INTERNAL REVENUE
BULLETIN

IRS

HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2017–16
April 17, 2017

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

INCOME TAX

Notice 2017–23, page 1100.

This Notice provides interim guidance for determining eligibility for and making the payroll tax credit election under section 41(h) to claim the payroll tax credit under section 3111(f). In addition, the Notice provides interim guidance for claiming the payroll tax credit. Finally, the Notice requests comments on the interim guidance and other issues impacting payroll tax credit elections that may require future guidance.

Rev. Proc. 2017–31, page 1104.

This revenue procedure provides an updated list of countries with which the Treasury Department and the IRS have determined that it is appropriate to have an automatic exchange relationship with respect to bank deposit interest income information under §§1.6049–8(a) and 1.6049–4(b)(5) (Section 4). This rev. proc. adds three countries (Belgium, Colombia, and Portugal) to the list set forth in Section 4.

EMPLOYEE PLANS

Announcement 2017–04, page 1106.

This announcement provides relief from the excise taxes under section 4975 to certain persons engaged in prohibited transactions. The relief parallels similar relief provided by the Department of Labor to these persons in a recently released field assistance bulletin.

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Finding Lists begin on page ii.

The IRS Mission

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

Introduction

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

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

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

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

The Bulletin is divided into four parts as follows:

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

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

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

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

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

Part III. Administrative, Procedural, and Miscellaneous

Interim Guidance and Request for Comments; Election by Qualified Small Business to Claim Payroll Tax Credit for Increasing Research Activities

Notice 2017–23

SECTION 1. PURPOSE

The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) are developing guidance to implement the payroll tax credit election available to certain small businesses under § 41(h) of the Internal Revenue Code (Code) to claim the payroll tax credit under § 3111(f) of the Code. Sections 41(h) and 3111(f) allow a qualified small business to elect to apply a portion of the § 41(a) research credit for the taxable year against the employer portion of the old-age, survivors, and disability insurance tax (social security tax) under the Federal Insurance Contributions Act. Sections 41(h) and 3111(f) are effective for taxable years beginning after December 31, 2015. For purposes of this notice, the term "research credit" refers to the credit under § 41(a) against income tax liability, the term "payroll tax credit" refers to the credit under § 3111(f)(1) against liability for the employer portion of social security tax, and the term "payroll tax credit election" refers to the election available under § 41(h) to claim the payroll tax credit.

This notice provides interim guidance for making the payroll tax credit election. Specifically, this notice provides interim guidance regarding the term "qualified small business," including the applicable guidance for determining gross receipts for purposes of § 41(h). This notice also provides interim guidance relating to the time and manner of making the payroll tax credit election and claiming the credit. Finally, the Treasury Department and the IRS request comments on the interim guidance described in this notice and other issues affecting payroll tax credit elections that may require additional guidance.

SECTION 2. BACKGROUND

Sections 41(h) and 3111(f) were enacted by section 121(c) of the Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114–113, Div. Q, 129 Stat. 2242. Section 41(h)(1) provides that at the election of a qualified small business for any taxable year, § 3111(f) shall apply to the payroll tax credit portion of the research credit for the taxable year and such portion shall not be treated (other than for purposes of § 280C) as a research credit.

Section 41(h)(2) provides that the payroll tax credit portion of the research credit with respect to any qualified small business for any taxable year is the least of (A) the amount specified in the payroll tax credit election, (B) the research credit for the taxable year (determined before the application of § 41(h)), or (C) in the case of a qualified small business other than a partnership or S corporation, the amount of the business credit carryforward under § 39 carried from the taxable year (determined before the application of § 41(h) to the taxable year).

Under § 41(h)(3)(A)(i), a "qualified small business" means, with respect to any taxable year, a corporation or partnership if (I) the gross receipts (as determined under the rules of § 448(c)(3), without regard to subparagraph (A) thereof) of such entity for the taxable year are less than $5,000,000, and (II) such entity did not have gross receipts (as so determined) for any taxable year preceding the 5–taxable-year period ending with such taxable year. In addition, under § 41(h)(3)(A)(ii), a "qualified small business" includes any person (other than a corporation or partnership) who meets the requirements of § 41(h)(3)(A)(i)(I) and (II), determined by substituting "person" for "entity" each place it appears, and by taking into account only the aggregate gross receipts received by such person in carrying on all the trades or businesses of such person. Under § 41(h)(3)(B), a "qualified small business" shall not include an organization that is exempt from income taxation under § 501.

Section 41(h)(4)(A)(i) provides that any payroll tax credit election shall specify the amount of the research credit to which the election applies. Section 41(h)(4)(A)(ii) provides that any payroll tax credit election shall be made on or before the due date (including extensions) of (I) in the case of a qualified small business that is a partnership, the return required to be filed under § 6031 (for example, the Form 1065 or successor form), (II) in the case of a qualified small business that is an S corporation, the return required to be filed under § 6037 (for example, the Form 1120–S or successor form), and (III) in the case of any other qualified small business, the return of tax for the taxable year. Section 41(h)(4)(A)(iii) provides that, once made by a taxpayer, a payroll tax credit election may be revoked only with the consent of the Secretary.

Under § 41(h)(4)(B)(i), the amount specified in any payroll tax credit election shall not exceed $250,000. Section 41(h)(4)(B)(ii) provides that a person may not make a payroll tax credit election if such person (or any other person treated as a single taxpayer with such person under § 41(h)(5)(A)) has made a payroll tax credit election for 5 or more preceding taxable years.

Section 41(h)(4)(C) provides that, in the case of a qualified small business that is a partnership or S corporation, the payroll tax credit election shall be made at the entity level.

Section 41(h)(5)(A) provides that, except as provided in § 41(h)(5)(B), all persons or entities treated as a single taxpayer under § 41(f)(1) shall be treated as a single taxpayer for purposes of § 41(h). Section 41(h)(5)(B)(i) provides that, for purposes of §§ 41(h) and 3111(f), each of the persons treated collectively as a single taxpayer under § 41(h)(5)(A) may separately make the payroll tax credit election for any taxable year. Section 41(h)(5)(B)(ii) provides that, for purposes of §§ 41(h) and 3111(f), the $250,000 amount under § 41(h)(4)(B)(i) shall be allocated among all persons treated collectively as a single taxpayer under § 41(h)(5)(A) in the same manner as under § 41(f)(1)(A)(ii) or (B)(ii), whichever is applicable.

Section 41(h)(6) instructs the Secretary to prescribe regulations as may be necessary to carry out the purposes of § 41(h), including (A) regulations to prevent the

avoidance of the purposes of the limitations and aggregation rules through the use of successor companies or other means, (B) regulations to minimize compliance and recordkeeping burdens under § 41(h), and (C) regulations for recapturing the benefit of payroll tax credits in cases where there is a subsequent adjustment to the payroll tax credit portion of the research credit, including requiring amended income tax returns in the cases where there is such an adjustment.

Section 3111(f)(1) provides that, in the case of a taxpayer who has made a payroll tax credit election for a taxable year, there shall be allowed a payroll tax credit for the first calendar quarter which begins after the date on which the taxpayer files the return specified in § 41(h)(4)(A)(ii) in an amount equal to the payroll tax credit portion of the research credit determined under § 41(h)(2).

Under § 3111(f)(2), the payroll tax credit shall not exceed the employer portion of social security tax imposed for any calendar quarter on the wages paid with respect to the employment of all individuals in the employ of the employer.

Section 3111(f)(3) provides that if the amount of the payroll tax credit exceeds the limitation of § 3111(f)(2) for any calendar quarter, such excess is carried to the succeeding calendar quarter and allowed as a payroll tax credit for such quarter.

Section 3111(f)(4) provides that the payroll tax credit shall not be taken into account for purposes of determining the amount of any deduction allowed under chapter 1 of subtitle A of the Code for the employer portion of social security taxes.

The Treasury Department and the IRS recognize that businesses need immediate guidance to determine their eligibility for the payroll tax credit election with respect to taxable years beginning in 2016, and the procedures for making the election and claiming the credit. In response to Notice 2016–26, 2016–14 I.R.B. 533, which requests recommendations for the 2016–2017 Priority Guidance Plan, several commenters requested guidance under §§ 41(h) and 3111(f). In particular, commenters requested guidance regarding the term "gross receipts" for purposes of determining whether a business is a "qualified small business" under § 41(h)(3). In addition, commenters requested guidance regarding controlled groups of corporations and groups of trades or businesses under common control (collectively referred to as controlled groups) in the context of § 41(h). Because immediate guidance is necessary, this notice prescribes interim guidance in sections 3 and 4 regarding the definition of "qualified small business" and the time and manner of making the payroll tax credit election. Further, because the Treasury Department and the IRS are developing guidance under § 41(h), the Treasury Department and the IRS request comments in section 6 of this notice on the interim guidance provided in this notice and other issues under § 41(h) that may require additional guidance.

SECTION 3. INTERIM GUIDANCE FOR DEFINING QUALIFIED SMALL BUSINESS

.01 *Corporations and partnerships.*

A corporation (including an S corporation) or partnership is a qualified small business with respect to any taxable year if the corporation or partnership:

(1) Has gross receipts, as defined in section 3.04 of this notice, of less than $5,000,000 for the taxable year, and

(2) Did not have gross receipts, as defined in section 3.04 of this notice, for any taxable year before the 5–taxable-year period ending with the taxable year.

.02 *Other businesses.*

Any person (other than an entity described in section 3.01 of this notice) is a qualified small business if the person meets the requirements of section 3.01(1) and (2) of this notice taking into account the person's aggregate gross receipts, as defined in section 3.04 of this notice, received in carrying on all the person's trades or businesses.

.03 *Tax exempt organizations.*

Organizations exempt from income tax under § 501 are not qualified small businesses even if they satisfy the requirements of sections 3.01 or 3.02 of this notice.

.04 *Determination of gross receipts.*

The term "gross receipts" in section 3 of this notice means gross receipts as determined under § 448(c)(3) (without regard to § 448(c)(3)(A)) and § 1.448–1T(f)(2)(iii) and (iv) of the Income Tax Regulations. The definition of gross receipts under § 41(c)(7) and § 1.41–3(c) does not apply for purposes of § 41(h).

.05 *Aggregation rule.*

For purposes of the gross receipts rules in sections 3.01 and 3.02 of this notice, all members of a controlled group, as defined in § 1.41–6(a)(3)(ii), for a taxable year are treated as a single taxpayer. Thus, the aggregate gross receipts of all members of a controlled group for a taxable year must be taken into account in determining whether the requirements of section 3.01(1) and (2) of this notice are satisfied.

.06 *Examples.*

The following examples illustrate the application of section 3 of this notice:

(1) Corp A, a calendar year corporation, is not a tax-exempt organization under § 501 or a member of a controlled group in taxable year 2016. Corp A has gross receipts, as determined under section 3.04 of this notice, of $1 million, $7 million, $4 million, $3 million, and $4 million for taxable years 2012, 2013, 2014, 2015, and 2016, respectively. Corp A did not have gross receipts, as determined under section 3.04 of this notice, for any taxable year prior to 2012. Corp A is a qualified small business for taxable year 2016 because it has less than $5,000,000 in gross receipts for taxable year 2016 and did not have gross receipts before taxable year 2012 (before the 5–taxable-year period ending with 2016). Corp A's gross receipts in taxable years 2012–2015 are not relevant in determining whether Corp A is a qualified small business in taxable year 2016. Because Corp A had gross receipts in taxable year 2012, Corp A is not a qualified small business in taxable year 2017, regardless of its gross receipts in 2017.

(2) Corp A, Corp B, and Corp C are calendar year taxpayers that are not tax-exempt organizations under § 501 and are members of a controlled group for taxable year 2016 (Corp ABC controlled group). Corp A has gross receipts, as determined under section 3.04 of this notice, of $1

million, $7 million, $4 million, $3 million, and $4 million for taxable years 2012, 2013, 2014, 2015, and 2016, respectively. Corp B has gross receipts, as determined under section 3.04 of this notice, of $500,000, $1 million, $2 million, $1 million, and $1 million for taxable years 2012, 2013, 2014, 2015, and 2016, respectively. Neither Corp A nor Corp B had gross receipts, as determined under section 3.04 of this notice, for any taxable year prior to 2012. Corp C has gross receipts, as determined under section 3.04 of this notice, of $1 million, $3 million, $4 million, $3 million, $1 million, and $500,000 for taxable years 2011, 2012, 2013, 2014, 2015, and 2016, respectively. Corp A, Corp B, and Corp C are not qualified small businesses for taxable year 2016 because the aggregate gross receipts of Corp ABC controlled group for taxable year 2016 are not less than $5 million ($4 million (Corp A) + $1 million (Corp B) + $500,000 (Corp C)). In addition, neither Corp A, Corp B, nor Corp C is a qualified small business in taxable year 2016 because Corp C had gross receipts in taxable year 2011 (before the 5–taxable-year period ending with 2016).

SECTION 4. INTERIM GUIDANCE FOR ELECTING THE PAYROLL TAX CREDIT

.01 *In general.*

A qualified small business, as defined in section 3 of this notice, may make a payroll tax credit election in an amount limited as specified in section 4.03 or 4.05(2) of this notice for any taxable year beginning after December 31, 2015. If a qualified small business makes a payroll tax credit election, the amount elected is not treated as a research credit, except for purposes of § 280C.

.02 *Time and manner of election.*

A qualified small business makes a payroll tax credit election by completing the appropriate portion of Form 6765, Credit for Increasing Research Activities, or successor form, relating to the payroll tax credit election, and attaching the completed form to the qualified small business's timely filed (including extensions) return for the taxable year to which the election applies. The term "return" means the return required to be filed under § 6031 in the case of a partnership (for example, the Form 1065 or successor form), the return required to be filed under § 6037 in the case of an S corporation (for example, the Form 1120–S or successor form), and the return with respect to income tax for the taxable year in the case of any other qualified small business.

If a qualified small business timely files its return for a taxable year beginning after December 31, 2015, but fails to make the payroll tax credit election, it may make the election on an amended return filed on or before December 31, 2017. To qualify for this extension, the business must either: 1) indicate on the top of its Form 6765 reflecting the payroll tax credit election that the form is "FILED PURSUANT TO NOTICE 2017–23," or 2) attach a statement to its Form 6765 reflecting the payroll tax credit election that the form is filed pursuant to Notice 2017–23.

.03 *Amount of election.*

The amount of any payroll tax credit election may not exceed the least of:

(1) The qualified small business's research credit for the taxable year (determined before the application of § 41(h)),

(2) $250,000, or

(3) In the case of a qualified small business other than a partnership or S corporation, the amount of the qualified small business's business credit carryforward under § 39 carried from the taxable year (determined before the application of § 41(h)).

.04 *Limitation on number of taxable years.*

A person may not make a payroll tax credit election for a taxable year if the person (or any other member of the person's controlled group as defined under § 1.41–6(a)(3)(ii)) has made an election for 5 or more preceding taxable years.

.05 *Special rules for controlled groups.*

(1) *In general.*

In the case of a controlled group, as defined under § 1.41–6(a)(3)(ii), each member of the controlled group separately makes the payroll tax credit election in the time and manner described in section 4.02 of this notice.

(2) *Amount of election.*

Each member of a controlled group can separately elect the least of:

(a) The electing member's allocable share of the group's research credit, as determined under § 1.41–6T(c),

(b) The electing member's allocable share of the $250,000 amount, as determined under section 4.05(3) of this notice, or

(c) In the case of an electing member other than a partnership or S corporation, the amount of the electing member's business credit carryforward under § 39 carried from the taxable year (determined before the application of § 41(h)).

(3) *$250,000 amount.*

The $250,000 amount is allocated for purposes of section 4.05(2)(b) of this notice to each member of a controlled group in the same manner as the group's research credit is allocated under § 1.41–6T(c), regardless of whether all members of the controlled group make the payroll tax credit election. Thus, the $250,000 amount is allocated to each member of a controlled group on a proportionate basis to its share of the aggregate of the qualified research expenses, basic research payments, and amounts paid or incurred to energy research consortiums (collectively referred to as QREs) taken into account for the taxable year by such controlled group for purposes of the research credit.

(4) *Example.*

The following example illustrates the application of section 4.05 of this notice:

A, B, and C, all calendar year partnerships, are the only members of a controlled group (ABC controlled group) and are qualified small businesses under section 3 of this notice. A and B, but not C, make a payroll tax credit election for taxable year 2016 by completing the portion of their Forms 6765 relating to the payroll tax credit election and attaching the completed Forms 6765 to their timely filed (including extensions) Forms 1065, U.S. Return of Partnership Income, for taxable

year 2016. ABC controlled group calculated its total research credit for taxable year 2016 to be $300,000. Under § 1.41–6T(c), A is allocated $60,000, B is allocated $90,000, and C is allocated $150,000 of the group's research credit on a proportionate basis to each member's proportionate share of the controlled group's aggregate QREs. In the same manner as under § 1.41–6T(c), A is allocated $50,000, B is allocated $75,000, and C is allocated $125,000 of the $250,000 amount for purposes of section 4.05(2)(b) of this notice. For taxable year 2016, the maximum amount that A can elect as a payroll tax credit is $50,000 (the lesser of A's allocable share of the group's research credit and A's allocable share of the $250,000 amount). The maximum amount that B can elect as a payroll tax credit is $75,000 (the lesser of B's allocable share of the group's research credit and B's allocable share of the $250,000 amount). C did not make a payroll tax credit election. If A makes the payroll tax credit election in the amount of $50,000, A still has a research credit available for income tax purposes in the amount of $10,000. If B makes the payroll tax credit election in the amount of $75,000, B still has a research credit available for income tax purposes in the amount of $15,000. Because C did not make the payroll tax credit election, C still has a research credit available for income tax purposes in the amount of $150,000.

.06 *Claiming the credit on the employment tax return.*

A qualified small business that elects to claim the payroll tax credit and files quarterly employment tax returns, claims the payroll tax credit on its employment tax return for the first quarter that begins after it files the return reflecting the election as specified in section 4.02 of this notice. For example, if a qualified small business files an income tax return on April 10, 2017, with a Form 6765 attached reflecting the payroll tax credit election, the qualified small business would claim the payroll tax credit on its Form 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2017. A qualified small business that files annual employment tax returns claims the payroll tax credit on its annual employment tax return that includes the first quarter beginning after the date on which the business files the return reflecting the election as specified in section 4.02 of this notice. A qualified small business claiming the payroll tax credit on its employment tax return must complete Form 8974, Qualified Small Business Payroll Tax Credit for Increasing Research Activities, or successor form, and attach the completed form to that employment tax return. Under various employment tax procedural rules, the Employer Identification Number (EIN) of the taxpayer filing the employment tax return may differ from the EIN of the taxpayer that filed the return with an attached Form 6765 reflecting the election as specified in section 4.02 of this notice. On Form 8974, the taxpayer filing the employment tax return claiming the credit provides the EIN used on the Form 6765 reflecting the election.

The payroll tax credit claimed by an employer on an employment tax return cannot exceed the employer portion of the social security tax for any calendar quarter on wages paid with respect to the employment of all individuals in the employ of the employer. The employer uses Form 8974 to apply this limit to the amount of the payroll tax credit it elected on Form 6765 and to determine the amount of the credit allowed on its employment tax return. If the payroll tax credit elected on Form 6765 exceeds this limitation, then the excess determined on Form 8974 is carried over to the succeeding calendar quarter(s) and allowed as a payroll tax credit for the succeeding quarter(s), subject to the social security tax limitation applicable to the quarter(s).

SECTION 5. EFFECTIVE DATE

This notice applies to payroll tax credit elections made with respect to taxable years beginning after December 31, 2015.

SECTION 6. REQUEST FOR COMMENTS

.01 *Comments requested.*

The Treasury Department and the IRS request written comments on issues relating to §§ 41(h) and 3111(f) and the interim guidance provided in this notice. In particular, the Treasury Department and the IRS request comments that address the following:

(1) Section 41(h)(6)(A) grants the Secretary authority to provide rules to prevent the avoidance of the purposes of the limitations and aggregation rules under § 41(h) through the use of successor companies or other means. Because there may be scenarios in which a business could make a payroll tax credit election that is inconsistent with the intent of § 41(h) through the use of a successor company or otherwise, the Treasury Department and the IRS are considering whether rules are necessary to treat successor companies as the same person for purposes of § 41(h) and, if so, how the term "successor company" should be defined for purposes of § 41(h). In addition, the Treasury Department and the IRS are exploring whether businesses could otherwise avoid the purposes of the limitations and aggregation rules through means other than successor companies and, if so, whether rules are necessary to prevent such a result. The Treasury Department and the IRS invite comments regarding rules to address successor companies and other means of avoiding the purposes of the rules under § 41(h).

(2) Section 41(h)(6)(C) grants the Secretary authority to provide rules for recapturing the benefit of payroll tax credits in cases where there is a subsequent adjustment to the payroll tax credit portion of the research credit, including requiring amended income tax returns in cases where there is such an adjustment. The Treasury Department and the IRS invite comments on how the IRS should recapture excessive payroll tax credits if there is a subsequent adjustment to the payroll tax credit portion of the research credit. For example, the Treasury Department and the IRS request comments on how the IRS should recapture excessive payroll tax credits if: (A) the payroll tax credit portion of the research credit is reduced because the IRS subsequently adjusts a business's research credit, or, in the case of a business other than a partnership and S corporation, the amount of the business credit carryforward under § 39 carried from the taxable year (determined before the application of § 41(h)); (B) a business makes an invalid election because, for example, the business is not a qualified small business; or (C) an error in determining or claiming the payroll tax credit is made on

the employment tax return. The Treasury Department and the IRS also request specific comments on how the IRS should recapture excessive payroll tax credits if the situation is described in either (A), (B), or (C) of the preceding sentence, and either (i) the period of limitations on assessment of tax under § 6501 has expired for the income tax return, but has not expired for the employment tax return, or (ii) the period of limitations on assessment of tax has expired for the employment tax return, but has not expired for the income tax return.

(3) The Treasury Department and the IRS invite comments regarding whether guidance is necessary to address how the § 41(h) election rules apply to members of a consolidated group.

(4) Section 41(h)(4)(B)(ii) provides that a person may not make a payroll tax credit election if such person (or any other person treated as a single taxpayer under § 41(h)(5)(A) with such person) has made a payroll tax credit election for 5 or more preceding taxable years. The Treasury Department and the IRS invite comments regarding whether controlled group relationships that existed in previous taxable years that do not exist in the current taxable year are relevant for purposes of the 5–year-limitation period under § 41(h)(4)(B)(ii).

.02 *Date for comments*.

Comments in response to this notice are requested by July 17, 2017.

.03 *Address to send comments*.

(1) Comments responding to this notice should be sent to:

Internal Revenue Service
CC:PA:LPD:PR (Notice 2017–23)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Please include "Notice 2017–23" on the cover page.

(2) Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Internal Revenue Service
Courier's Desk
1111 Constitution Ave., N.W.
Washington, DC 20224
Attn: CC:PA:LPD:PR
(Notice 2017–23)

(3) Submissions may also be sent electronically to the following e-mail address: *Notice.Comments@irscounsel.treas.gov*. Please include "Notice 2017–23" in the subject line.

All comments will be available for public inspection and copying.

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Jennifer A. Records of the Office of Associate Chief Counsel (Passthroughs & Special Industries). However, other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this notice, contact Ms. Records at (202) 317-6853 (not a toll-free number).

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26 CFR 1.6049.00–00: Returns Relating to Payments of Interest
(Also: 1.3406.07–00 Exceptions to Backup Withholding)

Rev. Proc. 2017–31

SECTION 1. PURPOSE

This revenue procedure supplements the listing in Section 4 of Revenue Procedure 2014–64, 2014–53 I.R.B. 1022, as previously supplemented by Rev. Proc. 2015–50, 2015–42 I.R.B. 583, Rev. Proc. 2016–18, 2016–17 I.R.B. 635, and Rev. Proc. 2016–56, 2016–52 I.R.B. 920, of the countries with which the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) have determined that it is appropriate to have an automatic exchange relationship with respect to the information collected under §§ 1.6049–4(b)(5) and 1.6049–8(a).

SECTION 2. BACKGROUND

Sections 1.6049–4(b)(5) and 1.6049–8(a), as revised by TD 9584, require the reporting of certain deposit interest paid to nonresident alien individuals on or after January 1, 2013. Rev. Proc. 2012–24, 2012–20 I.R.B. 913, was published contemporaneously with the publication of TD 9584. Section 3 of that revenue procedure identified those countries with which the United States has in force an information exchange agreement, such that interest paid to residents of such countries must be reported by payors to the extent required under §§1.6049–4(b)(5) and 1.6049–8(a). Section 4 of that revenue procedure identified the countries with which the Treasury Department and the IRS had determined that it was appropriate to have an automatic exchange relationship with respect to the information collected under §§1.6049–4(b)(5) and 1.6049–8(a). Rev. Proc. 2012–24 was updated and superseded by Rev. Proc. 2014–64, Section 4 of which contained an updated list of countries with which an automatic exchange relationship had been determined appropriate. Rev. Proc. 2014–64 was supplemented by Rev. Proc. 2015–50, Rev. Proc. 2016–18, and Rev. Proc. 2016–56, each of which added countries to the list in Section 4 of Rev. Proc. 2014–64. This revenue procedure further supplements Rev. Proc. 2014–64 by adding Belgium, Colombia, and Portugal to the list of countries in Section 4 of Rev. Proc. 2014–64.

SECTION 3. SUPPLEMENT TO SECTION 4 OF REV. PROC. 2014–64

Section 4 of Rev. Proc. 2014–64, as supplemented by Rev. Proc. 2015–50, Rev. Proc. 2016–18, and Rev. Proc. 2016–56, is further supplemented to read as follows:

The following list identifies the countries with which the automatic exchange of the information collected under §§ 1.6049–4(b)(5) and 1.6049–8 has been determined by the Treasury Department and the IRS to be appropriate:

Australia
Azerbaijan
Belgium
Brazil
Canada
Colombia
Czech Republic
Denmark
Estonia
Finland
France
Germany
Gibraltar
Guernsey
Hungary
Iceland
India
Ireland
Isle of Man

Israel
Italy
Jamaica
Jersey
Korea, Republic of
Latvia
Liechtenstein
Lithuania
Luxembourg
Malta
Mauritius
Mexico
Netherlands
New Zealand
Norway
Poland
Portugal
Saint Lucia
Slovak Republic
Slovenia
South Africa
Spain
Sweden
United Kingdom

SECTION 4. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2014–64, as supplemented by Rev. Proc. 2015–50, Rev. Proc. 2016–18, and Rev. Proc. 2016–56, is further supplemented.

SECTION 5. DRAFTING INFORMATION

The principal author of this revenue procedure is Jackie Bennett Manasterli of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure contact Ms. Manasterli at (202) 317-6941 (not a toll-free number).

Part IV. Items of General Interest

Non-Applicability of Excise Taxes Under Section 4975 To Conform With DOL Temporary Enforcement Policy on Fiduciary Duty Rule

Announcement 2017–04

This announcement provides relief from certain excise taxes under § 4975 of the Internal Revenue Code (Code), and any related reporting requirements, to conform to the temporary enforcement policy described by the Department of Labor (DOL) in Field Assistance Bulletin (FAB) 2017–01 with respect to the final fiduciary duty rule published in the Federal Register on April 8, 2016 (81 F.R. 20946), entitled "Definition of the Term 'Fiduciary'; Conflict of Interest Rule – Retirement Investment Advice" and related prohibited transaction exemptions, including the Best Interest Contract Exemption (BIC Exemption), the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption), and certain amended prohibited transaction exemptions (collectively, PTEs).

BACKGROUND

Section 4975(a) imposes an excise tax on each prohibited transaction equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. Section 4975(b) increases the tax to 100 percent of the amount involved in any cases in which an initial tax is imposed under § 4975(a) on a prohibited transaction and the transaction is not corrected within the taxable period. In each case, the tax is imposed on any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such). Section 4975(c) provides a definition of a prohibited transaction and authorizes the Department of the Treasury (Treasury Department) to grant administrative exemptions from the prohibited transaction provisions in the Code. Section 4975(c)(1)(A) through (D) prohibits the direct or indirect sale, exchange, leasing of property, or loan of money, or other extension of credit, between a plan (including an individual retirement account or individual retirement annuity (IRA)) and a disqualified person, or the direct or indirect transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan. Section 4975(c)(1)(E) and (F) prohibits fiduciaries from dealing with the income or assets of a plan in their own interest or for their own account or receiving any consideration for their own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan. Section 4975(d) provides a series of exemptions from the prohibitions in § 4975(c), and § 4975(e) provides a series of definitions, including the definition of a disqualified person to whom the tax may apply. Section 4975(e)(2)(A) provides that a disqualified person includes a fiduciary.

Sections 406 and 408 of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829 (1974)), as amended (ERISA), contain provisions on prohibited transactions that are substantially similar to the provisions of § 4975 of the Code, although the ERISA provisions prohibit the fiduciary from engaging in the transactions and provide for civil liability and remedies rather than imposing an excise tax. The DOL is the agency responsible for interpreting and enforcing the ERISA provisions as they apply to employee benefit plans. ERISA § 408(a) includes an authorization for the Secretary of Labor to grant administrative exemptions from ERISA's prohibited transaction provisions that parallels the similar authorization in § 4975(c) for the Treasury Department to grant administrative exemptions from the prohibited transaction provisions in the Code.

To ensure consistency in application, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1, 92 Stat. 3790, provides that the authority of the Treasury Department to issue regulations, rulings, opinions, and exemptions under § 4975 of the Code is transferred, with certain exceptions not relevant here, to the Secretary of Labor. As a result, the Internal Revenue Service (IRS) is responsible for enforcing the excise tax provisions in § 4975(a) and (b) of the Code, but generally is bound by the DOL's interpretive regulations, rulings, opinions, and exemptions in determining whether a prohibited transaction has occurred. Section 3003 of ERISA provides that the DOL and the Treasury Department are to consult with each other from time to time with respect to the provisions of § 4975 of the Code relating to prohibited transactions and exemptions in order to coordinate the rules applicable under such standards. Section 3004 of ERISA further provides that whenever the DOL and the Treasury Department are required to carry out provisions relating to the same subject matter, the agencies are required to coordinate and develop rules, regulations, and practices that, to the extent appropriate for the efficient administration of such shared provisions, are designed to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and burden of compliance by plan administrators, employers, and participants and beneficiaries.

On April 8, 2016, the DOL published a final regulation defining who is a "fiduciary" of an employee benefit plan under § 3(21)(A)(ii) of ERISA as a result of giving investment advice to a plan or its participants or beneficiaries. The final rule also applies to the definition of a "fiduciary" of a plan under § 4975(e)(3)(B) of the Code. The final rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan as fiduciaries in a wider array of advice relationships than was true of the prior regulatory definition. On this same date, the DOL published the PTEs, which provide two new administrative class exemptions from the prohibited transaction provisions of ERISA and the Code, as well as amendments to previously granted exemptions. The PTEs would allow, subject to appropriate safeguards, certain broker-dealers, insurance agents, and others that act as investment advice fiduciaries, as defined under the final rule, to continue to receive a variety of forms of compensation that would otherwise violate prohibited trans-

action rules, triggering excise taxes and civil liability.

The final fiduciary duty rule became effective on June 7, 2016, and has an applicability date of April 10, 2017. The PTEs also have an applicability date of April 10, 2017, with a phased implementation period ending on January 1, 2018, for the BIC Exemption and the Principal Transactions Exemption. The President, by Memorandum to the Secretary of Labor dated February 3, 2017, directed the DOL to examine whether the fiduciary duty rule may adversely affect the ability of Americans to gain access to retirement information and financial advice and to prepare an updated economic and legal analysis concerning the likely impact of the rule as part of that examination. On March 2, 2017, the DOL published a notice in the Federal Register (82 F.R. 12319) seeking public comments on (i) a proposal to adopt a 60–day delay of the April 10 applicability date described above, (ii) the questions raised in the Presidential Memorandum, and (iii) general questions of law and policy concerning the fiduciary duty rule and the related PTEs. The March 2 notice stated that, if adopted as a final rule, the proposed 60–day delay would be effective on the date of publication in the Federal Register of a final rule delaying the April 10 applicability date.

The DOL issued FAB 2017–01 on March 10, 2017, to announce a temporary enforcement policy related to its proposal to extend for 60 days the applicability date of the fiduciary duty rule and the related PTEs. The policy provides that:

A. In the event the DOL issues a final rule after April 10 implementing a delay in the applicability date of the fiduciary duty rule and related PTEs, the DOL will not initiate an enforcement action because an adviser or financial institution did not satisfy conditions of the rule or the PTEs during the "gap" period in which the rule becomes applicable before a delay is implemented, including a failure to provide retirement investors with disclosures or other documents intended to comply with provisions of the rule or the related PTEs.

B. In the event the DOL decides not to issue a delay in the fiduciary duty rule and related PTEs, the DOL will not initiate an enforcement action because an adviser or financial institution, as of the April 10 applicability date of the rule, failed to satisfy conditions of the rule or the PTEs, provided that the adviser or financial institution satisfies the applicable conditions of the rule or PTEs, including sending out required disclosures or other documents to retirement investors, within a reasonable period after the publication of a decision not to delay the April 10 applicability date.

Field Assistance Bulletin 2017–01 provides that, to the extent circumstances surrounding its decision on the proposed delay of the April 10 applicability date give rise to the need for other temporary relief, including retroactive prohibited transaction relief, the DOL will consider taking such additional steps as necessary with respect to the arrangements and transactions covered by the DOL temporary enforcement policy and any subsequent related DOL enforcement guidance. Following the issuance of the FAB, stakeholders have raised concerns about the potential application of excise taxes under § 4975 and related reporting obligations in cases covered by the DOL's temporary enforcement policy.

TRANSITION RELIEF

Because the Code and ERISA contemplate consistency in the enforcement of the prohibited transaction rules by the IRS and the DOL, as further reflected in and facilitated by the statutory Reorganization Plan, the Treasury Department and the IRS have determined that it is appropriate to adopt a temporary excise tax nonapplicability policy that conforms with the DOL's temporary enforcement policy described in FAB 2017–01. Accordingly, the IRS will not apply § 4975 and related reporting obligations with respect to any transaction or agreement to which the DOL's temporary enforcement policy, or other subsequent related enforcement guidance, would apply.

Definition of Terms

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

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

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

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

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

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

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

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

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

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

Abbreviations

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

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

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[1]A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2016–27 through 2016–52 is in Internal Revenue Bulletin 2016–52, dated December 26, 2016.

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