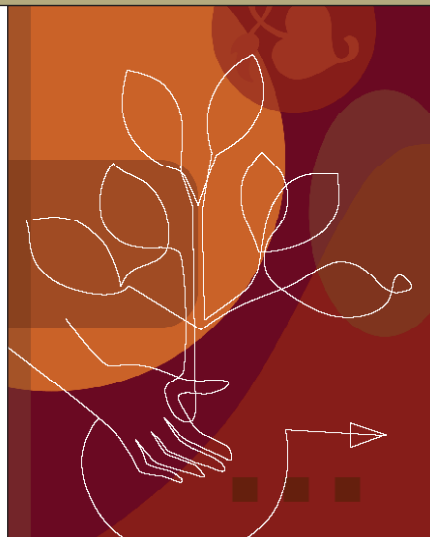


# 2009 TAX BULLETIN

Industry-Specific Expertise  
Industry-Specific Solutions



*HEALTH CARE*



*NOT-FOR-PROFIT*



*SPECIAL NEEDS*

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## **FEDERAL INDIVIDUAL INCOME TAX PROVISIONS**

### **LEGISLATIVE DEVELOPMENTS**

#### **Worker, Retiree and Employer Recovery Act of 2008**

Congress has passed the Worker, Retiree and Employer Recovery Act of 2008 which provides limited funding relief for single and multi-employer qualified retirement plans and relief from the minimum required distribution rules for retirees who have reached age 70½. The bill also makes technical corrections to the Pension Protection Act of 2006.

Specifically, the bill will:

- Allow pension plans to smooth out unexpected asset losses over two years;
- Provide additional transition to the new funding rules;
- Allow multiemployer plans to freeze their status based on the previous year's funding level and extend the required period for improving funding of endangered and critical plans by 3 years;
- Allow pension plans that fall below 60 percent funded as of the beginning of 2009 to look back to the previous plan year's funded status in order to avoid having to freeze accruals; and
- Suspend 2009 minimum required distributions from defined contribution plans or IRAs for individuals age 70 ½ or older.

#### **Pension Protection Bill of 2006 (H.R.4)**

##### **Overview**

The bill contains a charitable giving incentives package and a charitable reform package. It does not contain controversial Senate charitable reform provisions such as the mandatory payout requirements applicable to donor advised funds and supporting organizations and the 100 percent excise tax on certain life insurance contracts in which a charitable organization has an interest.

##### **Charitable Giving Incentives**

- ***Tax-Free Distributions from IRAs for Charitable Purposes***

Provides an exclusion from gross income for certain distributions of up to \$100,000 from a traditional individual retirement account (IRA) or a Roth IRA, (after age 70½) which would otherwise be included in income. To qualify, the charitable distribution must be made by the trustee directly to a tax-exempt organization to which deductible contributions can be made. Distributions to supporting organizations and donor advised funds are not qualified distributions. The provision was effective for two years through 2007, however, the Emergency Economic Stabilization Act signed into

law in October 2008 has extended the IRA charitable rollover provisions for the years 2008 and 2009.

- ***Charitable Deduction for Contributions of Book Inventory***

Extends the current-law provision that adds public schools to the list of eligible donees for the enhanced deduction for contributions of qualified book inventory by C corporations. The provision was effective for two years through 2007, however, the Emergency Economic Stabilization Act signed into law in October 2008 has extended the IRA charitable rollover provisions for the years 2008 and 2009.

- ***The Tax Treatment of Certain Payments to Controlling Exempt Organizations***

Under current law, rent, royalty, annuity, and interest income paid to a tax-exempt organization by a controlled taxable subsidiary is generally treated as unrelated business income, which is taxable to the tax-exempt parent organization. Payments received or accrued by certain exempt parents from taxable controlled subsidiaries will be treated as unrelated business taxable income only with respect to the amount that exceeds the amount which would have been paid or accrued if such payments meet the requirements of section 482 and the regulations thereunder. Exempt organizations are required to report certain amounts received from controlled organizations. An additional tax is imposed (20 percent) with respect to valuation misstatements. The provision was effective for two years through 2007. however, the Emergency Economic Stabilization Act signed into law in October 2008 has extended the IRA charitable rollover provisions for the years 2008 and 2009.

### **Charitable Reform**

- ***Fines and Penalties Applicable to Charitable Organizations***

The provision doubled the amount of excise taxes applicable to private foundations (self dealing, failure to distribute income, excess business holdings, investments which jeopardize charitable purposes, taxable expenditures) and 501(c)(3) and 501(c)(4) organizations (manager liability on excess benefit transactions).

- ***Recapture of Tax Benefit for Charitable Contributions of Exempt Use Property Not Used for an Exempt Use***

Provides for the recovery of the tax benefit derived from the contribution of property with respect to which a fair market value deduction was claimed if the property is not used for an exempt purpose of the donee organization. Period for reporting dispositions (Form 8282) is 3 years (formerly 2 years). Applicable to contributions after September 1, 2006. No adjustment is required if donee organization certifies that either use of property by donees was related to organization's purposes, and state how

property was used and how such use furthered such purposes, or state intended use by donee and certify that such use become infeasible or impossible

- ***Clothing and Household Items***

Specifies that no deduction is allowed for charitable contributions of clothing and household items if such items are not in good used condition or better. In addition, the Secretary may deny a deduction for any item with minimal monetary value.

- ***Modification of Recordkeeping Requirements for Certain Charitable Contributions***

Requires that in the case of a charitable contribution of money, regardless of the amount, the donor must maintain a cancelled check, bank record or receipt from the donee organization showing the name of the donee organization, the date of the contribution, and the amount of the contribution.

To deduct any charitable donation of money, a taxpayer must have a bank record or a written communication from the charity showing the name of the charity and the date and amount of the contribution. A bank record includes canceled checks, bank or credit union statements and credit card statements. Bank or credit union statements should show the name of the charity and the date and amount paid. Credit card statements should show the name of the charity and the transaction posting date.

Donations of money include those made in cash or by check, electronic funds transfer, credit card, and payroll deduction. For payroll deductions, the taxpayer should retain a pay stub, Form W-2 wage statement or other document furnished by the employer showing the total amount withheld for charity, along with the pledge card showing the name of the charity.

Prior law allowed taxpayers to back up their donations of money with personal bank registers, diaries or notes made around the time of the donation. Those types of records are no longer sufficient.

The new law does not change the prior-law requirement that a taxpayer get an acknowledgement from a charity for each deductible donation (either money or property) of \$250 or more. However, one statement containing all of the required information may meet the requirements of both provisions.

- ***Partial Interest in Donated Property***

Requires that charities receiving a fractional interest in an item of tangible personal property must take complete ownership of the item within 10 years or the death of the donor, whichever is first. In addition, the donee must have (i) taken possession of the item at least once during the 10-year period as long as the donor remains alive, and (ii) used the item for the organization's exempt purpose. Failure to comply with these

requirements results in the recapture of all tax benefits plus interest and the imposition of a 10 percent penalty. Applicable to contributions, bequests and gifts made after August 17, 2006.

- ***Public Disclosure of Information Relating to Unrelated Business Income Tax Returns***

Extends the present-law public disclosure requirements applicable to Form 990 to the unrelated business income tax returns of Section 501(c)(3) organizations. Note that disclosure only relates to returns that are tax-related and not merely informational.

- ***Treasury Study on Donor-Advised Funds and Supporting Organizations***

The Secretary will undertake a study on the organization and operation of donor-advised funds and of supporting organizations. The study will include an examination of requirements for determining if such organizations are operating in a manner consistent with the purposes or functions constituting the basis for their tax-exempt status.

- ***Improved Accountability for Donor-Advised Funds and Supporting Organizations***

- Tax imposed on sponsoring organizations of donor advised funds for taxable distributions.

A 20% tax is imposed on any sponsoring organization for taxable distributions. A five percent tax is imposed on the agreement of any fund manager to the making of a distribution if the manager knows it is a taxable distribution. For any taxable distribution, there is a \$10,000 limit on the amount of tax imposed on management. Taxable distributions are distributions to natural persons or to any entity for other than charitable purposes, or if the sponsoring organization does not exercise expenditure responsibility. Distributions to public charities (other than disqualified supporting organizations which include Type III supporting organizations), the sponsoring organization of the donor advised fund, or to any other donor advised fund, are not taxable distributions.

- Prohibited Transactions

Disqualified persons, for purposes of the excess benefit transaction taxes, have been extended to include donors to advised funds, advisors to the funds, investment advisors to the funds. Donors, donor advisors, and investment advisors to donor advised funds (and persons related to them) automatically are treated as disqualified persons with respect to the sponsoring organization under the excess benefit transaction rules of Code Sec. 4958.

▪ Taxes on Prohibited Transactions

An excise tax is imposed on the advice of certain persons that have a sponsoring organization made a distribution from a donor advised fund that results in the person receiving, directly or indirectly, more than an incidental benefit from the distribution. The tax is imposed against any person who recommended the distribution and against the recipient of the benefit. Such persons include donors, donor advisors and related persons who receive a benefit from a distribution from a donor advised fund. The tax is not imposed on investment advisors.

No additional tax is imposed on any distribution if a tax has already been imposed with respect to the distribution under the excess benefit transaction rules of Code Sec. 4958. If more than one person is liable for the tax, all such persons are jointly and severally liable for the entire amount of the tax. The excise taxes are subject to abatement if it is established that the taxable event was due to reasonable cause and not to willful neglect. The provision applies to tax years beginning after August 17, 2006.

▪ Charitable Contribution Deductions to Donor Advised Funds

Contributions to donor advised funds generally will be fully deductible from income, estate and gift tax. However, gift, tax purposes or estate contributions to a donor advised fund will not be eligible for a charitable deduction for if the income funds sponsoring organization is a Type III supporting organization that is not a functionally integrated Type III supporting organization.

In addition to satisfying the present-law substantiation requirements, a donor must obtain, with respect to each charitable contribution to a donor advised fund, a contemporaneous written acknowledgment from the sponsoring organization providing that the sponsoring organization has exclusive legal control over the assets contributed.

**Tax Increase Prevention And Reconciliation Act (May 11, 2006)**

IRC section 4965 imposes two excise taxes on tax-exempt entities that are parties to “prohibited tax shelter transactions.”

- Excise tax on organizations described in sections 501(c)(1), (3), (4), (5), (6), (9), (14), (15), (19), 501(d), 170(c) and Indian and Tribal governments that are a party to a prohibited tax shelter transaction or become a party to a subsequently listed transaction.
- Excise tax imposed on managers of tax exempt entities who approve the entity as a party (or otherwise cause the entity to be a party) to a prohibited tax shelter transaction and know or have reason to know the transaction is a prohibited tax shelter transaction.

- New prohibited tax shelter transaction disclosure requirements.

**Treatment of Loans to Qualified Continuing Care Facilities (CCF) (IRC Sec. 7872(h))**

- Effective for calendar years beginning after December 31, 2005, with respect to loans made before, on, or after December 31, 2005. Not applicable to any tax year after 2010.
- Qualification for exception to the imputed interest rules are relaxed
  - Facility may qualify as a CCF on the last day of the year in which the loan is made.
  - Age requirement of lender is reduced to 62 from 65 (as to lender or spouse as of last day of year).
  - Continuing care contract need no longer contain requirement for individual to progress from residence to an independent living unit to long-term care. In addition, requirement that long-term care be provided for no additional cost is also removed.
  - In addition to requirement that facility (facilities) provide services under continuing care contracts and that substantially all of the independent living unit residents have coverage under continuing care contracts, a qualified CCF must also include an independent living unit in addition to an assisted living facility and/or a nursing facility.
  - Facilities need no longer be substantially owned by borrower of the loan.
  - Inflation-adjusted limitation on the amount of the loan has been removed.

**2008 AND 2009 TAX RATES – INDIVIDUALS**

**2008 Tax Rates – Individuals**

<u>Tax Rate</u>	<u>Married Filing Jointly or Surviving Spouse</u>	<u>Married Filing Separately</u>	<u>Head of Household</u>	<u>Single Individuals</u>
10.0%	\$ 0 - \$ 16,050	\$ 0 - \$ 8,025	\$ 0 - \$ 11,450	\$ 0 - \$ 8,025
15.0%	16,051 - 65,100	8,026 - 32,550	11,451 - 43,650	8,026 - 32,550
25.0%	65,101 - 131,450	32,551 - 65,725	43,651 - 112,650	32,551 - 78,850
28.0%	131,451 - 200,300	65,726 - 100,150	112,651 - 182,400	78,851 - 164,550
33.0%	200,301 - 357,700	100,151 - 178,850	182,401 - 357,700	164,551 - 357,700
35.0%	over - 357,700	over - 178,850	over - 357,700	over - 357,700

**2009 Tax Rates – Individuals**

<u>Tax Rate</u>	<u>Married Filing Jointly or Surviving Spouse</u>	<u>Married Filing Separately</u>	<u>Head of Household</u>	<u>Single Individuals</u>
10.0%	\$ 0 - \$ 16,700	\$ 0 - \$ 8,350	\$ 0 - \$ 11,950	\$ 0 - \$ 8,350
15.0%	16,700 - 65,100	8,350 - 33,950	11,950 - 43,650	8,350 - 33,950
25.0%	67,900 - 131,450	33,950 - 65,725	45,500 - 112,650	33,950 - 78,850
28.0%	137,050 - 200,300	68,525 - 100,150	117,450 - 182,400	82,250 - 164,550
33.0%	208,850 - 357,700	104,425 - 178,850	190,200 - 357,700	171,550 - 357,700
35.0%	over - 372,950	over - 186,475	over - 372,950	over - 372,950

**CAPITAL GAINS**

**Maximum Tax Rate on Qualified Dividends and Net Capital Gain Reduced**

For tax years beginning after 2007, the 5% maximum tax rate on qualified dividends and net capital gain (the excess of net long-term capital gain over net short-term capital loss) is reduced to 0%. The 15% maximum tax rate on qualified dividends and net capital gain has not changed.

- ***Collectibles***

Subject to a rate of 28 percent are capital gains and losses from collectibles (including works of art, rugs, antiques, gems, stamps, coins and alcoholic beverages) held for more than one year, regardless of when the transaction occurred.

- ***Unrecaptured Section 1250 Gain***

Subject to a 25 percent rate is long-term capital gain, not otherwise recaptured as ordinary income, attributable to depreciation of real property held for more than 12 months.

- ***Netting Gains and Losses***

Within each group, gains and losses are netted to arrive at a net gain or loss. Net losses will be applied first to the highest percentage group and then, to the extent of any remaining net loss, to the next highest percentage category.

**ALTERNATIVE MINIMUM TAX**

The “Tax Extenders and Alternative Minimum Tax Relief Act of 2008” (the 2008 Extenders Act) extends partial relief to individual taxpayers from the alternative minimum tax.

The first \$175,000 of AMT income is taxed at 26%. Income in excess of \$175,000 (\$87,500 if married filing separately) is taxed at 28%, net of any allowable exemption. Net long-term capital gains and qualified dividends are taxed at the same maximum 15% rate for AMT as for regular tax.

An AMT exemption is allowed in 2008 up to \$69,950 if married filing jointly, \$46,000 if filing single or head of household, or \$34,975 if married filing separately. The exemption phases out based on your AMT income, fully eliminating the exemption once your 2008 AMT income reaches \$429,800 if married filing jointly, \$296,500 if single or head of household, or \$214,900 if married filing separately.

**CHARITABLE REMAINDER TRUST DISTRIBUTIONS**

Final regulations revise the rules for characterizing a CRT distribution to take into account differences in the Federal income tax rates applicable to items of income that are assigned to the same category. The trust’s income is assigned, in the year it is required to be taken into account by the trust, to one of three categories: the ordinary income category, the capital gains category, or the other income category. Within the ordinary income and capital gains categories, items are also assigned to different classes based on the Federal income tax rate applicable to each type of income in the category. A CRT distribution is treated as being made from the categories in the following order: ordinary income, capital gain, other income, and trust corpus. Within the ordinary income and capital gains categories, income is treated as distributed from the classes of income in that category beginning with the class subject to the highest Federal income tax rate and ending with the class subject to the lowest Federal income tax rate.

**ESTIMATED TAXES**

The amount of the de minimis threshold for an underpayment of estimated tax for individuals is \$1,000. Accordingly, additions to tax will not be imposed where the total tax liability for the year, reduced by any withheld tax and estimated tax payments, is less than \$1,000.

Estimated tax payments for individuals must be at least 90 percent of the current year’s tax liability. The underestimation penalty can still be avoided if the current year’s estimated tax payments equal or exceed the prior year’s tax liability.

The safe harbor provision for individual taxpayers with adjusted gross income of more than \$150,000 (\$75,000 for a married individual filing separately) in 2008 or thereafter allows such individuals to avoid an estimated tax penalty if they paid 110 percent of the prior year’s tax.

**STANDARD DEDUCTION**

The standard deduction, which may be utilized in lieu of itemizing deductions, is as follows:

**Filing Status**

	<u>2008</u>	<u>2009</u>
Single individuals	\$ 5,450	\$ 5,700
Joint returns or qualifying widow(er)	10,900	11,400
Heads of household	8,000	8,350
Married individuals filing separately	5,450	5,700

For 2009, elderly and blind individuals who are married (whether filing separately or jointly) or are qualifying widow(er)s will be entitled to an additional \$1,100 standard deduction (\$1,050 for 2008) (\$2,200 if blind and 65 or over and \$4,400 if both spouses are blind and 65 or over). Heads of household and unmarried individuals are entitled to an additional standard deduction of \$1,400 (\$1,350 for 2008) if either status exists (\$2,800 if both).

For 2008 and 2009, the basic standard deduction for a taxpayer who may be claimed as a dependent on another person's tax return and who had earned income in excess of \$300, but total income of less than the standard deduction amount equals the lesser of:

- Standard deduction for single taxpayers; or
- Greater of
  - \$950 for 2009 and \$900 for 2008, plus
  - Individual's earned income, plus \$300 for 2008 and 2009

**REAL ESTATE TAX DEDUCTION**

There is an additional standard deduction for those who don't itemize their deductions, but pay real estate taxes. The additional deduction amount is equal to the amount of real estate taxes paid up to \$500 for single filers or up to \$1,000 for joint filers. This deduction is available for the 2008 and 2009 tax years and increases your standard deduction.

**PERSONAL EXEMPTIONS**

The personal exemption for 2008 is \$3,500 and for 2009 will be \$3,650. If an individual can be claimed as a dependent on another taxpayer's return, no personal exemption will be allowed to such an individual on his or her own return. Thus, a student who has enough income to file a return cannot claim a personal exemption on his or her own return if his or her parents claim him or her as a dependent on their return.

**PHASEOUT OF PERSONAL EXEMPTIONS**

The deduction for personal exemptions is phased out as adjusted gross income (AGI) exceeds certain thresholds. The exemption amount is phased out by 2% for each \$2,500 (\$1,250 for a

married person filing separately) or fraction thereof by which a taxpayer's AGI exceeds the applicable threshold amount. The phaseouts are as follows:

	<u>2008 Threshold AGI</u>	<u>2009 Threshold AGI</u>
Single individuals	\$ 159,950	\$ 166,800
Joint returns or qualifying widow(er)	239,950	250,200
Heads of household	199,950	208,500
Married individuals filing separately	119,975	125,100

#### **DEPENDENCY EXEMPTION FOR STUDENTS**

A taxpayer may not claim a dependency exemption for a dependent who is a student who reaches 24 years of age at the close of the calendar year and whose gross income exceeds the exemption amount (\$3,500 in 2008 and \$3,650 in 2009).

#### **ADOPTION CREDIT**

The maximum credit for qualified adoption expenses was \$11,650 for 2008, and will be \$12,150 for 2009. For 2008, the credit is \$11,650 (\$11,390 for 2007) with respect to the adoption of a child with special needs, and is allowed regardless of the amount of qualified adoption expenses (if any) paid 7 and \$11,650 for 2008 without such assistance being included in the employee's income. For 2008, the amount excludable from an employee's gross income begins to phase out for taxpayers with modified adjusted gross income in excess of \$174,730 and is completely phased out for taxpayers with modified adjusted gross income of \$214,730. For 2009, the phaseout range is between \$182,180 and \$222,180.

#### **CHILD TAX CREDIT**

Taxpayers who have qualifying children under age 17 are entitled to a credit of \$1,000 per child for 2006 through 2010. The credit decreases to \$500 per qualifying child beginning in 2011. A qualifying child is an individual for whom the taxpayer may claim a personal exemption.

#### **FIRST-TIME HOMEBUYERS TAX CREDIT**

First-time homebuyers can take advantage of a new tax credit available for a limited time. The credit applies to primary home purchases between April 9, 2008, and June 30, 2009. Normally, this tax credit must be paid back in equal payments over 15 years. The credit is 10 percent of the purchase price of the home, with a maximum available credit of \$7,500 for either a single taxpayer or a married couple filing jointly. First-time homebuyers are those who have not owned a home in the three years prior to a purchase.

**TAX RETURN FILING REQUIREMENTS**

**CHART A – FOR MOST PEOPLE**

<b>IF YOUR FILING STATUS IS...</b>	<b>AND AT THE END OF 2008 YOU WERE*...</b>	<b>THEN FILE A RETURN IF YOUR GROSS INCOME** WAS AT LEAST...</b>
Single	under 65	\$ 8,950
	65 or older	10,300
Married filing jointly***	under 65 (both spouses)	\$17,900
	65 or older (one spouse)	18,950
	65 or older (both spouses)	20,000
Married filing separately	any age	\$ 3,500
Head of household	under 65	\$11,500
	65 or older	12,850
Qualifying widow(er) with dependent child	Under 65	\$14,400
	65 or older	15,450

\* If you were born on January 1, 1944, you are considered to be age 65 at the end of 2008.

\*\* **Gross income** means all income you received in the form of money, goods, property, and services that is not exempt from tax, including any income from sources outside the United States (even if you can exclude part or all of it). Do not include any social security benefits unless (a) you are married filing a separate return and you lived with your spouse at any time in 2008 or (b) one-half of your social security benefits plus your other gross income is more than \$25,000 (\$32,000 if married filing jointly). If (a) or (b) applies, see the instructions for lines 20a and 20b to figure the taxable part of social security benefits you must include in gross income.

\*\*\* If you did not live with your spouse at the end of 2008 (or on the date your spouse died) and your gross income was at least \$3,500, you must file a return regardless of your age.

**CHART B – FOR CHILDREN AND OTHER DEPENDENTS**

If your parent (or someone else) can claim you as a dependent, use this chart to see if you must file a return.

In this chart, **unearned income** includes taxable interest, ordinary dividends, and capital gain distributions. **Earned income** includes wages, tips and taxable scholarship and fellowship grants. **Gross income** is the total of your unearned and earned income.

**Single dependents.** Were you **either** age 65 or older **or** blind?

**No.** You must file a return if **any** of the following apply:

- Your **unearned income** was over \$900.
- Your **earned income** was over \$5,450.
- Your **gross income** was more than the **larger** of –
  - \$900 or
  - Your earned income (up to \$5,150) plus \$300.

**Yes.** You must file a return if **any** of the following apply:

- Your unearned income was over \$2,250 (\$3,600 if 65 or older **and** blind).
- Your earned income was over \$6,800 (\$8,150 if 65 or older **and** blind).
- Your gross income was more than –

**The larger of:**

- \$2,250 (\$3,600 if 65 or older **and** blind), or
- Your earned income (up to \$5,150)

**Plus**

}

**This amount:**

\$1,650 (\$3,000 if 65 or older **and** blind)

**Married dependents.** Were you **either** age 65 or older **or** blind?

- No.** You must file a return if **any** of the following apply:
- Your unearned income was over \$900.
  - Your earned income was over \$5,450.
  - Your gross income was at least \$5 and your spouse files a separate return and itemizes deductions.
  - Your gross income was more than the **larger** of –
    - \$8900 or
    - Your earned income (up to \$5,150) plus \$300.

- Yes.** You must file a return if **any** of the following apply:
- Your unearned income was over \$1,950 (\$3,000 if 65 or older **and** blind).
  - Your earned income was over \$6,500 (\$7,550 if 65 or older **and** blind).
  - Your gross income was at least \$5 and your spouse files a separate return and itemizes deductions.
  - Your gross income was more than –
 

<b>The larger of:</b>	<b>Plus</b>	<b>This amount:</b>
• \$1,950 (\$3,000 if 65 and blind), or	}	\$1,350 (\$2,400 if 65
• Your earned income (up to \$5,150)	}	or older <b>and</b> blind)

**CHART C – OTHER SITUATIONS WHEN YOU MUST FILE**

You must file a return if any of the four conditions below apply for 2008.

1. You owe any special taxes, including any of the following:
  - Alternative minimum tax,
  - Additional tax on a qualified plan, including an individual retirement arrangement (IRA), or other tax-favored account. But if you are filing a return only because you owe this tax, you can file **Form 5329** by itself,
  - Household employee taxes. But if you are filing a return only because you owe this tax, you can file **Schedule H** by itself,
  - Social security and Medicare tax on tips you did not report to your employer,
  - Write-in taxes, including uncollected social security and Medicare or RRTA tax on tips you reported to your employer or on group-term life insurance and additional tax on health savings account distributions,
  - Recapture taxes,
  - Additional tax on health savings account from Form 8889, Part III.
2. You received any advance earned income credit (EIC) payments from your employer. These payments are shown in Form W-2, box 9.
3. You had net earnings from self-employment of at least \$400.
4. You had wages of \$108.28 or more from a church or qualified church-controlled organization that is exempt from employer social security and Medicare taxes.

**INTEREST DEDUCTION LIMITATION**

With the exception of qualified residence interest, individuals are limited with respect to the deductibility of consumer interest and investment interest; however, see discussion of deduction of interest on education loans below. Such interest is paid or accrued on acquisition indebtedness or home equity indebtedness with respect to a qualified residence of the taxpayer. Acquisition indebtedness means debt (1) which is incurred in acquiring, constructing or substantially improving a qualified residence, and (2) which is secured by a qualified residence. A qualified residence is the taxpayer's principal residence plus one other residence. The aggregate amount of acquisition indebtedness is limited to \$1,000,000 (\$500,000 with respect to a married individual filing separately). In no event can the acquisition indebtedness exceed the cost of the residence and the improvements thereto. Home equity indebtedness is debt (other than acquisition indebtedness) that is secured by the taxpayer's principal or second residence and does not exceed the fair market value of such qualified residence reduced by the amount of acquisition indebtedness for such residence. Interest on qualifying home equity indebtedness is deductible even though the proceeds of the indebtedness are used for personal expenditures. The aggregate amount of home equity

indebtedness is limited to \$100,000 (\$50,000 with respect to a married individual filing separately). Consumer interest generally includes all interest other than interest incurred in a trade or business, investment interest, and qualified residence interest. It includes interest on automobile loans, educational loans and credit card balances, to the extent incurred for personal purposes, as well as interest on Federal, state, and local tax deficiencies. Consumer interest is totally nondeductible.

Investment interest is limited to net investment income. Any disallowed investment interest may be carried forward. To the extent that passive losses are deductible, such losses reduce net investment income. Investment income will not be reduced by the portion of a passive loss attributable to rental real estate activities in which the taxpayer actively participates. The percentages for the phase-in period are the same as those utilized for consumer interest.

### INTEREST ON EDUCATION LOANS

A qualified education loan is any debt incurred to pay the qualified higher education expenses (see below) of the taxpayer, the taxpayer's spouse, or an individual who was the taxpayer's dependent at the time that the debt is incurred and must be attributable to education furnished during a period during which the recipient was an eligible student. An eligible student, in general, means an individual who is enrolled or accepted for enrollment in a degree, certificate, or other program leading to a recognized credential at an eligible institution of higher education. In order to qualify for the deduction, the education expenses must be attributable to a period during which the student was attending an eligible educational institution at least half time, meaning one-half of the normal full-time work load for the course of study that the student is pursuing. For purposes of the deduction, a qualified education loan also encompasses debt used to refinance the qualified education loan. However, any debt owed to a related party is not a qualified education loan.

For 2008, payees that receive payments of interest of \$600 or more on a qualified education loan must file Form 1098-E with the IRS by March 2, 2009, if filed on paper or magnetic media, or by March 31, 2009, if filed electronically. A statement containing the same information as the Form 1098-E must be furnished to the payee by February 2, 2009.

Qualified higher education expenses are the costs of attending an eligible educational institution (see below), less adjustments for certain nontaxable educational benefits. The costs of attendance are generally the costs of tuition, fees, room and board, and related expenses, such as books and supplies. The adjustments are for amounts excluded from gross income with respect to: (1) employer-provided educational assistance; (2) U.S. savings bond interest used to pay higher education costs; (3) education individual retirement accounts; and (4) allowances or payments such as qualified scholarships, educational assistance allowances, and any other excludable payments for education expenses that do not constitute a gift or inheritance.

An eligible education institution includes post-secondary educational institutions and certain vocational schools defined by reference to section 481 of the Higher Education Act of 1965. For purposes of this interest deduction, the term also includes an institution conducting an internship or residency program leading to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility which offers postgraduate training.

The maximum deductible amount of interest is \$2,500 for 2008 and 2009. The maximum deduction is reduced when modified adjusted gross income exceeds \$55,000 (\$115,000 for joint returns [\$120,000 on joint returns for 2009]) and is completely eliminated when modified AGI is \$70,000 (\$145,000 for joint returns [\$150,000 for joint returns for 2009]).

**EMPLOYEE BUSINESS EXPENSES, INVESTMENT EXPENSES AND OTHER MISCELLANEOUS DEDUCTIONS**

Certain miscellaneous expenses, including unreimbursed employee business expenses, are deductible only to the extent the total of all such expenses exceeds 2% of adjusted gross income. Items such as union and professional dues, qualifying educational expenses, travel, meals, entertainment expenses and employment-related moving expenses are included in this category. With respect to entertainment expenses, the 50% limitation on their deductibility must be taken into account prior to the application of the 2% floor. Expenses related to the production of income or maintaining income-producing property (other than rental or royalty property), not including interest and real estate taxes, as well as tax preparation fees, the unreimbursed cost of periodicals, as well as the business use of a personal automobile are subject to the 2% floor.

**CLUB DUES, TRAVEL EXPENSES, MEALS AND ENTERTAINMENT**

No deduction is allowed for club dues or for travel expenses of a spouse, dependent or other individual accompanying person on business travel unless such (1) person is a bona fide employee of the person paying or reimbursing expenses, (2) travel of spouse, dependent or other person is for a bona fide business purpose, and (3) expense for spouse, dependent or other person would otherwise be deductible.

Absent a showing that a principal purpose of the organization is to conduct entertainment activities for members or their guests or to provide members or their guests with access to entertainment facilities, business leagues, trade associations, chambers of commerce, boards of trade, real estate boards, professional organizations (such as bar associations and medical associations), and civic or public service organizations will not be treated as clubs organized for business, pleasure, recreation or other social purpose.

Meals and entertainment expenses are deductible to the extent of 50%.

**LIMITATION ON ITEMIZED DEDUCTIONS**

Otherwise allowable deductions (other than medical expenses, casualty and theft losses, and investment interest – all of which are subject to separate limitations) are reduced by an amount equal to 3% of AGI in excess of \$159,950 for 2008 and \$166,800 for 2009 for all returns other than married filing separately. For married filing separately, the amount is \$79,975 for 2008 and \$83,400 for 2009.

### **MOVING EXPENSES**

Deductible moving expenses do not include (1) costs of meals while traveling and while living in temporary quarters near a new workplace, nor (2) costs of selling (or settling an unexpired lease on the old residence) and buying (or acquiring a lease in) the new residence. (Closing costs continue to reduce taxable gain on sale of a residence.) In addition, a deduction will be allowed only if the new place of work is at least 50 miles farther from the taxpayer's former residence than the taxpayer's former residence was from the former place of work. Moving expenses are deductible in arriving at AGI, rather than being itemized deductions subject to the disallowance rule applicable to miscellaneous itemized deductions. Qualified moving expenses reimbursed by an employer will be excludable from an employee's gross income as a qualified fringe benefit. (Includes payments made directly to a third party and services furnished in kind. Such excludable payments are reported in Box 12 of Form W-2 and are denoted as Code P.)

### **REIMBURSEMENT OF EMPLOYEE BUSINESS LODGING, MEALS AND TRAVEL**

#### **Accountable Plans**

To be deductible as an adjustment to gross income (rather than as an itemized deduction subject to the 2% AGI floor), the reimbursement by the employer must be pursuant to an "accountable plan." Such a plan, in addition to providing for reimbursement of business-related expenses, must require the employee to substantiate the amount, time, place and business purpose of the expenditure, as well as require the employee to return to the employer any amounts paid in excess of substantiated expenses within a reasonable period of time after the advance is received. An adequate accounting can be satisfied by using per diem allowances, or by submitting the appropriate documentation.

#### **Reporting of Reimbursements/Expenses**

Reimbursement or expense allowance equal to expenses: Nothing is reported on W-2 and employee reports nothing on his tax return.

Reimbursement of expenses using a per diem or mileage allowance in excess of those established by IRS: Amount deemed substantiated (not in excess of IRS rates) is reported in Box 12 with Code L entered. Amounts in excess of IRS rates are entered in Box 1.

Reimbursement or expense allowance less than expenses: If under an accountable plan, no amount should be reported as wages on Form W-2 or on the employee's tax return. If the employee can substantiate the reimbursed expenses as well as those in excess thereof, such expenses may be claimed as an itemized deduction subject to the 2% of AGI floor. Form 2106 must be completed.

#### **Non-Accountable Plans**

Entire reimbursement (not just excess) is to be reported on Form W-2. An itemized deduction for substantiated expenses can be claimed subject to the 2% AGI floor.

**Utilization of Per Diem Allowances in Conjunction with Accountable Plans**

Instead of substantiating actual travel-related meal and lodging costs, optional IRS per diem allowances may be used. In addition to meeting the “accountable plan” requirements, the allowance must be:

- Paid for ordinary and necessary business expenses in connection with employee’s travel away from home.
- Reasonably calculated not to exceed the amount of expenses or anticipated expenses.
- Paid at the applicable federal per diem rate or other IRS-specified rate or schedule.

If the per diem allowance exceeds the federal rates, the excess must be reported as wages on Form W-2 and is subject to income tax withholding, social security tax, Medicare tax and Federal Unemployment tax.

**INCOME TAXATION OF SOCIAL SECURITY BENEFITS**

The includable portion is 85% paid to couples with modified AGI above \$44,000, and individuals with modified AGI above \$34,000. Modified AGI is equal to AGI plus tax-exempt interest plus 50% of Social Security benefits. The 50% inclusion will apply to modified AGI between \$25,000 and \$34,000 for individuals (\$32,000 and \$44,000 for joint filers).

If modified AGI exceeds \$34,000 (\$44,000 for joint filers), gross income will include the lesser of:

- a. 85% of Social Security benefits or
- b. Sum of 85% of excess of modified AGI over the new threshold amounts (\$34,000 for individuals or \$44,000 for joint filers) plus smaller of
  - (i) Amount included under current law; or
  - (ii) \$4,500 for individuals (\$6,000 for married filing jointly).

For married taxpayers filing separately, gross income includes the lesser of 85% of the taxpayer’s Social Security benefits or 85% of the taxpayer’s modified AGI.

**INCOME TAXATION OF MINOR CHILDREN (“KIDDIE TAX”)**

The Small Business and Work Opportunity Tax Act of 2007, P. L. 110-28, did not change the basics of the kiddie tax, but broadened its application to include more children. For years, the kiddie tax only applied to the unearned income of a child under age 14. But in 2006, Congress extended this tax to reach those under age 18 at year end. In the recent tax bill, effective with the 2008 tax year, the kiddie tax has expanded in a very complex manner to potentially apply to children under age 24 as of year end. The extended version of the kiddie tax targets two groups

who have attained age 18: 1) those who reach their 18th birthday during the year, and 2) those in full-time student status for at least five months of the year who attain their 19th through 23rd birthday during the tax year.

There is now a further test for those in the 18-23 age groups. The kiddie tax only applies if the earned income of the child (wages and self-employment income) does not exceed one-half of the child's support for the tax year. In calculating support, amounts covered by scholarships are not taken into account.

The Kiddie Tax rules provide that investment income in excess of \$1,800 for 2008 will be taxed at the higher of the parent's rate or the child's rate. For this purpose, investment income is income other than earned income.

### **EDUCATION SAVINGS BONDS**

Interest on U.S. Series E.E. savings bonds is excludable from gross income if the redeemed bonds are utilized for the payment of qualified educational expenses (net of scholarships, fellowships and tuition reductions) at an institution of higher learning. The exclusion is equal to the lesser of (1) the amount that otherwise would be includable in gross income, but for this provision, or (2) the amount of such higher education expenses.

The exclusion is available only to persons who purchased the bonds, after age 24, and who are the sole owners, or who own such bonds jointly with their spouse. It is not available to an owner of a bond purchased by another person or parent and put in the name of a child or another dependent of the taxpayer. Bonds must be redeemed by the owner, rather than transferred to the educational institution. Subject to a phaseout rule, all interest is excludable if the qualified education expenses exceed the redemption amount (principal and interest).

If the redemption amount exceeds qualified education expenses, the exclusion is equal to the ratio of qualified education expenses to the redemption amount of all Series E.E. bonds redeemed during the year. For 2008, the phaseout range is between \$100,650 and \$130,650 (adjusted gross income) for joint returns and between \$67,100 and \$82,100 for other returns. For 2009, the phaseout range will be between \$104,900 and \$134,900 (adjusted gross income) for joint returns and between \$69,950 and \$84,950 for other filers. Form 8815 is utilized to determine the exclusion. Married taxpayers filing separately are not eligible for the exclusion.

### **INDIVIDUAL RETIREMENT ACCOUNTS**

#### **Maximum Annual Contribution (other than Education IRAs)**

For 2009, the contribution limit is \$5,500. Individuals age 50 and over are eligible to make additional \$1,000 catch-up contributions for tax years beginning after 2005.

### **Deductible**

*Eligibility* — Individuals who do not take part in employer retirement plans, regardless of income. For individuals with such plans who file jointly, the adjusted gross income (AGI) phaseout range is from \$85,000 to \$105,000 for 2008 and thereafter. For single filers and heads of households the phaseout range for 2008 will be \$53,000–\$63,000.

*Tax Rules* — Contributions and earnings are not taxed until withdrawal. Distributions before age 59½ are generally subject to a 10 percent penalty. Exceptions to the penalty apply to withdrawals for education and withdrawals of up to \$10,000 for first-time home buying. Distributions must begin at age 70½.

### **Roth**

*Eligibility* — Joint filers whose AGI is less than \$166,000 (phasing out at \$176,000); single filers whose AGI is less than \$105,000 (phasing out at \$120,000) for 2009.

*Tax Rules* — Contributions are after tax. Earnings are not taxed, even after withdrawal, as long as the account is 5 years old and the account holder is at least 59½, dead or disabled. The education and home-purchase exceptions to the 10 percent penalty also apply. Distributions need not begin at age 70½.

*Special Rollover Rule* — A qualified rollover contribution to a Roth IRA from a non-Roth IRA is not permissible if the taxpayer's adjusted gross income exceeds \$100,000 or the taxpayer is a married individual filing separately.

### **Reconversions**

*Corrections of erroneous conversions of Regular IRAs to Roth IRAs* — In order to assist individuals who erroneously convert regular IRAs into Roth IRAs, or who otherwise wish to change the nature of an IRA contribution, the IRS Restructuring and Reform Act of 1998 provides that (except as provided by regulations) contributions to an IRA and earnings on those contributions may be transferred in a trustee-to-trustee transfer from any IRA to another IRA by the due date for the taxpayer's return for the year of the contribution (including extensions). Any such transferred contributions will be treated as if contributed to the transferee IRA (and not to the transferor IRA).

Any transfer of contributions must be accompanied by any net income allocable to the contributions. Also, such transfers are permitted only if no deduction was allowed with respect to the contribution to the transferor plan.

### **Nondeductible**

*Eligibility* — Anyone with enough income to cover the contribution.

*Tax Rules* — Contributions are after tax. Earnings are taxable upon withdrawal. Other rules are similar to those of deductible IRAs.

### **Spousal**

*Eligibility* — A working spouse who is not covered by an employer-sponsored plan may have a deductible IRA, even if his/her spouse is in an employer-sponsored plan, if AGI is less than \$159,000 (phasing out at \$169,000). For 2008 and 2009, a nonworking spouse and his/her working spouse may contribute up to \$10,000 to an IRA, \$5,000 for each person, as long as the working spouse earns at least \$10,000.

*Tax Rules* — An eligible working spouse may choose either a deductible or a Roth IRA. An eligible nonworking spouse may have a deductible, Roth, or nondeductible IRA, depending on the couple's income and retirement plans.

### **QUALIFIED RETIREMENT PLANNING SERVICES**

Employer-provided qualified retirement planning services are excludable from employees' gross wages. This exclusion applies to qualified retirement planning services offered to employees and their spouses by employers sponsoring qualified retirement plans for years beginning in 2002. Qualified employer plans include plans that are qualified under 401(a), 403(b) annuity contracts, simplified employee pensions (SEPs), and SIMPLE retirement accounts.

“Qualified retirement planning services” is defined as “any retirement planning advice or information provided to an employee and his spouse by an employer maintaining a qualified employer plan.” The exclusion applies to highly compensated employees only if qualified retirement planning services are available on substantially the same terms to all employees of the group who normally receive information and education about the plan. The provision applies to overall retirement income planning by employees and their spouses, such as how the employer's plan fits into an employee's overall retirement income plan. The provision is not meant to include related services, such as tax preparation, accounting, legal or brokerage services.

### **EDUCATION INCENTIVE PROVISIONS**

#### **Education IRAs (Coverdell Education Savings Accounts)**

*Eligibility* — The contribution limit is \$2,000 and such contributions may be made until April 15 after the close of the applicable tax year. The AGI phaseout range is between \$190,000 and \$220,000 for joint filers, and between \$95,000 and \$110,000 for single filers. Permissible distributions include the payout of elementary and secondary school tuition or expenses (grades K-12), regardless of whether the school is public or private. Expenses that are covered include tutoring, acquisition of computer equipment, room and board, uniforms and extended day programs.

*Tax Rules* — Contributions are after tax. Earnings are not taxed, even after withdrawal, if used for qualifying educational expenses. Money not spent on education or rolled over to another

family member's account must be paid out to the beneficiary at age 30 and is generally subject to tax and a 10 percent penalty. An exception to the 30<sup>th</sup> birthday distribution requirement applies to individuals with special needs. The final date for making contributions is the due date of the return (not including extensions).

### **HOPE Scholarship Credit**

The HOPE Scholarship Credit provides a maximum allowable credit of \$1,800 per student for each of the first two years of post-secondary education. The HOPE Credit allows taxpayers a 100 percent credit per eligible student for the first \$1,200 of tuition expenses (room, board and books are not eligible expenses), and a 50 percent credit for the second \$1,200 of tuition paid. The maximum HOPE Credit is \$1,800 for 2008.

### **Lifetime Learning Credit**

The Lifetime Learning Credit provides a credit of 20 percent of tuition expenses (room, board and books are not eligible expenses). Whereas the HOPE Credit is allowed per student, the Lifetime Learning Credit is calculated per taxpayer and does not vary based on the number of students in the taxpayer's family. The Lifetime Learning Credit is also available for both undergraduate and graduate degree expenses. The credit is computed on the amount of tuition paid by the taxpayer and is available for the first \$10,000 of tuition. Unlike the Hope Scholarship, the Lifetime Learning tax credit may be claimed for an unlimited number of years.

### **Income Limitations: Rules Applicable to Both Credits**

Both credits are available for qualified tuition and related expenses incurred for the taxpayer, the taxpayer's spouse or the taxpayer's dependent. The allowable credits are reduced if modified adjusted gross income exceeds certain amounts. For 2008, the phaseout commences at \$487,000 (\$96,000 to \$116,000 for joint filers), and for 2009 commences at \$50,000 (\$100,000 to \$200,000 for joint filers). Qualified tuition and related expenses utilized in conjunction with the HOPE Credit cannot be taken into account with respect to Lifetime Learning Credit. Neither credit is available with respect to employer-paid educational expenses excluded from gross income, tax-free scholarships and fellowships or amounts deducted by students as business expenses. However, according to the legislative history, tuition expenses paid with loan proceeds are eligible for the credits in the payment year, not the year the loan is repaid. If tuition is paid during one tax year for an academic period that begins during the first three months of the following tax year, that academic period is treated as beginning during the year of payment.

### **Institutional Reporting Requirements**

The HOPE and Lifetime Learning Credits require eligible educational institutions to report to the IRS the amount of qualified tuition and related expenses received and/or reimbursed with respect to students. In addition, each student must receive a statement from the institution.

Information that must be reported includes the name, address and social security number of the student who made the payments, as well as the name, address and identification number of the school. In addition, there must also be an indication as to whether the student was enrolled in a graduate-level degree program. Schools may use the standards in the Higher Education Act to determine whether a student is enrolled full-time, half-time or less than half-time. This information is to be provided on Form 1098-T (to be filed with the IRS by March 2, 2009 if filed on paper) or on magnetic media, or March 31, 2009 if filed electronically. Recipients are to receive their copy by February 2, 2009.

### **Qualified Tuition Programs (QTP)**

A “qualified tuition program” includes certain prepaid tuition programs that are established and maintained by eligible private educational institutions. State-run QTP distributions will be excludable from gross income to the extent that they are used to pay for qualified higher education expenses; the exclusion will expand to QTPs established and maintained by non-state entities for distributions made in post-2003 tax years. Rules have been provided that coordinate the claim for education credits with distributions received from an education IRA and QTP in the same tax year. Rollovers among different programs will not constitute distributions, the definition of family members has been expanded, dollar amount limitations on room and board distributions were removed, and enrollment and attendance expenses of special needs students will constitute qualified higher education expenses.

Information with respect to New York’s College Savings Program is available at <https://uii.nysaves.s.upromise.com/> or by calling 1-877-NYSAVES (1-877-697-2837). Information about New Jersey’s program (NJBEST) can be obtained at <http://www.hesaa.org/> or by calling 1-877-4NJ-BEST (1-877-465-2378).

### **Coordination of Benefits**

The Hope and Lifetime Learning Credits can be claimed in the same year that a distribution from an Education IRA is made, provided the distribution is not used to cover the same expenses for which the education credits are claimed. In addition, contributions can be made to both an Education IRA and a qualified state tuition program in the same year for the same child without incurring a penalty.

### **College Tuition Deduction**

An above-the-line deduction (not subject to the limitations applicable to itemized deductions) for qualified higher education expenses is available. For 2008, the deduction is \$4,000 for taxpayers with adjusted gross income below \$65,000 (\$130,000 for joint filers). For 2008, single taxpayers with adjusted gross up to \$80,000 (\$160,000 for joint filers) may take a maximum deduction of \$2,000.

The deduction is not available if the Hope or Lifetime credits are utilized for the same student. It should also be noted that the foregoing credits phase out at AGI levels below those applicable

to the tuition deduction. Barring further Congressional action, this deduction will not apply to tax years beginning after 2009.

### **Education Expenses**

For 2008, taxpayers who are eligible educators can deduct as an adjustment to gross income up to \$250 in unreimbursed qualified expenses paid or incurred for books, supplies (other than nonathletic supplies for courses of instruction in health or physical education), computer equipment, and other equipment and materials used in the classroom. Eligible educators include teachers of kindergarten through grade 12, instructors, counselors, principals and aides in a school for at least 900 hours during a school year. After 2009, barring further Congressional action, these expenses will be deductible only as miscellaneous itemized deductions subject to the two-percent of adjusted gross income floor.

## **RETIREMENT AND EMPLOYEE BENEFIT PLANS**

### **QUALIFIED PLAN COST-OF-LIVING ADJUSTMENTS**

For 2009, the following dollar limitations will apply:

- Annual benefit under a defined benefit plan is \$195,000 (\$185,000 for 2008).
- Annual limitation for defined contribution plan is \$49,000 (\$46,000 for 2008).
- The limitation used in the definition of a highly compensated employee is \$110,000 for 2009 and \$105,000 for 2008).
- The maximum compensation that can be taken into account for purposes of contributions and/or benefits is \$245,000 (\$230,000 for 2008).

### **AGE 50 CATCH-UP CONTRIBUTION**

Individuals age 50 or older are entitled to make annual catch-up contributions. The catch-up is \$5,500 in 2009 and \$5,000 in 2008.

### **PORTABILITY**

As a general rule, eligible rollover distributions are permitted between qualified retirement plans, section 403(b) annuities, and section 457(b) plans.

**SECTION IRC 403(B) PLANS — TAX-SHELTERED ANNUITY PLANS**

**Section 403(b) Regulations**

The general effective date of the regulations is for taxable years beginning after December 31, 2008. There are some notable exceptions.

- Collectively bargained agreements where the 403(b) is directly affected or established as a result of the collectively bargained agreement being in place.
- Churches that sponsor 403(b)s where the obligation to either establish the 403(b) or amend the 403(b) plan itself is an outcome of a church convention.
- Certain governmental 403(b)s for limited universal availability purposes.

**Highlights**

***Written Plan Requirement***

Under the new 403(b) Final Regulations, the 403(b) program is required to be maintained pursuant to a written defined contribution plan, which plan, both in form and operation, satisfies the 403(b) requirements and contains all the terms and conditions for eligibility, limitations and benefits under the plan.

***Extension of Year-End Deadline for 403(b) Plan Sponsors***

On December 11, 2008, the IRS announced the extension of the deadline for 403(b) plan sponsors to adopt new written plans or amend their existing written plans from January 1, 2009, to December 31, 2009. The IRS will consider 403(b) plans as meeting the requirements of §403(b) and the final regulations for 2009 if the plan sponsor:

- adopts or amends a written plan by December 31, 2009 that is intended to satisfy §403(b) (and the final regulations) effective January 1, 2009;
- operates the plan during 2009 with a reasonable interpretation of §403(b), taking into account the final regulations; and
- makes its best effort to retroactively correct by the end of 2009, any operational failure occurring in 2009 to conform to the written plan, based on the general principles of correction in section 6 of Rev. Proc. 2008-50, the revenue procedure for the IRS's Employee Plans Compliance Resolution System.

The IRS plans to issue further guidance on 403(b) plans, including a revenue procedure establishing programs for 403(b) plans to obtain IRS approval of their plan document and allowing them to correct plan provisions for years after 2009 by making remedial amendments.

### *Elective Deferrals*

403(b) elective deferrals must generally be made available to all employees, and other contributions must satisfy the general nondiscrimination requirements applicable to qualified plans. All elective deferrals must satisfy the section 402(g) deferral limits (\$15,500 for 2008), and the overall section 415 annual addition limit. 403(b) plans also must satisfy minimum required distribution rules, incidental benefit requirements and rollover distribution rules. The new regulations explicitly state that 403(b) elective deferrals are limited to contributions made pursuant to a cash or deferred election.

The 403(b) and 401(k) elective deferral rules are similar in terms of the frequency with which a deferral election can be made, changed or revoked, including automatic enrollment. At a minimum, employees must have an annual opportunity to make, change or revoke a deferral election.

### *Universal Availability Rule*

In general, universal availability now applies separately to each entity employing a 403(b) program. If any employee who could be excluded from participating in the 403(b) program is able to participate, then all employees within that excludable category must be allowed to participate.

The nondiscrimination and universal availability requirements do not apply to a Section 403(b) contract purchased by a church. Additionally, the new regulations state that the following categories of employees are exempt from the universal availability rule:

- nonresident aliens
- students performing services described in section 3121(b)(10)
- employees who normally work fewer than 20 hours per week
- employees who can participate in an eligible governmental plan under
- Section 457(b) permitting contributions or deferrals, or a plan offering
- 401(k) deferrals

Employers also must provide employees with an annual notice explaining the “effective opportunity” to make or change their contribution to the plan. For many plan sponsors, this means assuming a more active role in communicating with employees.

### *Catch-Up Contributions*

A 403(b) program may provide additional catch-up contributions for participants who are age 50 by the end of a calendar year (up to \$5,000 for 2008). Additionally, employees of a qualified organization who have at least 15 years of service are entitled to a special 403(b) catch-up limit of up to \$3,000. A participant who is eligible for both types of contributions must first satisfy the special 403(b) catch-up limit before using the age 50 catch-up provision.

### *Timing of Distributions*

Neither employer contributions nor elective deferrals may be paid to a participant from a 403(b) custodial account before the participant has a severance from employment, becomes disabled or turns age 59½. Hardship distributions may not include earnings. Amounts attributable to elective deferrals may not be paid to a participant from a group annuity contract before he or she has a severance from employment, becomes disabled, experiences a hardship or turns age 59½. Distributions of amounts other than elective deferrals or after tax amounts may not be made to a participant from an annuity contract before he or she has a severance from employment or a stated event occurs. The regulations also include a number of exceptions to the timing of distributions.

### *Transfers and Exchanges*

The new transfer rule brings the 403(b) plan in line with the way transfers occur in 401(k) plans. Plan employers are allowed to direct or authorize the transfer, and the employer must enter into an agreement with the issuer of the other contract under which the employer and the issuer will provide each other with certain information. This includes information concerning the participant's employment as well as information that takes into account other Section 403(b) contracts or qualified employer plans, such as whether a severance from employment has occurred and whether the hardship withdrawal rules in the regulations are satisfied or loan rules are followed.

### *Plan Termination*

The new regulations now allow 403(b) plans to be terminated. All accumulated benefits under the plan must be distributed to participants and beneficiaries as soon as administratively possible after termination of the plan.

### *Form 5500 Reporting and Independent Audit Requirements*

#### *General Filing Requirements*

- **Large Plans** — ERISA-covered plans with 100 or more eligible participants generally will be required to file audited financial statements beginning with their 2009 Form 5500 filing as a "large plan."
- **Small Plans** — ERISA-covered plans with fewer than 100 eligible participants may be able to use a new Short Form 5500 as a "small plan." In years subsequent to the initial filing year, a plan that covers between 80 and 120 eligible participants at the beginning of the plan year may elect to complete the Form 5500 in the same category ("large plan" or "small plan") as was filed for the previous year.

*General Exemptions From Audit Requirements*

ERISA-covered plans with fewer than 100 eligible participants at the beginning of the plan year that file the form as a “small plan” are generally exempt from the audit requirement. DOL regulations in 29 CFR 2520.104-46 establish conditions for small plans to be exempt from the general audit requirement under Title I of ERISA. In addition to being a small plan filing the Schedule I, there are three basic requirements for a small plan to be eligible for the audit waiver:

- As of the last day of the preceding plan year at least 95% of a small pension plan’s assets must be “qualifying plan assets” or, if less than 95% are qualifying plan assets, then any person who handles assets of a plan that do not constitute “qualifying plan assets” must be bonded in an amount that at least equal to the value of the “non-qualifying plan assets” he or she handles. (“Qualifying assets” include investment and annuity contracts issued by any insurance company qualified to do business under the laws of a state.)
- The plan must include certain information in the Summary Annual Report(SAR) furnished to participants and beneficiaries in addition to the information ordinarily required.
- In response to a request from any participant or beneficiary, the plan administrator must furnish without charge copies of statements the plan receives from the regulated financial institutions holding or issuing the plan’s “qualifying plan assets” and evidence of any required fidelity bond.

In years subsequent to the initial filing year, a plan that files the Form 5500 as a “small plan” pursuant to the 80/120 rule is not required to have an audit of their financial statements. The Department and Labor advised that 403(b) plans that were eligible to file as a small plan in the previous year and that have participant counts of fewer than 121 in the beginning of the 2009 plan year can file as small plans under the new filing rules.

**DEFERRED COMPENSATION PLANS OF TAX-EXEMPT ORGANIZATIONS**

**Eligible Section 457(b) Plans**

TRA '86 subjects tax-exempt employers to the provisions which govern unfunded non-qualified deferred compensation arrangements of state and local governments. Such plans do not require a substantial risk of forfeiture to preclude current taxation.

Deferrals pursuant to eligible section 457(b) arrangements are not coordinated with elective deferrals under 403(b) arrangements. Elective deferrals under such plans were \$15,500 for 2008, and as is the case with 403(b) arrangements, will be \$16,500 for 2009.

**Interaction of 457(b) and 403(b) Deferral Provisions**

- For 2008, the combined elective deferral limit under 403(b) and 457(b) was \$31,000 and will increase to \$33,000 for 2009.

- For persons over 50 years of age, the 2008 deferral limit was \$36,000 (the age 50 catch-up provision is not available to employees of section 501(c)(3) organizations with respect to 457(b) plans), and will increase to \$38,000 for 2009.
- For persons over 50 years of age, and 15 years of service with the same employer, the deferral limit for 2008 is \$41,000. For 2009, the limit is \$43,000.

### **Ineligible Plans (Section 457(f))**

So-called “top hat” plans can provide deferrals in excess of the section 457(b) limits for highly compensated executive employees. Such plans involve substantial risks of forfeiture and must be individually designed.

Section 409A is generally effective with respect to all compensation deferred under a Section 457(f) plan, grandfathered, or church plan that is subject to a substantial risk of forfeiture as of January 1, 2005. Plan amendments could be made until December 31, 2005, if the plan is administered in “good faith” compliance throughout 2005. The regulations extend the amendment period and “good faith” compliance period to December 31, 2006. The regulations are intended solely as guidance with respect to the application of Section 409A to Section 457(f) arrangements, and should not be relied upon with respect to Section 457(f).

The IRS issued guidance under section 409A of the Internal Revenue Code including interim guidance on reporting and wage withholding requirements.

On December 10, 2008, the IRS released Notice 2008-115 which provides interim guidance concerning reporting and wage withholding requirements for amounts includible in income under Internal Revenue Code section 409A. At some point in the future, the IRS will require that section 409A compliant deferrals for the year (and possibly interest deferred in the year) be reported to the IRS (this would be information reporting on Form W-2, Box 12, Code Y, rather than taxable reporting). However, the Notice makes clear that the Code Y reporting requirement for deferred compensation will not be required until after section 409A income inclusion regulations are finalized.

Thus, at least for 2008 and likely all of 2009, employers do not need to report accrued deferred compensation that satisfies section 409A. The Notice also provides guidance to service providers on income tax reporting and tax payment requirements for amounts includible in gross income because of a failure to satisfy section 409A. If a payment does not satisfy section 409A and is not timely corrected under the new correction program described below, at least the distribution and possibly all amounts deferred under the plan for that individual are reported as taxable (as soon as vested) and are subject to federal income tax and FICA withholding and the employer reports the failure on Form W-2, Box 12, Code Z. The IRS then will collect the 20-percent additional income tax, arising because of a section 409A failure, from the employee.

**CORRECTIONS OF QUALIFIED RETIREMENT PLANS AND TAX-SHELTERED ANNUITIES**

The Internal Revenue Service has issued comprehensive guidance for sponsors of retirement plans intended to satisfy the requirements of section 403(b) plans and qualified plans. (Rev. Proc. 2008-50). This revenue procedure updates the comprehensive system of correction programs for sponsors of retirement plans that are intended to satisfy the requirements of section 401(a), section 403(a), or section 403(b) of the Internal Revenue Code (the "Code"), but that have not met these requirements for a period of time. This system, the Employee Plans Compliance Resolution System ("EPCRS"), permits plan sponsors to correct these failures and thereby continue to provide their employees with retirement benefits on a tax-favored basis. The components of EPCRS are the Self-Correction Program ("SCP"), the Voluntary Correction Program ("VCP"), and the Audit Closing Agreement Program ("Audit CAP").

**Labor Department Reporting and Disclosure Guide for Employee Benefit Plans**

The U.S. Department of Labor's Employee Benefits Security Administration (EBSA) has issued **Reporting and Disclosure Guide for Employee Plans** ([www.dol.gov/ebsa/pdf/rdguide.pdf](http://www.dol.gov/ebsa/pdf/rdguide.pdf)). The guide provides assistance to employers, plan sponsors and service providers.

**WITHHOLDING ON RETIREMENT PLAN DISTRIBUTIONS**

Rollovers from qualified retirement plans and section 403(b) annuities are subject to mandatory 20 percent federal withholding, unless the distributee elects to have the distribution transferred directly to an "eligible retirement plan" (includes an IRA). Such direct transfers are referred to as "direct rollovers." In conjunction with the imposition of mandatory withholding, the law has been broadened to permit most retirement plan distributions to qualify as "eligible rollover distributions". The following payments will not qualify as eligible rollovers:

- Substantially equal periodic payments made over the life or life expectancy of the employee (or the employee and the employee's designated beneficiary) or for a specified period of 10 years or more.
- Distributions to the extent they are minimum required distributions.
- Nontaxable distributions.

Ineligible rollovers are not excludable from current income taxation and are not subject to mandatory 20 percent withholding. Withholding is not required if distributions from a plan during the year do not exceed \$200 (employers have the discretion to aggregate payments from more than one plan in determining whether the \$200 floor is reached).

To be in compliance with the law, distributees must be provided with the appropriate notice within 30-90 days of the initial payment date. The IRS has released a model notice which may be utilized. Employees must be permitted to elect a direct rollover for only a portion of the eligible rollover distribution (the balance being received directly) if the rollover amount is at least \$500.

The regulations issued by the IRS provide that an employer may reasonably rely on information provided by the employee. They also permit an employer to make a direct rollover for an employee by any reasonable means of delivery to an eligible retirement plan. This includes delivery of a check to the eligible retirement plan by the employer, so long as the check is negotiable solely by the trustee of the recipient plan.

Example:

Check to IRA

[Name of Trustee] as trustee of the Individual Retirement Account of [Name of Employee].

Check to Plan

Trustee of [Name of Plan] for the benefit of [Name of Employee]

It should be kept in mind that if a direct rollover is not made, and therefore there is the mandatory 20 percent withholding, the distributee would have to rollover the gross amount (not just the amount net of the 20 percent withheld) in order to avoid taxation on the amount equal to the 20 percent withheld.

## **EMPLOYEE BENEFITS**

### **NONDISCRIMINATION RULES APPLICABLE TO EMPLOYEE BENEFIT PLANS**

The rules applicable to employee welfare benefit plans prior to TRA '86 are applicable. The plans involved and the nondiscrimination rules applicable to each are as follows:

#### **INSURED ACCIDENT AND HEALTH PLANS**

There are no nondiscrimination rules. Therefore, both the value of the health insurance coverage provided to employees, as well as reimbursements under the coverage, are excludable from the employee's income.

#### **SELF-INSURED MEDICAL REIMBURSEMENT PLANS**

To qualify as nondiscriminatory, the plan must meet one of three eligibility tests, as well as satisfy a benefits test. The eligibility tests (only one of which must be met) are:

- Reimbursement must be provided to at least 70 percent of all nonexcludable employees; or
- The plan is actually offered to at least 70 percent of all nonexcludable employees and actually pays benefits to at least 80 percent of all eligible employees; or

- The plan is offered to a "fair cross-section" of employees (as determined by the IRS on the basis of all the facts and circumstances).

A plan will meet the benefits test only if the benefits provided to highly compensated individuals are also provided to all other employees. The benefits test is applied to the benefits subject to reimbursement under the plan rather than the actual benefit payments made under the plan. If a plan is discriminatory, highly compensated employees must include such excess reimbursements in their income.

**GROUP TERM LIFE INSURANCE**

The cost of group-term life insurance provided to an employee during any taxable period for inclusion in the employee's gross income is to be determined under the uniform premium table method.

Under this method, the cost of group-term life insurance protection in excess of the excludable amount is determined on the basis of uniform premiums computed on the basis of five-year age brackets. The amount that must be included under the uniform premium table is generally less than the actual cost of the insurance.

The cost of each month of coverage is computed by multiplying the number of thousands of dollars of insurance, computed to the nearest tenth, by the appropriate amount in the table. If group-term life insurance is provided for less than one month, the amount shown in the table is prorated over the month.

The uniform premium table follows:

**TABLE – UNIFORM PREMIUMS FOR \$1,000 OF GROUP-TERM LIFE INSURANCE PROTECTION**

AGE OF EMPLOYEE	COST PER \$1,000 OF PROTECTION FOR 1-MONTH PERIOD
Under 25	\$ .05
25 to 29	.06
30 to 34	.08
35 to 39	.09
40 to 44	.10
45 to 49	.15
50 to 54	.23
55 to 59	.43
60 to 64	.66
65 to 69	1.27
70 and above	2.06

A plan will be deemed to discriminate in favor of key employees unless all benefits available to key employees are also available to all other participants. Benefits will not be discriminatory merely because the amount of life insurance bears a uniform relationship to compensation. Key employees are officers who earn more than \$150,000 for 2008 (\$160,000 for 2009), all 5 percent owners and 1 percent owners who earn more than \$150,000. If a plan is discriminatory, key employees must include in income the greater of either (a) the actual cost of employer-provided insurance, or (b) the cost as determined from the IRS table.

### **DEPENDENT CARE PLANS**

To qualify, a plan must meet discrimination, eligibility, benefits, and concentration tests.

- **Discrimination** — Neither contributions nor benefits may discriminate in favor of highly compensated employees;
- **Eligibility** — Program must be available to a "fair cross section" of employees (determined by the IRS on the basis of all facts and circumstances); and
- **Concentration** — No more than 55 percent of amounts paid under the plan may be provided to shareholders or owners owning more than a 5 percent interest.

Amounts paid or incurred by an employer pursuant to a Dependent Care Assistance Plan (DCAP) cannot be excluded from an employee's gross income unless the name, address and taxpayer identification number of the person performing the service are included on the taxpayer's return. If the provider of the service is a tax-exempt organization, the taxpayer's identification number can be omitted.

### **DEPENDENT CARE CREDIT**

A credit is allowed to an individual who maintains a household for one or more qualifying individuals and who pays child or dependent care expenses enabling him to be gainfully employed. The credit is a nonrefundable personal credit. Thus, it may not exceed income tax liability. The amount of the credit is equal to the applicable percentage of the employment-related child and dependent care expenses paid by the individual during the tax year.

Taxpayers with adjusted gross income of \$15,000 or less are allowed a credit equal to 35 percent of employment-related expenses. The credit is reduced by one percentage point for each \$2,000 of adjusted gross income, or fraction thereof, above \$15,000 through \$43,000. Taxpayers with adjusted gross incomes over \$43,000 are allowed a credit equal to 20 percent of employment-related expenses. For taxpayers maintaining a household for one qualifying individual, the maximum amount of eligible expenses is \$3,000. Taxpayers maintaining a household for two or more qualifying individuals are allowed a maximum of \$6,000 in expenses. The amount of employment-related expenses must be reduced by any child or dependent care allowance received by an employee that was not includable in gross income under a nondiscriminatory plan provided by the employer.

The amount of employment-related expenses must be reduced by any child or dependent care allowance received by an employee that was not includable in gross income under a nondiscriminatory plan provided by the employer.

Beginning with 2005 a taxpayer may claim the dependent care credit with respect to a qualifying individual who lives with the taxpayer for more than one-half of the year, even if the taxpayer does not provide more than one-half of the cost of maintaining the household. A disabled dependent or spouse of the taxpayer must have the same principal place of abode as the taxpayer for more than one-half of the tax year. Moreover, an individual will not be treated as having the same principal place of abode as the taxpayer if, at any time during the tax year the relationship between the individual and the taxpayer is in violation of local law.

### CAFETERIA PLANS

Cafeteria plans offer employees a choice between cash or qualified (nontaxable) benefits. Such benefits include health and group term life insurance, as well as dependent care assistance. Scholarships, educational assistance, and deferred compensation are not qualified benefits.

- If a cafeteria plan discriminates in favor of highly compensated participants with respect to eligibility, contributions, or benefits, the highly compensated may not exclude benefits received under the plan from their income.
- If in any year more than 25 percent of the total nontaxable benefits are provided to key employees (see definition set forth under group term life insurance), those key employees are taxed as if they had received all available taxable benefits under the plan.
- If a plan provides health coverage, a special benefits discrimination test applies.
- A cafeteria plan will not be discriminatory as to eligibility if:
  - No employee is required to complete more than 3 years of employment;
  - The employment requirement is the same for all employees; and
  - Any employee who has satisfied the employment requirement, and who is otherwise eligible to participate, begins participation no later than the first plan year after the employment is satisfied.
- The IRS has modified the “use it or lose it rule.” Employers may amend their cafeteria plan documents to extend the deadline for reimbursement of health care and dependent care expenses up to two-and-a-half months after the cafeteria plan year.
- Furthermore, the IRS has clarified the Form W-2, Wage and Tax Statement, reporting requirements with respect to amended cafeteria plans. Currently, the amount reported on Form W-2 is the total amount of cash reimbursement furnished to the employee during the calendar year. If the employer does not know the actual total amount of cash reimbursement at the time the Form W-2 is prepared, the employer may report a reasonable estimate of the total amount on Form W-2. The amount an employee elects to contribute

for the year (plus any employer matching contributions) will be considered a reasonable estimate.

### **EMPLOYER-PROVIDED EDUCATIONAL ASSISTANCE PLANS**

The exclusion may not exceed \$5,250. The exclusion applies to graduate level courses as well.

### **EMPLOYEE FRINGE BENEFITS FOR LOCAL TRANSPORTATION**

#### **Transit Passes**

Certain employer-provided transportation benefits (local) are excludable from an employee's gross income as a de minimis fringe benefit. Such benefits include public transit passes provided at a discount to defray an employee's commuting costs. The exclusion also applies to vouchers or similar instruments that may be exchanged solely for tokens, fare cards or other instruments that enable the employee to use a public transit system, as well as car-pooling arrangements. For 2009, the monthly limit was \$120 and for 2008, the monthly limit is \$115. If an employer exceeds the monthly amount, the amount in excess of the limit is includable in gross income.

Transit passes may be distributed in advance for more than one month (such as for a calendar quarter). The applicable statutory monthly limit on the combined amount of transit passes and transportation in a commuter highway vehicle may be calculated by taking into account the monthly limits for all months for which the transit passes are distributed. Thus, for example, the employer may distribute advance transit passes for a subsequent calendar quarter with a value equal to the statutory monthly limit times three months (for 2009, \$120 times three equals \$360). However, if transit passes are provided, the value of transit passes covering the month(s) that begin after the employee's employment terminates is included in the employee's wages for income tax purposes and for employment tax purposes (income tax withholding, FICA and FUTA) to the extent the employer does not recover those transit passes or the value of those passes.

#### **Employer-Provided Parking**

The value of parking provided by an employer to an employee on or near the business premises of the employer is excludable from gross income as a working condition fringe benefit. The exclusion was \$220 for 2008. For 2009, the monthly limit increases to \$230. It is applicable whether the employer owns or rents the parking facility or parking space. The exclusion does not apply to any parking facility or space located on property owned or leased for residential purposes by the employee.

#### **Salary Reduction Arrangements**

Transit passes and employer-provided parking can be provided pursuant to salary reduction agreements.

Though the salary reduction arrangement operates in the same manner as would a cafeteria plan, requiring an agreement to reduce salary by an amount equal to that which is being utilized to provide these benefits, parking and transit passes cannot be provided as an additional benefit under an existing cafeteria plan. The reason for this is statutory language, which precludes this benefit from being offered as part of the cafeteria plan. However, discussions with the IRS National Office indicate that the rules applicable to cafeteria plans would be relevant to these benefits. Furthermore, since these benefits (parking and transit passes) are specifically excluded from wages, social security taxes are not applicable to the reduction amount. Retirement benefits based upon annual salaries should not be impacted, since the definition of wages for retirement plan purposes can include such nontaxable benefits.

## **CHARITABLE CONTRIBUTIONS**

### **SUBSTANTIATION REQUIREMENT**

Charitable contributions of \$250 or more require substantiation in the form of contemporaneous written acknowledgment in order to be tax-deductible. Thus, a canceled check will no longer be deemed substantiation.

To be tax-deductible, contributions of \$250 or more will require written acknowledgment from the donee organization. If, in the context of quid pro quo contributions, the total payment is \$250 or more, written acknowledgment is required. While there is no penalty imposed on charities for failure to provide written acknowledgment, it is unlikely that donee organizations will not provide such acknowledgments. The written acknowledgment must provide the following information:

- Amount of cash and a description, but not the value, of property other than cash contributed.
- Whether donee organization provided any goods or services in consideration, in whole or in part, for any property contributed.
- A description and good faith estimate of the value of any goods or services provided by the donee organization, or if the goods or services consist solely of intangible religious benefits, a statement to that effect that such a benefit was provided, but the substantiation need not further describe, nor provide a valuation for such benefit.

An intangible religious benefit is any benefit that is provided by an organization organized exclusively for religious purposes and that generally is not sold in a commercial transaction outside the donative context. Admission to a religious ceremony is an intangible religious benefit, whereas tuition leading to a recognized degree is not an intangible religious benefit.

To be contemporaneous, a written acknowledgment must be obtained by the donor on or before the earlier of:

- Date taxpayer files a return for the year in which the contribution was made, or

- Due date, including extensions, for filing the return.

### **OTHER RULES**

Deductions pursuant to payroll withholding may be substantiated by a document furnished by an employer evidencing the amount withheld (i.e., pay stub), and document prepared by the donee organization that goods or services are not provided in consideration for any contributions made by payroll deduction. The IRS has indicated that the document stating that no goods or services were provided may appear on a document prepared by the employer.

### **QUID PRO QUO CONTRIBUTIONS (QPQ)**

**Definition** — Payment made partly as a contribution and partly in consideration for goods or services provided to the payer. Quid pro quo contributions do not include any payment made to an organization organized exclusively for religious purposes, in return for which the taxpayer receives solely an intangible religious benefit that generally is not sold in a commercial transaction outside the donative context.

### **DISCLOSURE REQUIREMENTS**

With respect to QPQ contributions in excess of \$75, charitable organizations must provide a written statement in connection with the solicitation that informs the donor that the amount deductible is limited to the excess of the amount of any money and the value of any property other than money contributed by the donor over the value of the goods or services provided by the organization, and provides the donor with a good faith estimate of the value of such goods or services.

- Disclosure requirement does not apply if only de minimis, token goods or services are given to donor. Provision also does not apply to transactions that do not have any donative element, e.g., museum gift shop sales that are not, in part, contributions.
- Print size of disclosure must be such that it is reasonably likely to come to the attention of the donor.
- For purposes of the \$75 threshold, separate payments made at different times of the year with respect to separate fund-raising events generally will not be aggregated. It is expected that rules will be issued to prevent avoidance of the QPQ disclosure requirements by writing separate checks for the same transaction.

### **PENALTIES**

Whereas no penalty is imposed on charitable organizations for not providing written acknowledgment of contributions of \$250 or more, such is not the case with respect to QPQ contributions. A penalty of \$10 for each QPQ contribution will be imposed upon charities that fail to make the required disclosure. The maximum penalty for a particular fund-raising event or mailing is \$5,000. The penalty can be waived only if the failure is due to reasonable cause. The

Committee Reports indicate that the penalty is to apply if an organization either fails to make any disclosure in connection with a QPQ contribution or makes a disclosure that is incomplete or inaccurate.

**IRS GUIDELINES — INSUBSTANTIAL BENEFITS TO DONOR**

The IRS has provided guidance to organizations as to advising donors of the amount of their deductible contributions in situations in which donors receive relatively insignificant or insubstantial benefits in return.

- The safe-harbor rules do not apply if the premium is cash or cash equivalent, or if the charitable organization in all other situations does not inform donors of the nondeductibility of contributions. Premiums will be considered to have insubstantial value, permitting contributions to be fully deductible if (1) the fair market value of all benefits received by a particular donor is the lesser of 2% of the payment or \$91.00 for 2008 (2007 indexed amount was \$89.00); or (2) the payment is \$45.50 or more for 2008 (2007 indexed amount was \$44.50), and the only benefits received are token items bearing the organization's name or logo, the cost of which in total for the year is no more than \$9.10 for 2008 (2007 indexed amount was \$8.60).
- Newsletters and program guides will be considered to have no value if their primary purpose is to inform members about program activities, are not available to nonmembers, and are not of "commercial quality." "Commercial quality" publications include all professional journals and all other publications that accept advertising and contain articles written for compensation.
- Where the medium of solicitation makes it impractical to state how much of every contribution is deductible (e.g., telethons), charities may request a ruling from the IRS as to alternative notification procedures.
- If the safe-harbor rule applies, the IRS suggests that the fund-raising materials include a statement to the effect that "Under IRS guidelines the estimated value of (the benefits received) is not substantial; therefore, the full amount of your payment is a deductible contribution."

**CONTRIBUTIONS OF \$250 OR MORE AND QUID PRO QUO DISCLOSURE**

A summary of the regulations, with respect to substantiation of charitable contributions of \$250 or more, as well as quid pro quo disclosure required with respect to payments in excess of \$75, is set forth below.

- A two-part test for determining whether a payment is deductible as a charitable contribution has been adopted. In order for a charitable contribution to be allowed, a taxpayer must intend to make a payment in an amount that exceeds the fair market value of the goods or services received in return, and must actually make a payment in an amount that exceeds that fair market value.

- The donee organization's estimate of the value of goods or services provided to the donor in exchange for a contribution (whether set forth in a quid pro quo disclosure statement or in a contemporaneous written acknowledgment) may be relied upon by the donor, unless the donor knows or has reason to know, that such an estimate is unreasonable.
- If in conjunction with an auction conducted by a charitable organization the required written disclosure of the organization's good faith estimate of the value of the items available for bidding is set forth in a catalogue or similar publication, a taxpayer having knowledge of such estimated value, prior to making a bid in excess of the estimated value, would satisfy the requirements for a charitable contribution deduction.
- A donor may rely on an organization's estimate of the fair market value of the goods or services provided such estimate is made in good faith even if the estimate is in error.
- Goods or services provided by a donee organization in consideration for a payment by a taxpayer include goods or services provided in the year other than the year in which the taxpayer makes the payment to the donee organization.
- A good faith estimate means the donee organization's estimate of the fair market value of any goods or services, without regard to the manner in which the organization in fact made that estimate.
- In determining the value of goods or services provided in exchange for contributions, the following items may be disregarded:
  - Goods or services that have insubstantial value under the guidelines provided in Revenue Procedure 90-12, and any successor documents (low cost items costing \$9.10 or less for 2008 (2007 amount was \$8.90), newsletters that are not commercial publications, and benefits worth 2% or less of the payment up to a maximum of \$91.00 for 2008 (2007 amount was \$89.00)).
  - Annual membership benefits offered to a taxpayer for a payment of \$75 or less per year that consist of (1) any rights or privileges that taxpayer can exercise frequently during the membership period. Examples of such rights and privileges include, but are not limited to, free or discounted admission to the organization's facilities or events, free or discounted parking, preferred access to goods or services, and discounts on the purchase of goods or services; and (2) admission to events during the membership period that are open only to members of the donee organization and for which the donee organization reasonably projects that the cost per person (excluding any allocable overhead) for each such event is within the limits established for low cost articles (\$9.10 for 2008 and \$9.10 for 2007). The projected cost to the donee organization is determined at the time the organization first offers its membership package for the year. If the payment for membership is in excess of \$75 and the benefit provided include benefits which could be disregarded or below the \$75 payment, such benefits may be disregarded as well with respect to payments in excess of \$75.

- In comments accompanying the final regulations, it is stated that the regulations did not adopt the position that recognition items, such as plaques or trophies with an honoree's name inscribed, are items which should be considered to have little, if any, fair market value. Rather, it is stated that inscribed plaques and trophies have some value, even though the value may be less than cost. Therefore, such items cannot be disregarded.
- Goods or services provided by a donee organization to a taxpayer's employees in return for a payment to the organization may be disregarded to the extent that the goods or services provided to each employee are the same as those that could be disregarded in conjunction with payments of \$75 or less per year described above. If a taxpayer makes a contribution of \$250 or more to a donee organization and, in return, the organization offers taxpayer employees goods or services other than the items disregarded as described above, the contemporaneous written acknowledgment need only describe the goods, but need not provide a good faith estimate of the value. If the employee benefits cannot be disregarded, their value must be subtracted from the amount of the employer's payment to determine the correct amount of the charitable contribution deduction. While the valuation may be difficult, the regulations state that the employer is in a better position than the charity to value the benefits provided to employees.
- Transfers of property to a charitable remainder annuity trust, charitable remainder unitrust or charitable lead trust will not require the issuance of an acknowledgment in order for these contributions to be deductible for income tax purposes. In the case of a transfer of cash or property to a pooled income fund, the final regulations require that the written acknowledgment of the charitable organization maintaining the fund include a statement that the cash or property was transferred to the organization's pooled income fund and state whether any goods or services, in addition to the income interest in the fund, were provided to the transferor. The contemporaneous written acknowledgment need not include the value of the income interest in the fund. With respect to the purchase of an annuity from a charitable organization, the contemporaneous written acknowledgment must state whether any goods or services in addition to the annuity were provided to the taxpayer. The acknowledgment is not required to include a good faith estimate of the value of the annuity.
- If a partnership or S corporation makes a charitable contribution of \$250 or more, the partnership or S corporation will be treated as a taxpayer for the purposes of the contemporaneous written acknowledgment. Since the partnership or S corporation must substantiate the contribution with a contemporaneous written acknowledgment from the donee organization, a partner or a shareholder of such an entity is not required to obtain any additional substantiation for his or her share of the entity's charitable contribution.
- If a taxpayer's payment to a donee organization is matched, in whole or in part by another payor, and the taxpayer receives goods or services in consideration for its payment, and some or all of the matching payments, those goods and services will be treated as provided in consideration for the taxpayers' payment and not in consideration for the matching payment.

- In making a good faith estimate of the value of goods or services provided to donors, an organization may use any reasonable methodology provided it applies that methodology in good faith. A good faith estimate of the value of goods or services that are not generally available in commercial transactions may be determined by reference to the fair market value of similar or comparable goods or services. Goods or services may be similar or comparable even though they do not have the unique qualities of the goods or services that are being valued. The presence of a celebrity at an event may be disregarded in certain circumstances. For example, if tours of a museum are typically free to the public, a tour conducted by a famous artist rather than a regular tour guide does not render the tours dissimilar or incomparable for valuation purposes.
- Donors who are entitled to benefits may refuse such benefits and be entitled to a deduction for the full amount of the quid pro quo payment. To be entitled to a full deduction, a donor can utilize a “check-off box” on a form provided by the charity that can be used to reject a benefit at the time of contribution. In the absence of such a “check-off,” a donor would have to have effectively refused and/or returned the benefits prior to the occurrence of the event.
- The Internal Revenue Code provides that payments to colleges or universities for the right to purchase tickets to athletic events are partially (80 percent) deductible as charitable contributions. The final regulations provide that for the purposes of substantiation and quid pro quo disclosure, 20 percent of the amount paid for such right is treated as a good faith estimate of the fair market value of this right.

**SUBSTANTIATION OF CASH CONTRIBUTIONS — LESS THAN \$250**

Taxpayers making a contribution of money must have a canceled check or a receipt from the donee organization showing the date of the contribution, the amount, and the charitable organization's name. If not available, other reliable written records showing the name of the donee, the date of the contribution, and the amount can serve as proof. In the absence of canceled checks or receipts supporting monetary contributions, the taxpayer has the burden of maintaining reliable written records.

**CONTRIBUTIONS OF PROPERTY (OTHER THAN CASH) — LESS THAN \$250**

Taxpayers are required to keep a receipt from the charity and a reliable written record which includes the donee's name, the date and location of the contribution, and a description with enough detail to identify the particular property. A letter acknowledging the donation and describing the property will be deemed to be a receipt.

Since the responsibility for establishing the fair market value of donated items is the taxpayer's, the method of arriving at the claimed value is of the utmost importance. As to items of relatively lesser value, it may be possible to estimate the value based on recent sales of similar items (under similar conditions). Alternatively, the cost of replacing the donated item on the valuation date (date of contribution) could be used. With respect to items of greater value, an appraisal may be the best method of establishing the value.

**CONTRIBUTIONS OF PROPERTY (OTHER THAN CASH) — IN EXCESS OF \$5,000**

If a taxpayer donates and claims an income tax deduction for an item of property, or similar items of property, for which a tax deduction in excess of \$5,000 is claimed, additional substantiation rules are applicable. With the exception of publicly traded securities and non-publicly traded stock with a claimed value of less than \$10,000, a qualified appraisal must be obtained, and a summary thereof attached to the taxpayer's income tax return. This requirement applies not only to individuals, but also to closely held corporations, S corporations and partnerships. Section B of Form 8283, also containing detailed information with regard to the property, signed by an independent appraiser, must be submitted to the donee organization for acknowledgment by an authorized signatory within 60 days of the date of contribution. The acknowledgment does not signify the donee organization's agreement with the claimed value. Rather, it signifies the organization's acknowledgment of receipt of the property and its agreement to file Form 8282 if the property is disposed of within two years of receipt. Failure to submit Form 8283 and to attach an appraisal summary to the taxpayer's income tax return will result in the disallowance of the deduction for the donated property.

If property other than publicly traded securities for which a deduction in excess of \$5,000 was claimed is disposed of within two years of receipt, the donee organization is required to file a return (Form 8282) with the Internal Revenue Service setting forth the amount received on disposition. This will enable the Internal Revenue Service to compare the claimed deduction with the actual amount realized. Form 8282 must be filed within 125 days of disposition of the property. Organizations are exempted from filing Form 8282 if certain conditions are met. An organization need not file if the donor's appraisal summary contains a statement that the item donated does not have a value of more than \$500 or, if the appraisal summary includes more than one item, the specific items with values of \$500 or less must be clearly identified. For the purpose of the donor determining whether the appraised value exceeds \$500, items that form a "set" will be considered one item.

The term "set" must not be confused with the phrase "similar items," which is utilized in conjunction with aggregating items for the purpose of the \$5,000 appraisal summary threshold.

The term "set" is a narrower concept than "similar items." Whereas any item of clothing (including furs) is similar to any other item of clothing, because they are wearable, items of clothing would not ordinarily be a set. In the case of a particular outfit, the various coordinates would make up a set. An entire wardrobe by a particular designer would not, however, be deemed to be a set. Although donors still have the responsibility to determine whether the value of their donations of property exceed \$5,000, taking into consideration similar items of property, they can help the charitable organization avoid reporting sales of items which individually, or as a set, have a value of \$500 or less. This can be accomplished if the appraisal summary clearly indicates the items so qualifying. Finally, no reporting by the charitable organization is required if an item is disposed of for no consideration and the disposition is in furtherance of the organization's exempt purpose.

**OUT-OF-POCKET EXPENSES**

The mileage allowance for 2009 remains at 14 cents per mile. In addition to the mileage allowance, parking fees and tolls may be deducted. Alternatively, actual expenses (not including repairs, maintenance, depreciation or insurance) may be deducted.

In addition to expenses attributable to an automobile, other expenses incurred in connection with charitable activities are also deductible. However, no deduction is allowed for traveling expenses while away from home, whether paid directly or by reimbursement, unless there is no significant element of personal pleasure, recreation, or vacation in such travel. Furthermore, traveling expenses may be deducted only if an individual is serving in the capacity of a "delegate." The term "delegate" is interpreted as meaning one who is appointed and sent by another, with the authority to transact business.

Volunteers who incur unreimbursed out-of-pocket expenditures in conjunction with services rendered to charitable organizations will be treated as having obtained a contemporaneous written acknowledgment for those expenditures if the taxpayer has (1) adequate records to substantiate the expenditures; and (2) obtains by the initial or extended due date for the filing of the tax return a statement prepared by the donee organization containing (i) a description of the services provided by the taxpayer; (ii) a statement of whether or not the donee organization provides any goods or services in consideration, in whole or in part, for the unreimbursed expenditures; and (iii) if the donor organization does provide the goods or services, a good faith estimate of the value thereof.

**CONTRIBUTIONS OF "QUALIFIED APPRECIATED STOCK" TO PRIVATE NONOPERATING FOUNDATIONS**

Contributions are deductible to the extent of fair market value, rather than donor's cost basis.

**QUALIFIED SPONSORSHIP PAYMENTS (OSP)**

- *Definition* — Any payment made by a person engaged in a trade or business with respect to which the person will receive no substantial return benefit other than the use or acknowledgment of the name or logo (or product lines) of the person's trade or business in connection with the organization's activities. Does not include advertising of such person's products or services—meaning qualitative or comparative language, price information or other indications of savings or value, or an endorsement or other inducement to purchase, sell, or use such products or services.
- *Contingent Payments* — Qualified sponsorship payment does not include any payment where the amount of such payment is contingent, by contract or otherwise, upon the level of attendance at an event, broadcast ratings, or other factors indicating the degree of public exposure to an activity. The fact that a sponsorship payment is contingent upon an event actually taking place or being broadcast in and of itself would not cause the payment to fail to be a qualified sponsorship payment.

- *Acknowledgments or Advertising in Periodicals* — Does not apply to the sale of advertising or acknowledgments in tax-exempt organization periodicals. “Periodical” would mean regularly scheduled and printed material published by (or on behalf of) the payee organization that is not related to and primarily distributed in connection with a specific event conducted by the payee organization. For example, does not apply to payments that lead to acknowledgments in a monthly journal, but does apply if a sponsor receives an acknowledgment in a program or brochure distributed at a sponsored event.
- *Qualified Trade Show Activities* — QSP does not include any payment made in connection with a “qualified convention or trade show activity.” Section 513(d)(3)(B) defines “qualified convention or trade show activity” and generally refers to conventions or trade shows conducted by certain tax-exempt organizations that have as one of their purposes the promotion of interest in the products and services of the industry in general or the purpose to educate the attendees regarding new developments or products and services related to the exempt activities of the organization.
- *Allocation of Payments* — To the extent that a portion of a payment would (if made as a separate payment) be a qualified sponsorship payment, such portion of the payment would be treated as a separate payment. Thus, if a sponsorship payment made to a tax-exempt organization entitles the sponsor to both product advertising and use or acknowledgment of the sponsor’s name or logo by the organization, then the UBIT would not apply to the amount of such payment that exceeds the fair market value of the product advertising provided to the sponsor.
- *Provision of Services and Other Privileges to the Sponsor* — According to the House Committee Report, the provision of facilities, services or other privileges to a sponsor or the sponsor’s designees (e.g., complimentary tickets, pro-am playing spots in golf tournaments, or receptions for major donors) in connection with a sponsorship payment will not affect the determination of whether the payment is a qualified sponsorship payment. In general, if such services or facilities do not constitute a substantial return benefit or if the provision of such services or facilities is a related business activity, then the payments attributable to such services or facilities would not be subject to the UBIT.
- *Receipt of License* — A sponsor’s receipt of a license to use an intangible asset (e.g., trademark, logo or designation) of the tax-exempt organization likewise will be treated as separate from the qualified sponsorship transaction in determining whether the organization has unrelated business taxable income.

### **CONTRIBUTIONS OF COMPUTER TECHNOLOGY**

Certain gifts of computer technology and equipment by C corporations to elementary or secondary schools qualify for an “augmented charitable deduction.” The donated property must fit productively into the school’s education plan.

**NEW YORK STATE FUND-RAISING RULES**

**New Fund-Raising Regulations**

Charitable organizations organized in or operating in New York are subject to the provisions of the Executive Law (“Article 7-A”), and the Estates, Powers and Trusts Law (“EPTL”). Article 7-A requires registration and reporting with respect to the solicitation of contributions from New Yorkers. The EPTL requires registration and reporting by New York and other charitable entities that have property and/or conduct charitable activities in New York. Regulations have recently been issued that extend and broaden the information to be submitted by charities, as well as fund-raising professionals. Highlights of the regulations are as follows:

- Charities are prohibited from engaging a fund-raising professional unless they receive written confirmation of compliance with Article 7-A from such fund-raising professional prior to entering into a contract.
- Requires professional fund raisers, fund-raising counsel and commercial co-venturers to make their records available for audit by their client charities.
- With respect to the utilization of professional fund raisers, fund-raising counsel and/or commercial coventurers, schedules on Form 497-C (Combined Annual Financial Report) will now require information as to (1) whether or not contract was reviewed and approved by charity’s governing body, (2) how many bids, if any, were reviewed by the charity’s governing body prior to engaging a professional fund raiser, and (3) whether the contract provides for cancellation procedures. Form 497 will be similarly revised.

**Disclosure**

Article 7-A of the Executive Law requires the disclosure of the names and the professional/paid status of the professional fund raiser/professional solicitor conducting any solicitation on behalf of a charitable organization. The disclosure requirement does not apply to fund-raising counsel (persons who do not have access to contributions), nor does it apply to a bona fide officer, volunteer, or employee of a charitable organization.

**Raffles**

In order to conduct a legal raffle, the following steps must be taken:

- The organization must submit an application for a registration number. This application is available at [www.racing.state.ny.us](http://www.racing.state.ny.us) (click in sequence on charitable gaming, forms and applications, and on GC-2, GC-2A and GC-2B). It can also be obtained by writing to the New York State Racing and Wagering Board, 1 Broadway Center, Suite 600, Schenectady, New York 12305-2553. (518-395-5400).

- Upon receiving a registration number, a license to conduct a raffle must be obtained from a town or county clerk. In New York City such a license is issued by the Licensing Division of the Department of Consumer Affairs.

## **INCOME TAX CONSIDERATIONS WITH RESPECT TO BUSINESS USAGE OF AUTOMOBILES**

### **LISTED PROPERTY SUBSTANTIATION**

No deduction shall be allowed with respect to listed property, unless substantiated by adequate records or sufficient corroborative evidence. Although oral or written evidence may be considered, the regulations express a strong preference for written evidence.

In addition, while Congress specifically barred the Internal Revenue Service from requiring a contemporaneous record of business usage, the regulations make it quite clear that the closer in time the written record is to the expenditure or use, the greater is its probative value. The elements to be proven with regard to any use or expenditure are the amount, date and business purpose. The degree of detail required for each element of business or investment use may vary depending on the facts and circumstances. A taxpayer may maintain an adequate record for portions of a tax year and use that record to substantiate the business/investment use for all or part of the tax year if he can show that the part of the year for which records were maintained is representative. This method cannot be used to substantiate the use of an employer's vehicle made available for use by more than one employee for all or part of a tax year.

### **TAX RETURN INFORMATION**

Taxpayers must include certain information on their tax returns regarding the business use of vehicles. The information to be provided includes the date the vehicle was placed in service, the number of miles driven for personal, business and commuting purposes, the percentage of business use, and whether the evidence is written. Employers providing vehicles to employees are required to obtain information from employees sufficient to complete the employer's tax returns. However, an employer providing more than five vehicles to employees need not include any information on its return. Rather, such information is to be retained by the employer. Form 2106, Employee Business Expenses, and Form 4562, Depreciation and Amortization, contain questions which elicit the foregoing information. Individuals and noncorporate taxpayers are not required to complete or attach Form 4562 if the only depreciation deduction is for assets (other than listed assets such as automobiles and computers) placed in service prior to 1992.

### **VEHICLES PROVIDED TO EMPLOYEES**

The value of the availability of an employer-provided vehicle is not excludable from an employee's gross income as a working condition fringe benefit unless the employer substantiates the amount of the exclusion through adequate records or sufficient corroborative evidence. If an employer includes the value of the vehicle's availability in the employee's gross income without taking into account an exclusion for a working condition fringe benefit, it is up to the employee to substantiate

any deduction for the business use. An employer may exclude a portion of the value of the vehicle's availability attributable to employee business usage. The employer may rely on adequate records maintained by the employee or the employee's own statement if corroborated by other sufficient evidence (unless the employer has reason to believe that the records or evidence is not accurate). Alternatively, reliance may be placed on an employee's statement that provides sufficient information to allow the employer to determine the business use.

Employees (other than a control employee\*) will not be subject to the foregoing substantiation rules if all the following conditions are satisfied:

1. The vehicle is owned or leased by the employer and is provided to one or more employees in connection with the employer's business;
2. The employer requires the employee to use the vehicle to commute for noncompensatory business reasons;
3. The employer has a written policy under which the employee may not use the vehicle for personal purposes other than commuting or de minimis use (such as a stop for lunch or a personal errand on the way home);
4. The employer reasonably believes that this policy is followed;
5. The employer includes in the employee's gross income, reported on Form W-2, the value of the commuting use; and
6. There must be evidence that would enable the Internal Revenue Service to determine whether the vehicle meets the above conditions. If these conditions are met, the employer and employee each has the option of including in compensation \$3.00 for each day the vehicle is used for commuting.

\* Control Employee is any employee who (1) is a board or shareholder appointed, confirmed, or elected officer whose compensation is \$90,000 or more, (2) is a director of the employer, (3) receives compensation of \$185,000 for 2008 (\$180,000 for 2007) or more, regardless of whether an officer or an owner, or (4) owns a one percent or greater interest in the employer.

### **VALUATION OF EMPLOYER-PROVIDED VEHICLES**

If all the conditions in the previous section are met, the value of the use of the vehicle can be \$3.00 per day for each day the employee uses the car.

Alternatively, the amount to be included in an employee's income can be determined by using the facts and circumstances method, the safe harbor method or, if the fair market value of the vehicle is \$15,000 (2008 indexed amount) or less, a standard mileage allowance of 55 cents per mile for 2009. For employees who are officers, these three methods are the only ones that may be utilized. The employer can also treat the entire value as includable. In this case, the employee is entitled to a deduction for business use on Form 2106. Under the facts and circumstances method, the fair market value (FMV) of the personal use of an employer-provided car will be the amount it would

have cost the employee to rent a comparable car for the same period plus insurance, maintenance and fuel costs.

Under the safe harbor method, the compensation attributable to the personal use of an employer-provided car is based on the annual lease value (which includes annual rental, maintenance and insurance costs) as set forth in an Internal Revenue Service table. To use the table, the FMV as of the first date the car is made available to any employee for personal use must be determined. The annual lease value so determined must be used until four full calendar years have elapsed. At such time, the FMV of the car must be redetermined to determine a new annual lease value. For example, if a car had an FMV of \$18,000 as of the first date it was made available for personal use, the annual lease value would be \$5,100. Fuel costs are not included in the annual lease value. Under the safe harbor method, fuel (where paid for by the employer) may be valued at 5.5 cents per mile. To the extent that an employee uses the car for business (not including commuting), the value attributable to such usage is excludable as a working condition fringe benefit.

#### **REPORTING AND WITHHOLDING REQUIREMENTS**

With respect to the reporting of the income attributable to personal usage, and the withholding of taxes thereon, the IRS has issued rules which allow for a significant amount of flexibility. If income tax is withheld, either the regular rates, or the supplemental rate of 25% may be used. Employers can notify employees that no federal income tax will be withheld with respect to the income generated by personal usage of a car if such notice is in writing. Notice is to be given by January 31<sup>st</sup> or within 30 days after an employee is given a car, whichever is later.

For employees earning less than the social security wage base, the employer is required to withhold the employee's FICA share and pay the employer's share as well. However, an employer is given the option of treating the benefit as being paid as of December 31st, thereby minimizing administrative burdens. Furthermore, an employer is given the option of treating the compensation attributable to the personal use of a car during the last two months (or a shorter period) of the year as being paid in the following year. The purpose of this rule is to facilitate year-end calculations. To the extent there is income to be reported and taxes withheld, such amounts will have to be reflected on Forms W-2 and 941.

#### **IRS STANDARD RATES FOR MILEAGE**

The deduction in 2008 for the business use of automobiles has been set at 50.5 cents per mile for the period January 1 through June 30, 2008 and 58.5 cents per mile for the period July 1 through December 31, 2008. The standard mileage rate may not be used if the automobile has previously been depreciated using a method other than straight-line for its estimated useful life, additional first year depreciation has been claimed, or the Accelerated Cost Recovery System (accelerated depreciation) has been used. If, after using the business standard mileage rate actual costs are utilized, depreciation is limited to straight-line.

## **FEDERAL AND NEW YORK STATE/CITY REMINDERS**

### **IRS WEBSITE**

The IRS website ([www.irs.gov](http://www.irs.gov)) provides a wealth of information for individual taxpayers, as well as exempt organizations. In addition to access to IRS forms and publications, the site includes toll-free telephone numbers, an updated list of current developments, as well as an income tax withholding calculator.

### **FAST-TRACK SETTLEMENT FOR TAX-EXEMPT/GOVERNMENT ENTITIES**

The IRS provides an opportunity for entities with issues under examination by the Tax Exempt and Governmental Entities Division (TE/GE) to use Fast Track Settlement (FTS) to expedite case resolution. The TE/GE FTS will enable TE/GE entities that currently have unagreed issues in at least one open period under examination to work together with TE/GE and the Office of Appeals (Appeals) to resolve outstanding disputed issues while the case is still in TE/GE jurisdiction.

TE/GE and Appeals will jointly administer the TE/GE FTS process. TE/GE FTS will be used to resolve factual and legal issues, and it may be initiated at any time after an issue has been fully developed, but before the issuance of a 30-day letter (or its equivalent). TE/GE FTS will be available to taxpayers for a pilot period of up to two years, beginning upon the date of publication of this announcement. Upon completion of the two-year pilot period, TE/GE and Appeals will evaluate the program, consider necessary adjustments, and determine whether to make the program permanent.

### **FIVE-MONTH EXTENSIONS FOR FORMS 1065, 1041, AND 8804**

For Federal Forms 1065 (U.S. Return of Partnership Income), 1041 (U.S. Income Tax Return), and 8804 (Annual Return for Partnership Withholding Tax) that are due to be filed after December 31, 2008, the automatic extension period has been reduced from six to five months. An extension of time to file is requested by filing Federal Form 7004.

**NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE WEBSITE** — [WWW.TAX.STATE.NY.US](http://WWW.TAX.STATE.NY.US).

**NEW YORK STATE PERSONAL INCOME TAX**

For tax year 2008, the highest personal income tax bracket is 6.85 percent for all taxpayers who have taxable incomes in excess of \$40,000. Tax rates for tax years beginning in 2008 are as follows:

**MARRIED FILING JOINTLY AND QUALIFYING WIDOW(ER)**

<b>IF THE NEW YORK TAXABLE INCOME IS:</b>	<b>THE TAX IS</b>
Not over \$16,000	4% of the New York taxable income
Over \$16,000 but not over \$22,000.....	\$640 plus 4.5% of excess over \$16,000
Over \$22,000 but not over \$26,000.....	\$910 plus 5.25% of excess over \$22,000
Over \$26,000 but not over \$40,000.....	\$1,120 plus 5.9% of excess over \$26,000
Over \$40,000 .....	\$1,946 plus 6.85 of excess over \$40,000

**SINGLE, MARRIED FILING SEPARATELY, AND ESTATES AND TRUSTS**

<b>IF THE NEW YORK TAXABLE INCOME IS:</b>	<b>THE TAX IS:</b>
Not over \$8,000	4% of the New York taxable income
Over \$8,000 but not over \$11,000.....	\$320 plus 4.5% of excess over \$8,000
Over \$11,000 but not over \$13,000.....	\$455 plus 5.25% of excess over \$11,000
Over \$13,000 but not over \$20,000.....	\$560 plus 5.9% of excess over \$13,000
Over \$20,000.....	\$973 plus 6.85% of excess over \$20,000

**HEAD OF HOUSEHOLD**

<b>IF THE NEW YORK TAXABLE INCOME IS:</b>	<b>THE TAX IS:</b>
Not over \$11,000.....	4% of the New York taxable income
Over \$11,000 but not over \$15,000.....	\$440 plus 4.5% of excess over \$11,000
Over \$15,000 but not over \$17,000.....	\$620 plus 5.25% of excess over \$15,000
Over \$17,000 but not over \$30,000.....	\$725 plus 5.9% of excess over \$17,000
Over \$30,000.....	\$1,492 plus 6.85% of excess over \$30,000

**Tax Benefit Recapture**

The two additional tax benefit recapture provisions that applied to tax years 2003 through 2005 have expired. Accordingly, the only tax benefit recapture provision applicable to tax years beginning after 2005 is the recapture of the tax benefit on the rates below 6.85% for taxpayers with a New York adjusted gross income of \$100,000 or more.

**NEW YORK CITY PERSONAL INCOME TAX RATES AND CREDITS**

For tax year beginning in 2008, the highest tax bracket under section 1304-D is 3.648% percent for all taxpayers who have taxable incomes in excess of \$50,000. The second highest bracket is set at 3.591 percent for tax years beginning in 2006. Accordingly, the New York City personal tax rates for tax years beginning in 2008 are as follows:

**MARRIED FILING JOINTLY AND QUALIFYING WIDOW(ER)**

<b>IF THE CITY TAXABLE INCOME IS:</b>	<b>THE TAX IS</b>
Not over \$21,600	2.907% of the city taxable income
Over \$21,600 but not over \$45,000.....	\$628 plus 3.534% of excess over \$21,600
Over \$45,000 but not over \$90,000.....	\$1,455 plus 3.591% of excess over \$45,000
Over \$90,000.....	\$3,071 plus 3.648% of excess over \$90,000

**SINGLE, MARRIED FILING SEPARATELY, AND ESTATES AND TRUSTS**

<b>IF THE CITY TAXABLE INCOME IS:</b>	<b>THE TAX IS:</b>
Not over \$12,000	2.907% of the city taxable income
Over \$12,000 but not over \$25,000.....	\$349 plus 3.534% of excess over \$12,000
Over \$25,000 but not over \$50,000.....	\$808 plus 3.591% of excess over \$25,000
Over \$50,000.....	\$1,706 plus 3.648% of excess over \$50,000

**HEAD OF HOUSEHOLD**

<b>IF THE CITY TAXABLE INCOME IS:</b>	<b>THE TAX IS:</b>
Not over \$14,400.....	2.907% of the city taxable income
Over \$14,400 but not over \$30,000.....	\$419 plus 3.534% of excess over \$14,400
Over \$30,000 but not over \$60,000.....	\$970 plus 3.591% of excess over \$30,000
Over \$60,000.....	\$2,047 plus 3.648% of excess over \$60,000

### **Tax Benefit Recapture**

For the tax years beginning in 2006, a supplemental tax is added to recapture the tax benefit a taxpayer receives from the tax rates that are below the highest rate in calculating taxes using the City tax tables. The supplemental tax is imposed on: (1) New York City resident individuals and estates and trusts who have New York adjusted gross income over \$150,000 with a taxable income subject to the second highest rate of tax; and (2) New York City resident individuals, estates and trusts who have New York adjusted gross income over \$500,000.

### **PERSONAL EXEMPTIONS**

The exemption amount is \$1,000. The exemption will only be allowed for dependents of the taxpayer, other than the taxpayer and his spouse. If an individual can be claimed as a dependent on another taxpayer's return, such an individual cannot claim a personal exemption on his or her own return. Blind and elderly taxpayers are no longer entitled to additional personal exemption.

### **STANDARD DEDUCTIONS — 2008**

Married, filing jointly or surviving spouse	\$ 15,000
Head of household	10,500
Single	7,500
Married, filing separately	7,500
Dependent filers	3,000

If a standard deduction is claimed on the federal return, it must also be claimed on the New York State return. If a taxpayer itemized on the federal return, the taxpayer has a choice of either itemizing or taking the standard deduction on the New York State return. Whereas blind and elderly taxpayers are entitled to an additional standard deduction for federal purposes, no additional New York State amount is allowed.

### **ITEMIZED DEDUCTIONS**

New York deductions remain basically the same as federal deductions. State and local income taxes remain nondeductible. A varying percentage of the amount of itemized deductions is disallowed, depending on the taxpayer's adjusted gross income range and filing status.

### **NEW YORK STATE PENSION EXCLUSION**

Up to \$20,000 of pension income may be subtracted from federal adjusted gross income. In order to qualify, the recipient must be 59½ or older. In addition, pension payments from New York State/New York City are totally excludable. Recipients of federal pensions are also eligible to exclude the entire amount received.

**LLC/LLP FEES AND C/S CORPORATION MINIMUM TAXES**

The 2008 tax law restructures the member-based filing fees for limited liability companies and limited liability partnerships. The reform converts the current filing fee of \$50 per member (\$325 minimum and \$10,000 maximum) to a fee based on New York source gross income. Also, single member LLCs, which are disregarded entities for Federal income tax purposes, are required to remit a filing fee of \$25 beginning in 2008.

**C and S Corporations**

The current fixed dollar minimum tax on C and S corporations ranges from \$100 for payrolls of \$250,000 or less to \$1,500 for payrolls of \$6.25 million or more. The new minimum will vary depending on the amount of New York receipts.

The current fixed dollar minimum of \$800 for corporations with total receipts, assets and payroll all \$1,000 or less is eliminated; such entities will pay \$25 under the new structure.

The fixed dollar minimum tax is only one of four tax bases under which a C corporation may pay tax; therefore, it is possible the new structure will allow C corporations to pay tax on the entire net income, capital or minimum taxable income.

**DISREGARDED ENTITIES FOR PURPOSES OF EMPLOYMENT TAX**

For wages paid on or after January 1, 2009, single member/single owner limited liability companies (LLCs) that have not elected to be treated as corporations may be required to change the way they report and pay federal employment taxes and wage payments. On August 16, 2007, new regulations were issued which stated that the LLC, not its single owner, will be responsible for filing and paying all employment taxes on wages paid on or after Jan. 1, 2009.

A limited liability company is an entity formed under state law. For federal tax purposes, an LLC with more than one owner may be classified as if it were a partnership or a corporation. For federal tax purposes, an LLC with one owner is referred to as an entity disregarded as separate from its owner, or a "disregarded entity," unless an election is made for it to be treated as a corporation. If the owner is an individual, a single member LLC is treated as a sole proprietorship for federal income tax purposes, and the owner is subject to taxes under the Self-Employment Contributions Act (SECA). If the owner is not an individual, a single member LLC is treated as a branch or division of the owner.

For wages paid before Jan. 1, 2009, disregarded entities follow the guidance under Notice 99-6 and choose how they want to file and pay their employment taxes using either the name and EIN assigned to the LLC or the name and EIN of the single member owner. The new regulations make Notice 99-6 obsolete for wages paid on or after January 1, 2009; employment taxes must be reported and paid in the name and EIN of the LLC. An LLC may secure an EIN by applying online at [www.irs.gov](http://www.irs.gov) or by filing Form SS-4, Application for Employer Identification Number.

The regulations changes are not retroactive. The owner of a disregarded entity remains responsible for paying employment taxes on wages paid before Jan. 1, 2009 and the LLC is responsible for paying employment taxes on wages paid beginning Jan. 1, 2009.

These changes in the regulations do not change income tax treatment for a disregarded entity or other LLCs, or employment and/or excise tax treatment for LLCs classified as partnerships or corporations.

#### **SALES BY EXEMPT ORGANIZATIONS**

Effective September 1, 2008, tax-exempt nonprofit organizations are required to collect sales tax on additional classes of retail sales. Specifically, Tax Law Sect. 1116(b) was amended to state the following sales by tax- exempt nonprofit organizations are not exempt from state and local sales and compensating use taxes (by virtue of the general exemption provided in section 1116[a]):

- Utility services and services to real property, whether sold from the exempt organization's "shop or store";
- Intangible personal property and services sold remotely (such as by telephone, the Internet or through mail order); and
- Tangible personal property leased or rented by an exempt organization to another person.

Consequently, exempt organizations engaging in such sales are required to register as vendors (if they aren't already) and collect sales tax on those retail sales.

#### **REPORTING OF REIMBURSEMENT OF EMPLOYEE'S AUTOMOBILE EXPENSES**

Employers are not required to report reimbursements equal to or less than the standard mileage rate set by the IRS (50.5 cents per mile for the period January 1 through June 30, 2008 and 58.5 cents per mile for the period July 1 through December 31, 2008). Employers are required to report on Form W-2 reimbursements in excess of the IRS rate. The amount treated as substantiated (i.e., the nontaxable portion) is reportable in box 13 using code L.

#### **WITHHOLDING ALLOWANCES**

The IRS announced that employers are no longer required to send copies of questionable W-4 withholding forms to the IRS. Employers are no longer required to submit W-4's claiming more than 10 allowances or claiming exemption from withholding if \$200 or more in weekly wages was expected.

#### **FEDERAL INCOME TAX WITHHOLDING**

As in prior years, employers are required to furnish employees with copies (Copy B and Copy C) of Form W-2 by February 2, 2009. Distributions from pensions, annuities, retirement or profit-

sharing plans, IRAs and insurance contracts are reported on Form 1099R. Recipients are to receive Form 1099R by February 2, 2009.

Copy A of Form W-2 and 1099R must be filed with the Social Security Administration by March 2, 2009. If you file electronically, the due date is March 31, 2009. The Form W-2 is to be accompanied by Form W-3. Form 1099R is to be accompanied by Form 1096. Copy D of Form W-2 and Form 1099R are to be retained in the employer's records.

**SUPPLEMENTAL WAGE PAYMENTS**

Federal Income Tax Withholding on supplemental wage payments (i.e. bonuses, commissions, overtime pay) that are not paid concurrently with wages (or are paid concurrently, but are separately stated) for a payroll period will be subject to a withholding rate of 25% (35% for pay over \$1 million).

New York State	7.35%
New York City Residents	4.00%

**REPORTING PAYMENTS MADE BY PENSION OR DEFERRED COMPENSATION PLANS ON FORM W-2**

Amounts contributed by an employer to a simplified employee pension (SEP) plan are neither includable in an employee's income, nor deductible by the employee. Therefore, these amounts should not be reported in Box 1.

Box 13 of Form W-2 contains a check-box for retirement plans. The box should be checked if an employee was an active participant in a qualified 401(a) plan (including a 401(k) plan and a simplified employee pension (SEP) plan), a SIMPLE retirement account, a 403(b) plan, or an eligible 457(b) maintained by the employer. Box 12 is to reflect the foregoing deferrals with the appropriate code letter. The instructions for Form W-2 set forth codes to be utilized.

**FEDERAL ESTATE AND GIFT TAXATION**

For 2008, the estate tax credit (formerly, the unified credit) eliminates tax on taxable estates of up to \$2 million. The applicable exclusion amount for estate tax purposes will increase to \$3.5 million in 2009; however, for gift tax purposes, the applicable exclusion amount will remain at \$1 million.

The annual gift tax exclusion for 2008 is \$12,000 and \$13,000 for 2009 per donee. For married couples electing to make split gifts, the maximum per donee is \$24,000 in 2008 and \$26,000 for 2009. An unlimited exclusion is applicable to amounts paid directly to third parties for medical and school expenses for the benefit of a donee. Donors need only file a gift tax return once annually. The due date is April 15th of the year following the gift.

A donor who makes a gift to charity in excess of the annual gift tax exclusion will not be required to file a gift tax return if the donor's entire interest in the property was transferred.

## **SOCIAL SECURITY**

The tax is composed of two parts: old age, survivor, and disability insurance (OASDI) and Medicare hospital insurance (HI). The OASDI rate of 6.2%, as well as the HI rate of 1.45% is imposed on the employer and employee. The self-employment rate is equal to the combined employer and employee tax rate of 15.3%.

For 2008, the amount of wages and self-employment income subject to the OASDI rate of 6.2% is \$102,000 (\$106,800 for 2009). There is no limit on the amount of earnings subject to the HI rate of 1.45%. Self-employed individuals are allowed a deduction for income tax purposes equal to one half of the self-employment tax liability.

### **RETIREMENT EARNINGS TAX-EXEMPT AMOUNTS**

The Retirement Earnings Test has been eliminated for individuals age 65-69. It remains in effect for those aged 62 through 64. A modified test applies for the year an individual reaches age 65. (The Senior Citizen's Freedom To Work Act of 2000)

	<u>2008</u>	<u>2009</u>
Year individual reaches 65	\$ 36,120/yr. (\$3,010/mo.)	\$ 37,680/yr. (\$3,140/mo.)

**NOTE:** Applies only to earnings for months prior to attaining age 65. One dollar in benefits will be withheld for every \$3 in earnings above the limit. There is no limit on earnings beginning the month an individual attains age 65.

Under age 65	\$13,560/yr. (\$1,130/mo.)	\$14,160/yr. (\$1,180/mo.)
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**NOTE:** One dollar in benefits will be withheld for every \$2 in earnings above the limit.

### **MAXIMUM SOCIAL SECURITY BENEFIT**

	<u>January 2008</u>	<u>January 2009</u>
Worker retiring at age 65* in	\$2,185/mo.	\$2,323/mo.

\*\*Full retirement age in 2008 is age 66.

## **FEDERAL DEPOSIT REQUIREMENTS**

Generally, an employer must deposit withheld federal income tax and Social Security Tax (FICA) in an authorized commercial bank or at the Federal Reserve Bank serving its geographic area. If any due date falls on a Saturday, Sunday or legal holiday, the next regular workday should be used for depositing taxes. The amount of taxes determines the frequency of deposits. Employers owe these taxes when the wages are paid, not when the payroll periods end.

If, for any reason, the Form 8109 coupon booklet is not available or is incorrect, the IRS should be contacted to determine the appropriate procedure. All taxes must be deposited directly at a bank. The mailing of such payments to the Internal Revenue Service will result in the imposition of penalties if received after the deposit due date. For new organizations which have not yet received an employer identification number, the deposit must be sent directly to the Internal Revenue Service Center.

### **IRS SIMPLIFIED PAYROLL REPORTING RULES**

Employers are required to report and make deposits of payroll taxes separately from non-payroll taxes withheld (for example, backup withholding, and withholding for pensions). Form 8109, Federal Tax Deposit Coupons, have a box to check for non-payroll items. Non-payroll items will be reported annually on Form 945. Since non-payroll items are no longer deposited with payroll taxes, many employers with non-payroll items will be able to move from semi-weekly deposit schedules to monthly deposit schedules.

Deposits of taxes reported on Form 945 are to be made on a monthly or semi-weekly basis. The Form 945 is due February 2, 2009.

## **SUMMARY OF DEPOSIT RULES FOR WITHHELD FEDERAL INCOME TAX AND SOCIAL SECURITY TAXES**

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### **Monthly Deposits**

Employers who reported \$50,000 or less during the look back period will deposit monthly. Such deposit must be made by the 15th day of the following month.

### **Semi-Weekly Deposits**

Employers who reported over \$50,000 during the look back period will make semi-weekly deposits. For paydays on Wednesday, Thursday, or Friday, the deposit will be due by the Wednesday after the payday. For all other paydays, the deposit will be due by the Friday following the payday.

### **One-Day Rule**

Both monthly and semi-weekly rules are superseded if on any one day an employer has \$100,000 or more of employment taxes accumulated. Any accumulation of \$100,000 or more must be deposited by the next banking day. A monthly depositor who becomes subject to the \$100,000 next-day rule becomes a semi-weekly depositor for the remainder of the current year, as well as for the following calendar year.

**Safe-Harbor Rule**

An employer will be treated as having deposited the required amount of employment taxes if any shortfall (excess of amount of employment taxes required to be deposited for the period over the amount deposited for the period) does not exceed the greater of (1) \$100, or (2) 2% of the amount of taxes otherwise required to be deposited by the prescribed time. With respect to monthly depositors, the shortfall must be deposited or remitted by the due date of the return. With respect to deposits under the semi-weekly or one-day rule, shortfalls must be deposited on or before the first Wednesday or Friday (whichever is earlier) falling on or after the 15th day of the month in which the deposit was required to be made.

**De Minimis Rule**

If the total amount of accumulated employment taxes for the quarter is less than \$2,500 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.

**IRS ISSUES PROPOSED AND TEMPORARY REGULATIONS REGARDING EMPLOYMENT TAX RETURNS AND DEPOSITS (FORM 944 PROGRAM)**

The IRS has issued temporary and proposed regulations relating to the federal employment tax return filing requirements and to the employment tax deposit requirements. These temporary regulations amend the current regulations and are part of the IRS's effort to reduce taxpayer burden by permitting certain employers to file one return annually to report their employment tax liabilities instead of four quarterly returns. The temporary regulations affect taxpayers that file Form 941, "Employer's Quarterly Federal Tax Return," Form 944 and "Employer's Annual Federal Tax Return".

The temporary regulations allow certain employers to file an annual employment tax return, Form 944, to report their social security, Medicare, and withheld Federal income taxes rather than the quarterly Form 941. For these employers, Form 944 will replace Form 941, reducing the number of returns they are required to file each year. Most participating employers can also pay their employment taxes annually with their Form 944, rather than making monthly or bi-weekly deposits. Generally, Form 944 is due January 31 of the year following the year for which the return is filed. If the employer timely deposits all accumulated employment taxes on or before this due date, the employer will have 10 extra calendar days to file Form 944.

Eligibility for the Form 944 Program is generally limited to employers with an annual estimated employment tax liability of \$1,000 or less. The IRS will notify employers it believes are eligible; however, the temporary regulations provide that the Form 944 program is voluntary. The IRS will issue guidance informing employers how they can contact the IRS to participate in the Form 944 Program and how they can elect out if they later decide that they want to file Forms 941 instead of Form 944. Because the program is being made voluntary, beginning in tax year 2010, employers will be able to opt out for any reason if they follow procedures to be provided in future guidance.

**FEDERAL UNEMPLOYMENT TAX**

The wage base continues to be \$7,000 and the rate is 3.5%. For 2008, the federal tax rate is 6.2% and the state credit is 5.4%, with the result that the net federal tax is 0.8%. The 6.2% FUTA tax rate scheduled to decrease to 6.0% after December 31, 2008, has been extended through calendar year 2009.

**DEPOSITING FEDERAL UNEMPLOYMENT TAX (FUTA)**

Deposit FUTA in an authorized financial institution or a Federal Reserve Bank. Include a pre-inscribed Federal Tax Coupon (Form 8109) with each deposit. For deposit purposes, figure FUTA quarterly. Deposit any amount due by the last day of the first month after the quarter ends. A deposit is not required unless there is a cumulative liability of more than \$500 at the end of any quarter.

To determine whether the employer must deposit the tax for any one of the first three quarters in a year, multiply that part of the first \$7,000 of each employee's annual wage that was paid during a quarter by .008. If the amount to be deposited (plus any amount not yet deposited for an earlier quarter) is more than \$500, deposit all of the tax by February 2, 2009. If the tax for the year (less deposits) is \$500 or less, it may either be deposited or paid with Form 940 or Form 940-EZ by February 2, 2009.

**ELECTRONIC FEDERAL TAX PAYMENT SYSTEM (EFTPS)**

Employers make deposits using EFTPS for all depository tax liabilities for the current year if more than \$200,000 was made in aggregate deposits for all types of Federal depository taxes in the year two years before the current year or if the employer was required to make electronic deposits in the previous year.

Once an employer meets the mandated threshold, all federal business tax payments must be made electronically, even if the taxpayer's deposit activity falls below the threshold in future periods. Taxes included under this system are:

- 720 Quarterly Federal Excise Tax
- 940 Employer's Annual Federal Unemployment Tax
- 941 Employer's Quarterly Federal Tax
- 945 Annual Return of Withheld Federal Income Tax
- 1120 U.S. Corporation Income Tax
- 990PF Return of Private Foundation
- 990T Exempt Organization Business Income Tax
- 1042 Annual Withholding Tax Return for U.S. Source Income of Foreign Persons

The IRS offers business taxpayers two options to make electronic payments: Automatic Clearinghouse (ACH) debit and ACH credit. Before using the ACH methods, taxpayers must first enroll with the IRS. The IRS has contracts with two financial institutions to handle the enrollment and money transfer process. The taxpayer's geographical area will determine with whom they enroll. Taxpayers will receive an enrollment form at the same time they receive their mandated status notification. Depending on the taxpayer's banking arrangements, there may be a fee associated with ACH processing.

For ACH debit, the employer will be asked to provide business and bank account information and select one of the following input methods:

- Personal Computer
- Audio Response
- Voice Response

Payment must be initiated by 8:00 p.m. ET one business day prior to the tax due date. This is necessary for the ACH system to receive the transaction and debit the bank account on the tax due date. A confirmation number is provided after entry of each ACH debit.

Employers will also be asked if they would like to establish upper limits for their payments. Upon completion of the enrollment, the employers will be provided with a PIN number that they will use each time they enter the system to make a payment.

Employers who select ACH credit must initiate payment one day prior to tax payment due date and confirm cut-off times and associated fees with their financial institution.

There is no mechanism to provide a confirmation number when using ACH credit, since the credit is self-initiated as opposed to the debit, which is system-generated. However, employers will be provided a PIN number upon enrollment to enable them to query the IRS system and obtain confirmation that the IRS has received and processed an ACH credit. Unlike the ACH debit, the PIN is not used when making an ACH credit payment.

Business taxpayers can alternate between ACH debit and credit methods for paying a particular tax, but it must be noted on the enrollment form that the business wants to use both payment methods. The start-up procedures are different for the ACH debit and ACH credit methods of payment.

ACH debit payments must be initiated through the Government's Financial Agent by 8:00 p.m. ET on the business day prior to due date. ACH credit payment deadlines are set by the depository institutions which initiate the payments. Taxpayers who wish to initiate ACH credit payments must contact their banks to obtain their cut-off times. In any case, the payment must be initiated no later than the business day before it is due.

Taxpayers participating in EFTPS are responsible for ensuring that their funds are deposited on a timely basis. Internal Revenue Code Section 6656 provides that a penalty shall be imposed by the IRS for failure to make a timely deposit of tax.

If it is determined that the failure to pay is based on reasonable cause, the taxpayer will not be penalized. Reasonable cause is determined by the facts of the specific incident, including the events and parties involved, whether the taxpayer exercised ordinary business care, and if circumstances beyond his/her control prevented timely payment.

Businesses should allow 10 weeks to enroll although, according to the IRS, it generally takes four to six weeks. The IRS does not charge fees in connection with electronic payments, but the taxpayer's bank may. Depending on the taxpayer's banking arrangements, there may be a fee associated with ACH processing.

If a due date falls on a holiday, taxes are due on the next business day, which is the current policy. However, under EFTPS, the payment must be initiated on the business day before the holiday and will be settled on the next business day following the holiday. However, if the date before the due date is a Saturday or Sunday or ACH holiday (generally the same as banking holidays), the taxpayer must initiate the payment information one day earlier in order for the funds to settle on the tax due date; that is, the due date does not change but the initiation is required one day earlier.

## **INFORMATION RETURNS**

### **FEDERAL**

Every person engaged in a trade or business, including a nonprofit organization, is required to file information returns (Form 1099 series) with respect to certain payments made to another person during the calendar year. Form 1099-MISC will be the most used information return. This form is used to report fees, commissions or any other compensation for services rendered in the course of the payer's business, when the recipient is not treated as an employee and the amount to be reported is at least \$600. The recipient must receive his copy by February 2, 2009.

All Forms 1099 are required to be submitted to the Internal Revenue Service on or before March 2, 2009, accompanied by Form 1096, Annual Summary and Transmittal of U.S. Information Returns. If you file electronically, the due date is March 31, 2009.

## **NEW YORK STATE/CITY WITHHOLDING TAX AND WAGE REPORTING**

The new Business Information Center will respond to forms requests and questions on withholding and wage reporting requirements. The center may be reached by writing the New York State Tax Department, Withholding Tax Bureau, Building 8, W.A. Harriman Campus, Albany, New York 12227-0135. The toll-free telephone number, 1-800-972-1233, can be accessed from both within and outside New York State. Employers can also continue to use the Department's other two numbers – 1-800-CALL TAX (from within New York State only) and (518) 438-8581 (from areas outside the State).

## **NEW JERSEY INCOME TAX WITHHOLDING AND REPORTING**

The New Jersey gross income tax law is administered by the Division of Taxation, Department of the Treasury, 50 Barrack Street, P.O. Box 269, Trenton, New Jersey 08646. Telephone (609)-292-6400.

## **CONNECTICUT STATE INCOME TAX**

The Connecticut income tax law is administered by the Connecticut Department of Revenue Services, 92 Farmington Ave., Hartford, Connecticut 06105. Returns should be sent to the place

designated on the returns. For more information, local employers may call: 1-800-3TAX-INFO (1-800-382-9403); employers outside the state may call (860) 297-5962.

## **EMPLOYEE BENEFIT PLANS**

### **DELINQUENT FILER VOLUNTARY COMPLIANCE PROGRAM (DFVC) OF FORM 5500 SERIES**

#### **Program Criteria**

Participation in the DFVC Program is a two-part process. First, file with EBSA a complete Form 5500 Series Annual Return/Report, including all schedules and attachments, for each year relief is requested. Special simplified rules apply to “top hat” plans and apprenticeship and training plans. Second, submit to the DFVC Program the required documentation and applicable penalty amount. The plan administrator is personally liable for the applicable penalty amount and, therefore, amounts paid under the DFVC Program shall not be paid from the assets of an employee benefit plan.

The program reduces penalties for the late filing, or non-filing, of the Form 5500 series. The “Delinquent Filer Voluntary Compliance Program (DFVC) includes the following penalties:

#### **Penalty Structure**

*Reduced per day penalty* — The basic penalty under the program has been reduced from \$50 to \$10 per day for delinquent filings.

*Reduced “per filing” cap* — The maximum penalty for a single late annual report has been reduced from \$2,000 to \$750 for a small plan (generally a plan with fewer than 100 participants at the beginning of the plan year) and from \$5,000 to \$2,000 for a large plan.

*“Per plan” cap* — The revised DFVC Program also includes a new “per plan” cap. This cap is designed to encourage reporting compliance by plan administrators who have failed to file an annual report for a plan for multiple years. The “per plan” cap limits the penalty to \$1,500 for a small plan and \$4,000 for a large plan regardless of the number of late annual reports filed for the plan at the same time. There is no “per administrator” or “per sponsor” cap. If the same person is the administrator or sponsor of several plans required to file annual reports under Title I of ERISA, the maximum applicable penalty amounts would apply for each plan.

*Small plans sponsored by certain tax-exempt organizations* — A special “per plan” cap of \$750 applies to a small plan sponsored by an organization that is tax-exempt under Internal Revenue Code §501(c)(3). The \$750 limitation applies regardless of the number of late annual reports filed for the plan at the same time. It is not available, however, if as of the date the plan files under the DFVC Program there is a delinquent annual report for a plan year during which the plan was a large plan.

“Top hat” plans and apprenticeship and training plans — The penalty amount for “top hat” plans and apprenticeship and training plans was reduced to \$750.

### **Updated and Simplified Procedures**

The Department also simplified and updated the procedures governing participation in the program. The changes are intended to make the program easier to use. For example:

- Plan administrators may use the Form 5500 for the year relief is sought or the most current form available at the time of participation. This option allows administrators to choose the form that is most efficient and least burdensome for their circumstances;
- The forms and penalty payment check should no longer be annotated in bold red print identifying the filing as a DFVC filing;
- The program has been updated to conform to the annual reporting procedures under the computerized ERISA Filing Acceptance System (EFAST); and
- The address where DFVC Program remittances are submitted has been changed to DFVC Program, EBSA, P.O. Box 530292, Atlanta, Georgia 30353-0292. Submissions made to the old address will be returned to the filer.

### **IRS and PBGC Participation**

Although the DFVC Program does not cover late filing penalties under the Internal Revenue Code or Title IV of ERISA, the Internal Revenue Service and Pension Benefit Guaranty Corporation agreed to provide certain penalty relief for delinquent Form 5500s filed for Title I plans where the conditions of the DFVC Program have been satisfied.

## **PARSONAGE ALLOWANCE**

In order for a parsonage allowance to be nontaxable, several requirements must be met. The church must officially identify the amount of the parsonage as a definite part of the minister's compensation, designated to be used by him to provide a home. It should be evidenced in the minutes of the governing board. The parsonage for each year must be established in advance. Some general rules to keep in mind are:

1. The parsonage allowance cannot exceed the fair rental value of the home plus the cost of utilities.
2. A minister is not automatically entitled to exclude the fair rental value plus the cost of utilities. He must actually spend that amount.
3. If the total amounts spent for mortgage amortization payments, interest, taxes, improvements, repairs, insurance and other allowable costs of providing a home are less

than or equal to the fair rental value, then the minister can exclude only the amounts actually spent for these items plus the cost of utilities.

In conjunction with the payment of a parsonage allowance, it must be noted that members of the clergy are deemed to be self-employed for the purpose of the social security system. Accordingly, such individuals are subject to the self-employment tax. While it is possible for these individuals to increase their income tax withholding to cover the self-employment tax liability, an employer cannot withhold the employee's share of social security tax, nor may it remit its share of the social security tax.

## IRS TOLL-FREE NUMBERS TO ASSIST TAXPAYERS

800-829-1040	IRS Tax Help Line for Individuals	For individual and joint filers who need procedural or tax law information and/or help to file their 1040-type individual returns (including Schedules C and E); and general account information for Form 1040 Filers. Automated Self-Service Interactive Applications are also offered on this line.
800-829-4933	Business and Specialty Tax Line	For Small Businesses, Corporations, Partnerships and Trusts who need information and/or help related to their Business Returns or Business (BMF) Accounts. Services cover Employer Identification Numbers (EINs), 94x returns, 1041, 1065, 1120S, Excise Returns, Estate and Gift Returns, as well as issues related to Federal tax deposits.
800-829-1954	Refund Hotline	For 1040-type Individual and Joint Filers who need to check the status of their current year refund. Automated Refund Self-Service Interactive Applications are offered on this line.  <b>NOTE:</b> The “Where’s My Refund?” automated self-service feature is also available 24/7 to obtain refund status information.
800-829-3676	Forms and Publications	For individuals, businesses and tax practitioners who need IRS tax forms, instructions and related materials and tax publications.
877-777-4778	National Taxpayer Advocate’s Help Line	For taxpayers whose tax problems have not been resolved through normal channels. Taxpayer Advocate Service (TAS) provides an independent system to assure that tax problems are promptly and fairly handled. TAS operates independently of any other IRS office and reports directly to Congress through the National Taxpayer Advocate.
800-829-4059	Telephone Device for the Deaf (TDD)	For hearing-impaired taxpayers who need tax law and/or procedural information relating to filing their returns or who need information and/or assistance relating to their accounts.
888-912-1227	Taxpayer Advocacy Panel	For citizens who want to provide ideas and suggestions on how to improve IRS services or who want to make recommendations for improvement of IRS systems and procedures.
800-555-4477 or 800-945-8400	Electronic Federal Tax Payment System (EFTPS) Hotline	For taxpayers who want to pay business or individual taxes through electronic funds transfer. The EFTPS Toll-Free numbers can provide callers with EFTPS enrollment forms, instructions and customer assistance.
877-829-5500	Tax Exempt-Government Entity (TEGE) Help Line	For taxpayers who need tax information or assistance relating to Tax Exempt or Government Entities, Tax Exempt Bonds, Employer/Employee Pension Plans or Indian Tribal Agreements.
800-829-4477	Tele-tax Topics and Refund Status	For individuals who need to check the status of their current year refund or who want to listen to recorded tax information. Available 24 hours a day, seven days a week.
888-796-1074	Extension to File Tele-File System	For individual filers who want to submit an Extension to File for a 1040-series return via telephone.
866-255-0654	E-Help Desk	For individuals who need to check the status of their current year refund or who want to listen to recorded tax information. Available 24 hours a day, seven days a week.
866-463-3278	Department of Labor’s Employee Benefit Security Administration	For questions about the Form 5500 filing and audit requirements for section 403(b) retirement plans. Visit the Department of Labor’s Employee Benefit Security Administration Web site at <a href="http://www.dol.gov/ebsa">http://www.dol.gov/ebsa</a>

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