

applicant fails to meet his or her burden of proof under 22 CFR 51.23(a) and 51.40 or otherwise does not provide documentation sufficient to establish entitlement to passport issuance within ninety days of notification by the Department that additional information from the applicant is required. Thereafter, if an applicant wishes to pursue a claim of entitlement to passport issuance, he or she must submit a new application and supporting documents, photographs, and statements in support of the application, along with applicable application and execution fees.

#### **§ 51.66 Surrender of passport.**

The bearer of a passport that is revoked must surrender it to the Department or its authorized representative upon demand.

### **Subpart F—Procedures for Review of Certain Denials and Revocations**

#### **§ 51.70 Request for hearing to review certain denials and revocations.**

(a) A person whose passport has been denied or revoked under 22 CFR 51.60(b)(1) through (10), 51.60(c), 51.60(d), 51.61(b), 51.62(a)(1) where the basis for the adverse action would entitle the applicant to a hearing under this section, or § 51.62(a)(2) may request a hearing to the Department to review the basis for the denial or revocation within 60 days of receipt of the notice of the denial or revocation.

(b) The provisions of §§ 51.70 through 51.74 do not apply to any action of the Department taken on an individual basis in denying, restricting, revoking, or invalidating a passport or in any other way adversely affecting the ability of a person to receive or use a passport for reasons excluded from § 51.70(a) including:

- (1) Non-nationality;
- (2) Refusal under the provisions of 51.60(a);
- (3) Refusal to grant a discretionary exception under emergency or humanitarian relief provisions of § 51.61(c);
- (4) Refusal to grant a discretionary exception from geographical limitations of general applicability.

(c) If a timely request for a hearing is made, the Department will hold it within 60 days of the date the Department receives the request, unless the person requesting the hearing asks for a later date and the Department and the hearing officer agree.

(d) The Department will give the person requesting the hearing not less than 10 business days' written notice of the date and place of the hearing.

#### **§ 51.71 The hearing.**

(a) The Department will name a hearing officer, who will make findings of fact and submit recommendations based on the record of the hearing as defined in § 51.72 to the Deputy Assistant Secretary for Passport Services in the Bureau of Consular Affairs.

(b) The person requesting the hearing may appear in person, or with or by his designated attorney. The attorney must be admitted to practice in any state of the United States, the District of Columbia, any territory or possession of the United States, or be admitted to practice before the courts of the country in which the hearing is to be held.

(c) The person requesting the hearing may testify, offer evidence in his or her own behalf, present witnesses, and make arguments at the hearing. The person requesting the hearing is responsible for all costs associated with the presentation of his or her case. The Department may present witnesses, offer evidence, and make arguments in its behalf. The Department is responsible for all costs associated with the presentation of its case.

(d) Formal rules of evidence will not apply, but the hearing officer may impose reasonable restrictions on relevancy, materiality, and competency of evidence presented. Testimony will be under oath or by affirmation under penalty of perjury. The hearing officer may not consider any information that is not also made available to the person requesting the hearing and made a part of the record of the proceeding.

(e) If any witness is unable to appear in person, the hearing officer may, in his or her discretion, accept an affidavit from or order a deposition of the witness, the cost for which will be the responsibility of the requesting party.

#### **§ 51.72 Transcript and record of the hearing.**

A qualified reporter will make a complete verbatim transcript of the hearing. The person requesting the hearing and/or his or her attorney may review and purchase a copy of the transcript. The hearing transcript and the documents received by the hearing officer will constitute the record of the hearing.

#### **§ 51.73 Privacy of hearing.**

Only the person requesting the hearing, his or her attorney, the hearing officer, official reporters, and employees of the Department directly concerned with the presentation of the case for the Department may be present at the hearing. Witnesses may be present only while actually giving testimony or as

otherwise directed by the hearing officer.

#### **§ 51.74 Final decision.**

After reviewing the record of the hearing and the findings of fact and recommendations of the hearing officer, the Deputy Assistant Secretary for Passport Services will decide whether to uphold the denial or revocation of the passport. The Department will promptly notify the person requesting the hearing in writing of the decision. If the decision is to uphold the denial or revocation, the notice will contain the reason(s) for the decision. The decision is final and is not subject to further administrative review.

Dated: November 8, 2007.

**Janice L. Jacobs,**

*Principal Deputy Assistant Secretary,  
Consular Affairs, Department of State.*

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## **DEPARTMENT OF THE TREASURY**

### **Internal Revenue Service**

#### **26 CFR Part 31**

[TD 9367]

RIN 1545—BH00

#### **Payments Made by Reason of a Salary Reduction Agreement**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulation.

**SUMMARY:** This document promulgates a final regulation that defines the term *salary reduction agreement* for purposes of section 3121(a)(5)(D) of the Internal Revenue Code (Code). The final regulation provides guidance to employers (public educational institutions and section 501(c)(3) organizations) purchasing annuity contracts described in section 403(b) on behalf of their employees.

**DATES:** *Effective Date:* This regulation is effective November 15, 2007.

*Applicability Date:* This regulation applies to contributions to section 403(b) plans made on or after November 15, 2007.

**FOR FURTHER INFORMATION CONTACT:** Neil D. Shepherd, (202) 622-6040 (not a toll-free number).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

This final regulation amends the Employment Tax Regulations (26 CFR part 31) by providing guidance relating

to section 3121(a)(5)(D). The Federal Insurance Contributions Act (FICA) imposes taxes on employees and employers equal to a percentage of the wages received with respect to employment. Section 3121(a) defines wages for FICA tax purposes as all remuneration for employment unless otherwise excepted. Section 3121(a)(5)(D), added by the Social Security Amendments of 1983 (Public Law 98-21 (97 Stat. 65)), generally excepts from wages payments made by an employer for the purchase of an annuity contract described in section 403(b). However section 3121(a)(5)(D) expressly excludes from the exception payments made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise). Thus, payments made under a salary reduction agreement to purchase a section 403(b) annuity contract are included in wages for FICA purposes. A temporary and proposed regulation defining the term "salary reduction agreement" for purposes of section 3121(a)(5)(D) was published in the **Federal Register** (69 FR 67054) on November 16, 2004.

For income tax purposes, contributions made by an employer to a section 403(b) contract, including contributions made pursuant to a cash or deferred election or other salary reduction agreement, are generally excluded from income. § 403(b); see also section 1450(a) of the Small Business Job Protection Act of 1996 (Pub. L. 104-188 (110 Stat. 1755)). Conversely, for FICA tax purposes, contributions made by an employer to a section 403(b) contract pursuant to a cash or deferred election or other salary reduction agreement are included in wages. § 3121(a)(5)(D); see also S. Rep. No. 98-23, at 40-41, 98th Cong., 1st Sess. (1983).

#### Summary of Comments and Explanation of Provisions

This regulation finalizes the temporary and proposed regulation without change. The final regulation provides that the term "salary reduction agreement" includes (1) a plan or arrangement whereby a payment will be made if the employee elects to reduce his or her compensation pursuant to a cash or deferred election as defined at § 1.401(k)-1(a)(3) of the Income Tax Regulations, (2) a plan or arrangement whereby a payment will be made if the employee elects to reduce his or her compensation pursuant to a one-time irrevocable election made at or before the time of initial eligibility to participate in such plan or arrangement (or pursuant to a similar arrangement

involving a one-time irrevocable election), and (3) a plan or arrangement whereby a payment will be made if the employee agrees as a condition of employment (whether such condition is set by statute, contract, or otherwise) to make a contribution that reduces the employee's compensation.

Comments were submitted with respect to the definition of the term "salary reduction agreement" for purposes of section 3121(a)(5)(D) and with respect to the applicability date of the temporary and proposed regulation.

#### Salary Reduction Agreement

Commentators asserted that Congress intended the term "salary reduction agreement" in section 3121(a)(5)(D) to apply only to voluntary reductions in salary and not to salary reductions required as a condition of employment. In support of this view, commentators cited the legislative history underlying section 3121(a)(5)(D), particularly the following language from the Senate Report:

The bill also provides that any amounts paid by an employer to a tax-sheltered annuity by reason of a salary reduction agreement between the employer and the employee would be includible in the employee's social security wage base. The committee intended that the provision would merely codify the holding of Revenue Ruling 65-208, 1965-2 Cum. Bull. 383, without any implication with respect to the issue of whether a particular amount paid by an employer to a tax-sheltered annuity is, in fact, made by reason of a "salary reduction agreement."

S. Rep. No. 98-23, at 40-41, 98th Cong., 1st Sess. (1983).

Commentators maintained that Revenue Ruling 65-208 distinguishes between voluntary and mandatory salary reduction contributions and that the legislative history reflects Congress' intent to treat only voluntary salary reduction contributions as having been made by reason of a salary reduction agreement. While the Senate Report indicates a Congressional intent to "codify the holding of Revenue Ruling 65-208," the revenue ruling does not address any distinction between voluntary and mandatory reductions in salary. The critical distinction drawn in Revenue Ruling 65-208 is between situations "where an organization uses its own funds for the purchase of an annuity contract" (a supplemental contribution) and situations "where the employee takes a voluntary reduction in salary to provide the necessary funds" (a salary reduction contribution). At the time Revenue Ruling 65-208 was issued the statutory standard under section 3121(a)(2) for determining whether to

include contributions to section 403(b) annuity contracts in wages for FICA purposes was whether the contributions had been paid by the employer or by the employee. Thus, in determining whether the employer or the employee has paid the contribution, the revenue ruling distinguishes between supplemental contributions funded by the employer and salary reduction contributions funded by the employee. Whether a salary reduction contribution was voluntary or mandatory is irrelevant in establishing that the employee funded the contribution through a reduction in salary.

Several courts have discussed Revenue Ruling 65-208 and confirmed that it addresses the distinction between salary supplements and salary reductions. See *Temple University v. United States*, 769 F.2d 126, 130 (3d Cir. 1985), discussing the distinction drawn by Revenue Ruling 65-208 between supplemental contributions and salary reduction contributions, and *Canisius College v. United States*, 799 F.2d 18, 20-21 (2d Cir. 1986), distinguishing between "salary supplement plans" and "salary reduction plans." See also *University of Chicago v. United States*, No. 06 C 3452, 2007 U.S. Dist. LEXIS 61632, at \*8 (N.D. Ill. Aug. 21, 2007) concluding that "the distinction that was being drawn in [Revenue Ruling 65-208] was between annuity purchase funds that come from employee contributions and those that come from employer contributions." The Treasury Department and the Internal Revenue Service (IRS) continue to believe that it is consistent with the legislative history of section 3121(a)(5)(D) and with the codification of Revenue Ruling 65-208 to treat both voluntary salary reductions and salary reductions to which the employee agrees as a condition of employment as payments made pursuant to a salary reduction agreement.

Commentators suggested that the term "salary reduction agreement" for purposes of section 3121(a)(5)(D) should mean an elective deferral within the meaning of section 402(g)(3)(C), which defines the term *elective deferral* for purposes of the section 402(g)(3) limit on the exclusion of elective deferrals from gross income. In their view, because salary reduction contributions made pursuant to a one-time irrevocable election or as a condition of employment are not elective deferrals under section 402(g)(3)(C) and its accompanying regulations, such contributions are not made pursuant to a salary reduction agreement and, consequently, are excluded from wages under section 3121(a)(5)(D).

Section 402(g)(3)(C) provides that the term “elective deferral” includes “any employer contribution to purchase an annuity contract under section 403(b) under a salary reduction agreement (within the meaning of section 3121(a)(5)(D)).” However, when enacting section 402(g)(3), Congress made the following statement about the relationship among mandatory salary reduction contributions, elective deferrals, and salary reduction agreements: “if an employee is required to contribute a fixed percentage of compensation to a tax-sheltered annuity as a condition of employment, the contributions are not treated as elective deferrals.” H.R. Rep. No. 99-841 at II-405 (1986). Similarly, in 1988 Congress added the flush language of 402(g)(3) providing that a one-time irrevocable election will not be treated as an elective deferral. Congress added the flush language to clarify that the term “elective deferral” excludes contributions “made pursuant to a one-time election to participate in the tax-sheltered annuity even though such contribution would be considered made under a salary reduction agreement under section 3121(a)(5)(D).”

S. Rep. No. 100-445, at 151, 100th Cong., 2d Sess. (1988). Congress explained the clarification to section 402(g)(3) as follows:

The bill conforms the statutory language to the legislative history by providing that contributions to a tax-sheltered annuity are not considered elective deferrals if the contributions are made pursuant to a one-time irrevocable election made by the employee at the time of initial eligibility to participate in the annuity or are made pursuant to a similar arrangement specified in regulations. The bill does not change the definition of salary reduction agreement for purpose of section 3121(a)(5)(D).

Sen. Rep. 100-445, 100th Cong., 2d Sess. (1988) 151.

Thus, as reflected in both the statutory language of section 402(g) and in its legislative history, Congress intended the definition of salary reduction agreement for purposes of section 3121(a)(5)(D) to be distinct from the definition of elective deferral for purposes of section 402(g)(3)(C).

Furthermore, Congress intended that the term *wages* would have different meanings for income tax withholding and FICA tax purposes. The broader scope of the term for FICA tax purposes is consistent with the general policy underlying the FICA. See S. Rep. No. 98-23, at 39, 98th Cong., 1st Sess. (1983) relating to the Social Security Amendments of 1983 (Pub. L. 98-21 (97 Stat. 65)). Moreover, the legislative history to section 3121(a)(5)(D) cited in

this preamble describes Congress’s intent to codify the holding in Revenue Ruling 65-208 (see § 601.601(d)(2)(ii)(b)), which provides that certain amounts included in income and amounts included in wages with respect to contributions used to purchase a 403(b) annuity contract are not the same. Based on the statutory language and the legislative history of section 3121(a)(5)(D) and related provisions, including section 3121(v)(1)(B) as discussed in this preamble, the Treasury Department and the IRS continue to believe that the term “salary reduction agreement” in section 3121(a)(5)(D) includes salary reduction contributions made pursuant to a one-time irrevocable election or as a condition of employment.

The term “salary reduction agreement” is used not only in section 3121(a)(5)(D) but also in another subsection of section 3121, specifically section 3121(v)(1)(B), which provides that wages include “any amount treated as an employer contribution under section 414(h)(2) where the pickup referred to in such section is pursuant to a salary reduction agreement (whether evidenced by a written instrument or otherwise).” Commentators contended that the term “salary reduction agreement” should be interpreted differently for purposes of sections 3121(a)(5)(D) and 3121(v)(1)(B) because section 3121(v)(1)(B) applies only to salary reduction contributions made under a section 414(h) pick-up plan established by a State or local government employer. By definition, the salary reductions that fund these employer contributions are mandatory whereas contributions to section 403(b) annuity plans may be mandatory or voluntary. While it is correct that salary reductions in connection with section 414(h) pick-up plans are mandatory, we see no evidence in the statute or legislative history that Congress intended to interpret the same language differently or to treat similarly situated employees differently for FICA purposes. Both section 3121(a)(5)(D) and section 3121(v)(1)(B) include salary reduction contributions in wages for FICA tax purposes. Neither the statute nor the legislative history gives a basis for concluding that mandatory salary reductions made in connection with a section 414(h) pick-up plan should be included in wages for FICA purposes while mandatory salary reductions made in connection with a section 403(b) annuity plan should be excluded from wages. Thus, the Treasury Department and the IRS continue to believe that it is appropriate to give a

consistent interpretation to identical language in two subsections of the same statutory section enacted only one year apart.

Similarly, as discussed in the preamble to the temporary and proposed regulation, the Tenth Circuit’s decision in *Public Employees’ Retirement Board v. Shalala*, 153 F.3d 1160 (10th Cir. 1998) supports the view that a mandatory salary reduction contribution nonetheless requires the employee’s agreement. In *Public Employees’ Retirement Board* the Court of Appeals held that the term “salary reduction agreement” includes mandatory salary reduction contributions made as a condition of employment. As the Court said, “[A]n employee’s decision to go to work or continue to work \* \* \* constitutes conduct manifesting assent to a salary reduction.” 153 F.3d at 1166. The employment relationship itself is a voluntary relationship, and the employee manifests his or her agreement with the terms and conditions of the employment relationship by accepting employment. See *University of Chicago v. United States*, No. 06 C 3452, 2007 U.S. Dist. LEXIS 61632, at \*7 (N.D. Ill. Aug. 21, 2007) citing *Public Employees’ Retirement Board* for the proposition that “a salary reduction agreed to as a condition of employment constitutes a salary reduction agreement because ‘the employee has “agreed” to the salary reduction by continuing employment.’” The temporary and proposed regulations, and now the final regulations, read the term “agreement” for purposes of section 3121(a)(5)(D) as the Tenth Circuit read it for purposes of section 3121(v)(1)(B), as both an agreement to accept employment subject to a mandatory salary reduction and an agreement to a specified salary reduction.

Accordingly, the final regulation adopts the definition of salary reduction agreement as proposed.

#### *Applicability Date*

Commentators asked the IRS to confirm that the definition of salary reduction agreement provided in the temporary and proposed regulation would apply prospectively only and, therefore, would not affect contributions to a section 403(b) plan made prior to November 16, 2004, the date the temporary and proposed regulation went into effect. As explicitly set forth in § 31.3121(a)(5)-2T the temporary and proposed regulation was applicable to contributions to section 403(b) annuity plans made on or after November 16, 2004. Therefore, the Internal Revenue

Service will not apply the temporary and proposed regulation to contributions made to any section 403(b) plan prior to November 16, 2004, for purposes of determining whether such contributions were subject to FICA tax. The final regulation will apply only to contributions made to any section 403(b) plan on or after November 15, 2007.

### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) do not apply to this regulation, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

### Drafting Information

The principal author of this regulation is Neil D. Shepherd, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in its development.

### List of Subjects in 26 CFR Part 31

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

### Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 31 is amended as follows:

### PART 31—EMPLOYMENT TAXES

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

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

■ **Par. 2.** Section 31.3121(a)(5)–2 is added to read as follows:

#### § 31.3121(a)(5)–2 Payments under or to an annuity contract described in section 403(b).

(a) *Salary reduction agreement defined.* For purposes of section 3121(a)(5)(D), the term *salary reduction agreement* means a plan or arrangement (whether evidenced by a written instrument or otherwise) whereby payment will be made by an employer, on behalf of an employee or his or her beneficiary, under or to an annuity contract described in section 403(b)—

(1) If the employee elects to reduce his or her compensation pursuant to a cash or deferred election as defined at § 1.401(k)–1(a)(3) of this chapter;

(2) If the employee elects to reduce his or her compensation pursuant to a one-time irrevocable election made at or before the time of initial eligibility to participate in such plan or arrangement (or pursuant to a similar arrangement involving a one-time irrevocable election); or

(3) If the employee agrees as a condition of employment (whether such condition is set by statute, contract, or otherwise) to make a contribution that reduces his or her compensation.

(b) *Effective/applicability date.* This section is applicable on November 15, 2007.

#### § 31.3121(a)(5)–2T [Removed]

■ **Par. 3.** Section 31.3121(a)(5)–2T is removed.

Approved: November 13, 2007.

Linda E. Stiff,

*Deputy Commissioner for Services and Enforcement.*

Eric Solomon,

*Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. 07–5730 Filed 11–14–07; 1:17 pm]

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## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 943

[Docket No. TX–057–FOR]

#### Texas Regulatory Program and Abandoned Mine Land Reclamation Plan

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Final rule; approval of amendments.

**SUMMARY:** We, the Office of Surface Mining Reclamation and Enforcement (OSM), are approving amendments to the Texas regulatory program (Texas program) and the Texas abandoned mine land reclamation plan (Texas plan) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Texas proposed revisions to and additions to regulations concerning post mining land uses; terms and conditions of the bond; topsoil redistribution; standards for revegetation success; public hearing; review of notice of violation or cessation order; determination of amount of penalty;

assessment of separate violation for each day; request for hearing; and liens. Also, Texas proposed revisions to its statute concerning liens and administrative penalty for violation of permit conditions. Texas intends to revise its program and plan to be consistent with the corresponding Federal regulations and/or SMCRA, to clarify ambiguities, and to improve operational efficiency.

**DATES:** *Effective Date:* November 19, 2007.

#### FOR FURTHER INFORMATION CONTACT:

Alfred L. Clayborne, Director, Tulsa Field Office. Telephone: (918) 581–6430. E-mail: [aclayborne@osmre.gov](mailto:aclayborne@osmre.gov).

#### SUPPLEMENTARY INFORMATION:

- I. Background on the Texas Program and Texas Plan
- II. Submission of the Amendments
- III. OSM's Findings
- IV. Summary and Disposition of Comments
- V. OSM's Decision
- VI. Procedural Determinations

#### I. Background on the Texas Program and Texas Plan

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act \* \* \*; and rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.” See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior (Secretary) conditionally approved the Texas program effective February 16, 1980. You can find background information on the Texas program, including the Secretary's findings, the disposition of comments, and the conditions of approval, in the February 27, 1980, **Federal Register** (45 FR 12998). You can find later actions on the Texas program at 30 CFR 943.10, 943.15, and 943.16.

The Abandoned Mine Land Reclamation Program was established by Title IV of the Act (30 U.S.C. 1201 *et seq.*) in response to concerns over extensive environmental damage caused by past coal mining activities. A reclamation fee on each ton of coal supports the abandoned mine land reclamation program. The money collected is used to finance the reclamation of abandoned coal mines and for other authorized activities. Section 405 of the Act allows States and Indian Tribes to assume exclusive