



Treasury Decisions
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Rules and Regulations

DEPARTMENT OF THE TREASURY
Internal Revenue Service (IRS)

26 CFR Parts 31 and 602

73 FR 37371

RIN 1545-BG50

Employment Tax Adjustments

T.D. 9405

DATE: July 1, 2008

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to employment tax adjustments and employment tax refund claims. The final regulations modify the process for making interest-free adjustments for both underpayments and overpayments of Federal Insurance Contributions Act (FICA) and Railroad Retirement Tax Act (RRTA) taxes and Federal income tax withholding (ITW) under sections 6205(a) and 6413(a), respectively, of the Internal Revenue Code (Code). These regulations also modify the process for filing claims for refund of overpayments of employment taxes under sections 6402 and 6414.

This document contains final regulations relating to the return requirements under section 6011 to reflect the changes to the adjustment and refund processes, and to reflect additional statutory and process updates. This document also contains final regulations under section 6302 to clarify deposit obligations with respect to interest-free adjustments of underpayments and the effect of adjustments and refunds on the deposit schedule of a Form 943 filer.

EFFECTIVE DATE: *Effective Date:* These final regulations are effective on January 1, 2009.

Applicability date: With respect to the regulations under Code sections 6205, 6402, 6413, and 6414, these final regulations apply to any error ascertained on or after January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Ligeia M. Donis, (202) 622-0047 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2097. The collection of information in these proposed regulations is in §§ 31.6011(a)-1, 31.6011(a)-4, 31.6011(a)-5, 31.6205-1, 31.6402(a)-2, 31.6413(a)-1, 31.6413(a)-2, and 31.6414-1. This information is required by the IRS to verify compliance with return requirements under section 6011, employment tax adjustments under sections

6205 and 6413, and claims for refund of overpayments of employment taxes under sections 6402 and 6414. This information will be used to determine whether the amount of tax has been reported and calculated correctly.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

These final regulations are issued in connection with the IRS's development of new forms to report adjustments to employment taxes which will replace the existing process of reporting adjustments of employment taxes on regularly filed employment tax returns. These regulations affect taxpayers that file employment tax returns, including Form 941, "Employer's QUARTERLY Federal Tax Return," Form 943, "Employer's Annual Tax Return for Agricultural Employees," Form 944, "Employer's ANNUAL Federal Tax Return," Form 945, "Annual Return of Withheld Federal Income Tax," and Form CT-1, "Employer's Annual Railroad Retirement Tax Return," and any related Spanish-language returns or returns for U.S. possessions.

These final regulations are part of the IRS's effort to reduce taxpayer burden by permitting employers to make employment tax adjustments on a separately filed form as soon as an error is ascertained. These regulations amend the Employment Tax Regulations (26 CFR part 31) under section 6011 relating to the requirement to file a return, under sections 6205(a) and 6413(a) relating to the process for making adjustments of underpayments and overpayments, respectively, of employment taxes, under section 6302 relating to deposit obligations, and under sections 6402 and 6414 relating to the process of filing a claim for refund for an overpayment of employment taxes. For purposes of these regulations, the term *employment taxes* means the Federal Insurance Contributions Act (FICA) tax (both the social security and Medicare portions) imposed on both the employer and the employee, the Railroad Retirement Tax Act (RRTA) tax imposed on both the employer and employee, and Federal income tax withholding (ITW). To the extent that other types of withholding are treated as ITW under section 3402(a) (that is, gambling withholding, pension withholding, and backup withholding as set forth in sections 3402(q)(7), 3405(f), and 3406(h)(10), respectively), these other types of withholding are included in the term employment taxes.

Interest-Free Adjustments

Generally, the Code requires that interest be paid to the IRS on any underpayment of tax and that interest be allowed and paid to the taxpayer on any overpayment of tax. See sections 6601(a) and 6611(a), respectively. An exception to the general rule, however, applies uniquely to employment taxes. Where an amount other than the correct amount of tax imposed by sections 3101 (employee FICA tax), 3111 (employer FICA tax), 3201 (employee RRTA tax), 3221 (employer RRTA tax), or 3402 (ITW) is reported to the IRS with respect to any payment of wages or compensation, sections 6205(a) and 6413(a) permit employers to make interest-free adjustments for underpayments and overpayments, respectively. Where the correct amount of tax has been reported but not paid, no adjustment to the amount reported is necessary; accordingly, the interest-free adjustment rules do not apply.

Claims for Refund

For overpayments of employment taxes, section 6413(b) permits the filing of a claim for refund when an interest-free adjustment cannot be made. Under the regulatory authority in section 6413(b), the IRS has permitted taxpayers to choose between filing a claim for refund pursuant to section 6402(a) and making an interest-free adjustment pursuant to section 6413(a) to correct an overpayment of employment taxes.

Under section 6402(a), the IRS, within the applicable period of limitations on credit or refund, may credit the amount of an overpayment, including any interest, against any tax liability of the person who made the overpayment and shall, subject to certain offsets, refund any balance to such person. A claim for refund under section 6402(a) must be filed within the period of limitations on credit or refund. Section 6414 permits refunds of ITW only to the extent the amount of the ITW overpayment was not actually deducted and withheld from an employee.

Since 1960, the regulations under sections 6205 and 6413 have provided that employment tax adjustments are made by reporting the adjustment on an employer's current period employment tax return. Because the adjustment was

reported on a current period return, the amount of the adjustment was treated as part of the current period's liability. Such a process for making adjustments of employment taxes presented a number of problems for both employers and the IRS, in large part because it required employers to make adjustments for past periods in connection with the filing of their current period returns.

The IRS, as part of the Form 94X Project initiated by the Office of Taxpayer Burden Reduction and in response to the request of employers and the payroll community, is developing new forms to be used when making adjustments of employment taxes. The new forms will reduce the employer's burden in making and tracking adjustments and increase the IRS's ability to ensure employment tax compliance. The IRS is simultaneously revising the process for claiming refunds. These final regulations are issued in connection with the IRS's development of such new forms which will be used by employers to make overpayment and underpayment adjustments to employment taxes or to claim refunds of overpaid employment taxes.

A notice of proposed rulemaking (REG-111583-07, 2008-4 IRB 323, 72 FR 74233) was published in the **Federal Register** on December 31, 2007. A correction to the notice of proposed rulemaking was published in the **Federal Register** on January 28, 2008 (73 FR 4765). No requests for a public hearing were received, therefore, no public hearing was held. The IRS received written and electronic comments responding to the notice of proposed rulemaking, but none of them requested substantive changes to the proposed regulations. The proposed regulations are adopted as amended by this Treasury decision. The revisions are discussed.

Summary of Comments and Explanation of Provisions

Several positive comments were received on the proposed regulations. No substantive changes to the regulations were requested. Several commentators suggested changes for the draft form, Form 941X, "Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund," which was released to the public on the IRS Web site (<http://www.irs.gov>) on March 4, 2008, as a vision draft for comment. The Form 941X is the first of a series of forms being developed by the IRS in conjunction with these regulations. The series of forms will correspond to Form 941, Form 943, Form 944, Form 945, and Form CT-1 and will be used by employers when making adjustments of employment taxes or claiming refunds of employment taxes. The comments on the draft Form 941X will be taken into account in preparing the final version of the form.

As the IRS has continued to prepare for the implementation of the new adjustment and refund claim processes for employment taxes, some necessary changes to the proposed regulations were identified and incorporated into these final regulations. These changes to the proposed regulations are discussed below.

Overview of Final Regulations Under Sections 6205 and 6413

The final regulations under sections 6205 and 6413 set forth the procedures for making interest-free adjustments for underpayments and overpayments of employment taxes, respectively. Like the proposed regulations, the final regulations under sections 6205 and 6413 have been drafted to set up parallel structures according to the type of tax being adjusted and when the error is ascertained. Accordingly, the final regulations under sections 6205 and 6413 are divided into provisions dealing with FICA and RRTA taxes and provisions dealing with ITW. The provisions are further broken down based on when the error is ascertained, that is, whether the error is ascertained before or after a return has been filed.

Interest-Free Adjustments

The final regulations under section 6205 set forth the procedures for making interest-free adjustments for underpayments of employment taxes. They provide that if a return is filed and less than the correct amount of employee or employer portions of FICA or RRTA tax is reported, and the employer discovers such error after filing the return, the employer shall adjust the resulting underpayment of tax by reporting the additional amount due on an adjusted return for the return period in which the wages or compensation was paid. The adjustment must be made by the due date of the return for the return period in which the error is ascertained and the amount of the underpayment must be paid by the time the adjustment is made, or interest will begin to accrue from that date. An underpayment adjustment may only be made within the period of limitations for assessment. For underpayments of ITW where the incorrect amount was withheld, subject to limited exceptions, an adjustment may be made only for errors ascertained during the calendar year in which the wages were paid.

Under the final regulations interest-free adjustments for underpayments of FICA tax, RRTA tax, and ITW are available under certain circumstances where the underpayment arises because the employer failed to file an original return or failed to report and pay the correct type of tax. The final regulations revise the processes set forth in the proposed regulations to accommodate the various possibilities of errors in these situations and to ensure the IRS can process the adjustments.

Specifically, under the final regulations, if an employer filed a return reporting FICA tax when a return reporting RRTA tax should have been filed, the employer can make an interest-free adjustment by filing an original return reporting the correct amount of RRTA tax and attaching an adjusted return to correct the erroneously reported FICA tax. Conversely, if an employer filed a return reporting RRTA tax when a return reporting FICA tax should have been filed, the employer can make an interest-free adjustment by filing an original return reporting the correct amount of FICA tax and attaching an adjusted return to correct the erroneously reported RRTA tax. In the latter situation, if the employer already filed a return that is used to report FICA tax in order to report ITW, the employer can make an interest-free adjustment by filing an adjusted return to report the correct amount of FICA tax with an adjusted return to correct the erroneously reported RRTA tax. The final regulations also add a cross-reference to the regulations under section 3503 which provide that if an amount is paid under the wrong chapter, that is, an employer erroneously pays FICA tax under chapter 21 instead of RRTA tax under chapter 22, or RRTA tax instead of FICA tax, the amount erroneously paid shall be credited against the tax for which the employer is liable and any balance refunded.

In addition, the final regulations provide the process by which an employer can make an interest-free adjustment if the employer failed to file a return for a return period solely because the employer failed to treat any individuals as employees. The employer can make an interest-free adjustment to report the tax due with respect to the reclassified workers by filing an original return and an attached adjusted return reporting the correct amount of tax, in accordance with the instructions for the adjusted return.

Generally, such reporting will constitute an interest-free adjustment in each of these situations if the original return and/or adjusted return(s) are filed by the due date of the correct return for the return period in which the error is ascertained. The amount reported must be paid by the time the original return and/or adjusted return(s) are filed or interest will accrue from that date.

The final regulations under section 6413(a) set forth the procedures for making interest-free adjustments for overpayments of employment taxes. They provide that, if an employer ascertains an overpayment error within the applicable period of limitations on credit or refund, the employer is required to repay or reimburse its employees the amount of overcollected employee FICA tax or employee RRTA tax prior to the expiration of the applicable period of limitations on credit or refund. However, the requirement to repay or reimburse does not apply to the extent that taxes were not withheld from the employee or if, after reasonable efforts, the employer cannot locate the employee; in such case, the employer may make an adjustment for only the employer share of FICA or RRTA tax. An interest-free adjustment for an overpayment may not be made once a claim for refund has been filed.

The final regulations under section 6413(a) further provide that once an employer repays or reimburses an employee to the extent required, the employer may report both the employee and employer portions of FICA or RRTA tax as an overpayment on an adjusted return. The employer must certify on the adjusted return that it has repaid or reimbursed its employees to the extent required.

Under the final regulations, the reporting of the overpayment constitutes an interest-free adjustment if the overpayment is reported on an adjusted return filed before the 90th day prior to expiration of the period of limitations on credit or refund. Similar rules apply for making interest-free adjustments for overpayments of ITW, except that an interest-free adjustment may only be made if the employer ascertains the error and repays or reimburses its employees within the same calendar year that the wages were paid and reports the adjustment on an adjusted return.

Unlike the proposed regulations, the final regulations do not require the employer to repay or reimburse the employee or to adjust the overpayment by the due date of the return for the return period following the return period in which the error is ascertained. Upon further consideration, the IRS determined there was insufficient reason to impose a timing restriction other than the period of limitations on credit or refund of taxes.

For both underpayments and overpayments, interest-free adjustments are made by reporting the error on a separately filed adjusted return. The new adjusted return will not be filed as an attachment to a current return and will not affect the liability reported on the current return. In addition, the regulations provide that the forms used to accept an assessment of employment taxes after an examination (that is, Form 2504, "Agreement and Collection of Additional Tax

and Acceptance of Overassessment (Excise or Employment Tax)", and Form 2504-WC, "Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment in Worker Classification Cases (Employment Tax)") constitute adjusted returns for purposes of permitting the assessment to be treated as an interest-free adjustment.

The IRS intends to issue guidance to provide examples of how the final regulations under sections 6205, 6402, 6413, and 6414 apply in different factual scenarios.

Deposits, Payments, and Credits

The final regulations under section 6302 provide that an employer making an interest-free adjustment must pay the amount of the adjustment by the time it files an adjusted return; such timely payment will satisfy the employer's deposit obligations with respect to the adjustment. Conversely, if the amount of the adjustment is not paid by the time the adjusted return is filed, a penalty under section 6656 for failure to deposit may apply because the deposit obligation for such taxes is not deemed to be satisfied and the employer may not have otherwise satisfied its deposit obligations for accumulated employment taxes.

In addition, the final regulations governing agricultural employers (Form 943 filers) provide that for purposes of determining the amount of accumulated taxes in the employer's lookback period (which determines the employer's deposit schedule), adjustments to tax liability made pursuant to the filing of adjusted returns or claims for refund will not be taken into account. This rule is consistent with the rule already in effect with respect to Form 941 and Form 944 filers that adjustments to prior return periods are not taken into account in determining the employment tax liability for such prior return period. See § 31.6302-1T(b)(4). The final regulations also added language to clarify that new agricultural employers are treated as having employment tax liabilities of zero for any lookback period before the date the employer started or acquired its business, which is consistent with the current rule governing the lookback period for Form 941 and Form 944 filers.

The adjusted overpayment amount will be applied as a credit toward payment of the employer's liability for the calendar quarter (or calendar year for annual returns being adjusted) in which the adjusted return is filed, unless the IRS notifies the employer that the employer is not entitled to the adjustment (that is, because there is no overpayment or because the requirements for making an adjustment were not satisfied) or that the credit will be applied to a different return period.

Refunds for Overpayments

In lieu of making an interest-free adjustment for an overpayment, employers may file a claim for refund pursuant to section 6402 or 6414 for the amount of the overpayment. Furthermore, if an employer cannot make an interest-free adjustment with respect to an overpayment because the period of limitations for claiming a credit or refund for such overpayment will expire within 90 days or because the IRS has otherwise notified the employer that it is not entitled to the adjustment, the employer may recover the overpayment only by filing a claim for refund.

The final regulations under section 6402(a) set out the procedures for filing a claim for refund of overpaid FICA and RRTA taxes. The regulations permit an employer to file a claim for refund of an overpayment of FICA or RRTA tax, but require the employer to certify as part of the claim process that the employer has repaid or reimbursed the employee's share of FICA or RRTA tax to the employee or has secured the written consent of the employee to allowance of the refund or credit. However, the employer is not required to repay or reimburse the employee or obtain the written consent of the employee to the extent that the overpayment does not include taxes withheld from the employee or, after reasonable efforts, the employer cannot locate the employee or the employee, once contacted, will not provide the requested consent.

The final regulations under section 6414 set out the procedures for filing a claim for refund of overpaid ITW which are similar to the procedures for filing a claim for refund of overpaid FICA or RRTA tax, except that an employer may not file a claim for refund of an overpayment of ITW for an amount the employer deducted or withheld from an employee.

Tax Returns or Statements

The final regulations for reporting employment taxes under section 6011 reflect the changes to the adjustment and refund processes. The final regulations are updated to conform to current law due to the enactment of section 3510, added to the Code by section 2(b)(1) of the Social Security Domestic Employment Reform Act of 1994 (Public Law

103-387), which mandates annual returns for domestic service employment taxes, and to reflect the current use of Schedule H (Form 1040) as the generally prescribed form for reporting wages for domestic service in a private home paid in calendar years beginning after December 31, 1994.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (*5 U.S.C. chapter 5*) does not apply to these regulations.

In accordance with the Regulatory Flexibility Act (*5 U.S.C. chapter 6*), this regulation will not have a significant economic impact on a substantial number of small entities.

The final regulations under sections 6011, 6205, 6402, 6413, and 6414 affect all taxpayers that file employment tax returns. Therefore, the IRS has determined that these regulations will have an impact on a substantial number of small entities.

The IRS has determined, however, that the impact on entities affected by the final regulations will not be significant. The regulations require taxpayers to provide certain information if they file adjusted returns to make interest-free adjustments to their employment taxes for either underpayments or overpayments or file claims for refund for an overpayment of employment tax. The taxpayer must provide an explanation setting forth the basis for the correction or the claim in detail, designating the return period in which the error was ascertained and the return period being corrected, and setting forth such other information as may be required by the instructions to the form. In addition, for adjustments of overpayments and for claims for refund, taxpayers must also obtain and retain the written receipt of the employee showing the date and amount of the repayment, evidence of reimbursement, or the written consent of the employee. For purposes of overpayment adjustments and claims for refund of employee FICA and RRTA tax overcollected in an earlier year, the employer must also obtain and retain the employee's written statement that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and that the employee will not claim refund or credit of the amount.

This collection of information is not new to the final regulations and has been in existence since the 1960's when the previous regulations were promulgated. In addition, the amendments to the regulations are being made in conjunction with a project of the Office of Taxpayer Burden Reduction which seeks to revise the process for making corrections to employment tax returns to make it less burdensome to taxpayers. The filing of a claim for refund and the making of an interest-free adjustment pursuant to the final regulations are voluntary on the part of taxpayers.

Based on these facts, the IRS hereby certifies that the collection of information contained in these regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Ligeia M. Donis of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 31 and 602 are amended as follows:

PART 31--EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

Paragraph 1. The authority citation for part 31 continues to read, in part, as follows:

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

Par. 2. Section 31.6011(a)-1 is amended by revising the text of paragraphs (a)(2), (a)(3), and the section heading and text of paragraphs (a)(4) and (c) to read as follows:

§ 31.6011(a)-1 Returns under Federal Insurance Contributions Act.

(a) * * *

(2) *Employers of agricultural workers.* Every employer who pays wages for agricultural labor with respect to taxes imposed by the Federal Insurance Contributions Act must make a return for the first calendar year in which the employer pays such wages and for each subsequent calendar year (whether or not wages are paid) until the employer has filed a final return in accordance with § 31.6011(a)-6. Form 943, "Employer's Annual Federal Tax Return for Agricultural Employees," is the form prescribed for making the annual return required by this section, except that, if the employer's principal place of business is in Puerto Rico, or if the employer has employees who are subject to income tax withholding for Puerto Rico, the return must be made on Form 943-PR, "Planilla para la Declaracion ANUAL de la Contribucion Federal del Patrono de Empleados Agricolas." However, Form 943 is the form prescribed for making such return in the case of every employer of agricultural workers who is required pursuant to § 31.6011(a)-4 to make a return of income tax withheld from wages.

(3) *Employers of domestic workers.* Schedule H (Form 1040), "Household Employment Taxes," is the form prescribed for use by every employer in making a return as required under paragraph (a)(1) of this section in respect of wages, as defined in the Federal Insurance Contributions Act, paid by the employer in any calendar year for domestic service as defined in section 3510. Schedule H (Form 1040) is generally filed as an attachment to an income tax return; however, if the employer does not otherwise have an obligation to file an income tax return, Schedule H (Form 1040) may be filed as a separate return. If, however, the employer is required under paragraph (a)(1) of this section to make a return on Form 941, "Employer's QUARTERLY Federal Tax Return," or under paragraph (a)(2) of this section to make a return on Form 943, "Employer's Annual Federal Tax Return For Agricultural Employees," or under paragraph (a)(5) of this section to make a return on Form 944, "Employer's ANNUAL Federal Tax Return," the employer may choose instead to report wages with respect to domestic workers on such Form 941, Form 943, or Form 944. If such wages are included on Form 941, Form 943, or Form 944, the employer must also include Federal unemployment tax for the employee(s) on Form 940, "Employer's Annual Federal Unemployment (FUTA) Tax Return," under the provisions of § 31.6011(a)-3.

(4) *Employers in Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands.* Form 941-PR, "Planilla para la Declaracion Federal TRIMESTRAL del Patrono," (or Form 944-PR, "Planilla para la Declaracion Federal ANUAL del Patrono," if the IRS notified the employer that the Form 944-PR must be filed in lieu of Form 941-PR) is the form prescribed for use in making the return required under paragraph (a)(1) (or (a)(5)) of this section in the case of every employer whose principal place of business is in Puerto Rico, or if the employer has employees who are subject to income tax withholding for Puerto Rico. Form 941-SS, "Employer's QUARTERLY Federal Tax Return (American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands)," (or Form 944-SS, "Employer's ANNUAL Federal Tax Return (American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands)," if the IRS notified the employer that Form 944-SS must be filed in lieu of Form 941-SS) is the form prescribed for use in making the return required under paragraph (a)(1) (or (a)(5)) of this section in the case of every employer whose principal place of business is in the U.S. Virgin Islands, Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands, or if the employer has employees who are subject to income tax withholding for these U.S. possessions. However, Form 941 (or Form 944 if the IRS notified the employer that Form 944 must be filed in lieu of Form 941) is the form prescribed for making such return in the case of every such employer who is required pursuant to § 31.6011(a)-4 to make a return of income tax withheld from wages.

* * * * *

(c) *Adjustments and refunds.* For rules applicable to adjustments and refunds of employment taxes, see sections 6205, 6402, 6413, and 6414, and the applicable regulations.

* * * * *

Par. 3. Section 31.6011(a)-4 is amended by revising paragraph (a)(2) to read as follows:

§ 31.6011(a)-4 Returns of income tax withheld.

(a) * * *

(2) *Wages paid for domestic service.* Schedule H (Form 1040), "Household Employment Taxes," is the form prescribed for making the return required under paragraph (a)(1) of this section with respect to income tax withheld, pursuant to an agreement under section 3402(p), from wages paid for domestic service as defined in section 3510. Schedule H (Form 1040) is generally filed as an attachment to an income tax return; however, if the employer does not otherwise have an obligation to file an income tax return, Schedule H (Form 1040) may be filed as a separate return. The preceding sentence shall not apply in the case of an employer who has chosen under § 31.6011(a)-1(a)(3) to use Form 941, "Employer's QUARTERLY Federal Tax Return," Form 943, "Employer's Annual Tax Return for Agricultural Employees," or Form 944, "Employer's ANNUAL Federal Tax Return," as the return with respect to such payments for purposes of the Federal Insurance Contributions Act. For the requirements relating for Schedule H (Form 1040) with respect to qualified State individual income taxes, see § 301.6361-1(d)(3)(iv).

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Par. 4. Section 31.6011(a)-5 is amended by revising paragraph (a) to read as follows:

§ 31.6011(a)-5 Monthly returns.

(a) *In general --(1) Requirement.* The provisions of this section are applicable in respect of the taxes reportable on returns required pursuant to § 31.6011(a)-1 or § 31.6011(a)-4. An employer (or other person) who is required by § 31.6011(a)-1 or § 31.6011(a)-4 to make quarterly or annual returns on any such form shall, in lieu of making such quarterly or annual returns, make returns of such taxes in accordance with the provisions of this section if the employer is so notified in writing by the IRS. Every employer (or other person) notified by the IRS shall make a return for the calendar month in which the notice is received, for each of the prior calendar months in the return period, and for each calendar month afterwards (whether or not wages are paid in any such month) until the employer has filed a final return or is required to make quarterly or annual returns pursuant to notification as provided in paragraph (a)(2) of this section. Each return required under this section shall be made on the form prescribed for making the return which would otherwise be required of the employer (or other person) under the provisions of § 31.6011(a)-1 or § 31.6011(a)-4, except that, if some other form is furnished by the IRS for use in lieu of such prescribed form, the return shall be made on such other prescribed form. The IRS may notify any employer (or other person)--

(i) Who by reason of notification as provided in § 301.7512-1, is required to comply with the provisions of such § 301.7512-1; or

(ii) Who failed to--

(A) Make any return required pursuant to § 31.6011(a)-1 or § 31.6011(a)-4;

(B) Pay tax reportable on any such form; or

(C) Deposit any such tax as required under the provisions of § 31.6302-1.

(2) *Termination of requirement.* The IRS, in its discretion, may notify the employer in writing that the employer shall discontinue the filing of monthly returns under this section. If the employer is so notified, the IRS will provide the employer with instructions for filing the final monthly return. Afterwards, the employer shall make quarterly or annual returns in accordance with the provisions of § 31.6011(a)-1 or § 31.6011(a)-4.

* * * * *

Par. 5. Section 31.6205-1 is amended to read as follows:

§ 31.6205-1 Adjustments of underpayments.

(a) *In general.* (1) An employer who has underreported and underpaid employee Federal Insurance Contributions Act (FICA) tax under section 3101 or employer FICA tax under section 3111, employee Railroad Retirement Tax Act (RRTA) tax under section 3201 or employer RRTA tax under section 3221, or income tax required under section 3402 to be withheld, with respect to any payment of wages or compensation, shall correct such error as provided in this section. Such correction may constitute an interest-free adjustment as provided in paragraph (b) or (c) of this section.

(2) No correction will be eligible for interest-free adjustment treatment if the failure to report relates to an issue that was raised in an examination of a prior return period or if the employer knowingly underreported its employment tax liability.

(3) Every correction under this section of an underpayment of tax with respect to a payment of wages or compensation shall be made on the form prescribed by the IRS that corresponds to the return being corrected. The form, filed in accordance with this section and the instructions, will constitute an adjusted return for the return period being corrected.

(4) Every adjusted return on which an underpayment is corrected pursuant to this section shall designate the return period in which the error was ascertained and the return period being corrected, explain in detail the grounds and facts relied upon to support the correction, and set forth such other information as may be required by the regulations in this section and by the instructions relating to the adjusted return.

(5) For purposes of this section, an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(6) No correction will be eligible for interest-free adjustment treatment pursuant to this section after the earlier of the following:

(i) Receipt from the IRS of notice and demand for payment thereof based upon an assessment.

(ii) Receipt from the IRS of a Notice of Determination of Worker Classification (Notice of Determination) in connection with such underpayment. Prior to receipt of a Notice of Determination, the taxpayer may, in lieu of making a payment, make a cash bond deposit that would have the effect of stopping the accrual of any interest, but would not deprive the taxpayer of its right to receive a Notice of Determination and to petition the Tax Court under section 7436.

(7) Subject to the exceptions specified in paragraphs (a)(2) and (a)(6) of this section, Form 2504, "Agreement and Collection of Additional Tax and Acceptance of Overassessment (Excise or Employment Tax)," Form 2504-WC, "Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment in Worker Classification Cases (Employment Tax)," and such other forms as may be prescribed by the IRS, constitute adjusted returns for purposes of this section.

(8) For provisions related to furnishing employee statements and corrected employee statements reporting wages and withheld taxes, see sections 6041 and 6051 and §§ 1.6041-2 and 31.6051-1. For provisions relating to filing information returns and corrected information returns reporting wages and withheld taxes, see sections 6041 and 6051 and §§ 1.6041-2 and 31.6051-2.

(9) For the period of limitations upon assessment and collection of taxes, see § 301.6501(a)-1.

(b) *Federal Insurance Contributions Act and Railroad Retirement Tax Act --(1) Undercollection ascertained before return is filed.* If an employer collects less than the correct amount of employee FICA or RRTA tax from an employee with respect to a payment of wages or compensation, and if the employer ascertains the error before filing the return on which the employee tax with respect to such wages or compensation is required to be reported, the employer shall nevertheless report on the return and pay to the IRS the correct amount of employee tax. If the employer does not report the correct amount of tax in these circumstances, the employer may not later correct the error through an interest-free adjustment.

(2) *Error ascertained after return is filed.* (i) If an employer files a return on which FICA tax or RRTA tax is required to be reported, and reports on the return less than the correct amount of employee or employer FICA or RRTA tax with respect to a payment of wages or compensation, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the underpayment of tax by reporting the additional amount due on an adjusted return for the return period in

which the wages or compensation was paid, accompanied by a detailed explanation of the amount being reported on the adjusted return and any other information as may be required by this section and by the instructions relating to the adjusted return. The reporting of the underpayment on an adjusted return constitutes an adjustment within the meaning of this section only if the adjusted return is filed within the period of limitations for assessment for the return period being corrected, and by the due date for filing the return for the return period in which the error is ascertained. For purposes of the preceding sentence, the due date for filing the adjusted return is determined by reference to the return being corrected, without regard to the employer's current filing requirements. For example, an employer with a current annual filing requirement who is correcting an error on a previously filed quarterly return must file the adjusted return by the due date for filing a quarterly return for the quarter in which the error is ascertained. The amount of the underpayment adjusted in accordance with this section must be paid to the IRS by the time the adjusted return is filed. If an adjustment is reported pursuant to this section, but the amount of the adjustment is not paid when due, interest accrues from that date (see section 6601).

(ii) If an employer files a return reporting FICA tax for a return period although the employer was required to file a return reporting RRTA tax, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the underpayment of RRTA tax by reporting the correct amount of RRTA tax on an original return for reporting RRTA tax for the return period for which the incorrect return was filed, accompanied by an adjusted return corresponding to the incorrect return that was filed to correct the erroneously reported and paid FICA tax. The adjusted return must include a detailed explanation of the amounts being reported on the original return and the adjusted return and any other information as may be required by the regulations in this section and by the instructions relating to the adjusted return. The reporting of the correct amounts for the period constitutes an adjustment within the meaning of this section only if the returns are filed by the due date of the return for reporting the RRTA tax for the return period in which the error is ascertained. Pursuant to § 31.3503-1, the amount of erroneously paid FICA tax will be credited against the underpaid RRTA tax. Any remaining underpayment of RRTA tax adjusted in accordance with this section must be paid to the IRS by the time the returns are filed in accordance with this paragraph. If an adjustment is reported pursuant to this section, but the amount of the remaining underpayment is not paid when due, interest accrues from that date (see section 6601).

(iii) If an employer files a return reporting RRTA tax for a return period although the employer was required to file a return reporting FICA tax, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the underpayment of FICA tax by reporting the correct amount of FICA tax on an original return for reporting FICA tax for the return period for which the incorrect return was filed (or an adjusted return for reporting the FICA tax if an original return was already filed for such return period to report the income tax required to be withheld under section 3402), accompanied by an adjusted return corresponding to the incorrect return that was filed to correct the erroneously reported and paid RRTA tax. The adjusted return(s) must include a detailed explanation of the amount being reported on the original return and/or the adjusted return(s) and any other information as may be required by the regulations in this section and by the instructions relating to the form. The reporting of the correct amounts for the period constitutes an adjustment within the meaning of this section only if the returns are filed by the due date of the return for reporting the FICA tax for the return period in which the error is ascertained. Pursuant to § 31.3503-1, the amount of erroneously paid RRTA tax will be credited against the underpaid FICA tax. Any remaining underpayment of FICA tax adjusted in accordance with this section must be paid to the IRS by the time the returns are filed in accordance with this paragraph (b)(2)(iii). If an adjustment is reported pursuant to this section, but the amount of the remaining underpayment is not paid when due, interest accrues from that date (see section 6601).

(3) *Return not filed because of failure to treat individual as employee.* If an employer fails to file a return for a return period solely because the employer failed to treat any individuals properly as employees for the return period (and, therefore, failed to withhold and pay any employer or employee FICA or RRTA tax with respect to wages or compensation paid to the employees) and if the employer ascertains the error after the due date of the return, the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall report the amount due by filing an original return required to be filed to report the tax for the return period for which the employer failed to file a return, accompanied by an adjusted return as provided in the instructions to the adjusted return. The adjusted return must include a detailed explanation of the amount being reported on the original return and adjusted return and any other information as may be required by this section and by the instructions relating to the adjusted return. The reporting of the correct amount of tax for the return period constitutes an adjustment within the meaning of this section only if the original and adjusted returns are filed by the due date of the return for reporting such tax for the

return period in which the error is ascertained. For purposes of the preceding sentence, the due date for filing the adjusted return is determined by reference to the return being corrected, without regard to the employer's current filing requirements. For example, an employer with a current annual filing requirement who is correcting an error on a previously filed quarterly return must file the adjusted return by the due date for filing a quarterly return for the quarter in which the error is ascertained. The amount of the underpayment adjusted in accordance with this section must be paid to the IRS by the time the returns are filed in accordance with this paragraph. If an adjustment is reported pursuant to this section, but the amount of the adjustment is not paid when due, interest accrues from that date (see section 6601).

(c) *Income tax required to be withheld from wages --(1) Undercollection ascertained before return is filed.* If an employer collects less than the correct amount of income tax required to be withheld from wages under section 3402, and if the employer ascertains the error before filing the return on which the withheld tax is required to be reported, the employer shall nevertheless report on the return and pay to the IRS the correct amount of tax required to be withheld. If the employer does not report the correct amount of tax in these circumstances, the employer may not correct the error through an interest-free adjustment.

(2) *Error ascertained after return is filed.* If an employer files a return on which income tax required to be withheld from wages is required to be reported and reports on the return less than the correct amount of income tax required to be withheld, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the underpayment of tax by reporting the additional amount due on an adjusted return for the return period in which the wages were paid, accompanied by a detailed explanation of the amount being reported on the adjusted return and any other information as may be required by this section and by the instructions relating to the adjusted return. The reporting of the underpayment on an adjusted return constitutes an adjustment within the meaning of this section only if the adjusted return is filed by the due date for filing the return for the return period in which the error is ascertained. For purposes of the preceding sentence, the due date for filing the adjusted return is determined by reference to the return being corrected, without regard to the employer's current filing requirements. For example, an employer with a current annual filing requirement who is correcting an error on a previously filed quarterly return must file the adjusted return by the due date for filing a quarterly return for the quarter in which the error is ascertained. However, an adjustment may only be reported pursuant to this section if the error is ascertained within the same calendar year that the wages to the employee were paid, unless the underpayment is attributable to an administrative error (that is, an error involving the inaccurate reporting of the amount actually withheld), section 3509 applies to determine the amount of the underpayment, or the adjustment is reported on a Form 2504 or Form 2504-WC. The amount of the underpayment adjusted in accordance with this section must be paid to the IRS by the time the adjusted return is filed. If an adjustment is reported pursuant to this section, but the amount of the adjustment is not paid when due, interest accrues from that date (see section 6601).

(3) *Return not filed because of failure to treat individual as employee.* If an employer fails to file a return for a return period solely because the employer failed to treat any individuals properly as employees for the return period (and, therefore, failed to withhold and pay any income tax required to be withheld from wages), the employer shall correct the error through an interest-free adjustment as provided in this section. The employer shall report the amount due by filing an original return for the return period for which the employer failed to file a return, accompanied by an adjusted return as provided in the instructions to the adjusted return. The adjusted return must include a detailed explanation of the amount being reported on the original and adjusted returns and any other information as may be required by this section and by the instructions relating to the adjusted return. The reporting of the correct amount of tax for the return period constitutes an adjustment within the meaning of this section only if the original and adjusted returns are filed by the due date of the return for reporting such tax for the return period in which the error is ascertained. For purposes of the preceding sentence, the due date for filing the adjusted return is determined by reference to the return being corrected, without regard to the employer's current filing requirements. For example, an employer with a current annual filing requirement who is correcting an error on a previously filed quarterly return must file the adjusted return by the due date for filing a quarterly return for the quarter in which the error is ascertained. However, an adjustment may only be reported pursuant to this section if the error is ascertained within the same calendar year that the wages to the employee were paid, or if section 3509 applies to determine the amount of the underpayment, or if the adjustment is reported on a Form 2504 or Form 2504-WC. The amount of the underpayment adjusted in accordance with this section must be paid to the IRS by the time the returns are filed in accordance with this paragraph. If an adjustment is reported pursuant to this section, but the amount of the adjustment is not paid when due, interest accrues from that date (see section 6601).

(d) *Deductions from employee --(1) Federal Insurance Contributions Tax Act and Railroad Retirement Tax Act.* If an employer collects less than the correct amount of employee FICA or RRTA tax from an employee with respect to a payment of wages or compensation, the employer must collect the amount of the undercollection by deducting the amount from remuneration of the employee, if any, paid after the employer ascertains the error. Such deductions may be made even though the remuneration, for any reason, does not constitute wages or compensation. The correct amount of employee tax must be reported and paid, as provided in paragraph (b) of this section, whether or not the undercollection is corrected by a deduction made as prescribed in this paragraph (d)(1), and even if the deduction is made after the return on which the employee tax must be reported is due. If such a deduction is not made, the obligation of the employee to the employer with respect to the undercollection is a matter for settlement between the employee and the employer. If an employer makes an erroneous collection of employee tax from two or more of its employees, a separate settlement must be made with respect to each employee. An overcollection of employee tax from one employee may not be used to offset an undercollection of such tax from another employee. For provisions relating to the employer's liability for the tax, whether or not it collects the tax from the employee, see § 31.3102-1(d). This paragraph (d)(1) does not apply if section 3509 applies to determine the employer's liability.

(2) *Income tax required to be withheld from wages.* If an employer collects less than the correct amount of income tax required to be withheld from wages during a calendar year, the employer must collect the amount of the undercollection on or before the last day of the year by deducting the amount from remuneration of the employee, if any, paid after the employer ascertains the error. Such deductions may be made even though the remuneration, for any reason, does not constitute wages. The correct amount of income tax must be reported and paid, as provided in paragraph (c) of this section, whether or not the undercollection is corrected by a deduction made as prescribed in this paragraph (d)(2), and even if the deduction is made after the return on which the tax must be reported is due. If such a deduction is not made, the obligation of the employee to the employer with respect to the undercollection is a matter for settlement between the employee and the employer within the calendar year. If an employer makes an erroneous collection of income tax from two or more of its employees, a separate settlement must be made with respect to each employee. An overcollection of income tax from one employee may not be used to offset an undercollection of such tax from another employee. For provisions relating to the employer's liability for the tax, whether or not it collects the tax from the employee, see § 31.3403-1. For provisions relating to the employer's liability for an underpayment of tax unless the employer can show that the income tax against which the tax under section 3402 may be credited has been paid, see § 31.3402(d)-1. This paragraph (d)(2) does not apply if section 3509 applies to determine the employer's liability.

Par. 6. Section 31.6302-0 is amended by adding new entries for § 31.6302-1 paragraphs (c)(7) and (g)(4)(i) and (ii) to read as follows:

§ 31.6302-0 Table of contents.

* * * * *

§ 31.6302-1 Federal tax deposit rules for withheld income taxes and taxes under the Federal Insurance Contributions Act (FICA) attributable to payments made after December 31, 1992.

* * * * *

(c) * * *

(7) Exception to the monthly and semi-weekly deposit rules for employers making interest-free adjustments.

* * * * *

(g) * * *

(4) * * *

(i) In general.

(ii) Adjustments and Claims for Refund.

* * * * *

Par. 7. Section 31.6302-1 is amended by adding paragraph (c)(7) and revising paragraph (g)(4) to read as follows:

§ 31.6302-1 Federal tax deposit rules for withheld income taxes and taxes under the Federal Insurance Contributions Act (FICA) attributable to payments made after December 31, 1992.

* * * * *

(c) * * *

(7) *Exception to the monthly and semi-weekly deposit rules for employers making interest-free adjustments.* An employer filing an adjusted return under § 31.6205-1 to report taxes that were accumulated in a prior return period shall pay the amount of the adjustment by the time it files the adjusted return, and the amount timely paid will be deemed to have been timely deposited by the employer. The payment may be made by a check or money order with the adjusted return, by electronic funds transfer, or by other methods of payment as provided by the instructions relating to the adjusted return.

* * * * *

(g) * * *

(4) *Lookback period --(i) In general.* For purposes of this paragraph (g), the lookback period for Form 943 taxes is the second calendar year preceding the current calendar year. For example, the lookback period for calendar year 1993 is calendar year 1991. New employers shall be treated as having employment tax liabilities of zero for any lookback period before the date the employer started or acquired its business.

(ii) *Adjustments and Claims for Refund.* The employment tax liability reported on the original return for the return period is the amount taken into account in determining whether the amount of Form 943 taxes accumulated in the lookback period exceeds \$ 50,000. Any amounts reported on adjusted returns or claims for refund pursuant to sections 6205, 6402, 6413 and 6414 filed after the due date of the original return are not taken into account when determining the amount of Form 943 taxes accumulated in the lookback period. However, prior period adjustments reported on Form 943 for 2008 and earlier years are taken into account in determining the employment tax liability for the return period in which the adjustments are reported.

* * * * *

Par. 8. Section 31.6402(a)-1 is amended by revising paragraph (a) to read as follows:

§ 31.6402(a)-1 Credits or refunds.

(a) *In general.* For regulations under section 6402 of special application to credits or refunds of employment taxes, see §§ 31.6402(a)-2, 31.6402(a)-3, and 31.6414-1. For regulations under section 6402 of general application to credits or refunds, see §§ 301.6402-1 and 301.6402-2. For provisions relating to adjustments without interest of overpayments of taxes under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act or income tax withholding, see §§ 31.6413(a)-1 and 31.6413(a)-2.

* * * * *

Par. 9. Section 31.6402(a)-2 is amended by revising paragraph heading and text of paragraph (a) and removing paragraph (c) to read as follows:

§ 31.6402(a)-2 Credit or refund of tax under Federal Insurance Contributions Act or Railroad Retirement Tax Act

(a) *Claim by person who paid tax to IRS --(1) In general.* (i) Any person may file a claim for credit or refund for an overpayment (except to the extent that the overpayment must be credited pursuant to § 31.3503-1) if the person paid to the IRS more than the correct amount of employee Federal Insurance Contributions Act (FICA) tax under section 3101 or employer FICA tax under section 3111, employee Railroad Retirement Tax Act (RRTA) tax under section 3201, employee representative RRTA tax under section 3211, or employer RRTA tax under section 3221, or interest, addition to the tax, additional amount, or penalty with respect to any such tax.

(ii) The claim for credit or refund must be made in the manner and subject to the conditions stated in this section. The claim for credit or refund must be filed on the form prescribed by the IRS and must designate the return period to which the claim relates, explain in detail the grounds and facts relied upon to support the claim, and set forth such other information as may be required by this section and by the instructions relating to the form used to make such claim. No refund or credit pursuant to this section for employer tax will be allowed unless the employer has first repaid or reimbursed its employee or has secured the employee's consent to the allowance of the claim for refund and includes a claim for the refund of such employee tax. However, this requirement does not apply to the extent that the taxes were not withheld from the employee or, after the employer makes reasonable efforts to repay or reimburse the employee or secure the employee's consent, the employer cannot locate the employee or the employee will not provide consent. No refund or credit of employee FICA or RRTA tax overcollected in an earlier year will be allowed if the employee has claimed a refund or credit of the amount of the overcollection which has not been rejected or if the employee has taken the amount of such tax into account in claiming a credit against or refund of the employee's income tax, including instances in which the employee has included an overcollection of employee FICA or RRTA tax in computing a special refund (see § 31.6413(c)-1).

(iii) For adjustments without interest of overpayments of FICA or RRTA taxes, see § 31.6413(a)-2.

(iv) For corrections of FICA and RRTA tax paid under the wrong chapter, see § 31.6205-1(b)(2)(ii) and (iii) and § 31.3503-1.

(v) For provisions related to furnishing employee statements and corrected employee statements reporting wages and withheld taxes, see sections 6041 and 6051 and §§ 1.6041-2 and 31.6051-1. For provisions relating to filing information returns and corrected information returns reporting wages and withheld taxes, see sections 6041 and 6051 and §§ 1.6041-2 and 31.6051-2.

(vi) For the period of limitations on credit or refund of taxes, see § 301.6511(a)-1.

(2) *Statements supporting employer's claims for employee tax.* (i) Every employer who files a claim for refund or credit of employee FICA tax under section 3101 or employee RRTA tax under section 3201 collected from an employee must certify as part of the claim process that the employer has repaid or reimbursed the tax to its employee or has secured the employee's written consent to allowance of the filing of the claim for refund except to the extent that the taxes were not withheld from the employee. The employer must retain as part of its records the written receipt of the employee showing the date and amount of the repayment, evidence of reimbursement, or the written consent of the employee, whichever is used in support of the claim.

(ii) Every employer who files a claim for refund or credit of employee FICA tax under section 3101 or employee RRTA tax under section 3201 collected from an employee in a calendar year prior to the year in which the credit or refund is claimed, also must certify as part of the claim process that the employer has obtained the employee's written statement that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and that the employee will not claim refund or credit of the amount. The employer must retain the employee's written statement as part of the employer's records.

* * * * *

Par. 10. Section 31.6413(a)-1 is revised to read as follows:

§ 31.6413(a)-1 Repayment or reimbursement by employer of tax erroneously collected from employee.

(a) *Federal Insurance Contributions Act and Railroad Retirement Tax Act* --(1) *Overcollection ascertained before return is filed.* (i) If an employer during any return period collects from an employee more than the correct amount of employee Federal Insurance Contributions Act (FICA) tax under section 3101 or employee Railroad Retirement Tax Act (RRTA) tax under section 3201, and if the employer ascertains the error before filing the return on which the employee tax is required to be reported, repays or reimburses the amount of the overcollection to the employee before filing the return for such return period, and obtains and keeps as part of its records the written receipt of the employee showing the date and amount of the repayment or evidence of reimbursement, the employer shall not report on any return or pay to the IRS the amount of the overcollection.

(ii) Any overcollection not repaid or reimbursed to the employee as provided in paragraph (a)(1)(i) of this section shall be reported and paid to the IRS on the return for reporting such tax for the return period in which the

overcollection is made. However, the reporting and payment of the overcollection may subsequently be treated as an overpayment error ascertained after the return is filed for purposes of paragraph (a)(2) of this section.

(iii) For purposes of this paragraph (a)(1), an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(2) *Error ascertained after return is filed.* (i) If an employer files a return for a return period on which FICA tax or RRTA tax is reported, collects from an employee and pays to the IRS more than the correct amount of the employee FICA or RRTA tax, and if the employer ascertains the error after filing the return and within the applicable period of limitations on credit or refund, the employer shall repay or reimburse the employee in the amount of the overcollection prior to the expiration of such limitations period. However, this paragraph (a)(2) does not apply to the extent that, after reasonable efforts, the employer cannot locate the employee, or the employee does not provide the employer with the written statement required by § 31.6413(a)-1(a)(2)(iv). This paragraph (a)(2) has no application in any case in which an overcollection is made the subject of a claim by the employer for refund or credit under the procedure provided in § 31.6402(a)-2.

(ii) If the employer repays the amount of the overcollection to an employee, the employer shall obtain and keep as part of its records the written receipt of the employee, showing the date and amount of the repayment.

(iii) If the employer reimburses the amount of the overcollection to an employee, the employer shall keep as part of its records evidence of reimbursement. The employer shall reimburse the employee by applying the amount of the overcollection against the employee FICA or RRTA tax which attaches to wages or compensation paid by the employer to the employee prior to the expiration of the applicable period of limitations on credit or refund. If the amount of the overcollection exceeds the amount so applied against such employee tax, the excess amount shall be repaid to the employee as required by this section.

(iv) If, in any calendar year, an employer repays or reimburses an employee in the amount of an overcollection of employee FICA or RRTA tax that was collected from the employee in a prior calendar year, the employer shall obtain from the employee and keep as part of its records a written statement that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and that the employee will not claim refund or credit of such amount. For this purpose, a claim for refund or credit by the employee includes instances in which the employee has included an overcollection of employee FICA or RRTA tax in computing a special refund (see § 31.6413(c)-1).

(v) For purposes of this paragraph (a)(2), an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(vi) For the period of limitations on credit or refund of taxes, see § 301.6511(a)-1.

(vii) For corrections of FICA and RRTA tax paid under the wrong chapter, see § 31.6205-1(b)(2)(ii) and (iii) and § 31.3503-1.

(b) *Income tax withheld from wages --(1) Overcollection ascertained before return is filed.* (i) If an employer during any return period collects from an employee more than the correct amount of tax required to be withheld from wages under section 3402, and if the employer ascertains the error before filing the return on which such tax is required to be reported, repays or reimburses the amount of the overcollection to the employee before filing the return for such return period and before the end of the calendar year in which the overcollection was made, and obtains and keeps as part of its records the written receipt of the employee showing the date and amount of the repayment or evidence of reimbursement, the employer shall not report on any return or pay to the IRS the amount of the overcollection.

(ii) Any overcollection not repaid or reimbursed to the employee as provided in paragraph (b)(1)(i) of this section shall be reported and paid to the IRS on the return for reporting such tax for the return period in which the overcollection is made. However, the reporting and payment of the overcollection may subsequently be treated as an overpayment error ascertained after the return is filed for purposes of paragraph (b)(2) of this section.

(iii) For purposes of this paragraph (b)(1), an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(2) *Error ascertained after return is filed.* (i) If an employer files a return for a return period on which tax required to be withheld from wages is reported, collects from an employee and pays to the IRS more than the correct amount of the tax required to be withheld from wages, and if the employer ascertains the error after filing the return but before the

end of the calendar year in which the wages were paid, the employer shall repay or reimburse the employee in the amount of the overcollection prior to the end of the calendar year. However, this paragraph does not apply to the extent that, after reasonable efforts, the employer cannot locate the employee.

(ii) If the employer repays the amount of the overcollection to an employee, the employer shall obtain and keep as part of its records the written receipt of the employee, showing the date and amount of the repayment.

(iii) If the employer reimburses the amount of the overcollection to an employee, the employer shall keep as part of its records evidence of reimbursement. The employer shall reimburse the employee by applying the amount of the overcollection against the tax under section 3402, which otherwise would be required to be withheld from wages paid by the employer to the employee in the calendar year in which the overcollection is made. If the amount of the overcollection exceeds the amount so applied against such tax, the excess amount shall be repaid to the employee as required by this section.

(iv) For purposes of this paragraph (b)(2), an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

Par. 11. Section 31.6413(a)-2 is revised to read as follows:

§ 31.6413(a)-2 Adjustments of overpayments.

(a) *In general.* (1) An employer who has overcollected or overpaid employee Federal Insurance Contributions Act (FICA) tax under section 3101 or employer FICA tax under section 3111, employee Railroad Retirement Tax (RTTA) tax under section 3201 or employer RTTA tax under section 3221, or income tax required under section 3402 to be withheld, and has repaid or reimbursed the amount of the overcollection of such tax to the employee, shall correct such error as provided in this section. Such correction may constitute an interest-free adjustment as provided in paragraph (b) or (c) of this section.

(2) Every correction under this section of an overpayment of tax shall be made on the form prescribed by the IRS that corresponds to the return being corrected. The form, filed in accordance with this section and the instructions, will constitute an adjusted return for the return period being corrected.

(3) Every adjusted return on which an overpayment is corrected pursuant to this section shall certify that the employer has repaid or reimbursed its employee, except where taxes were not withheld from the employee or where, after reasonable efforts, the employer cannot locate the employee. Every adjusted return shall designate the return period in which the error was ascertained and the return period being corrected, explain in detail the grounds and facts relied upon to support the correction, and set forth such other information as may be required by this section and § 31.6413(a)-1 and by the instructions relating to the adjusted return. Every adjusted return, filed by an employer, for overpayment of employee FICA tax under section 3101 or employee RTTA tax under section 3201 collected from an employee in a calendar year prior to the year in which the adjusted return is filed, must also certify that the employer has obtained the employee's written statement that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and that the employee will not claim refund or credit of the amount.

(4) For purposes of this section, an error is ascertained when the employer has sufficient knowledge of the error to be able to correct it.

(5) For provisions related to furnishing employee statements and corrected employee statements reporting wages and withheld taxes, see sections 6041 and 6051 and §§ 1.6041-2 and 31.6051-1. For provisions relating to filing information returns and corrected information returns reporting wages and withheld taxes, see sections 6041 and 6051 and §§ 1.6041-2 and 31.6051-2.

(b) *Federal Insurance Contributions Act and Railroad Retirement Tax Act--* (1) *Overcollection ascertained before return is filed.* If an employer collects more than the correct amount of employee FICA or RTTA tax from an employee, and if the employer ascertains the error before filing the return on which the employee tax with respect to such wages or compensation is required to be reported, and repays or reimburses the employee under § 31.6413(a)-1(a)(1), the employer shall not report on any return or pay to the IRS the amount of the overcollection. If the employer does not repay or reimburse the amount of the overcollection under § 31.6413(a)-1(a)(1) before filing the return, the employer must report the amount of the overcollection on the return. However, the payment of the overcollection may

subsequently be treated as an overpayment error ascertained after the return is filed for purposes of paragraph (b)(2) of this section.

(2) *Error ascertained after return is filed --(i) Employee tax.* If an employer files a return for a return period on which FICA tax or RRTA tax is required to be reported and reports on the return more than the correct amount of employee FICA or RRTA tax, and if the employer ascertains the error after filing the return, and repays or reimburses the employee the amount of the overcollection of employee tax, as provided in § 31.6413(a)-1(a)(2), the employer may correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the overpayment of tax by reporting the overpayment on an adjusted return for the return period in which the wages or compensation was paid, accompanied by a detailed explanation of the amount being reported on the adjusted return as required by paragraph (a)(3) of this section. Except as provided in paragraph (d) of this section, the reporting of the overpayment on an adjusted return constitutes an adjustment within the meaning of this section only if the adjusted return is filed before the expiration of the period of limitations on credit or refund. The employer shall take the adjusted amount as a credit towards payment of employment tax liabilities for the return period in which the adjusted return is filed unless the IRS notifies the employer that the adjustment is not permitted under paragraph (d) of this section.

(ii) *Employer tax.* If an employer files a return for a return period on which FICA or RRTA tax is required to be reported and reports on the return more than the correct amount of employer FICA or RRTA tax, and if the employer ascertains the error after filing the return, the employer may correct the error through an interest-free adjustment as provided in this section. The employer must first repay or reimburse the employee the amount of any overcollection of employee tax, if any, as required by § 31.6413(a)-1(a)(2), before making the adjustment for the employer tax. The employer shall adjust the overpayment of tax by reporting the overpayment on an adjusted return for the return period in which the wages or compensation was paid, accompanied by a detailed explanation of the amount being reported on the adjusted return as required by paragraph (a)(3) of this section. Except as provided in paragraph (d) of this section, the reporting of the overpayment on an adjusted return constitutes an adjustment within the meaning of this section only if the adjusted return is filed before the expiration of the period of limitations on credit or refund. The employer shall take the adjusted amount as a credit towards payment of employment tax liabilities for the return period in which the adjusted return is filed unless the IRS notifies the employer that the adjustment is not permitted under paragraph (d) of this section.

(c) *Income tax withheld from wages --(1) Overcollection ascertained before return is filed.* If an employer collects more than the correct amount of income tax required to be withheld from wages, and if the employer ascertains the error before filing the return on which the tax is required to be reported, and repays or reimburses the employee under § 31.6413(a)-1(b)(1), the employer shall not report on any return or pay to the IRS the amount of the overcollection. If the employer does not repay or reimburse the amount of the overcollection under § 31.6413(a)-1(b)(1) before filing the return, the employer must report the amount of the overcollection on the return. However, the reporting and payment of the overcollection may subsequently be treated as an overpayment error ascertained after the return is filed for purposes of paragraph (c)(2) of this section.

(2) *Error ascertained after return is filed.* If an employer files a return for a return period on which income tax required to be withheld from wages is required to be reported and reports on the return more than the correct amount of income tax required to be withheld, and if the employer ascertains the error after filing the return, and repays or reimburses the employee in the amount of the overcollection as provided in § 31.6413(a)-1(b)(2), the employer may correct the error through an interest-free adjustment as provided in this section. The employer shall adjust the overpayment of tax by reporting the overpayment on an adjusted return for the return period in which the wages were paid, accompanied by a detailed explanation of the amount being reported on the adjusted return as required in paragraph (a)(3) of this section. Except as provided in paragraph (d) of this section, the reporting of the overpayment on an adjusted return constitutes an adjustment within the meaning of this section. If the amount of the overcollection is not repaid or reimbursed to the employee under § 31.6413(a)-1(b)(2), there is no overpayment to be adjusted under this section. However, the employer may adjust an overpayment of tax attributable to an administrative error, that is, an error involving the inaccurate reporting of the amount withheld, pursuant to this section. The employer shall take the adjusted amount as a credit towards payment of employment tax liabilities for the return period in which the adjusted return is filed unless the IRS notifies the employer that the adjustment is not permitted under paragraph (d) of this section.

(d) *Adjustments not permitted --(1) In general.* If an adjustment cannot be made, a claim for refund or credit may be filed in accordance with § 31.6402(a)-2 or § 31.6414-1.

(2) *90-day exception.* No adjustment in respect of an overpayment may be made if the overpayment relates to a return period for which the period of limitations on credit or refund of such overpayment will expire within 90 days of filing the adjusted return.

(3) *No adjustment after claim for refund filed.* No adjustment in respect of an overpayment may be made after the filing of a claim for credit or refund of such overpayment under § 31.6402(a)-2.

(4) *No adjustment after IRS notification.* No adjustment may be made upon notification by the IRS that the adjustment is not permitted.

Par. 12. Section 31.6414-1 is amended by revising paragraph (a) to read as follows:

§ 31.6414-1 Credit or refund of income tax withheld from wages.

(a) *In general.* (1) Any employer who pays to the IRS more than the correct amount of income tax required to be withheld from wages under section 3402 or interest, addition to the tax, additional amount, or penalty with respect to such tax, may file a claim for refund of the overpayment in the manner and subject to the conditions stated in this section on the form prescribed by the IRS. The claim for refund must designate the return period to which the claim relates, explain in detail the grounds and facts relied upon to support the claim, and set forth such other information as may be required by the regulations in this section and by the instructions relating to the form used to make such claim. No refund to the employer will be allowed under this section for the amount of any overpayment of tax which the employer deducted or withheld from an employee.

(2) For provisions related to furnishing employee statements and corrected employee statements reporting wages and withheld taxes, see sections 6041 and 6051 and §§ 1.6041-2 and 31.6051-1. For provisions relating to filing information returns and corrected information returns reporting wages and withheld taxes, see sections 6041 and 6051 and §§ 1.6041-2 and 31.6051-2.

(3) For interest-free adjustments of overpayments of income tax withheld from wages, see § 31.6413(a)-2.

* * * * *

PART 602--OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 13. The authority citation for part 602 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

Par. 14. In § 602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers

* * * * *

(b) * * *

CFR part or section where identified
and described

Current OMB control No.

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| | |
|--------------|-----------|
| 31.6011(a)-1 | 1545-2097 |
| 31.6011(a)-4 | 1545-2097 |
| 31.6011(a)-5 | 1545-2097 |
| 31.6205-1 | 1545-2097 |
| 31.6402(a)-2 | 1545-2097 |
| 31.6413(a)-1 | 1545-2097 |
| 31.6413(a)-2 | 1545-2097 |
| 31.6414-1 | 1545-2097 |

* * * * *

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

Approved: June 23, 2008.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E8-14947 Filed 6-30-08; 8:45 am]

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