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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 910

[Lemon Regulation 748]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation establishes the quantity of California-Arizona lemons that may be shipped to domestic markets during the period from December 16 through December 22, 1990. Consistent with program objectives, such action is needed to balance the supplies of fresh lemons with the demand for such lemons during the period specified. This action was recommended by the Lemon Administrative Committee (Committee), which is responsible for local administration of the lemon marketing order.

EFFECTIVE DATE: Regulation 748 (7 CFR part 910) is effective for the period from December 16 through December 22, 1990.

FOR FURTHER INFORMATION CONTACT: Beatriz Rodriguez, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture (Department), room 2524-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 475-3861.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Order 910 (7 CFR part 910), as amended, regulating the handling of lemons grown in California and Arizona. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended, hereinafter referred to as the Act.

This final rule has been reviewed by the Department in accordance with Departmental Regulation 1512-1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities as well as larger ones.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 70 handlers of lemons grown in California and Arizona subject to regulation under the lemon marketing order and approximately 2,000 lemon producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of handlers and producers of California-Arizona lemons may be classified as small entities.

The California-Arizona lemon industry is characterized by a large number of growers located over a wide area. The Committee's estimate of the 1990-91 production is 42,412 cars (one car equals 1,000 cartons at 38 pounds net weight each), compared to 37,881 cars during the 1989-90 season. The production area is divided into three districts which span California and Arizona. The Committee estimates District 1, central California, 1990-91 production at 6,600 cars compared to the 4,158 cars produced in 1989-90. In District 2, southern California, the crop is expected to be 24,700 cars compared to the 24,292 cars produced last year. In District 3, the California desert and Arizona, the Committee estimates a production of 11,112 cars compared to the 9,436 cars produced last year.

According to the National Agricultural Statistics Service, 1990-91 lemon production is expected to total 40,200 cars, 8 percent above the 1989-90 season and 1 percent more than the crop utilized in 1988-89.

The three basic outlets for California-Arizona lemons are the domestic fresh, export, and processing markets. The domestic (regulated) fresh market is a preferred market for California-Arizona lemons. Based on its crop estimate of 42,412 cars, the Committee estimates that about 42.2 percent of the 1990-91 crop will be utilized in fresh domestic channels (17,900 cars), compared with the 1989-90 total of 16,600 cars, about 44 percent of the total production of 37,881 cars in 1989-90. Fresh exports are projected at 20 percent of the total 1990-91 crop utilization compared with 22 percent in 1989-90. Processed and other uses would account for the residual 37.8 percent compared with 34 percent of the 1989-90 crop.

Volume regulations issued under the authority of the Act and Marketing Order No. 910 are intended to provide benefits to growers and consumers. Reduced fluctuations in supplies and prices result from regulating shipping levels and contribute to a more stable market. The intent of regulation is to achieve a more even distribution of lemons in the market throughout the marketing season and to avoid unreasonable fluctuations in supplies and prices.

Based on the Committee's marketing policy, the crop and market information provided by the Committee, and other information available to the Department, the costs of implementing the regulations are expected to be more than offset by the potential benefits of regulation.

Reporting and recordkeeping requirements under the lemon marketing order are required by the Committee from handlers of lemons. However, handlers in turn may require individual growers to utilize certain reporting and recordkeeping practices to enable handlers to carry out their functions. Costs incurred by handlers in connection with recordkeeping and reporting requirements may be passed on to growers.

The Committee submitted its marketing policy for the 1990-91 season to the Department on June 19. The marketing policy discussed, among other

things, the potential use of volume and size regulations for the ensuing season. The Committee considered the use of volume regulation for the season. This marketing policy is available from the Committee or Ms. Rodriguez. The Department reviewed that policy with respect to administrative requirements and regulatory alternatives in order to determine if the use of volume regulations would be appropriate.

The Committee met publicly on December 11, 1990, in Newhall, California, to consider the current and prospective conditions of supply and demand and unanimously recommended that 310,000 cartons is the quantity of lemons deemed advisable to be shipped to fresh domestic markets during the specified week. The marketing information and data provided to the Committee and used in its deliberations were compiled by the Committee's staff or presented by Committee members at the meeting. This information included, but was not limited to, price data for the previous week from Department market news reports and other sources, the preceding week's shipments and shipments to date, crop conditions, weather and transportation conditions, and a reevaluation of the prior week's recommendation in view of the above.

The Department reviewed the Committee's recommendation in light of the Committee's projections as set forth in its 1990-91 marketing policy. This recommended amount is 20,000 cartons below the estimated projections in the Committee's current shipping schedule.

During the week ending on December 8, 1990, shipments of lemons to fresh domestic markets, including Canada, totaled 297,000 cartons compared with 321,000 cartons shipped during the week ending on December 9, 1989. Export shipments totaled 116,000 cartons compared with 145,000 cartons shipped during the week ending on December 9, 1989. Processing and other uses accounted for 449,000 cartons compared with 374,000 cartons shipped during the week ending on December 9, 1989.

Fresh domestic shipments to date for the 1990-91 season total 5,723,000 cartons compared with 5,540,000 cartons shipped by this time during the 1989-90 season. Export shipments total 2,817,000 cartons compared with 2,977,000 cartons shipped by this time during 1989-90. Processing and other use shipments total 5,432,000 cartons compared with 3,887,000 cartons shipped by this time during 1989-90.

For the week ending on December 8, 1990, regulated shipments of lemons to the fresh domestic market were 297,000 cartons on an adjusted allotment of 301,000 cartons, resulting in

undershipments of 4,000 cartons. Regulated shipments for the current week (December 9 through December 15, 1990) are estimated at 320,000 cartons on an adjusted allotment of 316,000 cartons. Thus, overshipments of 4,000 cartons should be carried forward to the week ending on December 22, 1990.

The average f.o.b. shipping point price for the week ending on December 8, 1990, was \$9.49 per carton based on a reported sales volume of 302,000 cartons compared with last week's average of \$9.89 per carton on a reported sales volume of 286,000 cartons. The 1990-91 season average f.o.b. shipping point price to date is \$12.24 per carton. The average f.o.b. shipping point price for the week ending on December 9, 1989, was \$12.49 per carton; the season average f.o.b. shipping point price at this time during 1989-90 was \$14.04 per carton.

The Department's Market News Service reported that, as of December 11, the demand for lemons is "moderate" and the market for lemons is "about steady." At the meeting, a Committee member indicated that demand is good. However, that member commented that the problem of inventory buildup of small-sized fruit (165's and smaller) will likely continue through the winter. One Committee member reported that current Japanese inventory levels are high, the highest level in five years. Several Committee members and an observer commented that the weak export market will ultimately have an adverse impact on the domestic market. The Committee unanimously recommended volume regulation for the week ending on December 22, 1990.

Based upon fresh utilization levels indicated by the Committee and an econometric model developed by the Department, the California-Arizona 1990-91 season average fresh on-tree price is estimated at \$8.83 per carton, 106 percent of the projected season average fresh on-tree parity equivalent price of \$8.35 per carton. The California-Arizona 1989-90 season average fresh on-tree price is estimated at \$9.02, 121 percent of the projected season average fresh on-tree parity equivalent price of \$7.47 per carton.

Limiting the quantity of lemons that may be shipped during the period from December 16 through December 22, 1990, would be consistent with the provisions of the marketing order by tending to establish and maintain, in the interest of producers and consumers, an orderly flow of lemons to market.

Based on considerations of supply and market conditions, it is found that this action will tend to effectuate the declared policy of the Act.

Based on the above information, the Administrator of the AMS has determined that issuance of this rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to 5 U.S.C. 553, it is further found and determined that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register*. This is because there is insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared policy of the Act.

In addition, market information needed for the formulation of the basis for this action was not available until December 11, 1990, and this action needs to be effective for the regulatory week which begins on December 16, 1990. Further, interested persons were given an opportunity to submit information and views on the regulation at an open meeting, and handlers were apprised of its provisions and effective time. It is necessary, therefore, in order to effectuate the declared purposes of the Act, to make this regulatory provision effective as specified.

List of Subjects in 7 CFR Part 910

Lemons, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR parts 910 is amended as follows:

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR part 910 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 910.1048 is added to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 910.1048 Lemon Regulation 748.

The quantity of lemons grown in California and Arizona which may be handled during the period from December 16 through December 22, 1990, is established at 310,000 cartons.

Dated: December 12, 1990.

Robert C. Keeney,
Deputy Director, Fruit and Vegetable
Division.

[FR Doc. 90-29488 Filed 12-14-90; 8:45 am]

BILLING CODE 3410-02-M

7 CFR Part 1030

[DA-90-033]

Milk in the Chicago Regional Marketing Area; Revision of Supply Plant Shipping Percentages

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Revision of rules.

SUMMARY: This action revises certain provisions of the Chicago Regional milk order for the months of November 1990 through January 1991. The action reduces the shipping percentages for pooling individual supply plants by 3 percentage points (from 5 to 2 percent of receipts) and units of supply plants by 5 percentage points (from 10 to 5 percent of receipts) for the months of November and December 1990, and reduces the shipping percentage for individual supply plants by 2 percentage points (from 3 to 1 percent) and for units of supply plants by 3 percentage points (from 6 to 3 percent) for January 1991. The revision is made in response to a request by Central Milk Producers Cooperative, a federation of cooperatives that represents producers who supply the market. The action is necessary to prevent uneconomic shipments of milk from supply plants to distributing plants.

EFFECTIVE DATE: December 17, 1990.

FOR FURTHER INFORMATION CONTACT: John F. Borovics, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456 (202) 447-2089.

SUPPLEMENTARY INFORMATION: Prior document in this proceeding: Notice of Proposed Revision of Supply Plant Shipping Percentages: Issued November 16, 1990; published November 23, 1990 (55 FR 48852).

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this action will not have a significant economic impact on a substantial number of small entities. The action reduces the regulatory impact on milk handlers and tends to insure that the market will be adequately supplied

with milk for fluid use with a smaller proportion of milk shipments from pool supply plants.

This final rule has been reviewed by the Department in accordance with Departmental Regulation 1512-1 and the criteria contained in Executive Order 12291 and has been determined to be a "non-major" rule.

This revision is issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the provisions of § 1030.7(b)(5) of the Chicago Regional order.

Statement of Consideration

After consideration of all relevant material, including the proposal set forth in the aforesaid notice, and other available information, it is hereby found and determined that supply plant shipping percentages should be lowered by 3 percentage points (from 5 to 2 percent of receipt) for individual supply plants and by 5 percentage points (from 10 to 5 percent of receipts) for supply plants units during November and December 1990, and the supply plant shipping percentages should be lowered 2 percentage points (from 3 to 1 percent of receipts) from individual supply plants and by 3 percentage points (from 6 to 3 percent of receipts) for supply plant units during January 1991.

Currently, the order provides that individual supply plants must ship at least 5 percent of milk receipts to other plants to qualify as pool plants while a unit of supply plants must ship at least 10 percent of total receipts for pooling purposes during the months of September through December. During other months the shipping standards are 3 percent for individual plants and 6 percent for a unit of plants.

The Chicago order provides that the market administrator may adjust the shipping standards for individual plants and units of plants by up to 2 percentage points. The order also provides that the Director of the Dairy Division may increase the shipping standards by up to 5 percentage points or decrease the shipping standard by up to 10 percentage points. The adjustments can be made to encourage additional milk shipments or to prevent uneconomic shipments.

The revision was requested by Central Milk Producers Cooperative (CMPC), a federation of cooperative associations that represent a substantial number of the producers who supply the market. CMPC contends that a reduction of the shipping percentages is necessary to prevent uneconomic shipments of milk from distant supply plants solely for pooling purposes.

Based on supply and sales estimates, CMPC requested and was granted a reduction of the supply plant shipping percentages for the months of August through October. CMPC indicates that these reductions permitted the use of nearby milk to satisfy fluid milk needs and saved substantial transportation costs because milk did not have to be shipped from distant supply plants.

Based on the most recent supply and demand estimates, CMPC indicates that a further reduction of the shipping percentages for November 1990 through January 1991 is necessary. CMPC contends that in order to make the most efficient use of available milk supplies, as much as possible of nearby milk supplies will have to be utilized with reliance on distant supplies only on days when nearer milk supplies have been exhausted. For the months of November and December, CMPC indicates that such efficiencies can only be realized if the shipping standards for individual plants and units of supply plants are reduced to 2 and 5 percent of receipts, respectively. In addition, CMPC indicates that the January 1991 shipping standards should be reduced to 1 and 3 percent of receipts for individual plants and units of supply plants, respectively, on the basis of supply and demand projections.

The current supply/demand relationship for the market indicates that the supply plant shipping percentages should be reduced for the months of November and December 1990, as proposed. Furthermore, a reduction for the month of January 1991 is also supported by projections of milk supplies and sales. These reductions of the shipping percentages will contribute to orderly marketing in that costly and inefficient shipments of milk from distant supply plants will not be necessary. Thus, dairy farmers who have supplied the market will continue to have their milk pooled under the order without making uneconomic shipments of milk.

It is hereby found and determined that 30 days' notice of the effective date hereof is impractical, unnecessary, and contrary to the public interest in that:

(a) This revision is necessary to reflect current marketing conditions and to maintain orderly marketing conditions in the marketing area for the months of November 1990 through January 1991;

(b) This revision does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of the proposed revision was given interested parties and they

were afforded the opportunity to file written data, views, or arguments concerning this issue. The action was supported by a number of interested parties and no opposing views were received.

Therefore, good cause exists for making this revision effective upon publication in the *Federal Register*.

List of Subjects in 7 CFR Part 1030

Milk marketing orders.

It is therefore ordered that the following provisions of § 1030.7(b) of the Chicago Regional milk order are hereby revised for the months of November 1990 through January 1991.

PART 1030—MILK IN THE CHICAGO REGIONAL MARKETING AREA

1. The authority for 7 CFR part 1030 continues to read as follows:

Authority: Sections 1–19, 48 Stat. 31, as amended (7 U.S.C. 601–674).

§ 1030.7 [Amended]

2. In the introductory text of § 1030.7(b) the provision "5 percent" is revised to "2 percent" and the provision "10 percent" is revised to "5 percent" for the months of November and December 1990, and the provision "3 percent" is revised to "1 percent" and the provision "6 percent" is revised to "3 percent" for the month of January 1991.

Signed at Washington, DC, on: December 10, 1990.

Richard M. McKee,

Acting Director, Dairy Division.

[FR Doc. 90–29409 Filed 12–14–90; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 404

RIN 0960–AD01

Prohibition Against Termination of Coverage for American Citizens and Residents Working Abroad for a Foreign Affiliate of an American Employer and Extension of Disability Insurance Program Demonstration Project Authority

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: These final rules revise a reference in our regulations to section 3121(l) of the Internal Revenue Code (the Code) to reflect changes made by section 10201 of Public Law (Pub. L.)

101–239, the Omnibus Budget Reconciliation Act of 1989. Section 3121(l) of the Code governs the Social Security coverage agreements entered into by American employers with respect to their foreign affiliates. These final rules also reflect section 10103 of Public Law 101–239 which, among other things, extends to June 9, 1993, the date by which the Secretary of Health and Human Services must submit to Congress his final report on the demonstration projects conducted under section 505(a) of the Social Security Disability Amendments of 1980, Public Law 96–265. These demonstration projects, which under section 10103 of Public Law 101–239, may be initiated through June 9, 1993, are to test ways to encourage individuals entitled to disability insurance benefits to return to work.

EFFECTIVE DATE: This rule is effective on December 17, 1990.

FOR FURTHER INFORMATION CONTACT: Henry D. Lerner, Legal Assistant, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (301) 965–1762.

SUPPLEMENTARY INFORMATION:

Termination of Social Security Coverage Agreements Entered into by American Employers with Respect to Foreign Affiliates

United States citizens and residents employed abroad by a foreign affiliate of an American employer are covered by Social Security at the option of the employer through an agreement between the employer and the Secretary of the Treasury. Prior to the enactment of section 10201 of Public Law 101–239, the employer could terminate this coverage by giving a 2 years advance notice after the agreement had been in effect for at least 8 years. Section 10201 amended section 3121(l) of the Code to provide, among other things, that with respect to any such coverage agreement in effect on or after June 15, 1989, for which there is no notice of termination in effect on this date, American employers no longer have the option of terminating the coverage of United States citizens and residents employed abroad in their foreign affiliate. Section 10201 also amended section 3121(l) of the Code to provide that these coverage agreements would terminate at the end of any calendar quarter in which a foreign entity, at any time in such quarter, ceased to be a foreign affiliate of an American employer. It additionally redesignated the paragraph of section 3121(l) of the Code that defines a foreign affiliate from paragraph 8 to paragraph

6. To reflect this latter change in the Code, section 10201 of Public Law 101–239 made a conforming amendment to section 210(a) of the Social Security Act (the Act) by striking the reference to section 3121(l)(8) and inserting, in its place, a reference to section 3121(l)(6) of the Code. Section 210(a) of the Act defines the term "employment" for purposes of Social Security coverage and provides that it includes any service outside the United States by a citizen or resident of the United States as an employee of a foreign affiliate of an American employer during any period for which there is in effect an agreement, entered into pursuant to section 3121(l) of the Code, with respect to the affiliate. We are, accordingly, amending § 404.1004(b)(5) of our regulations by removing the reference to section 3121(l)(8) of the Code and adding, in its place, a reference to section 3121(l)(6) of the Code.

We are also amending § 404.1004(a)(2)(ii) of our regulations to correct a typographical error. This amendment is not related to section 10201 of Public Law 101–239.

Demonstration Project Authority

We published final regulations covering the rules on demonstration projects in the disability insurance program on February 23, 1983 (48 FR 7573) implementing section 505(a) of the Social Security Disability Amendments of 1980, Public Law 96–265. Section 505(a) directed the Secretary of Health and Human Services to develop and carry out experiments and demonstration projects to test the advantages of various ways to facilitate and encourage the return to employment of individuals entitled to disability insurance benefits who would otherwise remain dependent on disability insurance benefits.

Section 12101 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law 99–272, among other things, extended the Secretary's authority to initiate disability insurance demonstration projects under section 505(a) of Public Law 96–265 and the time for the Secretary to submit to Congress a final report on these projects from June 9, 1985, to June 9, 1990. Regulations reflecting this change were published on October 8, 1987 (52 FR 37604). Section 10103 of Public Law 101–239, among other things, further extended the Secretary's demonstration authority under section 505(a) of Public Law 96–265 and the date for a final report to June 9, 1993. This final rule amends § 404.1599(e) of our regulations by removing the reference to "1990" and

adding, in its place, a reference to "1993."

Justification for Final Rules

The Department, even when not required by statute, as a matter of policy, generally follows the Administrative Procedure Act (APA) Notice of Proposed Rulemaking and public comment procedures specified in 5 U.S.C. 553 in the development of its regulations. The APA provides exceptions to its notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest. We have determined that, under 5 U.S.C. 553(b)(3), good cause exists for waiver of Notice of Proposed Rulemaking and public comment procedures on this regulation since opportunity for public comment is unnecessary in this case because the rules simply reflect self-executing statutory provisions involving no discretionary policy making and correct a typographical error in our regulations.

Regulatory Procedures

Executive Order 12291

The Secretary has determined that these are not major rules under Executive Order 12291 because these regulations do not meet any of the threshold criteria for a major rule. Therefore, a regulatory impact analysis is not required.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because they only reflect self-executing statutory provisions and correct a typographical error in our regulations. Therefore, a regulatory flexibility analysis as provided in Public Law 96-354, the Regulatory Flexibility Act, is not required.

Paperwork Reduction Act

These regulations impose no reporting/recordkeeping requirements requiring Office of Management and Budget clearance.

(Catalog of Federal Domestic Assistance Program No. 13.802, Social Security-Disability Insurance)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Death benefits, Disability benefits, Old-Age, Survivors and Disability Insurance.

Dated: August 27, 1990.

Gwendolyn S. King,
Commissioner of Social Security.

Approved: October 31, 1990.

Louis W. Sullivan,
Secretary of Health and Human Services.

For the reasons set out in the preamble, subparts K and P, part 404, chapter III of title 20, Code of Federal Regulations are amended as set forth below.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950—)

Subpart K—[Amended]

1. The authority citation for 20 CFR part 404, subpart K continues to read as follows:

Authority: Secs. 205(a), 209, 210, 211, 226, 226A, 229(a), 230, 231, and 1102 of the Social Security Act; 42 U.S.C. 405(a), 409, 410, 411, 426, 426A, 429(a), 430, 431, and 1302.

§ 404.1004 [Amended]

2. In § 404.1004 paragraph (a)(2)(ii) is amended by removing the word "than" and adding, in its place, the word "that" and paragraph (b)(5) is amended by removing the reference to "3121(l)(8)" and adding, in its place, a reference to "3121(l)(6)".

Subpart P—[Amended]

3. The authority citation for 20 CFR part 404, subpart P is revised to read as follows:

Authority: Secs. 202, 205 (a), (b), and (d)—(h), 216(i), 221 (a) and (i), 222(c), 223, 225, and 1102 of the Social Security Act; 42 U.S.C. 402, 405 (a), (b), and (d)—(h), 416(i), 421 (a) and (i), 422(c), 423, 425, and 1302; sec. 505(a) of Pub. L. 96-265; 94 Stat. 473; sec. 2(d)(2), 5, 6, and 15 of Pub. L. 98-460, 98 Stat. 1797, 1801, 1802, and 1808; sec. 10103 of Pub. L. 101-239, 103 Stat. 2472.

§ 404.1599 [Amended]

4. In § 404.1599, the third sentence of paragraph (e) is amended by removing the reference to "1990" and adding, in its place, "1993."

[FR. Doc. 90-29334 Filed 12-14-90; 8:45 am]
BILLING CODE 4190-11-M

Food and Drug Administration

21 CFR Part 5

Delegations of Authority and Organization; Center for Drug Evaluation and Research (CDER)

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration is amending the regulations for delegations of authority in five sections of 21 CFR part 5 concerning approval of new drug applications. These authorities will be delegated to specified titles in the Pilot Drug Evaluation Staff (PDES), CDER.

EFFECTIVE DATE: December 17, 1990.

FOR FURTHER INFORMATION CONTACT: Ellen Rawlings, Division of Management and Operations (HFA-340), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4976.

SUPPLEMENTARY INFORMATION: On July 7, 1989, CDER established PDES for a trial period to facilitate improvements in the quality, efficiency, and speed of CDER's drug review process. PDES' responsibilities are to analyze barriers to innovation, develop new methods of review, and evaluate alternative methods of conducting the review process, all with effective management controls.

Inclusion in the delegations of authority listed below will provide the PDES director with signatory authority for drug evaluation and regulatory activities; it will also provide signatory authority on particular decisions to supervisory consumer safety officers, supervisory medical officers, and other supervisory reviewers in PDES.

The affected sections of 21 CFR Part 5 to which PDES titles will be added are as follows: § 5.31 Petitions under part 10 (21 CFR 5.31) is amended by adding paragraph (a)(2)(iv); § 5.58 Orphan products (21 CFR 5.58) is amended by adding paragraph (c)(1)(iv); § 5.71 Termination of exemptions for new drugs for investigational use in human beings and in animals (21 CFR 5.71) is amended by revising paragraphs (b)(2) and (c)(2); § 5.80 Approval of new drug applications and their supplements (21 CFR 5.80) is amended by adding paragraph (a)(1)(iii); and § 5.94 Extensions or stays of effective dates for compliance with certain labeling requirements for human prescription drugs (21 CFR 5.94) is amended by adding paragraph (b)(4).

Further redelegation of the authority delegated is not authorized. Authority delegated to a position by title may be exercised by a person officially designated to serve in such a position in an acting capacity or on a temporary basis.

Lists of Subjects in 21 CFR Part 5

Authority delegations (Government agencies); Imports, Organization and functions (Government agencies).

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs, 21 CFR part 5 is amended as follows:

PART 5—DELEGATIONS OF AUTHORITY AND ORGANIZATION

1. The authority citation for 21 CFR part 5 continues to read as follows:

Authority: 5 U.S.C. 504, 552, App. 2; 7 U.S.C. 2271; 15 U.S.C. 638, 1261-1282, 3701-3711a; secs. 2-12 of the Fair Packaging and Labeling Act (15 U.S.C. 1451-1461); 21 U.S.C. 41-50, 61-63, 141-149, 467f, 679(b), 801-886, 1031-1309; secs. 201-903 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321-393); 35 U.S.C. 156; secs. 301, 302, 303, 307, 310, 311, 351, 352, 354-360F, 361, 362, 1701-1706, 2101 of the Public Health Service Act (42 U.S.C. 241, 242, 242a, 242l, 242n, 243, 262, 263, 263b-263n, 264, 265, 300u-300u-5, 300aa-1); 42 U.S.C. 1395y, 3246b, 4332, 4831(a), 10007-10008; E.O. 11490, 11921, and 12591.

2. Section 5.31 is amended by adding new paragraph (a)(2)(iv) to read as follows:

§ 5.31 Petitions under part 10.

(a) * * *

(2) * * *

(iv) The Director and supervisory consumer safety officers, Pilot Drug Evaluation Staff, Office of the Center Director, CDER.

3. Section 5.58 is amended by adding new paragraph (c)(1)(iv) to read as follows:

§ 5.58 Orphan products.

(c) * * *

(1) * * *

(iv) The Director and supervisory medical officers, Pilot Drug Evaluation Staff, Office of the Center Director, CDER.

4. Section 5.71 is amended by revising paragraphs (b)(2) and (c)(2) to read as follows:

§ 5.71 Termination of exemptions for new drugs for investigational use in human beings and in animals.

(b) * * *

(2) * * *

(2) The Directors and Deputy Directors in the divisions in the Offices of Drug Evaluation I and Drug Evaluation II and the Director and supervisory medical officers, Pilot Drug Evaluation Staff, Office of the Center Director, CDER.

(c) * * *

(2) * * *

(2) The Directors and Deputy Directors in the divisions in the Offices

of Drug Evaluation I and Drug Evaluation II and the Director and supervisory medical officers, Pilot Drug Evaluation Staff, Office of the Center Director, CDER.

5. Section 5.80 is amended by adding new paragraph (a)(1)(iii) to read as follows:

§ 5.80 Approval of new drug applications and their supplements.

(a) * * *

(1) * * *

(iii) The Director, Pilot Drug Evaluation Staff, Office of the Center Director, CDER, plus at least one supervisory reviewer, selected by the Director, Pilot Drug Evaluation Staff, through their joint signatures, for drugs under their jurisdiction.

6. Section 5.94 is amended by adding new paragraph (b)(4) to read as follows:

§ 5.94 Extensions of stays of effective dates for compliance with certain labeling requirements for human prescription drugs.

(b) * * *

(4) * * *

(4) The Director and supervisory consumer safety officers, Pilot Drug Evaluation Staff, Office of the Center Director, CDER.

Dated: December 11, 1990.

Ronald G. Chesemore,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 90-29435 Filed 12-14-90; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8318]

RIN 1545-AO38

Limitations on Passive Activity Losses and Credits; Developer Rule Amendments

AGENCY: Internal Revenue Service, Treasury.

ACTION: Correction to amendments of temporary regulations.

SUMMARY: This document contains a correction to temporary regulations (T.D. 8318), which was published, Monday, November 19, 1990, (55 FR 48107). The temporary regulations relate to the limitations on passive activity losses and passive activity credits.

FOR FURTHER INFORMATION CONTACT: Dexter A. Johnson (202) 566-4751 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

Section 1.469-2T(f)(5) reduces a taxpayer's passive activity gross income by the net income and gain from certain rental property. This rule applies to certain property that is not used in an activity involving the rental of the property for a period of at least 12 months between its development and its disposition.

Need for Correction

As published, the temporary regulations contain an error which may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the temporary regulations (T.D. 8318) which was the subject of FR Doc. 90-27122 is corrected as follows:

§ 1.469-2T [Corrected]

1. In § 1.469-2T, page 48108, column 2, paragraph (f)(5)(ii)(A), lines 5 and 6, remove the language "rental of the property commences on the first date on".

Dale D. Goode,

Federal Register Liaison Officer, Assistant Chief Counsel (Corporate).

[FR Doc. 90-29381 Filed 12-14-90; 8:45 am]

BILLING CODE 4830-01-M

26 CFR Parts 1, 31, and 602

[T.D. 8324]

RIN 1545-AO06

Employee Business Expenses—Reporting and Withholding on Employee Business Expense Reimbursements and Allowances

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations concerning the taxation of and reporting and withholding on payments with respect to employee business expenses under a reimbursement or other expense allowance arrangement. These final and temporary regulations reflect changes to the law made by the Family Support Act of 1988. These final and temporary regulations will affect employees who receive payments and payors who make payments under reimbursement or other expense allowance arrangements.

EFFECTIVE DATES: The provisions of these temporary regulations under

§ 1.62-1T are effective for expenses paid or incurred in taxable years beginning before January 1, 1989. The income tax provisions of these final regulations under § 1.62-2 are effective for payments made under reimbursement or other expense allowance arrangements received by an employee in taxable years of the employee beginning on or after January 1, 1989, with respect to expenses paid or incurred in taxable years beginning on or after January 1, 1989. However, the provisions of § 1.62-2(h) of these regulations are effective for payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990 with respect to expenses paid or incurred on or after July 1, 1990, and the provisions of §§ 1.62-2(d)(3) and 1.62-2(h)(2)(i)(B) of these regulations are effective for payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1991 with respect to expenses paid or incurred on or after January 1, 1991. The provisions of § 1.62-17(e)(3) of these regulations are effective for taxable years beginning on or after January 1, 1989. The reporting provisions of these final regulations under § 1.6041-3(i) are effective for payments made under reimbursement or other expense allowance arrangements that are received by an employee on or after January 1, 1989, with respect to expenses paid or incurred on or after January 1, 1989; however, a transition rule is provided under § 1.6041-3(i) effective for payments made prior to July 1, 1990. The provisions of these final regulations under §§ 31.3121(a)-1(h), 31.3121(a)-3, 31.3231(e)-1, 31.3231(e)-3, 31.3306(b)-1, 31.3306(b)-2, 31.3401(a)-1(b)(2) and 31.3401(a)-4 are effective for amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990. The amendment to part 602 is effective December 17, 1990.

FOR FURTHER INFORMATION CONTACT: Richard Pavel at 202-377-9372 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information requirements contained in this final regulation have been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control number 1545-1148. The estimated average annual burden per recordkeeper is one-half hour.

This estimate is an approximation of the average time expected to be necessary for a collection of information. It is based on such information as is available to the Internal Revenue Service. Individual recordkeepers may require greater or less time, depending on their particular circumstances.

Comments concerning the accuracy of these burden estimates and suggestions for reducing the burden should be directed to the Internal Revenue Service, Attn: IRS Reports Clearance Officer T:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Background

On December 12, 1989, the Federal Register published temporary regulations (54 FR 51021) on employee business expense reimbursements and allowances. Those regulations provided guidance concerning the taxation of and reporting and withholding on payments with respect to employee business expenses under a reimbursement or other expense allowance arrangement. The text of those temporary regulations also served as the comment document for a notice of proposed rulemaking ("the proposed regulations") published in the Federal Register for the same day (54 FR 51038).

Written comments were received from the public on the proposed regulations. In addition, on June 11, 1990, the Internal Revenue Service held a public hearing concerning the regulations. After consideration of the comments received and the statements made at the public hearing, the proposed regulations are adopted as revised by this Treasury decision. This Treasury decision also supersedes and obsoletes Announcement 90-127, 1990-48 I.R.B. 8.

Summary of Comments and Explanation of Provisions:

More Than One Expense Allowance Arrangement

Commentators requested that the regulations provide guidance on what factors are considered in determining whether an employer has one arrangement or more than one arrangement with an employee. Commentators were especially concerned that small amounts of nonaccountable payments might be treated as part of an otherwise accountable plan, thereby "tainting" the accountable payments if clearly separate plans were not adopted. The

final regulations clarify that if an arrangement provides advances, allowances, or reimbursements for deductible employee business expenses and for other bona fide expenses related to the employer's business that are not deductible, the payor will be treated as maintaining two arrangements. The portion of the arrangement that provides payments for the deductible employee business expenses will be treated as one arrangement that satisfies the business connection test and the portion of the arrangement that provides payments for the nondeductible employee business expenses will be treated as a second arrangement that does not satisfy the business connection test.

Reimbursement Requirement

Some practitioners have asked whether a portion of an employee's salary may be recharacterized as being paid under a reimbursement arrangement. The final regulations clarify that if a payor arranges to pay an amount to an employee regardless of whether the employee incurs (or is reasonably expected to incur) deductible business expenses or other bona fide expenses related to the employer's business that are not deductible, the arrangement does not meet the business connection requirement of § 1.62-2(d) of the regulations and all amounts paid under the arrangement are treated as paid under a nonaccountable plan. These amounts are subject to withholding and payment of employment taxes when paid. Thus, no part of an employee's salary may be recharacterized as being paid under a reimbursement arrangement or other expense allowance arrangement.

The final regulations also provide that an arrangement providing a per diem allowance for travel expenses (whether or not deductible) that is computed on a basis similar to that used in computing the employee's wages or other compensation (e.g., the number of hours worked, miles traveled, or pieces produced) satisfies the business connection requirement of § 1.62-2(d) only if, as of December 12, 1989, (1) the per diem allowance was identified by the payor either by making a separate payment or by specifically identifying the amount of the per diem allowance, or (2) a per diem allowance computed on that basis was commonly used in the industry in which the employee is employed. A per diem allowance that satisfies this requirement may be adjusted in a manner that reasonably reflects actual increases in employee

business expenses occurring after December 12, 1989.

Special Withholding Rules for Per Diem or Mileage Allowances

Some practitioners have suggested that the safe harbors provided for satisfying the reasonable period of time requirements can be used to avoid reporting and withholding on per diem or mileage allowances where the amount paid exceeds the amount of expenses deemed substantiated. The safe harbors were not intended to be used in that manner.

Accordingly, the final regulations provide that, if (under an arrangement that meets the business connection, substantiation, and return of excess requirements of the regulation) a payor pays a per diem or mileage allowance, the portion, if any, of the allowance paid that relates to days or miles of travel substantiated and that exceeds the amount of the employee's expenses deemed substantiated for those days or miles of travel is treated as paid under a nonaccountable plan. Because the employee is not required to return this excess portion, the reasonable period of time provisions (relating to the return of excess amounts) do not apply to this excess portion.

The final regulations also provide that in the case of a per diem or mileage allowance paid as a reimbursement at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel (e.g., the employer reimburses at a rate of 30 cents per mile when the amount deemed substantiated is 26 cents per mile), the excess portion is subject to withholding and payment of employment taxes in the payroll period in which the payor reimburses the expenses for the days or miles of travel substantiated. The final regulations further provide that in the case of a per diem or mileage allowance paid as an advance at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (i.e., the days or miles of travel) are substantiated. Of course, the expenses with respect to which the advance was paid must be substantiated within a reasonable period of time.

The final regulations also provide that the Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability

regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

The Employer's Obligation to Report

Commentators requested clarification as to whether amounts treated as paid under an accountable plan may, in certain circumstances, be reported by the employer on the employee's Form W-2. The proposed regulations provided that such amounts "are not required to be reported" on the employee's Form W-2. The final regulations clarify that amounts treated as paid under an accountable plan are not reported as wages or other compensation on the employee's Form W-2. Thus, if an employer operates an accountable plan and the employee meets all the requirements of the regulations in terms of timely substantiation and return of excess, the employer may not report such amounts as wages or other compensation on the employee's Form W-2. However, the regulations do not require the employer to provide an accountable plan. Thus, if the employer chooses to provide an expense allowance arrangement that does not meet the accountable plan requirements, the employer must report all amounts paid under the plan as wages or other compensation on the employee's Form W-2 even though an employee might voluntarily substantiate expenses to the employer and return any excess amounts to the employer.

Pattern of Overreimbursements

The safe harbors provided for satisfying the reasonable period of time requirements are designed to meet reasonable administrative needs of employers, not to permit avoidance of the rules regarding accountable plans. Accordingly, the final regulations clarify that if, under a reimbursement or other expense allowance arrangement, a payor has a plan or practice to provide amounts in excess of substantiated expenses to employees and to avoid reporting and withholding on such amounts, the payor may not use either of the safe harbors provided under the reasonable period of time requirement for any years during which such plans or practice exists.

Anti-Abuse Rule

The final regulations provide that if a payor's reimbursement or other expense allowance arrangement evidences a pattern of abuse of the rules under section 62(c) of the Code and the regulations thereunder, regarding reimbursement and other expense allowance arrangements, all payments made under the arrangement will be

treated as made under a nonaccountable plan and the appropriate penalties will be imposed.

Examples

As a result of questions raised by commentators, examples have been added to the final regulations to illustrate the application of the regulations.

Exempting State, County, and Local Governments

Commentators from state, county, and local governments requested that they be exempted from the requirements of the regulations. There is no indication in the statute or the legislative history that Congress intended that there be an exemption for government employers. The final regulations therefore treat government employers and private sector employers in the same manner and do not exempt federal, state, county, and local governments.

Country Club Dues

Practitioners have requested that the final regulations provide special rules for country club dues because of special deduction limitations applicable to such dues. These rules would create a special reasonable period safe harbor for country club dues and would provide an exception to the return of excess requirement for country club dues that are reported as wages and subjected to withholding and payment of employment taxes. These suggestions have not been adopted because they would create needless complexity in the regulations and they are not supported by the statute or the legislative history.

Deemed Substantiation Issues

Commentators submitted several comments regarding issues raised by Revenue Procedures 89-66 and 89-67, 1989-2 C.B. 792, 795, and their progeny. Those issues are generally not addressed by these final regulations, but will instead be addressed in revenue procedures or other pronouncements of general applicability.

Moving Expenses

Some practitioners have asked whether the regulations are intended to apply to reimbursements for moving expenses. Section 62(a)(2)(A) of the Code and the regulations refer to advances, allowances, or reimbursements for business expenses that are allowable as deductions by part VI (section 161 and the following), subchapter B, chapter 1 of the Code. Therefore, neither the proposed regulations nor the final regulations deal

with deductions, such as moving expense deductions under section 217, that are not found in part VI.

Reporting Rules

The final regulations generally retain the same reporting rules that were provided in the temporary regulations. However, in order to simplify reporting in 1990 and because of the July 1, 1990 effective date for withholding, the transitional reporting rule that was provided in the temporary regulations for payments received by an employee on or after January 1, 1989, and prior to January 1, 1990 has been extended to payments received by an employee prior to July 1, 1990 (rather than January 1, 1990, as provided in the proposed regulations).

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking for the regulations was submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Richard Pavel, Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and Treasury Department participated in their development.

List of Subjects

26 CFR 1.61-1 through 1.281-4

Deductions, Exemptions, Income taxes, Taxable income.

26 CFR Part 31

Employment taxes, Income taxes, Lotteries, Railroad retirement, Social Security, Unemployment tax, Withholding.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 31, and 602 are amended as follows:

PART 1—[AMENDED]

Paragraph 1. The authority citation for part 1 is amended in part by removing the citation “§ 1.62-1T and 1.62-2T also issued under 26 U.S.C. 62” and by adding the following citations:

Authority: 26 U.S.C. 7805 * * * secs. 1.62-1T and 1.62-2 also issued under 26 U.S.C. 62 * * * sec. 1.6041-3 also issued under 26 U.S.C. 62.

Par. 2. In § 1.62-1T, paragraph (c)(2) is revised to read as follows:

§ 1.62-1T Adjusted gross income (temporary).

(c) Deductions allowable in computing adjusted gross income. * * *

(2) Deductions allowable under part VI, subchapter B, chapter 1 of the Code, (section 161 and following) that consist of expenses paid or incurred by the taxpayer in connection with the performance of services as an employee under an express reimbursement or other expense allowance arrangement (as defined in paragraph (f) of this section or § 1.62-2, whichever is applicable) with his or her employer;

Par. 3. Section 1.62-2T is removed and § 1.62-2 is added in the appropriate place to read as follows:

§ 1.62-2 Reimbursements and other expense allowance arrangements.

- (a) Table of contents.
- (b) Scope.
- (c) Reimbursement or other expense allowance arrangement.
 - (1) Defined.
 - (2) Accountable plans.
 - (i) In general.
 - (ii) Special rule for failure to return excess.
 - (3) Nonaccountable plans.
 - (i) In general.
 - (ii) Special rule for failure to return excess.
 - (4) Treatment of payments under accountable plans.
 - (5) Treatment of payments under nonaccountable plans.
- (d) Business connection.
 - (1) In general.
 - (2) Other bona fide expenses.
- (3) Reimbursement requirement.
 - (i) In general.
 - (ii) Per diem allowances.
- (e) Substantiation.
 - (1) In general.
 - (2) Expenses governed by section 274(d).
 - (3) Expenses not governed by section 274(d).
 - (f) Returning amounts in excess of expenses.
 - (1) In general.
 - (2) Per diem or mileage allowances.

- (g) Reasonable period.
 - (1) In general.
 - (2) Safe harbors.
 - (i) Fixed date method.
 - (ii) Periodic payment method.
 - (3) Pattern of overreimbursements.
- (h) Withholding and payment of employment taxes.
 - (1) When excluded from wages.
 - (2) When included in wages.
- (i) Accountable plans.
 - (A) General rule.
 - (B) Per diem or mileage allowances.
 - (1) In general.
 - (2) Reimbursements.
 - (3) Advances.
 - (4) Special rules.
 - (ii) Nonaccountable plans.
 - (i) Application.
 - (j) Examples.
 - (k) Anti-abuse provision.
 - (l) Cross references.
 - (m) Effective dates.

(b) *Scope.* For purposes of determining “adjusted gross income,” section 62(a)(2)(A) allows an employee a deduction for expenses allowed by part VI (section 161 and following), subchapter B, chapter 1 of the Code, paid by the employee, in connection with the performance of services as an employee of the employer, under a reimbursement or other expense allowance arrangement with a payor (the employer, its agent, or a third party). Section 62(c) provides that an arrangement will not be treated as a reimbursement or other expense allowance arrangement for purposes of section 62(a)(2)(A) if—

(1) Such arrangement does not require the employee to substantiate the expenses covered by the arrangement to the payor, or

(2) Such arrangement provides the employee the right to retain any amount in excess of the substantiated expenses covered under the arrangement.

This section prescribes rules relating to the requirements of section 62(c).

(c) *Reimbursement or other expense allowance arrangement—(1) Defined.* For purposes of §§ 1.62-1T and 1.62-2, the phrase “reimbursement or other expense allowance arrangement” means an arrangement that meets the requirements of paragraphs (d) (business connection), (e) (substantiation), and (f) (returning amounts in excess of expenses) of this section. A payor may have more than one arrangement with respect to a particular employee, depending on the facts and circumstances. See paragraph (d)(2) of this section (payor treated as having two arrangements under certain circumstances).

(2) *Accountable plans—(i) In general.* Except as provided in paragraph

(c)(2)(ii) of this section, if an arrangement meets the requirements of paragraphs (d), (e), and (f) of this section, all amounts paid under the arrangement are treated as paid under an "accountable plan."

(ii) *Special rule for failure to return excess.* If an arrangement meets the requirements of paragraphs (d), (e), and (f) of this section, but the employee fails to return, within a reasonable period of time, any amount in excess of the amount of the expenses substantiated in accordance with paragraph (e) of this section, only the amounts paid under the arrangement that are not in excess of the substantiated expenses are treated as paid under an accountable plan.

(3) *Nonaccountable plans—(i) In general.* If an arrangement does not satisfy one or more of the requirements of paragraphs (d), (e), or (f) of this section, all amounts paid under the arrangement are treated as paid under a "nonaccountable plan." If a payor provides a nonaccountable plan, an employee who receives payments under the plan cannot compel the payor to treat the payments as paid under an accountable plan by voluntarily substantiating the expenses and returning any excess to the payor.

(ii) *Special rule for failure to return excess.* If an arrangement meets the requirements of paragraphs (d), (e), and (f) of this section, but the employee fails to return, within a reasonable period of time, any amount in excess of the amount of the expenses substantiated in accordance with paragraph (e) of this section, the amounts paid under the arrangement that are in excess of the substantiated expenses are treated as paid under a nonaccountable plan.

(4) *Treatment of payments under accountable plans.* Amounts treated as paid under an accountable plan are excluded from the employee's gross income, are not reported as wages or other compensation on the employee's Form W-2, and are exempt from the withholding and payment of employment taxes (Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA), Railroad Retirement Tax Act (RRTA), Railroad Unemployment Repayment Tax (RURT), and income tax.) See paragraph (1) of this section for cross references.

(5) *Treatment of payments under nonaccountable plans.* Amounts treated as paid under a nonaccountable plan are included in the employee's gross income, must be reported as wages or other compensation on the employee's Form W-2, and are subject to withholding and payment of employment taxes (FICA, FUTA, RRTA, RURT, and income tax).

See paragraph (h) of this section. Expenses attributable to amounts included in the employee's gross income may be deducted, provided the employee can substantiate the full amount of his or her expenses (i.e., the amount of the expenses, if any, the reimbursement for which is treated as paid under an accountable plan as well as those for which the employee is claiming the deduction) in accordance with § 1.274-5T or § 1.162-17, but only as a miscellaneous itemized deduction subject to the limitations applicable to such expenses (e.g., the 80-percent limitation on meal and entertainment expenses provided in section 274(n) and the 2-percent floor provided in section 67).

(d) *Business connection—(1) In general.* Except as provided in paragraphs (d)(2) and (d)(3) of this section, an arrangement meets the requirements of this paragraph (d) if it provides advances, allowances (including per diem allowances, allowances only for meals and incidental expenses, and mileage allowances), or reimbursements only for business expenses that are allowable as deductions by part VI (section 161 and the following), subchapter B, chapter 1 of the Code, and that are paid or incurred by the employee in connection with the performance of services as an employee of the employer. The payment may be actually received from the employer, its agent, or a third party for whom the employee performs a service as an employee of the employer, and may include amounts charged directly or indirectly to the payor through credit card systems or otherwise. In addition, if both wages and the reimbursement or other expense allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

(2) *Other bona fide expenses.* If an arrangement provides advances, allowances, or reimbursements for business expenses described in paragraph (d)(1) of this section (i.e., deductible employee business expenses) and for other bona fide expenses related to the employer's business (e.g., travel that is not away from home) that are not deductible under part VI (section 161 and the following), subchapter B, chapter 1 of the Code, the payor is treated as maintaining two arrangements. The portion of the arrangement that provides payments for the deductible employee business expenses is treated as one arrangement that satisfies this paragraph (d). The

portion of the arrangement that provides payments for the nondeductible employee expenses is treated as a second arrangement that does not satisfy this paragraph (d) and all amounts paid under this second arrangement will be treated as paid under a nonaccountable plan. See paragraphs (c)(5) and (h) of this section.

(3) *Reimbursement requirement—(i) In general.* If a payor arranges to pay an amount to an employee regardless of whether the employee incurs (or is reasonably expected to incur) business expenses of a type described in paragraph (d)(1) or (d)(2) of this section, the arrangement does not satisfy this paragraph (d) and all amounts paid under the arrangement are treated as paid under a nonaccountable plan. See paragraphs (c)(5) and (h) of this section.

(ii) *Per diem allowances.* An arrangement providing a per diem allowance for travel expenses of a type described in paragraph (d)(1) or (d)(2) of this section that is computed on a basis similar to that used in computing the employee's wages or other compensation (e.g., the number of hours worked, miles traveled, or pieces produced) meets the requirements of this paragraph (d) only if, on December 12, 1989, the per diem allowance was identified by the payor either by making a separate payment or by specifically identifying the amount of the per diem allowance, or a per diem allowance computed on that basis was commonly used in the industry in which the employee is employed. See section 274(d) and § 1.274-5T(g). A per diem allowance described in this paragraph (d)(3)(ii) may be adjusted in a manner that reasonably reflects actual increases in employee business expenses occurring after December 12, 1989.

(e) *Substantiation—(1) In general.* An arrangement meets the requirements of this paragraph (e) if it requires each business expense to be substantiated to the payor in accordance with paragraph (e)(2) or (e)(3) of this section, whichever is applicable, within a reasonable period of time. See § 1.274-5T or § 1.162-17.

(2) *Expenses governed by section 274(d).* An arrangement that reimburses travel, entertainment, use of a passenger automobile or other listed property, or other business expenses governed by section 274(d) meets the requirements of this paragraph (e)(2) if information sufficient to satisfy the substantiation requirements of section 274(d) and the regulations thereunder is submitted to the payor. See § 1.274-5T. Under section 274(d), information sufficient to substantiate the requisite elements of each expenditure or use must be

submitted to the payor. For example, with respect to travel away from home, § 1.274-5T(b)(2) requires that information sufficient to substantiate the amount, time, place, and business purpose of the expense must be submitted to the payor. Similarly, with respect to use of a passenger automobile or other listed property, § 1.274-5T(b)(6) requires that information sufficient to substantiate the amount, time, use, and business purpose of the expense must be submitted to the payor. See § 1.274-5T(g), however, which grants the Commissioner authority to prescribe rules permitting the amount of certain expenses to be deemed substantiated to the payor (in lieu of substantiating the actual amount of such expenses) where an arrangement provides for a reimbursement, a per diem allowance, or a mileage allowance for travel away from home or transportation expenses. See also § 1.274-5T(j), which grants the Commissioner the authority to establish a method under which a taxpayer may elect to use a specified amount for meals while traveling away from home in lieu of substantiating the actual cost of meals. Substantiation of the amount of a business expense in accordance with rules prescribed pursuant to the authority granted by § 1.274-5T(g) or § 1.274-5T(j) will be treated as substantiation of the amount of such expense for purposes of this section.

(3) *Expenses not governed by section 274(d).* An arrangement that reimburses business expenses not governed by section 274(d) meets the requirements of this paragraph (e)(3) if information is submitted to the payor sufficient to enable the payor to identify the specific nature of each expense and to conclude that the expense is attributable to the payor's business activities. Therefore, each of the elements of an expenditure or use must be substantiated to the payor. It is not sufficient if an employee merely aggregates expenses into broad categories (such as "travel") or reports individual expenses through the use of vague, nondescriptive terms (such as "miscellaneous business expenses"). See § 1.162-17(b).

(f) *Returning amounts in excess of expenses—(1) In general.* Except as provided in paragraph (f)(2) of this section, an arrangement meets the requirements of this paragraph (f) if it requires the employee to return to the payor within a reasonable period of time any amount paid under the arrangement in excess of the expenses substantiated in accordance with paragraph (e) of this section. The determination of whether an arrangement requires an employee to return amounts in excess of

substantiated expenses will depend on the facts and circumstances. An arrangement whereby money is advanced to an employee to defray expenses will be treated as satisfying the requirements of this paragraph (f) only if the amount of money advanced is reasonably calculated not to exceed the amount of anticipated expenditures, the advance of money is made on a day within a reasonable period of the day that the anticipated expenditures are paid or incurred, and any amounts in excess of the expenses substantiated in accordance with paragraph (e) of this section are required to be returned to the payor within a reasonable period of time after the advance is received.

(2) *Per diem or mileage allowances.* The Commissioner may, in his discretion, prescribe rules in pronouncements of general applicability under which a reimbursement or other expense allowance arrangement that provides per diem allowances providing for ordinary and necessary expenses of traveling away from home (exclusive of transportation costs to and from destination) or mileage allowances providing for ordinary and necessary expenses of local travel and transportation while traveling away from home will be treated as satisfying the requirements of this paragraph (f), even though the arrangement does not require the employee to return the portion of such an allowance that relates to the days or miles of travel substantiated and that exceeds the amount of the employee's expenses deemed substantiated pursuant to rules prescribed under section 274(d), provided the allowance is paid at a rate for each day or mile of travel that is reasonably calculated not to exceed the amount of the employee's expenses or anticipated expenses and the employee is required to return to the payor within a reasonable period of time any portion of such allowance which relates to days or miles of travel not substantiated in accordance with paragraph (e) of this section.

(g) *Reasonable period—(1) In general.* The determination of a reasonable period of time will depend on the facts and circumstances.

(2) *Safe harbors—(i) Fixed date method.* An advance made within 30 days of when an expense is paid or incurred, an expense substantiated to the payor within 60 days after it is paid or incurred, or an amount returned to the payor within 120 days after an expense is paid or incurred will be treated as having occurred within a reasonable period of time.

(ii) *Periodic statement method.* If a payor provides employees with periodic statements (no less frequently than quarterly) stating the amount, if any, paid under the arrangement in excess of the expenses the employee has substantiated in accordance with paragraph (e) of this section, and requesting the employee to substantiate any additional business expenses that have not yet been substantiated (whether or not such expenses relate to the expenses with respect to which the original advance was paid) and/or to return any amounts remaining unsubstantiated within 120 days of the statement, an expense substantiated or an amount returned within that period will be treated as being substantiated or returned within a reasonable period of time.

(3) *Pattern of overreimbursements.* If, under a reimbursement or other expense allowance arrangement, a payor has a plan or practice to provide amounts to employees in excess of expenses substantiated in accordance with paragraph (e) of this section and to avoid reporting and withholding on such amounts, the payor may not use either of the safe harbors provided in paragraph (g)(2) of this section for any years during which such plan or practice exists.

(h) *Withholding and payment of employment taxes—(1) When excluded from wages.* If an arrangement meets the requirements of paragraphs (d), (e), and (f) of this section, the amounts paid under the arrangement that are not in excess of the expenses substantiated in accordance with paragraph (e) of this section (i.e., the amounts treated as paid under an accountable plan) are not wages and are not subject to withholding and payment of employment taxes.

(2) *When included in wages—(i) Accountable plans—(A) General rule.* Except as provided in paragraph (h)(2)(i)(B) of this section, if the expenses covered under an arrangement that meets the requirements of paragraphs (d), (e), and (f) of this section are not substantiated to the payor in accordance with paragraph (e) of this section within a reasonable period of time or if any amounts in excess of the substantiated expenses are not returned to the payor in accordance with paragraph (f) of this section within a reasonable period of time, the amount which is treated as paid under a nonaccountable plan under paragraph (c)(3)(ii) of this section is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the

reasonable period. A payor may treat any amount not substantiated or returned within the periods specified in paragraph (g)(2) of this section as not substantiated or returned within a reasonable period of time.

(B) *Per diem or mileage allowances—*
(1) *In general.* If a payor pays a per diem or mileage allowance under an arrangement that meets the requirements of the paragraphs (d), (e), and (f) of this section, the portion, if any, of the allowance paid that relates to days or miles of travel substantiated in accordance with paragraph (e) of this section and that exceeds the amount of the employee's expenses deemed substantiated for such travel pursuant to rules prescribed under section 274(d) and § 1.274-5T (g) or (j) is treated as paid under a nonaccountable plan. See paragraph (c)(3)(ii) of this section. Because the employee is not required to return this excess portion, the reasonable period of time provisions of paragraph (g) of this section (relating to the return of excess amounts) do not apply to this excess portion.

(2) *Reimbursements.* Except as provided in paragraph (h)(2)(i)(B)(4) of this section, in the case of a per diem or mileage allowance paid as a reimbursement at a rate for each day or mile of travel that exceeds the amounts of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion described in paragraph (h)(2)(i) of this section is subject to withholding and payment of employment taxes in the payroll period in which the payor reimburses the expenses for the days or miles of travel substantiated in accordance with paragraph (e) of this section.

(3) *Advances.* Except as provided in paragraph (h)(2)(i)(B)(4) of this section, in the case of a per diem or mileage allowance paid as an advance at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion described in paragraph (h)(2)(i) of this section is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (i.e., the days or miles of travel) are substantiated in accordance with paragraph (e) of this section. The expenses with respect to which the advance was paid must be substantiated within a reasonable period of time. See paragraph (g) of this section.

(4) *Special rules.* The Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of

withholding and payment of employment taxes on per diem and mileage allowances.

(ii) *Nonaccountable plans.* If an arrangement does not satisfy one or more of the requirements of paragraphs (d), (e), or (f) of this section, all amounts paid under the arrangement are wages and are subject to withholding and payment of employment taxes when paid.

(i) *Application.* The requirements of paragraphs (d) (business connection), (e) (substantiation), and (f) (returning amounts in excess of expenses) of this section will be applied on an employee-by-employee basis. Thus, for example, the failure by one employee to substantiate expenses under an arrangement in accordance with paragraph (e) of this section will not cause amounts paid to other employees to be treated as paid under a nonaccountable plan.

(j) *Examples.* The rules contained in this section may be illustrated by the following examples:

Example (1). Reimbursement requirement. Employer S pays its engineers \$200 a day. On those days that an engineer travels away from home on business for Employer S, Employer S designates \$50 of the \$200 as paid to reimburse the engineer's travel expenses. Because Employer S would pay an engineer \$200 a day regardless of whether the engineer was traveling away from home, the arrangement does not satisfy the reimbursement requirement of paragraph (d)(3)(i) of this section. Thus, no part of the \$50 Employer S designated as a reimbursement is treated as paid under an accountable plan. Rather, all payments under the arrangement are treated as paid under a nonaccountable plan. Employer S must report the entire \$200 as wages or other compensation on the employees' Forms W-2 and must withhold and pay employment taxes on the entire \$200 when paid.

Example (2). Reimbursement requirement, multiple arrangements. Airline T pays all its employees a salary. Airline T also pays an allowance under an arrangement that otherwise meets the requirements of paragraphs (d), (e), and (f) of this section to its pilots and flight attendants who travel away from their home base airports, whether or not they are "away from home." Because the allowance is paid only to those employees who incur (or are reasonably expected to incur) expenses of a type described in paragraph (d)(1) or (d)(2) of this section, the arrangement satisfies the reimbursement requirement of paragraph (d)(3)(i) of this section. Under paragraph (d)(2) of this section, Airline T is treated as maintaining two arrangements. The portion of the arrangement providing the allowances for away from home travel is treated as an accountable plan. The portion of the arrangement providing the allowances for non-away from home travel is treated as a nonaccountable plan. Airline T must report the non-away from home allowances as

wages or other compensation on the employees' Forms W-2 and must withhold and pay employment taxes on these payments when paid.

Example (3). Reimbursement requirement. Corporation R pays all its salespersons a salary. Corporation R also pays a travel allowance under an arrangement that otherwise meets the requirements of paragraphs (d), (e), and (f) of this section. This allowance is paid to all salespersons, including salespersons that Corporation R knows, or has reason to know, do not travel away from their offices on Corporation R business and would not be reasonably expected to incur travel expenses. Because the allowance is not paid only to those employees who incur (or are reasonably expected to incur) expenses of a type described in paragraph (d)(1) or (d)(2) of this section, the arrangement does not satisfy the reimbursement requirement of paragraph (d)(3)(i) of this section. Thus, no part of the allowance Corporation R designated as a reimbursement is treated as paid under an accountable plan. Rather, all payments under the arrangement are treated as paid under a nonaccountable plan. Corporation R must report all payments under the arrangement as wages or other compensation on the employees' Forms W-2 and must withhold and pay employment taxes on the payments when paid.

Example (4). Separate arrangement, miscellaneous expenses. Under an arrangement that meets the requirements of paragraphs (d), (e), and (f) of this section, County U reimburses its employees for lodging and meal expenses incurred when they travel away from home on County U business. For its own convenience, County U also separately pays certain of its employees a \$25 monthly allowance to cover the cost of small miscellaneous office expenses. County U does not require its employees to substantiate these miscellaneous expenses and does not require them to return the amounts by which the monthly allowance exceeds the miscellaneous expenses. The monthly allowance arrangement is a nonaccountable plan. County U must report the monthly allowances as wages or other compensation on the employees' Forms W-2 and must withhold and pay employment taxes on the monthly allowances when paid. The nonaccountable plan providing the monthly allowances is treated as separate from the accountable plan providing reimbursements for lodging and meal expenses incurred for travel away from home on County U business.

Example (5). Excessive advances. In anticipation of employee business expenses that Corporation V does not reasonably expect to exceed \$400 in any quarter, Corporation V nonetheless advances \$1,000 to Employee A for such expenses. Whenever Employee A substantiates an expense in accordance with paragraph (e) of this section, Corporation V provides an additional advance in an amount equal to the amount substantiated, thereby providing a continuing advance of \$1,000. Because the amounts advanced under this arrangement are not reasonably calculated so as not to exceed the

amount of anticipated expenditures and because the advance of money is not made on a day within a reasonable period of the day that the anticipated expenditures are paid or incurred, the arrangement is a nonaccountable plan. The arrangement fails to satisfy the requirements of paragraphs (d) (business connection) and (f) (reasonable calculation of advances) of this section. Thus, Corporation V must report the entire amount of each advance as wages or other compensation and must withhold and pay employment taxes on the entire amount of each advance when paid.

Example (6). Excess mileage advance. Under an arrangement that meets the requirements of paragraphs (d), (e), and (f) of this section, Employer W pays its employees a mileage allowance at a rate of 30 cents per mile (when the amount deemed substantiated for each mile of travel substantiated is 26 cents per mile) to cover automobile business expenses. The allowance is paid at a rate for each mile of travel that is reasonably calculated not to exceed the amount of the employee's expenses or anticipated expenses. Employer W does not require the return of the portion of the mileage allowance (4 cents) that exceeds the amount deemed substantiated for each mile of travel substantiated in accordance with paragraph (e) of this section. In June, Employer W advances Employee B \$150 for 500 miles to be traveled by Employee B during the month. In July, Employee B substantiates 500 miles of business travel. The amount deemed substantiated by Employee B is \$130. However, Employer W does not require Employee B to return the remaining \$20 of the advance. No later than the first payroll period following the payroll period in which the business miles of travel are substantiated, Employer W must withhold and pay employment taxes on \$20 (500 miles $\times$ 4 cents per mile).

Example (7). Excess per diem reimbursement. Under an arrangement that meets the requirements of paragraphs (d), (e), and (f) of this section, Employer X pays its employees a per diem allowance to cover lodging, meal, and incidental expenses incurred for travel away from home on Employer X business at a rate equal to 120 percent of the amount deemed substantiated for each day of travel to the localities to which the employees travel. Employer X does not require the employees to return the 20 percent by which the reimbursement for those expenses exceeds the amount deemed substantiated for each day of travel substantiated in accordance with paragraph (e) of this section. Employee C substantiates six days of business travel away from home: Two days in a locality for which the amount deemed substantiated is \$100 a day and four days in a locality for which the amount deemed substantiated is \$125 a day. Employer X reimburses Employee C \$840 for the six days of travel away from home ($2 \times (120\% \times \$100) + 4 \times (120\% \times \$125)$), and does not require Employee C to return the excess portion (\$140 excess portion = $2 \text{ days} \times \$20 (\$120 - \$100) + 4 \text{ days} \times \$25 (\$150 - \$125)$). For the payroll period in which Employer X reimburses the expenses, Employer X must withhold and pay employment taxes on \$140.

Example (8). Return Requirement. Employer Y provides expense allowances to certain of its employees to cover business expenses of a type described in paragraph (d)(1) of this section under an arrangement that requires the employees to substantiate their expenses within a reasonable period of time and to return any excess amounts within a reasonable period of time. Each time an employee returns an excess amount to Employer Y, however, Employer Y pays the employee a "bonus" equal to the amount returned by the employee. The arrangement fails to satisfy the requirements of paragraph (f) (returning amounts in excess of expenses) of this section. Thus, Employer Y must report the entire amount of the expense allowance payments as wages or other compensation and must withhold and pay employment taxes on the payments when paid. Compare example (6) (where the employee is not required to return the portion of the mileage allowance that exceeds the amount deemed substantiated for each mile of travel substantiated).

Example (9). Timely substantiation. Employer Z provides a \$500 advance to Employee D for a trip away from home on Employer Z business. Employee D incurs \$500 in business expenses on the trip. Employer Z uses the periodic statement method safe harbor. At the end of the quarter during which the trip occurred, Employer Z sends a quarterly statement to Employee D stating that \$500 was advanced to Employee D during the quarter and that no expenses were substantiated and no excess amounts returned. The statement advises Employee D that Employee D must substantiate any additional business expenses within 120 days of the date of the statement, and must return any unsubstantiated excess within the 120-day period. Employee D fails to substantiate any expenses or to return the excess within the 120-day period. Employer Z treats the \$500 as wages and withholds and pays employment taxes on the \$500. After the 120-day period has expired, Employee D substantiates the \$500 in travel expenses in accordance with paragraph (e) of this section. Employer Z properly reported and withheld and paid employment taxes on the \$500 and no adjustments may be made. Employee D must include the \$500 in gross income and may deduct the \$500 of expenses as a miscellaneous itemized deduction subject to the 2-percent floor provided in section 67.

(k) Anti-abuse provision. If a payor's reimbursement or other expense allowance arrangement evidences a pattern of abuse of the rules of section 62(c) and this section, all payments made under the arrangement will be treated as made under a nonaccountable plan.

(l) Cross references. For employment tax regulations relating to reimbursement and expense allowance arrangements, see §§ 31.3121(a)-3, 31.3231(e)-(3), 31.3306(b)-2, and 31.3401(a)-4, which generally apply to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July

1, 1990 with respect to expenses paid or incurred on or after July 1, 1990. For reporting requirements, see § 1.6041-3(i), which generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1989 with respect to expenses paid or incurred on or after January 1, 1989.

(m) Effective dates. This section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee in taxable years of the employee beginning on or after January 1, 1989, with respect to expenses paid or incurred in taxable years beginning on or after January 1, 1989. Paragraph (h) of this section generally applies to payments made under reimbursement or other expense allowance arrangements received by an employee on or after July 1, 1990 with respect to expenses paid or incurred on or after July 1, 1990. Paragraphs (d)(3) and (h)(2)(i)(B) of this section apply to payments made under reimbursement or other expense allowance arrangements received by an employee on or after January 1, 1991 with respect to expenses paid or incurred on or after January 1, 1991.

Par. 4. In § 1.162-17, paragraph (e)(3) is received to read as follows:

§ 1.162-17 Reporting and substantiation of certain business expenses of employees.

* * * * *

(e) Applicability. * * *
(3) For taxable years beginning on or after January 1, 1989, the provisions of this section are superseded by the regulations under section 62(c) to the extent this section is inconsistent with those regulations. See § 1.62-2.

Par. 5. In § 1.6041-3, paragraph (i) is revised to read as follows:

§ 1.6041-3 Payments for which no return of information is required under section 6041.

* * * * *

(i)(1) In general. Payments made under reimbursement or other expense allowance arrangements that meet the requirements of section 62(c) of the Code and § 1.62-2, that do not exceed the amount of the expenses substantiated (i.e., amounts which are treated as paid under an accountable plan), and that are received by an employee on or after January 1, 1989, with respect to expenses paid or incurred on or after January 1, 1989;

(2) Transition rule. Payments made under reimbursement or other expense allowance arrangements that are

received by an employee on or after January 1, 1989, but prior to July 1, 1990, to the extent that the employee is required to account (within the meaning of the term "account" as set forth in § 1.162-17(b)(4) or 1.274-5T(f)(4), whichever is applicable) and does so account to the payor for such expenses, provided the payor has made a reasonable, good faith effort to comply with the requirements of section 62(c). In general, compliance with the provisions of this section, as in effect for payments made under reimbursement or other expense allowance arrangements that were received by an employee before January 1, 1989, with respect to expenses paid or incurred before January 1, 1989, will constitute such reasonable good faith compliance. In no event, however, will reasonable good faith compliance exist if a payor fails to report payments made under an arrangement (other than a per diem or mileage allowance type arrangement) under which an employee is not required to substantiate expenses paid or incurred or is not required to return amounts in excess of the substantiated expenses;

PART 31—[AMENDED]

Par. 6. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * * Secs. 31.3121(a)-1, 31.3231(e)-1, 31.3306(b)-1, and 31.3401(a)-1 also issued under 26 U.S.C. 62.

Par. 7. In § 31.3121(a)-1, the last sentence of paragraph (h) is revised to read as follows:

§ 31.3121(a)-1 Wages.

(h) * * * For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see § 31.3121(a)-3.

Par. 8. Section 31.3121(a)-2T is redesignated as § 31.3121(a)-3 and revised to read as follows:

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

(a) *When excluded from wages.* If a reimbursement or other expense allowance arrangement meets the requirements of section 62(c) of the Code and § 1.62-2 and the expenses are substantiated within a reasonable period of time, payments made under the arrangement that do not exceed the substantiated expenses are treated as paid under an accountable plan and are not wages. In addition, if both wages and the reimbursement or other expense

allowance are combined in a single payment, the reimbursement or other expense allowance must be identified either by making a separate payment or by specifically identifying the amount of the reimbursement or other expense allowance.

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

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

(2) *Nonaccountable plans.* If a reimbursement or other expense allowance arrangement does not satisfy the requirements of section 62(c) and § 1.62-2 (e.g., the arrangement does not require expenses to be substantiated or require amounts in excess of the substantiated expenses to be returned), all amounts paid under the arrangement are treated as paid under a

nonaccountable plan, are included in wages, and are subject to withholding and payment of employment taxes when paid.

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

Par. 9. In § 31.3231(e)-1, the last sentence of paragraph (a)(3)(iv) is revised to read as follows:

§ 31.3231(e)-1 Compensation.

(a) * * *

(3) * * *

(iv) * * * For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see § 31.3231(e)-3.

Par. 10. Section 31.3231(e)-3T is redesignated as § 31.3231(e)-3 and revised to read as follows:

§ 31.3231(e)-3 Reimbursement and other expense allowance amounts.

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

(b) *When included in compensation—(1) Accountable plans—(i) General rule.* Except as provided in paragraph (b)(1)(ii) of this section, if a reimbursement or other expense allowance arrangement satisfies the requirements of section 62(c) and § 1.62-2, but the expenses are not substantiated within a reasonable period of time or amounts in excess of the substantiated expenses are not returned within a reasonable period of

time, the amount paid under the arrangement in excess of the substantiated expenses is treated as paid under a nonaccountable plan, is included in compensation, and is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period.

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

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

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

Par. 11. In § 31.3306(b)-1, the last sentence of paragraph (h) is revised to read as follows:

§ 31.3306(b)-1 Wages.

(h) * * * For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see § 31.3306(b)-2.

Par. 12. Section 31.3306(b)-2T is redesignated as § 31.3306(b)-2 and revised to read as follows:

§ 31.3306(b)-2 Reimbursement and other expense allowance amounts.

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

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

(ii) *Per diem or mileage allowances.* If a reimbursement or other expense allowance arrangement providing a per diem or mileage allowance satisfies the requirements of section 62(c) and § 1.62-2, but the allowance is paid at a rate for each day or mile of travel that exceeds the amount of the employee's expenses deemed substantiated for a day or mile of travel, the excess portion is treated as paid under a nonaccountable plan and is

included in wages. In the case of a per diem or mileage allowance paid as a reimbursement, the excess portion is subject to withholding and payment of employment taxes when paid. In the case of a per diem or mileage allowance paid as an advance, the excess portion is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the expenses with respect to which the advance was paid (i.e., the days or miles of travel) are substantiated. The Commissioner may, in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

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

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

Par. 13. In § 31.3401(a)-1, the last sentence of paragraph (b)(2) is revised to read as follows:

§ 31.3401(a)-1 Wages.

(b) * * *

(2) *Traveling and other expenses.* * * * For amounts that are received by an employee on or after July 1, 1990, with respect to expenses paid or incurred on or after July 1, 1990, see § 31.3401(a)-4.

Par. 14. Section 31.3401(a)-2T is redesignated as § 31.3401(a)-4 and revised to read as follows:

§ 31.3401 (a)-4 Reimbursements and other expense allowance amounts.

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

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

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

in his discretion, prescribe special rules in pronouncements of general applicability regarding the timing of withholding and payment of employment taxes on per diem and mileage allowances.

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

(c) *Withholding rate.* Employers may add any payments made under reimbursement or other expense allowance arrangements that are subject to income tax withholding to the employee's regular wages for a payroll period and compute withholding taxes on the total. Alternatively, the employer may withhold income tax from the reimbursement or other expense allowance at the flat 20-percent rate applicable to supplemental wages, provided the employer withholds income tax from the employee's regular wages and provided the reimbursement or allowance is paid separately (or separately identified if wages and reimbursement amounts are combined in a single payment). See § 31.3401 (g)-1 regarding supplemental wage payments.

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

PART 602—[AMENDED]

Par. 15. The authority for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 16. The table of OMB control numbers in § 602.101 (c) is amended as follows: The entry reading: "1.62.2 * * * 1545-1148" is revised to read: "1.62-2..... 1545-1148."

Dated: December 4, 1990.

Fred T. Goldberg, Jr.,
Commissioner of Internal Revenue.

Approved:

Kenneth W. Gideon,
Assistant Secretary of the Treasury.
[FR Doc. 90-29475 Filed 12-14-90; 8:45 am]
BILLING CODE 4830-01-M

DEPARTMENT OF LABOR**Occupational Safety and Health Administration****29 CFR Part 1910**

RIN 1218-AA82

Occupational Exposure to Formaldehyde

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Extension of administrative stay.

SUMMARY: On December 4, 1987, the Occupational Safety and Health Administration (OSHA) published a final rule in the *Federal Register* on occupational exposure to formaldehyde (29 CFR 1910.1048, 52 FR 46168). In response to numerous public comments which indicated confusion about the hazard warning provisions of the newly revised Formaldehyde Standard, on December 13, 1988, OSHA announced an administrative stay of paragraphs (m)(1)(i) through (m)(4)(ii) for a period of nine months. OSHA also announced its intention to revoke paragraphs (m)(1)(i) through (m)(4)(ii) and invite comments on replacing them with the Hazard Communication Standard (29 CFR 1910.1200) or another equally protective alternative which would be less confusing to the public (53 FR 50198).

The stay was subsequently extended until December 11, 1990 (54 FR 35639, August 29, 1989; 55 FR 24070, June 13, 1990; 55 FR 32616, August 10, 1990). OSHA is completing its re-evaluation of the need to stay these paragraphs. More time is needed to complete this evaluation. Consequently the stay is extended an additional 90 days so that OSHA may complete this process. While this stay is in effect, affected employers must continue to comply with the provisions of OSHA's Hazard Communication Standard.

EFFECTIVE DATE: The administrative stay of 29 CFR 1910.1048 (m)(1)(i) through (m)(4)(ii) will be effective until March 11, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. James Foster, Occupational Safety