Example 4. Subsequent redetermination of year in which business begins. The facts are the same as in *Example 2* except that, in 2010, Partnership X deducted the organizational expenses allocable to January through December of 2010 ($36,000/180 x 12 = $2,400). In addition, in 2011 it is determined that Partnership X actually began business in 2010. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to deduct organizational expenses under section 709(b) in 2010. Partnership X impermissibly deducted organizational expenses in 2009, and incorrectly determined the amount of organizational expenses deducted in 2010. Therefore, Partnership X is using an impermissible method of accounting for the organizational expenses and must change its method under §1.446–1(e) and the applicable general administrative procedures in effect in 2011.

Example 5. Expenditures of more than $50,000 but less than or equal to $55,000. The facts are the same as in *Example 1* except that Partnership X incurs organizational expenses of $54,500. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to deduct organizational expenses under section 709(b) in 2009. Therefore, Partnership X may deduct $500 ($5,000 - 4,500) and the portion of the remaining $54,000 that is allocable to July through December of 2009 ($54,000/180 x 6 = $1,800) in 2009, the taxable year in which Partnership X begins business.

Example 6. Expenditures of more than $55,000. The facts are the same as in *Example 1* except that Partnership X incurs organizational expenses of $450,000. Under paragraph (b)(2) of this section, Partnership X is deemed to have elected to deduct organizational expenses under section 709(b) in 2009. Therefore, Partnership X may deduct the amounts allocable to July through December of 2009 ($450,000/180 x 6 = $15,000) in 2009, the taxable year in which Partnership X begins business.

(5) *Effective/applicability date.* This section applies to organizational expenses paid or incurred after September 8, 2008. However, taxpayers may apply all the provisions of this section to organizational expenses paid or incurred after October 22, 2004, provided that the period of limitations on assessment of tax for the year the election under paragraph (b)(2) of this section is deemed made has not expired. Otherwise, for organizational expenses paid or incurred prior to September 8, 2008, see §1.709–1 in effect prior to that date (§1.709–1 as contained in 26 CFR part 1 edition revised as of April 1, 2008).

(6) *Expiration date.* This section expires on July 6, 2011.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Approved June 30, 2008.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on July 7, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 8, 2008, 73 F.R. 38910)

Section 248.—Organizational Expenditures

Final, temporary, and proposed regulations provide guidance for making elections to amortize expenses under sections 195, 248, and 709 of the Code. See T.D. 9411, page 398.

Final, temporary, and proposed regulations provide guidance for making elections to amortize expenses under sections 195, 248, and 709 of the Code. See REG-164965-04, page 450.

Section 401.—Qualified Pension, Profit-Sharing, and Stock Bonus Plans

A subsidiary will no longer be treated as an employer with respect to employees of the controlled group when it is no longer a member of the controlled group. See Rev. Rul. 2008-45, page 403.

Proposed regulations under sections 401(a)(9) and 403(b) of the Code permit a governmental plan to comply with the required minimum distribution rules by using a reasonable and good faith interpretation of the statute. See REG-142040-07, page 451.

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26 CFR 1.401–1: Qualified pension, profit-sharing, and stock bonus plans.
(Also, § 414.)

Exclusive benefit rule; transfer of plan sponsorship; controlled groups. This ruling provides that the exclusive benefit rule of section 401(a) of the Code is violated if the sponsorship of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the transfer is not in connection with a transfer of business assets or operations from the employer to the unrelated taxpayer.

Rev. Rul. 2008–45

ISSUE

Is the exclusive benefit rule of § 401(a) of the Internal Revenue Code ("Code") violated if the sponsorship of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the transfer of the sponsorship of the plan is not in connection with a transfer of business assets, operations, or employees from the employer to the unrelated taxpayer?

FACTS

Corporation A maintains an underfunded defined benefit plan with no ongoing accrual of benefits. Corporation A transfers sponsorship of the plan to Subsidiary B, a wholly-owned subsidiary of Corporation A. Subsidiary B does not maintain any trade or business, has no employees, and has nominal assets. As part of the transfer, the plan document is amended to substitute Subsidiary B as the plan sponsor and to provide for Subsidiary B to assume Corporation A's responsibilities under the plan.

In connection with the transfer of the plan sponsorship, Corporation A also transfers cash and marketable securities to Subsidiary B. The amount of the transferred assets is equal to the amount of the plan's underfunding, as determined with reference to specified actuarial assumptions, plus an additional margin.

Shortly after the sponsorship of the plan and these assets are transferred to Subsidiary B, ownership of at least 80% of Subsidiary B's stock is transferred to Corporation C, an unrelated corporation. After this transaction, Subsidiary B is no longer a member of the Corporation A controlled group, within the meaning of § 414(b) of the Code, but instead is a member of the Corporation C controlled group. The transaction is not in connection with the transfer of business assets (other than cash or marketable securities transferred to Subsidiary B), operations, or employees from Corporation A's controlled group to Corporation C's controlled group. The only business risk or opportunity in the transaction for Corporation C is to profit from the acquisition and operation of the plan.

LAW

Section 401(a) provides that, in order to be qualified under that section, a stock bonus, pension, or profit-sharing plan of an employer must be for the exclusive benefit of its employees or their beneficiaries. Consistent with this exclusive benefit rule of § 401(a), § 1.401–1(a)(2)(i) of the Income Tax Regulations provides,

in part, that a qualified pension plan is a definite written program and arrangement which is established and maintained by an employer to provide for the livelihood of employees or their beneficiaries after the retirement of the employees. Similarly, § 1.401–1(a)(3)(ii) requires that a qualified plan be established by an employer for the exclusive benefit of its employees or their beneficiaries in order to be qualified.

Section 414(a) provides that, in the case in which the employer maintains a plan of a predecessor employer, service for such predecessor is treated as service for the employer.

Section 414(b) provides that, for specified purposes, including § 401, all employees of all corporations which are members of a controlled group of corporations are treated as employed by a single employer.

ANALYSIS

Unlike other situations where the sponsorship of a plan is transferred in connection with the acquisition of business assets or operations, Subsidiary B does not maintain a business and its assets only compensate Corporation C for assuming Corporation A's responsibility under the plan to make contributions to the plan. Therefore, any profit or loss to Corporation C resulting from the transaction would be solely from the use of the assets that are transferred to its controlled group in connection with the acquisition and operation of the plan.

In accordance with § 414(b), all employees of all corporations which are members of a controlled group of corporations are treated as employed by a single employer. Accordingly, even though Subsidiary B has no employees of its own, it is treated as an employer with respect to the employees of the Corporation A controlled group while it is part of that controlled group. For purposes of the exclusive benefit rule of § 401(a), however, Subsidiary B will no longer be treated as an employer with respect to the employees of the Corporation A controlled group when it is no longer a member of that controlled group.

This result is not affected by § 414(a). Section 414(a) provides that if an employer maintains a plan of a predecessor employer, then service for such predecessor is treated as service for the employer. By its terms, § 414(a) applies only to an "employer" and does not create employer status for a taxpayer that is not otherwise an employer.

Accordingly, when Subsidiary B is no longer a member of the Corporation A controlled group, the plan does not satisfy the exclusive benefit rule of § 401(a) because it is not maintained by an employer to provide retirement benefits for its employees and their beneficiaries. This conclusion would be the same even if the new controlled group has some employees covered by the plan after the transaction, or some business assets or operations are transferred, where substantially all the business risks and opportunities under the transaction are those associated with the transfer of the sponsorship of the plan.

HOLDING

The exclusive benefit rule of § 401(a) is violated if the sponsorship of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the transfer of the sponsorship of the plan is not in connection with a transfer of business assets, operations, or employees from the employer to the unrelated taxpayer.

This ruling does not address any federal income tax consequences other than those specifically addressed herein.

DRAFTING INFORMATION

The principal author of this revenue ruling is Robert M. Walsh of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue ruling, please call the Employee Plans taxpayer assistance number between 8:30 a.m. and 4:30 p.m. Eastern time, Monday through Friday at (877) 829–5500 (a toll-free number) or email Mr. Walsh at *RetirementPlanQuestions@irs.gov*.

Section 403.—Taxation of Employee Annuities

Proposed regulations under sections 401(a)(9) and 403(b) of the Code permit a governmental plan to comply with the required minimum distribution rules by using a reasonable and good faith interpretation of the statute. See REG-142040-07, page 451.

Section 414.—Definitions and Special Rules

A subsidiary will no longer be treated as an employer with respect to employees of the controlled group when it is no longer a member of the controlled group. See Rev. Rul. 2008-45, page 403.

Section 468B.—Special Rules for Designated Settlement Funds

26 CFR 1.468B–6: Escrow accounts, trusts, and other funds used during deferred exchanges of like-kind property under section 1031(a)(3).

T.D. 9413

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR part 1

Escrow Accounts, Trusts, and Other Funds Used During Deferred Exchanges of Like-Kind Property

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 468B of the Internal Revenue Code (Code). The regulations provide rules regarding the taxation of income earned on escrow accounts, trusts, and other funds used during deferred like-kind exchanges of property, and final regulations under section 7872 regarding below-market loans to facilitators of these exchanges. The regulations affect taxpayers that engage in deferred like-kind exchanges and escrow holders, trustees, qualified intermediaries, and others that hold funds during deferred like-kind exchanges.

DATES: *Effective Date:* These regulations are effective July 10, 2008.

Applicability Dates: For dates of applicability, see §§1.468B–6(f), 1.7872–5(d), and 1.7872–16(g).

FOR FURTHER INFORMATION CONTACT: Concerning the final regulations under section 468B, Jeffrey T. Rodrick, (202) 622–4930;