to interest on a registered obligation that has been targeted to foreign markets?

A–12. The certificate described in A–9 is not required with respect to interest paid on a registered obligation that is targeted to foreign markets (in accordance with the provisions of A–13) if the interest is paid by a United States person to a registered owner at an address outside the United States, provided that the registered owner is a financial institution described in section 871(h)(4)(B). In that case, the United States person otherwise required to deduct and withhold tax may treat the interest as portfolio interest if it does not have actual knowledge that the beneficial owner is a United States person and if it receives the certificate described in A–14 from a financial institution or member of a clearing organization, which member is the beneficial owner of the obligation, or the documentary evidence or statement described in A–14 from the beneficial owner, in accordance with the procedures described in A–15.

Q–13. When is a registered obligation considered to be targeted to foreign markets for purposes of A–12?

A–13. An obligation is considered to be targeted to foreign markets for purposes of A–12 if it is sold (or resold in connection with its original issuance) only to foreign persons (or to foreign branches of United States financial institutions described in section 871(h)(4)(B) in accordance with procedures similar to those prescribed in § 1.163–5(c)(2)(i)(A), (B), or (D). However, the provisions of that section that require an obligation to be offered for sale or resale in connection with its original issuance only outside the United States do not apply with respect to registered obligations offered for sale through a public auction. Similarly, the provisions of that section that require delivery to be made outside the United States do not apply to registered obligations offered for sale through a public auction if the obligations are considered to be in registered form by virtue of the fact that they may be transferred only through a book entry system. The obligation, if evidenced by a physical document other than a confirmation receipt, must contain on its face a legend indicating that it has been sold (or resold in connection with its original issuance) in accordance with those procedures.

Q–14. What is the certificate or documentary evidence that may be provided in lieu of the Form W–8 (or substitute form) in the circumstances described in A–12?

A–14. No particular form is required for the certificate or documentary evidence in lieu thereof described in this A–14, but it must be described in either subdivision (i) or subdivision (ii). The certificate described in subdivision (i) is required if the United States person otherwise required to deduct and withhold tax (the ''withholding agent'') pays interest to a financial institution described in section 871(h)(4)(B) or to a member of a clearing organization, which member is the beneficial owner of the obligation. The documentary evidence or statement described in subdivision (ii) is required if a withholding agent pays interest to a beneficial owner that is neither a financial institution described in section 871(h)(4)(B) nor a member of a clearing organization.

(i)(A) If the withholding agent pays interest to a financial institution described in section 871(h)(4)(B) or to a member of a clearing organization, which member is the beneficial owner of the obligation, the withholding agent must receive a certificate which states that, beginning at the time the last preceding certificate under this subdivision (i) was provided and while the financial institution or clearing organization member has held the obligation, with respect to each registered obligation that is targeted to foreign markets (in accordance with the provisions of A–13) which has been held by the person providing the certificate at any time since the provision of such last preceding certificate, either—

(*1*) The beneficial owner of the obligation has not been a United States person on each interest payment date; or

(*2*) If the person providing the certificate is a financial institution which is holding or has held an obligation on behalf of the beneficial owner, the beneficial owner of the obligation has been a United States person on one or more interest payment dates (identifying such date or dates), and the person making the certification has forwarded or will forward the appropriate United States beneficial ownership notification to the withholding agent in accordance with the provisions of A–15.

The person providing the certificate need not state the foregoing where no previous certificate has been required to be provided by the payee to the withholding agent under this subdivision (i).

(B) Whether or not a previous certificate has been required to be provided under this subdivision (i), each certificate under this subdivision (i) must further state that, with respect to each registered obligation that is targeted to foreign markets (in accordance with the provisions of A–13) held and every other such obligation to be acquired and held by the person providing the certificate during the period beginning on the date of the certificate and ending on the date the next certificate is required to be provided, the beneficial owner of the obligation will not be a United States person on each interest payment date while the financial institution or clearing organization member holds the obligation and that, if the person providing the certificate is a financial institution which is holding or will be holding the obligation on behalf of a beneficial owner, such person will provide a United States beneficial ownership notification to the withholding agent (and a clearing organization that is not a withholding agent where a member organization is required by this A–14 to furnish the clearing organization with a statement) in accordance with A–15 of this section in the event such certificate (or statement in the case of a statement provided by a member organization to a clearing organization that is not a withholding agent) is or becomes untrue with respect to any obligation. A clearing organization is an entity which is in the business of holding obligations for member organizations and transferring obligations among such members by credit or debit to the account of a member without the necessity of physical delivery of the obligation.

(C) The certificate described in subdivision (i) (A) and (B) must identify the obligation or obligations with respect to which it is given, except where the certification is given with respect to an obligation that has not been acquired at the time the certification is made. An obligation is identified if it or the larger issuance of which it is a part is described on a list (*e.g.*, $5 million principal amount of 12% debentures of ABC Savings and Loan Association due February 25, 1995, $3 million principal amount of 10% U.S. Treasury notes due May 28, 1990) of all registered obligations targeted to foreign markets held by or on behalf of the person providing the certificate and the list is attached to, and incorporated by reference into, the certificate. The certificate must identify and provide the address of the person furnishing the certificate.

(D) If the withholding agent pays interest to a depository of a clearing obligation, then the clearing organization must provide the certificate to the withholding agent.

(E) Any certificate that is provided by a clearing organization must state that the clearing organization has received a statement from each member which complies with this subdivision (i) of A–14 and with A–15 (as if the clearing organization were the withholding agent and regardless of whether the member is a financial institution described in section 871(h)(4)(B)).

(F) Subject to the requirements set out in A–15, a certificate or statement in the form described in this subdivision (i) of A–14, in conjunction with the next annual certificate or statement, will serve as the certificate that may be provided in lieu of a Form W–8 with respect to interest on all foreign-targeted registered obligations held by the person making the certification or statement and which is paid to such person within the period beginning on the date of the certificate and ending on the date the next certificate is required to be provided.

(G) The certificate described in this subdivision may be provided electronically under the terms and conditions of §1.163–5(c)(2)(i)(D)(*3*)(*ii*).

(ii) If the withholding agent pays interest to the beneficial owner of an obligation that is neither a financial institution described in section 871(h)(4)(B) nor a member of a clearing organization, then such owner must provide the withholding agent a Form W–8 (or substantially similar form completed under penalties of perjury) as set forth in A–9 of this section. However, a withholding agent that is a foreign branch of a financial institution described in section 871(h)(4)(B) and a United States person need not receive any statement or certificate from such beneficial owner, provided that the beneficial owner furnishes the withholding agent with documentary evidence as described in subdivision (iii) of Q–5 of §35a.9999–4T that the beneficial owner is not a United States person.

Q–15. What procedures apply with respect to the certificate described in A–14?

A–15. (i)(A) Where no previous certificate with respect to registered obligations that are targeted to foreign markets (in accordance with the provisions of A–13) has been provided to the withholding agent by the person providing the certificate under subdivision (i) of A–14, such certificate must be provided within the period beginning 90 days prior to the first interest payment date on which the person holds a foreign-targeted registered obligation. (The withholding agent may, in its descretion, withhold the tax under section 1441(a) or 1442(a) if the certificate is not received by the date 30 days prior to the interest payment.) Thereafter the certificate must be filed within the period beginning on January 15 and ending January 31 of each year. If a certificate provided pursuant to the first sentence of this subdivision (i)(A) is provided during the period beginning on January 15 and ending on January 31 of any year, then no other certificate need be provided during such period in such year.

(B) If on any interest payment date after the obligation was acquired by the person making the certification the beneficial owner of the obligation is a United States person, then the person to whom the withholding agent pays interest must furnish the withholding agent with a United States beneficial ownership notification within 30 days after such interest payment date. A United States beneficial ownership notification must include a statement that the beneficial owner of the obligation has been a United States person on an interest payment date (identifying such date), that such owner has provided to the person providing the notification a Form W–9 (or a substitute form that is substantially similar to Form W–9 and completed under penalties of perjury), and that the person providing the notification has been and will be complying with the information reporting requirements of section 6049, if applicable.

(C) Where the person providing the notification described in subdivision (i)(B) of this A–15 is neither (*1*) a controlled foreign corporation within the meaning of section 957(a), nor (*2*) a foreign corporation 50 percent or more of the gross income of which from all sources for the three-year period ending with the close of the taxable year preceding the date of the statement was effectively connected with the conduct of trade or business in the United States, such person must attach to the notification a copy of the Form W–9 (or substitute form that is substantially similar to Form W–9 and completed under penalties of perjury) provided by the beneficial owner. When a person that provides the United States beneficial ownership notification does not attach to it a copy of such Form W–9 (or substitute form that is substantially similar to Form W–9 and completed under penalties of perjury), such person must state that it is either a controlled foreign corporation within the meaning of section 957(a), or a foreign corporation 50 percent or more of the gross income of which from all sources for the three-year period ending with the close of its taxable year preceding the date of the statement was effectively connected with the conduct of a trade or business in the United States. A withholding agent that receives a Form W–9 (or a substitute form that is substantially similar to Form W–9 and completed under penalties of perjury) must send a copy of such form to the Internal Revenue Service Center, Cincinnati, OH. 45999, within 30 days after receiving it and must attach a statement that the Form W–9 or substitute was provided pursuant to this A–15 with respect to a United States person that has owned a foreign-targeted registered obligation on one or more interest payment dates.

(D) If either a Form W–9 (or a substitute form that is substantially similar to a Form W–9 and completed under penalties of perjury) or the statement described in subdivision (C) of this A–15 is not attached to the United States beneficial ownership notification provided pursuant to subdivision (i)(B) of this A–15, the withholding agent is required to withhold tax under section 871 or 881 on a payment of interest made after the withholding agent has received the notification unless such form or statement (or a statement that the beneficial owner of the obligation is no longer a United States person) is received before the interest payment date from the person who provided the notification (or transferee). If, during the period beginning on the next January 15 and ending on the next January 31, such person certifies as set out in subdivision (i) (A) and (B) of A–14 (except that such person does not certify under subdivision (i)(A)(2) that it has forwarded all United States beneficial ownership notifications to the withholding agent in accordance with the provisions of A–15), then the withholding agent is not required to withhold tax during the year following such certification (unless such person again provides a United States beneficial ownership notification without attaching a Form W–9 or substitute form that is substantially similar to Form W–9 and completed under penalties of perjury or the statement described in subdivision (C) of this A–15).

(E) Within the period beginning 10 days before the end of the calendar quarter and ending on the last day of each calendar quarter, any clearing organization (including a clearing organization that is a withholding agent) relying on annual certificates or statements from its member organizations, as set forth in A–14 of this section, must send each member organization having submitted such certificate or statement a reminder that the member organization must give the clearing organization a United States beneficial ownership notification in the circumstances described in subdivision (i)(B) of this A–15.

(F) The certificate described in subdivision (i) of A–14 must be retained in the records of the withholding agent for four years from the end of the calendar year in which it was received. The statement described in subdivision (i) of A–14 that is received by a clearing organization from a member organization must be retained in the records of the clearing organization for four years from the end of the calendar year in which it was received. The withholding agent who receives the certificate described in subdivision (i) of A–14 is not required to file Form 1042S to report payments of interest that are made with respect to foreign-targeted registered obligations held by the person providing the certificate and are made within the period beginning with the certificate date and ending on the last date for filing the next certificate.

(ii)(A) The documentary evidence (or Form W–8 or substantially similar form completed under penalties of perjury) described in subdivision (ii) of A–14 must be provided to the withholding agent within the period beginning 90 days prior to and ending on the first interest payment date on which the withholding agent pays interest to the beneficial owner. The withholding agent may, in its discretion, withhold the tax under section 1441(a) or 1442(a) if the documentary evidence (or Form W–8 or substantially similar form completed under penalties of perjury) is not received by the date 30 days prior to the interest payment. The beneficial owner must confirm to the withholding agent the continuing validity of the documentary evidence within the period beginning 90 days prior to the first day of the third calendar year following the provision of such evidence and during the same period every three years thereafter while the owner still owns the obligation. The withholding agent who receives the documentary evidence described in subdivision (ii) of A–14 is not required to file Form 1042S for payments of interest that are made with respect to foreign-targeted registered obligations held by the person who provides the documentary evidence and are made within the period beginning with the date on which the documentary evidence is provided and ending on the last date for confirming the validity of the documentary evidence. Where a Form W–8 (or substantially similar form completed under penalties of perjury) has been provided, it must be prepared, renewed, and retained in accordance with the procedures prescribed in § 1.6049–5(b)(2)(iv) and must be attached to the Form 1042S required to be filed with respect to the payment.

(B) If, on any interest payment date after the obligation was acquired by the person providing the documentary evidence (or Form W–8 or substantially similar form completed under penalties of perjury) described in subdivision (ii) of A–14, the beneficial owner of the obligation is a United States person, then the beneficial owner must so inform the withholding agent within 30 days after such interest payment date and must provide a Form W–9 (or substitute form that is substantially similar completed under penalties of perjury) to the withholding agent. However, the beneficial owner is not required to provide another Form W–9 (or substitute form that is substantially similar and completed under penalties of perjury) if such person has already provided it to the withholding agent within the same calendar year.

(iii) In accordance with the provisions of section 871(h)(4), the Secretary may make a determination in appropriate cases that a certificate or statement by any person, or class of persons, does not satisfy the requirements of that section. Should that determination be made, all payments of interest that otherwise qualify as portfolio interest to that person would become subject to the 30 percent withholding tax.

(iv) Notwithstanding the foregoing requirements of A–14 and A–15 of this section,

(A) Any certificate that is required to be filed with the withholding agent during the period beginning on January 15 and ending on January 31, 1986 is not required to state that the beneficial owner of an obligation, prior to the date of the certificate, either was not a United States person or was a United States person if the obligation was acquired by the person providing the certificate on or before September 19, 1985; and

(B) All of the requirements of A–14 and A–15 of § 35a.9999–5, as in effect prior to the effective date of these amendments, shall remain effective with respect to each interest payment prior to the filing of the certificate described in subdivision (A), except that (*1*) the provisions of A–14 relating to which persons are required to receive certificates or statements and (*2*) subdivisions (ii) of A–14 and (ii) of A–15 shall become effective with respect to each interest payment after September 19, 1985.

Q–16. Is information reporting under section 6041 or 6049 or backup withholding required with respect to portfolio interest paid on a foreign-targeted registered obligation in the circumstances described in A–12?

A–16. No. Absent actual knowledge that the beneficial owner is a United States person, neither information reporting nor backup withholding is required in such circumstances if the certificate described in A–14 is provided to the payor in accordance with the provisions of A–15. Notwithstanding the foregoing, the collection outside the United States of portfolio interest on a registered obligation by a person acting as a custodian, nominee or other agent of the payee with respect to the obligation is subject to information reporting under section 6049 if that person is otherwise required to report amounts paid to, or collected on behalf of, the payee. For example, a foreign branch of a U.S. bank holding the obligation on behalf of a customer is required to report or backup withhold with respect to portfolio interest collected for the customer unless the customer is an exempt recipient described in § 1.6049–4(c)(1)(ii) or unless the branch has documentary evidence in its files that the customer is not a citizen or resident of the United States.

Q–17. Do the information reporting provisions of section 6045 apply with respect to the retirement or redemption of a registered obligation that has been targeted to foreign markets in accordance with A–13?

A–17. The general rules of section 6045 apply. For instance, a financial institution acting as a custodian, nominee or other agent for a customer with respect to a foreign-targeted registered obligation that presents such obligation to the issuer or its agent for redemption or retirement, or that otherwise acts as a broker with respect to the obligation, is subject to information reporting under section 6045 if that person is otherwise required to report transactions effected on behalf of the customer. For example, a foreign office of a United States broker presenting an obligation to an agent of the issuer outside the United States for retirement or redemption on behalf of a customer who is an individual is required to report or backup withhold unless the broker has documentary evidence in its files that the customer is a foreign person.

(c) *Convertibility of obligations.*

Q–18. May a bearer obligation be converted into a registered obligation that is subject to the certification requirements of A–9 or A–14 with respect to any interest payment?

A–18. A bearer obligation can be converted into a registered obligation that is subject to the certification requirements of A–9 or, if the requirements of A–12 are met with respect to an interest payment and the obligation has been targeted to foreign markets under A–13, to the certification requirements of A–14. That a certificate under A–9 was required to be provided with respect to a previous interest payment on the obligation is irrelevant to whether such a certificate (rather than a certificate under A–14) must be provided with respect to the present interest payment. Unless the certification requirements of A–14 apply, the general information reporting and backup withholding requirements of sections 6045, 6049, and 3406 apply to a registered obligation. An obligation issued after July 18, 1984, and on or before September 21, 1984, that would otherwise be in registered form but for the fact that it is convertible into bearer form, shall be considered to be in bearer form for purposes of A–1 if it satisfies the applicable requirements of the relevant temporary or proposed regulations under section 163(f)(2)(B), as described in §1.163–5(c)(2)(vi). An obligation issued after September 21, 1984, that would otherwise be in registered form but for the fact that it is convertible into bearer form shall be considered to be in bearer form. See A–1 of §35a.9999–5 (a) concerning the conditions that must be satisfied for interest with respect to a bearer obligation to qualify as portfolio interest.

Q–19. Under what circumstances is a certificate described in A–9 required with respect to a registered obligation that is considered to be targeted to foreign markets under A–12?

A–19. The certificate described in A–9 is required with respect to interest paid on a registered obligation that has been targeted to foreign markets under A–13 only if the requirements of A–12 are not satisfied. Provided that the requirements of A–12 are met with respect to an obligation at the time of an interest payment, that a certificate under A–9 was required to be provided with respect to a previous interest payment on the obligation is irrelevant to whether such a certificate must be provided with respect to the present interest payment. Also the general information reporting and backup withholding provisions of section 6045, 6049, and 3406 apply unless the certification requirements of A–14 apply.

(d) *Form 1042S requirements.*

Q–20. Is the owner of an obligation the interest on which qualifies as portfolio interest (within the meaning of section 871(h)(2) or section 881(c)(2)) required to file an ownership certificate described in §1.1461–1(b) (Form 1001) with respect to the obligation or is the withholding agent required to file an information return on Form 1042S?

A–20. (i) The owner of an obligation the interest on which qualifies as portfolio interest is not required to file the certificate described in §1.1461–1(b) (Form 1001). Pursuant to A–8, the statement described in A–9 (or described in A–14, in the circumstances described in A–12) is required to be provided to the withholding agent with respect to portfolio interest on a registered obligation.

(ii) If a statement is required pursuant to A–9 with respect to portfolio interest on a registered obligation, an information return on Form 1042S, accompanied by the statement (which may be a Form W–8) described in A–9, is required to be filed with the Internal Revenue Service for the calendar year in which the payment is made. See A–9 of this section. However, if a statement is required pursuant to A–14 with respect to portfolio interest on a registered obligation, an information return on Form 1042S is not required unless a Form W–8 (or substantially similar form completed under penalties of perjury) is provided. See A–15(ii)(A) of this section. With respect to a payment of portfolio interest on a bearer obligation, an information return on Form 1042S is not required to be filed.

(e) *Application of repeal of 30 percent withholding to pass-through certificates.*

Q–21. Will interest paid to a holder of a pass-through certificate as described in §1.163–5T(d)(1) qualify as portfolio interest for purposes of the exemption from 30 percent withholding under section 871(h)(2) or section 881(c)(2)?

A–21. (i) Interest paid to a holder of a pass-through certificate will qualify as portfolio interest under section 871(h)(2) or section 881(c)(2) for purposes of the exemption from 30 percent withholding if the interest satisfies the conditions described in A–1 or A–8 of this section. For purposes of A–1 or A–8 of this section and sections 871(h) and 881(c), interest is considered to be paid on or with respect to the pass-through certificate and not on or with respect to any obligations held by the fund or trust to which the pass-through certificate relates. The rule of this A–21 applies only to payments made to the holder of the pass-through certificate from the trustee of the pass-thorough trust and does not apply to payments made to the trustee of the pass-through trust. Thus, except as set forth in the last sentence of this answer, interest paid to the holder of a pass-through certificate is portfolio interest if the pass-through certificate is described in A–1 or A–8 of this section, without regard to whether any obligation held by the fund or trust to which the pass-through certificate relates is described in A–1 or A–8 of this section. For example, a mortgage pass-through certificate in bearer form must meet the requirements set forth in A–1 of this section, but the obligations held by the fund or trust to which the mortgage pass-through certificate relates need not meet the requirements set forth in A–1 and A–8 of this section. However, for purposes of A–1 and A–8 of this section and section 127 of the Tax Reform Act of 1984, a pass-through certificate will be considered as issued after July 18, 1984 only to the extent that the obligations held by the fund or trust to which the pass-through certificate relates are issued after July 18, 1984.

(ii) Interest paid to a holder of a regular or residual interest in a REMIC will qualify as portfolio interest under section 871(h)(2) or section 881(c)(2) for purposes of the exemption from 30 percent withholding if the interest paid to the holder satisfies the conditions described in A–1 or A–8 of this section. For purposes of A–1 or A–8 of this section and sections 871(h) and 881(c), interest paid to the holder of a regular interest in a REMIC is considered to be paid on or with respect to the regular interest in the REMIC and not on or with respect to any mortgage obligations held by the REMIC. The foregoing rule, however, applies only to payments made to the holder of the regular interest from the REMIC and does not apply to payments made to the REMIC. For purposes of A–1 or A–8 of this section and sections 871(h) and 881(c), interest paid to the holder of a residual interest in a REMIC is considered to be paid on or with respect to the obligations held by the REMIC, and not on or with respect to the residual interest. For purposes of A–1 and A–8 of this section and section 127 of the Tax Reform Act of 1984, a residual interest in a REMIC will be considered as issued after July 18, 1984, only to the extent that the obligations held by the REMIC are issued after July 18, 1984, but a regular interest in a REMIC will be considered as issued after July 18, 1984, if the regular interest was issued after July 18, 1984, without regard to the date on which the mortgage obligations held by the REMIC were issued.

Q–22. In the case of a mortgage pass-through certificate, under what circumstances will the mortgage obligations held by the fund or trust to which the mortgage pass-through certificate relates be considered to have been issued after July 18, 1984?

A–22. In general, a mortgage pass-through certificate will be considered to have been issued after July 18, 1984, if all of the mortgages held by the fund or trust were issued after July 18, 1984. If some of the mortgages held by the fund or trust were issued before July 19, 1984, then the portion of any interest payment which represents interest on those mortgages shall not be considered to be portfolio interest. The preceding sentence shall not apply, however, if all of the following conditions are satisfied:

(i) The mortgage pass-through certificate is issued after December 31, 1986;

(ii) Payment of the mortgage pass-through certificate is guaranteed by, and a guarantee commitment has been issued by, an entity that is independent from the issuer of the underlying obligation;

(iii) The guarantee commitment with respect to the mortgage pass-through certificate cannot have been issued more than 14 months prior to the date on which the mortgage pass-through certificate is issued.

(iv) The fund or trust to which the mortgage pass-through certificate relates cannot contain mortgage obligations on which the first scheduled monthly payment of principal and interest was made more than twelve months before the date on which the guarantee commitment was made.

[T.D. 7967, 49 FR 33240, Aug. 22, 1984; 49 FR 36645, Sept. 19, 1984, as amended by T.D. 8046, 50 FR 33526, Aug. 20, 1985; 51 FR 11447, Apr. 3, 1986; T.D. 8111, 51 FR 45464, Dec. 19, 1986; 53 FR 17928, May 19, 1988; T.D. 8300, 55 FR 19627, May 10, 1990]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 35a.9999–5 was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000.

PART 36—CONTRACT COVERAGE OF EMPLOYEES OF FOREIGN SUBSIDIARIES

AUTHORITY: Secs. 3121, 7805, 68A Stat. 417, as amended, 917; 26 U.S.C. 3121, 7805.

SOURCE: T.D. 6145, 20 FR 6577, Sept. 8, 1955; 25 FR 14021, Dec. 31, 1960, unless otherwise noted.

§36.3121(l)–0 Introduction.

(a) The regulations in this part deal with the circumstances under which a domestic corporation may enter into an agreement with the Internal Revenue Service for the purpose of extending the insurance system established by title II of the Social Security Act to certain services performed outside the United States by citizens of the United States as employees of a foreign subsidiary of the domestic corporation, and with the obligations of a domestic corporation which enters into such an agreement. The provisions of the Internal Revenue Code of 1954, as amended, to which the regulations in this part pertain are contained in section 3121(1). The liabilities assumed under an agreement entered into pursuant to such section are based on the remuneration for services covered by the agreement. Such agreement may not be effective prior to January 1, 1955.

(b) Although the obligations incurred under an agreement entered into pursuant to section 3121(1) of the Internal Revenue Code of 1954, as amended, must be distinguished from the obligations imposed on employers with respect to the taxes under the Federal Insurance Contributions Act, the two are similar in many respects. Accordingly, the regulations in this part are prescribed as a supplement to the regulations (26 CFR (1954), Part 31, Subpart B) relating to the employee tax and the employer tax imposed by the Federal Insurance Contributions Act. The terms used in the regulations in this part have the same meaning, unless otherwise provided, as when used in the regulations relating to the taxes imposed by such act.

(c) The regulations in this part constitute Part 36 of Title 26 of the Code of Federal Regulations. As used in the regulations in this part, the word ''Code'' means the Internal Revenue Code of 1954, as amended, and the term ''Federal Insurance Contributions Act'' means chapter 21 of such Code. All references to sections of law are references to the Code unless otherwise indicated. The number of each section of the regulations begins with 36 followed by a decimal point (36.). Numbers which do not begin with 36 followed by a decimal point are numbers of sections of law unless otherwise indicated. In identifying sections of regulations, the symbol ''§'' is used.

[T.D. 6145, 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7012, 34 FR 7693, May 15, 1969; T.D. 7665, 45 FR 6090, Jan. 25, 1980]

§36.3121(l)(1)–1 Agreements entered into by domestic corporations with respect to foreign subsidiaries.

(a) *In general.* (1) Any domestic corporation having one or more foreign subsidiaries may request the Internal Revenue Service to enter into an agreement for the purpose of extending the Federal old-age, survivors, and disability insurance system established by title II of the Social Security Act to certain services performed outside the United States by all citizens of the United States who are employees of any such foreign subsidiary. See §36.3121(l)(8)–1, relating to the definition of foreign subsidiary. Except as provided in § 36.3121(l)(5)–1, relating to the effect of the termination of an agreement entered into pursuant to the provisions of section 3121(l), the Internal Revenue Service shall, at the request of a domestic corporation enter into such agreement on Form 2032 in any case where a Form 2032 is executed, and submitted by the domestic corporation in the manner prescribed in this section. A domestic corporation may not have in effect at the same moment of time more than one agreement on Form 2032.

(2) An agreement authorized in section 3121(l)(1) may not be made applicable to any services performed outside the United States which would not constitute employment, for purposes of the taxes imposed under the Federal Insurance Contributions Act, if the services were performed within the United States. Thus, such an agreement shall have no application with respect to any services performed outside the United States which, if performed within the United States, would be specifically excepted from employment under any of the numbered paragraphs of section 3121(b), or which, although not so excepted, would be deemed not to be employment by application of section 3121(c), relating to included and excluded services. Further, an agreement may not be made applicable with respect to any services performed outside the United States which constitute employment, as defined in section 3121(b). Thus, an agreement may not be made applicable to services for any employer performed by any employee on or in connection with an American vessel or American aircraft when outside the United States, if (i) performed under a contract of service which is entered into within the United States or (ii) during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, because such services constitute employment as defined in section 3121(b). An agreement may not be made applicable to remuneration which would not constitute wages, as defined in section 3121(a), even if the services to which such remuneration is attributable had constituted employment.

(3) The terms ‘‘corporation’’, ‘‘domestic’’, and ‘‘foreign’’, as used in the regulations in this part, have the meaning assigned by paragraphs (3), (4), and (5), respectively, of section 7701(a). Section 701(a) (3), (4), and (5) provides as follows:

SEC. 7701. *Definitions.* (a) When used in this title [Internal Revenue Code of 1954], where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(3) *Corporation.* The term ‘‘corporation’’ includes associations, joint-stock companies, and insurance companies.

(4) *Domestic.* The term ‘‘domestic’’ when applied to a corporation * * * means created or organized in the United States or under the law of the United States or of any State or Territory.

(5) *Foreign.* The term ‘‘foreign’’ when applied to a corporation * * * means a corporation * * * which is not domestic.

(b) *Form and contents of agreement.* Form 2032 is the form prescribed for the agreement authorized in section 3121(l)(1). The agreement shall include provisions substantially as follows:

(1) That the agreement shall apply to all services performed outside the United States by all citizens of the United States who are in the employ of the foreign subsidiary or subsidiaries to which the agreement is made applicable, but only to the extent that the remuneration paid each employee for such services would constitute wages if paid by one employer for services performed in the United States;

(2) That the agreement shall not apply to any services which constitute employment within the meaning of section 3121;

(3) That the agreement shall become effective on the first day of the calendar quarter in which the Form 2032 is signed by the district director or director of the service center or on the first day of the next succeeding calendar quarter, whichever is specified in the agreement;

(4) That the domestic corporation will pay, as required by the regulations in this part, amounts equivalent to the sum of the taxes which would be imposed by sections 3101 and 3111, respectively, if the remuneration for the

services covered by the agreement constituted wages;

(5) That the domestic corporation will pay, in accordance with written notification and demand therefor to the domestic corporation, amounts equivalent to the interest, additions to the taxes, additional amounts, and penalties which would be applicable if the remuneration for services covered by the agreement constituted wages; and

(6) That the domestic corporation will comply with all provisions of the regulations in this part.

(c) *Execution and filing of Form 2032.* The request of any domestic corporation that the Internal Revenue Service enter into an agreement with the corporation on Form 2032 shall be signified by the corporation by executing and filing Form 2032 in triplicate. Such form shall be executed and filed in accordance with the regulations in this part and the instructions relating to the form. Each copy of the form shall be signed and dated by the officer of the corporation authorized to enter into the agreement, shall show the title of such officer, and shall have the corporate seal affixed thereto. A certified copy of the minutes of the meeting of the board of directors of the domestic corporation, or other evidence, showing the authority of such officer so to act shall accompany the form. Form 2032 executed and filed as provided in this paragraph shall be signed and dated by the district director or director of the service center and, upon such signing, the Form 2032 so executed and filed will constitute the agreement authorized in section 3121(l)(1). The Internal Revenue Service will return one copy of the agreement to the domestic corporation, will transmit one copy of the Department of Health, Education, and Welfare, and will retain one copy (together with all related papers).

[T.D. 6145, 20 FR 6577, Sept. 8, 1955, as amended by T.D. 7012, 34 FR 7693, May 15, 1969]

§36.3121(l)(1)–2 Amendment of agreement.

(a) An agreement entered into by a domestic corporation as provided in §36.3121(l)(1)–1 may be amended so as to be made applicable, in the same manner and under the same conditions, with respect to any one or more of the foreign subsidiaries of the domestic corporation not previously named in the agreement. See §36.3121(l)(2)–1(b), relating to the effective period of an amendment of an agreement.

(b) Form 2032 Supplement is the form prescribed for use in amending an agreement entered into by a domestic corporation as provided in §36.3121(l)(1)–1.

(c) A domestic corporation shall signify its desire to amend an agreement entered into by the corporation as provided in §36.3121(l)(1)–1 by executing and filing Form 2032 Supplement in triplicate.

(d) Form 2032 Supplement shall be executed and filed in the manner and in conformity with the requirements prescribed in the instructions relating to such form and in §36.3121(l)(1)–1(c) in respect of an agreement on Form 2032. Form 2032 Supplement executed and filed as provided in this paragraph shall be signed and dated by the district director or director of the service center, and, upon such signing, the Form 2032 Supplement so executed and filed will constitute an amendment of the agreement entered into on Form 2032. The Internal Revenue Service will return one copy of the amendment to the domestic corporation, will transmit one copy to the Department of Health, Education, and Welfare, and will retain one copy (together with all related papers).

[T.D. 6145, 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7012, 34 FR 7694, May 15, 1969]

§36.3121(l)(1)–3 Effect of agreement.

(a) *Liability for amounts equivalent to tax*—(1) *In general.* A domestic corporation which has entered into an agreement (as provided in §36.3121(l)(1)–1, or any amendment thereof (as provided in §36.3121(l)(1)–2, incurs liability under the agreement in respect of certain remuneration paid by each foreign subsidiary named in the agreement, or any amendment thereof. Liability is incurred in respect of the remuneration paid to all those employees of the foreign subsidiaries who are citizens of the United States and who perform services outside the United States (other than services which constitute employment) for the foreign subsidiaries. However, liability is incurred only with respect to that portion of such remuneration paid by the foreign subsidiary which is attributable to services performed during the period for which the agreement is in effect with respect to such subsidiary, and then only to the extent that the remuneration would constitute wages if the services to which the remuneration is attributable were performed in the United States. Liability with respect to such remuneration is incurred in an amount equivalent to the sum of the employee and employer taxes which would be imposed by sections 3101 and 3111, respectively, if such remuneration constituted wages. If an individual performs services for more than one of the foreign subsidiaries named in an agreement, including any amendment thereof, such services are regarded as being performed in the employ of a single employer for purposes of determining the amount of the remuneration for such services which would constitute wages if the services were performed in the United States. See § 36.3121(l)(9)–1, relating to the treatment of a domestic corporation as a separate entity in its capacity as a party to an agreement.

(2) *Examples.* The application of paragraph (a)(1) of this section may be illustrated by the following examples:

Example 1. P. a domestic corporation, has entered into an agreement as provided in § 36.3121(l)(1)–1, effective with respect to services performed on and after January 1, 1955. Three foreign subsidiaries, S–1, S–2, and S–3 are named in the agreement. A, a citizen of the United States, is employed during 1955 by S–1, S–2, and S–3, for the performance outside the United States of services covered by the agreement. In 1955 A is paid remuneration of $2,500 for such services by each of the foreign subsidiaries. The circumstances are such that the entire $7,500 would constitute wages if the services has been performed in the United States. However, only $4,200 of such remuneration would constitute wages if the services had been performed in the United States for a single employer, and it is with respect to this amount only that P incurs liability under its agreement.

Example 2. On August 1, 1955, P, the domestic corporation in the preceding example, amends its agreement to include therein its foreign subsidiary S–4. The amendment is in effect with respect to S–4 for the period beginning with October 1, 1955. B, a citizen of the United States, is employed by S–4 throughout 1955 for the performance of services outside the United States. B is paid remuneration of $500 in each month of 1955 for these services. The circumstances are such that the first $4,200 of such remuneration would constitute wages if the services had been performed in the United States, and, except for the $4,200 limitation, the remainder of such remuneration would constitute wages if the services had been so performed. P incurs no liability with respect to remuneration paid B for services performed for S–4 prior to October 1, 1955. However, P incurs liability under its agreement with respect to the $1,500 paid B in October, November, and December 1955, for services performed in these months. Since the remuneration paid to B for services performed during the first nine months of 1955 is not covered by the agreement, such remuneration is not taken into account in computing the $4,200 limitation or the liability under the agreement.

Example 3. Assume the same facts as in example 2 except that B's services for S–4 during December 1955 are of a character which if performed within the United States would be excepted from employment. Accordingly, P incurs no liability under the agreement with respect to the $500.00 paid in December 1955 for such services.

(3) *Determination of liability.* The amount of the liability referred to in paragraph (a)(1) of this section incurred by a domestic corporation for any period shall be determined in the same manner as liability for the employee tax and for the employer tax imposed by the Federal Insurance Contributions Act is determined, pursuant to regulations relating to the taxes under such act as in effect for the same period, with respect to wages paid by an employer to an employee.

(b) *Liability for amounts equivalent to interest or penalties.* A domestic corporation which has entered into an agreement as provided in § 36.3121(l)(1)–1 also incurs liability under the agreement for amounts equivalent to the amount of interest, additions to the taxes, additional amounts, and penalties which would be applicable if the remuneration for services covered by the agreement constituted wages.

(c) *Deductions from employees' remuneration.* There is no obligation to deduct, or cause to be deducted, from the remuneration of any employee of a foreign subsidiary any part of the amount due from a domestic corporation under its agreement. Whether such deduction shall be made is a matter for settlement between the employee and the domestic corporation or such other person as may be concerned.

(d) *Cross reference.* For other obligations of a domestic corporation under an agreement, see § 36.3121(l)(1)–1.

[T.D. 6145, 20 FR 6577, Sept. 8, 1955, as amended by T.D. 6390, 24 FR 4831, June 13, 1959]

§ 36.3121(l)(2)–1 Effective period of agreement.

(a) *In general.* An agreement entered into as provided in § 36.3121(l) (1)–1 shall be in effect for the period beginning with the first day of the calendar quarter in which the agreement is signed by the district director or director of the service center, or the first day of the calendar quarter following the calendar quarter in which the agreement is signed by the district director or director of the service center, whichever is specified in the agreement. In no case, however, shall the agreement be effective for any calendar quarter which begins prior to January 1, 1955.

(b) *Amendment of agreement.* If an amendment on Form 2032 Supplement (filed by a domestic corporation to include in its agreement services performed for a foreign subsidiary not previously named therein) is signed by the district director or director of the service center, within the quarter for which the agreement is first effective or within the first calendar month following such quarter, the agreement shall be effective with respect to the subsidiary named in the amendment as of the date such agreement first became effective. However, if the amendment is signed by the district director or director of the service center after the last day of the fourth month for which the agreement is in effect, such agreement shall be in effect with respect to the subsidiary named in the amendment for the period beginning with the first day of the calendar quarter following the calendar quarter in which the amendment is signed by the district director or director of the service center.

[T.D. 7012, 34 FR 7694, May 15, 1969]

§ 36.3121(l)(3)–1 Termination of agreement by domestic corporation or by reason of change in stock ownership.

(a) *Termination by domestic corporation.* (1) A domestic corporation which has entered into an agreement under section 3121(l)(1) with respect to one or more of its foreign subsidiaries may terminate such agreement in part or in its entirety by giving (for calendar quarters beginning before 1969, to the district director for the internal revenue district in which is located the principal place of business in the United States of the domestic corporation; and for calendar quarters beginning after 1968, except as provided in paragraph (b) of § 301.6091–1 (relating to hand-carried documents) to the director of the service center serving such internal revenue district 2 years' advance notice in writing of its desire so to terminate the agreement at the end of a specified calendar quarter: *Provided,* That, at the time of the receipt of such notice by such internal revenue officer, the agreement has been in effect with respect to the subsidiary or subsidiaries covered by the notice for at least 8 years. The notice of termination shall be signed and dated and shall show (i) the title of the officer authorized to sign the notice, (ii) the name, address, and identification number of the domestic corporation, (iii) the internal revenue officer with whom the agreement was entered into, (iv) the name and address of each foreign subsidiary with respect to which the agreement is to be terminated, (v) the date on which the agreement became effective with respect to each such foreign subsidiary, and (vi) the date on which the agreement is to be terminated with respect to each such foreign subsidiary. The notice shall be submitted in duplicate and shall be accompanied by a certified copy of the minutes of the meeting of the board of directors of the domestic corporation, or other evidence, showing authorization for the notice of termination. No particular form is prescribed for the notice of termination. The Internal Revenue Service will transmit one copy of the notice of termination to the Department of Health, Education, and Welfare.

(2) A notice of termination given by a domestic corporation in respect of any one or more of its foreign subsidiaries may be revoked by the corporation with respect to any such subsidiary or subsidiaries by giving, prior to the close of the calendar quarter specified in the notice of termination, written notice of revocation. The notice of revocation shall be filed with the internal revenue officer with whom the notice of termination was filed. Such notice of revocation shall be signed and dated and shall show (i) the title of the officer authorized to sign the notice of revocation, (ii) the name, address, and identification number of the domestic corporation, (iii) the name and address of each foreign subsidiary with respect to which the notice of termination is revoked, and (iv) the date of the notice of termination to be revoked. The notice shall be submitted in duplicate and shall be accompanied by a certified copy of the minutes of the meeting of the board of directors of the domestic corporation, or other evidence, showing authorization for the notice of revocation. No particular form is prescribed for the notice of revocation. The Internal Revenue Service will transmit one copy of the notice of revocation to the Department of Health, Education, and Welfare.

(b) *Termination by reason of change in stock ownership.* (1) The period for which an agreement entered into by a domestic corporation as provided in § 36.3121(l)(1)–1 is in effect with respect to a foreign corporation is automatically terminated at the end of the calendar quarter in which the foreign corporation ceases, at any time in such quarter, to be a foreign subsidiary of the domestic corporation. See § 36.3121(l)(8)–1, relating to definition of foreign subsidiary.

(2) A domestic corporation which has entered into an agreement as provided in § 36.3121(l)(1)–1 shall furnish (for calendar quarters beginning before 1969, to the district director for the internal revenue district in which is located its principal place of business in the United States; and for calendar quarters beginning after 1968, except as provided in paragraph (b) of § 301.6091–1 (relating to hand-carried documents) to the director of the service center serving such internal revenue district) written notification in the event that a foreign corporation named in the agreement, including any amendment thereof, as a foreign subsidiary of the domestic corporation ceases to be its foreign subsidiary. The written notification shall be furnished in duplicate on or before the last day of the first month following the close of the calendar quarter in which the foreign corporation ceases, at any time in such quarter, to be a foreign subsidiary of the domestic corporation. Such notification shall be signed and dated by the president or other principal officer of the domestic corporation. The written notification shall show (i) the title of the officer signing the notice, (ii) the name, address, and identification number of the domestic corporation, (iii) the internal revenue officer with whom the agreement was entered into, (iv) the date on which the agreement was entered into, (v) the name and address of the foreign corporation with respect to which the notification is furnished, and (vi) the date on which the foreign corporation ceased to be a foreign subsidiary of the domestic corporation. No particular form is prescribed for the written notification. The Internal Revenue Service will transmit one copy of the written notification to the Department of Health, Education, and Welfare.

[T.D. 6145, 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7012, 34 FR 7694, May 15, 1969]

§ 36.3121(l)(4)–1 Termination of agreement by Commissioner.

(a) *Notice of termination.* The period for which an agreement entered into with a domestic corporation as provided in § 36.3121(l)(1)–1 is in effect may be terminated by the Commissioner, with the prior concurrence of the Secretary of Health, Education, and Welfare, upon a finding by the Commissioner that the domestic corporation has failed to comply substantially with the terms of the agreement. The Commissioner shall give the corporation not less than 60 days' advance notice in writing that the period for which the agreement is in effect will terminate at the end of the calendar quarter specified in the notice of termination.

(b) *Revocation of notice of termination*. A notice of termination given to a domestic corporation by the Commissioner may be revoked by the Commissioner, with the prior concurrence of the Secretary of Health, Education and Welfare by giving written notice of revocation to the corporation prior to the close of the calendar quarter specified in the notice of termination.

§ 36.3121(l)(5)–1 Effect of termination.

(a) *Termination of entire agreement*. (1) If the effective period of an agreement entered into by a domestic corporation as provided in § 36.3121(l)(1)–1 is terminated by the domestic corporation, pursuant to § 36.3121(l)(3)–1(a), with respect to all foreign subsidiaries named in the agreement, including any amendment thereof, an agreement may not again be entered into by the domestic corporation under the provisions of section 3121(l)(1).

(2) If the effective period of an agreement entered into by a domestic corporation as provided in § 36.3121(l)(1)–1 is terminated by the Commissioner, pursuant to § 36.3121(l)(4)–1 (a), an agreement may not again be entered into by the domestic corporation under the provisions of section 3121(l)(1).

(3) If the effective period of an agreement entered into by a domestic corporation as provided in § 36.3121(l)(1)–1 is terminated automatically by reason of a change in stock ownership (see § 36.3121(l)(3)–1(b)) with respect to all foreign corporations named in the agreement, including any amendment thereof, a new agreement may be entered into by the domestic corporation, as provided in § 36.3121(l)(1)–1, with respect to any foreign corporation which is a foreign subsidiary of the domestic corporation.

(b) *Partial termination of agreement*. (1) If the effective period of an agreement entered into by a domestic corporation as provided in § 36.3121(l)(1)–1 is terminated by the domestic corporation, pursuant to § 36.3121(l)(3)–1(a), with respect to one or more foreign subsidiaries named in the agreement, including any amendment thereof, the period for which the agreement is in effect will continue with respect to any other foreign subsidiary or subsidiaries named in the agreement (or amendment). However, the agreement may not thereafter be amended to include any foreign subsidiary with respect to which the effective period of the agreement has been terminated.

(2) If the effective period of an agreement entered into by a domestic corporation as provided in § 36.3121(l)(1)–1 is terminated automatically by reason of a change in stock ownership (see § 36.3121(l)(3)–1(b)) with respect to a foreign corporation which has ceased to be a foreign subsidiary of the domestic corporation, but the period for which the agreement is in effect continues with respect to one or more other foreign subsidiaries, the agreement may not thereafter be amended to include such foreign corporation even though the foreign corporation may again become a foreign subsidiary of the domestic corporation.

§ 36.3121(l)(7)–1 Overpayments and underpayments.

(a) *Adjustments*—(1) *In general.* Errors in the payment of amounts for which liability equivalent to the employee and employer taxes with respect to any payment of remuneration is incurred by a domestic corporation pursuant to its agreement are adjustable by the domestic corporation in certain cases without interest. However, not all corrections made under this section constitute adjustments within the meaning of the regulations in this part. The various situations in which such corrections constitute adjustments are set forth in paragraphs (a)(2) and (3) of this section. All corrections in respect of underpayments and all adjustments or credits in respect of overpayments made under this section must be reported on a return filed by the domestic corporation under the regulations in this part and not on a return filed with respect to the employee and employer taxes imposed by sections 3101 and 3111, respectively. Every return on which such a correction (by adjustment, credit, or otherwise) is reported pursuant to this section must have securely attached as a part thereof a statement explaining the error in respect of which the correction is made, designating the calendar quarter in which the error was ascertained, and setting forth such other information as would be required if the correction were in respect of an overpayment or underpayment of taxes under the Federal Insurance Contributions Act. An error is ascertained when the domestic corporation has sufficient knowledge of the error to be able to correct it. An underpayment may not be corrected under this section after receipt from the district director or director of the service center of written notification of the amount due and demand for payment thereof, but the amount shall be paid in accordance with such notification.

(2) *Underpayments.* If a domestic corporation fails to report, on a return filed under the regulations in this part, all or any part of the amount for which liability equivalent to the employee and employer taxes is incurred under its agreement with respect to any payment of remuneration, the domestic corporation shall adjust the underpayment by reporting the additional amount due as an adjustment on a return or supplemental return filed on or before the last day on which the return for the return period in which the error is ascertained is required to be filed. The amount of each underpayment adjusted in accordance with this subparagraph shall be paid, without interest, at the time fixed for reporting the adjustment. If an adjustment is reported pursuant to this subparagraph but the amount thereof is not paid when due, interest thereafter accrues.

(3) *Overpayments.* If a domestic corporation pays more than the amount for which liability equivalent to the employee and employer taxes is incurred under its agreement with respect to any payment of remuneration, the domestic corporation may correct the error, subject to the requirements and under the conditions stated in this paragraph, by deducting the amount of the overpayment from the amount of liability reported on a return filed by the domestic corporation, except that—

(i) A correction may not be made in respect of any part of an overpayment which was collected from an individual by reason of the agreement unless the domestic corporation (a) has repaid the amount so collected to the individual, has secured the written receipt of the individual showing the date and amount of the repayment, and retains such receipt as a part of its records, or (b) has reimbursed the individual by reducing the amounts which otherwise should have been deducted from his remuneration by reason of the agreement; and

(ii) A correction may not be made in one calendar year in respect of any part of an overpayment which was collected from an individual in a prior calendar year unless the domestic corporation has secured the written statement of the individual showing that he has not claimed and will not claim refund or credit of the amount so collected, and retains such receipt as a part of its records. See §31.6413(c)–1 of this chapter, relating to claims for special credit or refund.

The correction constitutes an adjustment under this subparagraph only if it is reported on the return for the period in which the error is ascertained or on the return for the next following period, and then only if the correction is reported within the statutory period of limitation upon refund or credit of overpayments of amounts due under the agreement. See paragraph (b)(2)(iii) of this section relating to such statutory period. A claim for credit or refund may be filed in accordance with the provisions of paragraph (b)(2) of this section for any overpayment of an amount due under the agreement which is not adjusted under this subparagraph.

(b) *Errors not adjustable*—(1) *Underpayments.* If a domestic corporation fails to report all or any part of the amount for which liability equivalent to the employee and employer taxes is incurred under its agreement with respect to any payment of remuneration, and such underpayment is not reported as an adjustment within the time prescribed by paragraph (a)(2) of this section, the amount of such underpayment shall be reported on the domestic corporation's next return, or shall be reported immediately on a supplemental return for the return period in which such payment of remuneration was made. The reporting of an underpayment under this subparagraph does not constitute an adjustment without interest.

(2) *Overpayments.* (i) If more than the correct amount due from a domestic corporation pursuant to its agreement (including the amount of any interest or addition) is paid and the amount of the overpayment is not adjusted under paragraph (a) (3) of this section, the domestic corporation may file a claim for refund or credit. Except as otherwise provided in this subparagraph, such claim shall be made in the same manner and subject to the same conditions as to allowance of the claim as would be the case if the claim were in respect of an overpayment of taxes under the Federal Insurance Contributions Act. Refund or credit of an amount erroneously paid by a domestic corporation under its agreement may be allowed only to the domestic corporation.

(ii) Any claim filed under this subparagraph shall be plainly marked ''Claim under section 3121(1).''

(iii) No refund or credit of an overpayment of the amount due from a domestic corporation under its agreement will be allowed after the expiration of 2 years after the date of payment of such overpayment, except upon one or more of the grounds set forth in a claim filed prior to the expiration of such 2-year period.

(c) *Deductions from employees' remuneration.* If a domestic corporation deducts, or causes to be deducted, from the remuneration of an individual for services covered by the agreement amounts which are more or less than the employee tax which would be deductible therefrom if such remuneration constituted wages, any repayment to the individual (except to the extent otherwise provided in this section), or further collection from the individual, in respect of such deduction is a matter for settlement between the individual and the domestic corporation or such other person as may be concerned.

[T.D. 6145, 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7012, 34 FR 7694, May 15, 1969]

§36.3121(l)(8)–1 Definition of foreign subsidiary.

(a) *Prior to August 1, 1956.* (1) For the period January 1, 1955 to July 31, 1956, inclusive, a foreign corporation is a foreign subsidiary of a domestic corporation, within the meaning of the regulations in this part, if—

(i) More than 50 percent of the voting stock of the foreign corporation is owned by the domestic corporation; or

(ii) More than 50 percent of the voting stock of the foreign corporation is owned by a second foreign corporation and more than 50 percent of the voting stock of the second foreign corporation is owned by the domestic corporation.

(2) The application of subparagraph (1) of this paragraph may be illustrated by the following examples:

Example 1. P, a domestic corporation, owns 51 percent of the voting stock of S–1, a foreign corporation. S–1 owns 51 percent of the voting stock of S–2, a foreign corporation. S–2 owns 51 percent of the voting stock of S–3, a foreign corporation. S–1 and S–2 are foreign subsidiaries of P for purposes of the regulations in this part. Since neither P nor S–1 owns more than 50 percent of the voting stock of S–3, S–3 is not a foreign subsidiary of P within the meaning of the regulations in this part.

Example 2. Assume the same facts as those stated in example *1* except that 25 percent of the voting stock of S–2 is transferred by S–1 to P. P owns no other voting stock of S–2. Accordingly, after the transfer, P and S–1 together own more than 50 percent of the voting stock of S–2, but neither P nor S–1 alone owns more than 50 percent of such stock. S–2 ceases to be a foreign subsidiary of P when such transfer is effected.

(b) *On or after August 1, 1956.* (1) Beginning August 1, 1956, a foreign corporation is a foreign subsidiary of a domestic corporation, within the meaning of the regulations in this part, if—

(i) Not less than 20 percent of the voting stock of the foreign corporation is owned by the domestic corporation; or

(ii) More than 50 percent of the voting stock of the foreign corporation is owned by a second foreign corporation and not less than 20 percent of the voting stock of the second foreign corporation is owned by the domestic corporation.

(2) The application of subparagraph (1) of this paragraph may be illustrated by the following examples:

Example 1. P, a domestic corporation owns 20 percent of the voting stock of S–1, a foreign corporation. S–1 is, therefore, a foreign subsidiary of P. S–1 owns 51 percent and P owns 15 percent of the voting stock of S–2, a foreign corporation. S–2 is also a foreign subsidiary of P, and this would be so even if P owned none of the voting stock of S–2. S–2 owns 51 percent, S–1 owns 39 percent, and P owns 10 percent of the voting stock of S–3, a foreign corporation. Since P owns less than 20 percent of the voting stock of S–2 and less than 20 percent of the voting stock of S–3, and since S–1 owns not more than 50 percent of the voting stock of S–3, S–3 is not a foreign subsidiary of P within the meaning of the regulations in this part.

Example 2. Assume the same facts as those stated in example *1* except that 4 percent of the voting stock of S–2 is transferred by S–1 to P. After, as well as before, the transfer of 66 percent of the voting stock of S–2 is owned by P and S–1 together. After the transfer, however, P owns less than 20 percent and S–1 owns not more than 50 percent of the voting stock of S–2. When such transfer is effected S–2 ceases to be a foreign subsidiary of P for purposes of the regulations in this part.

(c) *Transfer of stock ownership.* The transfer of the voting stock of a foreign corporation which is a foreign subsidiary of a domestic corporation within the meaning of section 3121(l)(8) will not affect the status of the foreign corporation as such a foreign subsidiary if at all times either of the percentage tests stated in section 3121(l)(8), relating to ownership of the voting stock of such foreign corporation, is met.

(d) *Meaning of ''stock''.* The term ''stock'', as used in the regulations in this part, has the meaning assigned by paragraph (7) of section 7701(a). Section 7701(a)(7) provides as follows:

SEC. 7701. *Definitions.* (a) When used in this title [Internal Revenue Code of 1954], where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(7) *Stock.* The term ''stock'' includes shares in an association, joint-stock company, or insurance company.

[T.D. 6390, 24 FR 4831, June 13, 1959]

§ 36.3121(l)(9)–1 Domestic corporation as separate entity.

A domestic corporation which enters into an agreement as provided in § 36.3121(l)(1)–1 shall, for purposes of the regulations in this part and for purposes of section 6413(c)(2)(C), relating to special credits or refunds, be considered an employer in its capacity as a party to such agreement separate and apart from its identity as an employer incurring liability for the employee tax and employer tax on the wages of its own employees. Thus, if a citizen of the United States performs services in employment for the domestic corporation and at any time within the same calendar year performs services covered by the agreement as an employee of one or more foreign subsidiaries named therein, the limitation on wages provided in section 3121(a) (1) has application separately as to the wages for employment performed in the employ of the domestic corporation and as to the remuneration for services covered by the agreement performed in the employ of such foreign subsidiary or subsidiaries. All services covered by the agreement whether performed in the employ of one or more than one such foreign subsidiary are regarded for purposes of the wage limitation as having been performed in the employ of the domestic corporation in its separate capacity as a party to the agreement. Similarly, any remuneration for such services which, if the services were performed in the United States, would be excluded from wages unless a certain amount of such remuneration is paid by a single employer within a specified period (for example, remuneration for agricultural labor) is regarded, for purposes of determining whether the domestic corporation incurs liability under its agreement with respect to such remuneration, as having been paid by the domestic corporation in its separate capacity as a party to the agreement. All remuneration received by an employee for services covered by the agreement is deemed, for purposes of the special credit or refund provisions contained in section 6413(c), to have been received from the domestic corporation as an employer in its separate capacity as a party to the agreement.

§ 36.3121(l)(10)–1 Requirements in respect of liability under agreement.

To the extent not inconsistent with, or otherwise provided in, the regulations in this part, the requirements and duties (relating to identification number, account numbers, wage information statements to employees, record keeping, etc.) imposed on an employer for any period with respect to the taxes imposed by the Federal Insurance Contributions Act are hereby made applicable to a domestic corporation with respect to its obligations and liabilities, for the same period, under an agreement entered into as provided in § 36.3121(l)(1)–1.

§ 36.3121(l)(10)–2 Identification.

(a) *Domestic corporation.* A domestic corporation which has secured, or is required to secure, an identification number as an employer having in its employ one or more individuals in employment for wages is not required to secure an identification number under the regulations in this part.

(b) *Employees.* Every employee performing services covered by an agreement shall have the same duties in respect of an account number as would be the case if the employee were performing services in employment for the domestic corporation.

§ 36.3121(l)(10)–3 Returns.

(a) The forms prescribed for use in making returns of the taxes imposed by the Federal Insurance Contributions Act (except any forms particularly prescribed for use by household employers or by employers filing returns in Puerto Rico) shall be used by a domestic corporation in making returns of its liability under an agreement entered into as provided in § 36.3121(l)(1)–1. Returns of such liability shall be made separate and apart from any returns required of the domestic corporation in respect of the taxes imposed by the Federal Insurance Contributions Act. The domestic corporation shall plainly mark ''3121(l) Agreement'' at the top of each return, each detachable schedule thereof, and each paper or document constituting a part of the return, filed by the domestic corporation pursuant to the regulations in this part. Returns required under the regulations in this part shall be made by the domestic corporation as if all services covered by the agreement, whether performed in the employ of one or more than one foreign subsidiary, were performed in the employ of the domestic corporation as an employer in its separate capacity as a party to the agreement.

(b) Each return required under the regulations in this part must be filed on or before the last day of the month following the period for which the return is made.

[T.D. 6145, 20 FR 6577, Sept. 8, 1955, as amended by T.D. 6390, 24 FR 4832, June 13, 1959]

§ 36.3121(l)(10)–4 Payment of amounts equivalent to tax.

A domestic corporation which has entered into an agreement as provided in § 36.3121(l)(1)–1 is not required to make deposits with a Federal Reserve bank or authorized financial institution of any amount for which liability is incurred under its agreement.

[T.D. 6145, 20 FR 6577, Sept. 8, 1955; 25 FR 14021, Dec. 31, 1960, as amended by T.D. 7953, 49 FR 19646, May 9, 1984]

PARTS 37–39 [RESERVED]