

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 31

[REG-130074-11]

RIN 1545-BK54

Rules Relating to Additional Medicare Tax

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to Additional Hospital Insurance Tax on income above threshold amounts (“Additional Medicare Tax”), as added by the Affordable Care Act. Specifically, these proposed regulations provide guidance for employers and individuals relating to the implementation of Additional Medicare Tax. This document also contains proposed regulations relating to the requirement to file a return reporting Additional Medicare Tax, the employer process for making adjustments of underpayments and overpayments of Additional Medicare Tax, and the employer and employee processes for filing a claim for refund for an overpayment of Additional Medicare Tax. This document also provides notice of a public hearing on these proposed rules.

DATES: Written or electronic comments must be received by **March 5, 2013**. Requests to speak (with outlines of topics to be discussed) at the public hearing

scheduled for April 4, 2013, must be received by **February 28, 2013**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-130074-11), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-130074-11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (IRS REG-130074-11). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FUTURE INFORMATION CONTACT: Concerning the proposed regulations, Andrew K. Holubeck or Ligeia M. Donis at (202) 622-6040; concerning submission of comments, the hearing, and/or to be placed on the building access list to attend the hearing, please contact Oluwafunmilayo (Funmi) Taylor at [Oluwafunmilayo.P.Taylor@irs.counsel.treas.gov](mailto:Oluwafunmilayo.P.Taylor@irs.counsel.treas.gov) or (202) 622-7180 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION

##### **Paperwork Reduction Act**

The collection of information contained in these proposed regulations was previously reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2097. Comments on the collection of information should be sent 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, with

copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by February 5, 2013. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these proposed regulations is in §§31.6011(a)-1, 31.6011(a)-2, 31.6205-1, 31.6402(a)-2, 31.6413(a)-1, and 31.6413(a)-2. This information is required by the IRS to verify compliance with return requirements under section 6011, employment tax adjustments under sections 6205 and 6413, and claims for refund of overpayments under section 6402. This information will be used to determine whether the amount of tax has been reported and calculated correctly. The likely respondents are employers and individuals.

Estimated total annual reporting and/or recordkeeping burden: 1,900,000 hours.

Estimated average annual burden per respondent: 1 hour.

Estimated number of respondents: 1,900,000.

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

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

## **Background**

These proposed regulations are issued in connection with the Additional Hospital Insurance Tax on income above threshold amounts (“Additional Medicare Tax”), as added by section 9015 of the Patient Protection and Affordable Care Act (PPACA), Public Law 111-148 (124 Stat. 119 (2010)), and as amended by section 10906 of the PPACA and section 1402(b) of the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (124 Stat. 1029 (2010)) (collectively, the “Affordable Care Act”). The proposed regulations include amendments to §1.1401-1 of the Income Tax Regulations, and §§31.3101-2, 31.3102-1, 31.3102-4, 31.3202-1, 31.6011(a)-1, 31.6011(a)-2, 31.6205-1, 31.6402(a)-2, 31.6413(a)-1, and 31.6413(a)-2 of the Employment Tax Regulations. The proposed regulations provide guidance for employers and individuals relating to the implementation of Additional Medicare Tax, including the requirement to withhold Additional Medicare Tax on certain wages and compensation, the requirement to file a return reporting Additional Medicare Tax, the employer process for adjusting underpayments and overpayments of Additional

Medicare Tax, and the employer and employee processes for filing a claim for refund of Additional Medicare Tax.

For purposes of these proposed regulations, the term employment taxes means the Federal Insurance Contributions Act (FICA) tax imposed on employers and employees, the Railroad Retirement Tax Act (RRTA) tax imposed on employers and employees, and federal income tax withholding (ITW).

#### Federal Insurance Contributions Act and Railroad Retirement Tax Act Taxes

Tax under the FICA is composed of Old-Age, Survivors, and Disability Insurance (OASDI) tax, also referred to as social security tax, and Hospital Insurance (HI) tax, also referred to as Medicare tax. The Medicare portion of FICA tax is imposed separately on the employer, under section 3111(b), and the employee, under section 3101(b), in an amount equal to a percentage of wages. Under section 3102, the employer is required to collect the employee portion of FICA tax by deducting the amount of the tax from wages, as and when paid, and is liable for payment of the tax required to be collected. Until collected, the employee also is liable for the employee portion of the tax. See §31.3102-1(d).

Under the RRTA, railroad employment is subject to a separate and distinct system of taxes from those imposed under the FICA. The RRTA serves as the functional equivalent of FICA for railroad employers, employees, and employee representatives (a group unique to the railroad industry). Tax under the RRTA is divided into tiers and each tier finances different benefits. Tier 1 RRTA tax provides equivalent social security and Medicare benefits. Section 3201(a) imposes Tier 1 RRTA tax on employees and section 3211(a) imposes Tier 1 RRTA tax on employee

representatives, in an amount equal to the applicable percentage of compensation. For employees, the applicable percentage under section 3201(a) is the sum of the rates of tax under section 3101(a) and (b). For employee representatives, the applicable percentage under section 3211(a) is the sum of the rates of tax under sections 3101(a) and (b) and 3111(a) and (b).

Under section 3202, the employer is required to collect the employee portions of RRTA tax by deducting the amount of the taxes from compensation as and when paid, and is liable for payment of the taxes required to be collected. Until collected, the employee also is liable for the employee portion of the tax. See §31.3202-1(e).

The Affordable Care Act added section 3101(b)(2). Section 3101(b)(2) increases the employee portion of Medicare tax for wages received in any taxable year beginning after December 31, 2012, by an additional 0.9 percent of FICA wages which are in excess of certain threshold amounts. Additional Medicare Tax differs from Medicare tax in that Additional Medicare Tax is not imposed until wages exceed a threshold amount, and the threshold amount for application of the tax is based on the filing status of the individual. Under section 3101(b)(2), the threshold amount is \$250,000 in the case of a joint return, \$125,000 in the case of a married taxpayer filing a separate return, and \$200,000 in any other case. Additional Medicare Tax also differs from Medicare Tax in that there is no employer portion to correspond to the amount owed by the employee.

Additional Medicare Tax applies to RRTA compensation paid to railroad employees and employee representatives. See reference to section 3101(b) in sections 3201(a) and 3211(a). Accordingly, Tier 1 RRTA tax imposed under sections 3201(a) and 3211(a) will be increased for compensation received in any taxable year beginning

after December 31, 2012, by an additional 0.9 percent of RRTA compensation which is in excess of certain threshold amounts as enumerated in section 3101(b)(2). The threshold amount for Additional Medicare Tax applies separately to the FICA and the RRTA. Accordingly, an individual will not combine FICA wages and RRTA compensation in determining whether Additional Medicare Tax applies under FICA or under RRTA.

The Affordable Care Act added section 3102(f). Section 3102(f)(1) provides that an employer's obligation under section 3102(a) to withhold Additional Medicare Tax applies only to the extent that the wages the employee receives from the employer are in excess of \$200,000 in a calendar year. Section 3102(f)(1) further provides that in satisfying its obligation to withhold Additional Medicare Tax, the employer may disregard the amount of wages received by the employee's spouse.

Calculating wages for purposes of withholding Additional Medicare Tax is no different than calculating wages for FICA generally. Thus, for example, if an employee has amounts deferred under a nonqualified deferred compensation plan and the nonqualified deferred compensation (NQDC) is taken into account as wages for FICA tax purposes under the special timing rule described in §31.3121(v)(2)-1(a)(2), the NQDC would likewise be taken into account under the special timing rule for purposes of determining an employer's obligation to withhold Additional Medicare Tax.

Similarly, when an employee is concurrently employed by related corporations and one of the corporations disburses wages for services performed for each of the employers and the arrangement otherwise satisfies the common paymaster provisions of section 3121(s), liability for FICA tax with respect to the wages disbursed by the

common paymaster is computed as if there was a single employer. In this case, the obligation to withhold Additional Medicare Tax on wages in excess of \$200,000 disbursed by the common paymaster would also be determined as if there was a single employer.

Section 3102(f)(2) specifies that to the extent Additional Medicare Tax is not withheld by the employer, the employee must pay the tax. This is consistent with the general FICA rule in §31.3102-1(d), which provides that the employee is liable for the employee portion of FICA tax until collected by the employer.

Section 3102(f)(3) provides that if an employer fails to withhold Additional Medicare Tax, and the tax is subsequently paid by the employee, the IRS will not collect the tax from the employer. Section 3102(f)(3) specifies, however, that the employer would remain subject to any applicable penalties or additions to tax for failure to withhold Additional Medicare Tax as required. Section 3102(f)(3), reflecting that Additional Medicare Tax is imposed only on employees and is ultimately based on the employee's filing status, is similar to section 3402(d), which abates the employer's liability for ITW when the employee has paid the income tax.

#### Self-Employment Contributions Act Taxes

Section 1401 imposes social security and Medicare taxes on the self-employment income of every individual at the same combined employer and employee rates applicable under the FICA.

The Affordable Care Act added section 1401(b)(2). Section 1401(b)(2)(A) increases the Medicare tax on self-employment income for any taxable year beginning after December 31, 2012, by an additional 0.9 percent of self-employment income which



is in excess of certain threshold amounts. As with Additional Medicare Tax under the FICA, the threshold amounts for an individual to be subject to Additional Medicare Tax under the Self-Employment Contributions Act (SECA) are determined by the individual's filing status. The threshold amounts enumerated under section 1401(b)(2)(A), are \$250,000 in the case of a joint return, \$125,000 in the case of a married taxpayer filing a separate return, and \$200,000 in any other case.

Section 1401(b)(2)(B) provides for coordination with Additional Medicare Tax under the FICA and specifies that the threshold amounts under section 1401(b)(2)(A) are reduced (but not below zero) by the amount of wages taken into account in determining Additional Medicare Tax under the FICA. Section 1401(b)(2)(B) does not provide for similar coordination with Additional Medicare Tax under the RRTA. Therefore, the amount of RRTA compensation taken into account in determining Additional Medicare Tax under the RRTA will not reduce the threshold amounts under section 1401(b)(2)(A) for determining Additional Medicare Tax under the SECA.

### Estimated Taxes

Section 6654 imposes an addition to tax in the case of an individual's underpayment of estimated tax. Generally, the addition to tax imposed under section 6654 will not apply to individuals who have sufficient ITW on wages or who make estimated tax payments throughout the year. Employees may request additional ITW on wages on Form W-4, "Withholding Allowance Certificate," to reduce the need to make estimated tax payments to cover the individual's tax liability.

Under section 6654(m), which was added by the Affordable Care Act, Additional Medicare Tax is treated as a tax subject to estimated tax payment requirements. In the

case of employees, Additional Medicare Tax is collected through withholding on FICA wages or RRTA compensation in excess of \$200,000 in a calendar year. In addition, employees may request additional ITW on wages on Form W-4 and use this additional ITW to apply against taxes shown on their return, including any Additional Medicare Tax liability. To the extent not withheld, Additional Medicare Tax must be included when making estimated tax payments.

#### Interest-Free Adjustments of Employment Taxes

The current regulations under section 6205 set forth the procedures for making interest-free adjustments for underpayments of employment taxes. Generally, under the regulations, if an employer ascertains an underpayment of FICA or RRTA tax, the employer can make an underpayment adjustment, within the period of limitations for assessment, by reporting the additional amount due on an adjusted return for the return period in which the wages or compensation was paid. For underpayments of ITW, subject to limited exceptions for correcting worker misclassification errors or for administrative errors (that is, errors involving the inaccurate reporting of the amount actually withheld) and for audit adjustments, an adjustment may be made only for errors ascertained during the calendar year in which the wages were paid.

The current regulations under section 6413(a) set forth the procedures for making interest-free adjustments for overpayments of employment taxes. Under the regulations, if an employer ascertains within the applicable period of limitations on credit or refund that an overpayment error was made, the employer is generally required to repay or reimburse its employees the amount of overcollected employee FICA tax or employee RRTA tax prior to the expiration of the applicable period of limitations on

credit or refund. The regulations further provide that once an employer repays or reimburses an employee, the employer may report both the employee and employer portions of FICA or RRTA tax as an overpayment on an adjusted return within the period of limitations on credit or refund. The employer must generally certify on the adjusted return that it has repaid or reimbursed its employees.

Similar rules apply for making interest-free adjustments for overpayments of ITW, except that an interest-free adjustment may only be made if the employer ascertains the error and repays or reimburses its employees within the same calendar year that the wages were paid, unless the employer is correcting an administrative error.

#### Claims for Refund of Employment Taxes

In lieu of making an interest-free adjustment under section 6413(a) for an overpayment, employers may file a claim for refund pursuant to section 6402. Under section 6402(a), the IRS may credit the amount of an overpayment, including any interest, against any tax liability of the person who made the overpayment and shall, subject to certain offsets, refund any balance to such person. A claim for refund under section 6402(a) must be filed within the period of limitations on credit or refund. Section 6414 permits refunds of ITW only to the extent the amount of the ITW overpayment was not actually deducted and withheld from an employee.

The current regulations under section 6402(a) set out the procedures for filing a claim for refund of overpaid FICA and RRTA taxes. The regulations permit an employer to file a claim for refund of an overpayment of FICA or RRTA tax, but generally require the employer to certify as part of the claim process that the employer has repaid or reimbursed the employee's share of the overpayment of FICA or RRTA tax to the

employee or has secured the written consent of the employee to allowance of the refund or credit.

Generally, under the current section 6402 regulations, an employee may file a claim for refund of overpaid FICA or RRTA tax as long as the employee has not been repaid or reimbursed by the employer and does not give the employer consent to file a claim on his or her behalf, and the employee has not taken the overcollection into account in claiming a credit against, or refund of, his or her income tax, in the case of a claim under section 6413(c) for overpaid employee social security tax.

The current regulations under section 6414 set out the procedures for filing a claim for refund of overpaid ITW and provide that an employer may not file a claim for refund of an overpayment of ITW to the extent the amount was deducted or withheld from an employee.

### **Explanation of Provisions**

The proposed regulations provide rules for the withholding, computation, reporting, and payment of Additional Medicare Tax on wages, self-employment income, and RRTA compensation. The proposed regulations also provide rules for when and how employers may make an interest-free adjustment to correct an overpayment or an underpayment of Additional Medicare Tax and how employers and employees may claim refunds for overpayments of Additional Medicare Tax. These procedural rules for interest-free adjustments and claims for refund track the existing rules that apply to ITW rather than the rules that apply to FICA tax. The regulations take this approach because Additional Medicare Tax, like ITW, does not include an employer portion, and the ultimate liability is reconciled on the individual employee's income tax return.

### Rates and Computation of Employee FICA Tax

The proposed regulations under section 3101(b) update the rates of tax for the social security and Medicare tax on employees, and add a paragraph describing the rate of Additional Medicare Tax. The proposed regulations also provide an updated example illustrating that the social security and Medicare rates applicable to the calendar year in which wages are received apply to compute the tax liability.

### Employer's Obligation to Withhold Additional Medicare Tax

The proposed regulations under sections 3102 and 3202(a) describe the extent to which an employer is required to withhold Additional Medicare Tax. The proposed regulations under section 3102(f) provide that an employer must withhold Additional Medicare Tax from an employee's wages only to the extent that the employee receives wages from the employer in excess of \$200,000 in a calendar year. In determining whether wages exceed \$200,000, an employer does not take into account the employee's filing status or other wages or compensation which may impact the employee's liability for the tax. An employee may not request that the employer deduct and withhold Additional Medicare Tax on wages of \$200,000 or less. However, an employee who anticipates liability for Additional Medicare Tax may request that the employer deduct and withhold an additional amount of ITW under §31.3402(i)-2 on Form W-4. This additional ITW can apply against taxes shown on Form 1040, "U.S. Individual Tax Return," including any Additional Medicare Tax liability. An employee might request that the employer deduct and withhold an additional amount of ITW on wages that are not in excess of \$200,000 if, for example, the employee is married and files a joint return, and anticipates liability for Additional Medicare Tax because the

combined wages of the employee and the employee's spouse will exceed \$250,000. The proposed regulations under sections 3102(f) and 3202(a) include examples illustrating the extent of the employer's obligation to withhold Additional Medicare Tax.

Further, the proposed regulations under section 3102(f) provide that to the extent Additional Medicare Tax is not withheld by the employer, the employee is liable for the tax. The proposed regulations also provide that the IRS will not collect from an employer the amount of Additional Medicare Tax it failed to withhold from wages paid to an employee if the employee subsequently pays the Additional Medicare Tax. However, the proposed regulations also specify that the employer would remain subject to any applicable penalties or additions to tax for failure to withhold Additional Medicare Tax as required.

Although Additional Medicare Tax applies to RRTA compensation, the Affordable Care Act did not add provisions similar to section 3102(f) to the RRTA, nor does the RRTA cross-reference section 3102(f). However, in light of the general similarities between the FICA and the RRTA and the principles discussed above, and in order to provide guidance to railroad employers regarding their liability to withhold Additional Medicare Tax, the proposed regulations under section 3202(a) incorporate the same rules as provided in section 3102(f). Therefore, the proposed regulations under section 3202(a) provide that railroad employers must withhold Additional Medicare Tax from an employee's compensation only to the extent the employee receives compensation from the employer in excess of \$200,000 in a calendar year. Similar to the FICA rule, an employee may not request that the employer deduct and withhold Additional Medicare Tax on compensation of \$200,000 or less. Instead, an employee who anticipates

liability for Additional Medicare Tax may request that the employer deduct and withhold an additional amount of ITW under §31.3402(i)-2 on Form W-4 to apply against taxes shown on Form 1040, including any Additional Medicare Tax liability. The regulations under section 3202 further provide that: (1) to the extent Additional Medicare Tax is not withheld by the employer, the employee is liable for the tax; (2) the IRS will not collect Additional Medicare Tax from an employer who fails to withhold Additional Medicare Tax on compensation paid by the employer, if the tax is subsequently paid by the employee; and (3) the employer will remain subject to any applicable penalties or additions to tax for failure to withhold Additional Medicare Tax as required.

#### Employee's Obligation to Report and Pay Additional Medicare Tax

The proposed regulations under sections 3102(f) and 3202(a) provide that an employee is liable for Additional Medicare Tax on wages or compensation to the extent that the tax is not withheld by the employee's employer. This is consistent with the general rule in §§31.3102-1(d) and 31.3202-1(e) for FICA and RRTA purposes, respectively, that provides that the employee is liable for the tax until collected by the employer. Under the proposed regulations under section 6011, an individual must report Additional Medicare Tax on Form 1040. An individual will claim credit for any withheld Additional Medicare Tax on Form 1040 and pay any such tax due that was not previously paid through withholding or estimated tax. For example, if an employee and his or her spouse each had wages of \$200,000 or less, such that their employers did not withhold Additional Medicare Tax from the employee's or the spouse's wages, but the combined wages of the employee and the employee's spouse exceed the threshold for a joint return under section 3101(b)(2) (that is, exceed \$250,000), the proposed

regulations indicate that the employee and the employee's spouse are liable to pay Additional Medicare Tax. The proposed regulations under sections 3102(f) and 3202(a) include examples illustrating this principle for FICA wages and RRTA compensation, respectively.

#### Self-Employed Individual's Obligation to Pay Additional Medicare Tax

The proposed regulations under section 1401(b) describe the extent to which an individual who has self-employment income is liable for Additional Medicare Tax. Specifically, the proposed regulations describe how the applicable threshold amounts under section 1401(b)(2)(A) are reduced (but not below zero) by the amount of FICA wages taken into account in determining Additional Medicare Tax liability. Thus, the proposed regulations under section 1401(b)(2) illustrate the application of the reduced threshold amounts for purposes of determining liability for Additional Medicare Tax attributable to the individual's self-employment income.

The Affordable Care Act did not provide for a reduction in the self-employment income threshold amounts by the amount of any RRTA compensation taken into account in determining liability for Additional Medicare Tax. Accordingly, an individual who receives both RRTA compensation and self-employment income would not reduce the self-employment income threshold amounts under section 1401(b)(2)(A) by the amount of RRTA compensation taken into account in determining Additional Medicare Tax liability.

#### Interest-Free Adjustments of Additional Medicare Tax

The proposed regulations under sections 6205 provide that adjustments of underpayments of Additional Medicare Tax may be made only if the error is ascertained



in the same year the wages or compensation was paid, unless: (1) the underpayment is attributable to an administrative error, (2) section 3509 applies to determine the amount of the underpayment, due to the employer's failure to treat the individual as an employee, or (3) the adjustment is the result of an IRS examination.

Similarly, the proposed regulations under section 6413 provide that an adjustment of overpaid Additional Medicare Tax may only be made if the employer ascertains the error in the year the wages or compensation was paid and repays or reimburses the employee the amount of the overcollection prior to the end of the calendar year. As in the case of all overpayment adjustments, the requirement to repay or reimburse does not apply to the extent that, after reasonable efforts, the employer cannot locate the employee. However, if an employer has not repaid or reimbursed the amount of the overcollection to the employee, an adjustment cannot be made.

#### Claims for Refund of Additional Medicare Tax

The proposed regulations under section 6402 provide a process by which employers and employees claim refunds of overpaid Additional Medicare Tax. Under the proposed regulations, employers may claim refunds of overpaid Additional Medicare Tax only if the employer did not deduct or withhold the overpaid Additional Medicare Tax from the employee's wages or compensation.

For employees, the proposed regulations eliminate the requirements that the employee first seek a refund from the employer and provide a statement in support of the employee's claim. Further, the proposed regulations direct the employee to claim the refund or credit of overpaid Additional Medicare Tax by taking the overpayment into account in claiming a credit against, or refund of, tax on an individual tax return (for

example, Form 1040) for the year in which the overpayment was made, or for a taxable year for which a tax return has been filed, by filing Form 1040X, “Amended U.S. Individual Income Tax Return.” This process is in lieu of filing a claim for refund for overpaid Additional Medicare Tax on Form 843, “Claim for Refund and Request for Abatement.” Employees may only claim a refund of Additional Medicare Tax if they have not received repayment or reimbursement from their employer in the context of an interest-free adjustment.

### **Proposed Effective/Applicability Dates**

These regulations are proposed to be effective the date the final regulations are published in the **Federal Register**. The regulations under the Internal Revenue Code (Code) sections 1401, 3101, 3102, and 3202 are proposed to apply to quarters beginning after the date the final regulations are published in the **Federal Register**. The regulations under Code section 6011 are proposed to apply to taxable years beginning after the date the final regulations are published in the **Federal Register**. The regulations under Code sections 6205, 6402, and 6413 are proposed to apply to adjustments made and claims for refund filed after the date the final regulations are published in the **Federal Register**.

The Treasury Department and IRS intend to finalize these proposed regulations in 2013. Taxpayers may rely on these proposed regulations for tax periods beginning before the date that the final regulations are published in the Federal Register.

### **Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory

assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

The proposed regulations under section 6011 affect all taxpayers that file individual tax returns and are subject to Additional Medicare Tax. The proposed regulations under sections 6205, 6402, and 6413 affect all taxpayers that file employment tax returns, as well as taxpayers that file claims for refund of employment taxes. Therefore, the IRS has determined that these proposed regulations will have an impact on a substantial number of small entities.

The IRS has determined, however, that the impact on entities affected by the proposed regulations will not be significant. The proposed regulations require taxpayers who file employment tax returns and who make interest-free adjustments to their employment taxes for either underpayments or overpayments of Additional Medicare Tax or who file claims for refund for an overpayment of Additional Medicare Tax to provide an explanation setting forth the basis for the correction or the claim in detail, designating the return period in which the error was ascertained and the return period being corrected, and setting forth such other information as may be required by the instructions to the form. In addition, for adjustments of overpayments of Additional Medicare Tax, employers must also obtain and retain the written receipt of the employee showing the date and amount of the repayment to the employee or retain evidence of reimbursement. This collection of information is not new to the proposed regulations. The proposed regulations merely apply the existing procedural requirements, with appropriate modifications, to corrections of Additional Medicare Tax.

The filing of a claim for refund and the making of an interest-free adjustment pursuant to the proposed regulations are voluntary on the part of taxpayers.

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

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### **Comments and Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. All comments that are submitted by the public will be available for public inspection and copying at <http://www.regulations.gov> or upon request. A public hearing has been scheduled for April 4, 2013, beginning at 10 a.m., in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts.

For information about having your name placed on the building access list to attend the hearing, see the “FOR FURTHER INFORMATION CONTACT” section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit comments and an outline of the topics to be discussed and the time to be devoted to each topic by February 28, 2013.

A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

### **Drafting Information**

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

### **List of Subjects**

#### **26 CFR Part 1**

Income Taxes, Reporting and recordkeeping requirements.

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

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

### **Proposed Amendments to the Regulations**

Accordingly, 26 CFR parts 1 and 31 are proposed to be amended as follows:

**PART 1--INCOME TAXES**

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

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

Par. 2. Section 1.1401-1 is amended by revising paragraph (b) and adding new paragraphs (d) and (e) to read as follows:

§1.1401-1 Tax on self-employment income.

\* \* \* \* \*

(b) The rates of tax on self-employment income are as follows (these regulations do not reflect off-Code revisions to the below rates):

(1) For Old-age, Survivors, and Disability Insurance:

Taxable year	Percent
Beginning after December 31, 1983 and before January 1, 1988	11.40
Beginning after December 31, 1987 and before January 1, 1990	12.12
Beginning after December 31, 1989	12.40

(2)(i) For Hospital Insurance:

Taxable year	Percent
Beginning after December 31, 1983 and before January 1, 1985	2.60
Beginning after December 31, 1984 and before January 1, 1986	2.70
Beginning after December 31, 1985	2.90

(ii) For Additional Medicare Tax:

Taxable year	Percent
Beginning after December 31, 2012	0.9

\* \* \* \* \*

(d) Special rules regarding Additional Medicare Tax. (1) General rule. An individual is liable for Additional Medicare Tax to the extent that his or her self-employment income exceeds the following threshold amounts.

Filing Status	Threshold
Married individual filing a joint return	\$250,000
Married individual filing a separate return	\$125,000
Any other case	\$200,000

These threshold amounts are specified under section 1401(b)(2)(A).

(2) Coordination with Federal Insurance Contributions Act. (i) General rule.

Under section 1401(b)(2)(B), the applicable threshold specified under section 1401(b)(2)(A) is reduced (but not below zero) by the amount of wages (as defined in section 3121(a)) taken into account in determining Additional Medicare Tax under section 3101(b)(2) with respect to the taxpayer. This rule does not apply to Railroad Retirement Tax Act (RRTA) compensation (as defined in section 3231(e)).

(ii) Examples. The rules provided in paragraph (d)(2)(i) of this section are illustrated by the following examples:

Example 1. A, a single filer, has \$130,000 in self-employment income and \$0 in wages. A is not liable to pay Additional Medicare Tax.

Example 2. B, a single filer, has \$220,000 in self-employment income and \$0 in wages. B is liable to pay Additional Medicare Tax on \$20,000 (\$220,000 in self-employment income minus the threshold of \$200,000).

Example 3. C, a single filer, has \$145,000 in self-employment income and \$130,000 in wages. C's wages are not in excess of \$200,000 so C's employer did not withhold Additional Medicare Tax. However, the \$130,000 of wages reduces the self-employment income threshold to \$70,000 (\$200,000 threshold minus the \$130,000 of

wages). C is liable to pay Additional Medicare Tax on \$75,000 of self-employment income (\$145,000 in self-employment income minus the reduced threshold of \$70,000).

Example 4. E, who is married and files a joint return, has \$140,000 in self-employment income. F, E's spouse, has \$130,000 in wages. F's wages are not in excess of \$200,000 so F's employer did not withhold Additional Medicare Tax. However, the \$130,000 of F's wages reduces E's self-employment income threshold to \$120,000 (\$250,000 threshold minus the \$130,000 of wages). E and F are liable to pay Additional Medicare Tax on \$20,000 of E's self-employment income (\$140,000 in self-employment income minus the reduced threshold of \$120,000).

Example 5. D, who is married and files married filing separately, has \$150,000 in self-employment income and \$200,000 in wages. D's wages are not in excess of \$200,000 so D's employer did not withhold Additional Medicare Tax. However, the \$200,000 of wages reduces the self-employment income threshold to \$0 (\$125,000 threshold minus the \$200,000 of wages). D is liable to pay Additional Medicare Tax on \$75,000 of wages (\$200,000 in wages minus the \$125,000 threshold for a married filing separately return) and on \$150,000 of self-employment income (\$150,000 in self-employment income minus the reduced threshold of \$0).

(e) Effective/applicability date. Paragraphs (b) and (d) of this section apply to quarters beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

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

Par. 3. The authority citation for part 31 continues to read in part as follows:

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

Par. 4. Section 31.3101-2 is amended by revising paragraphs (a), (b), and (c) and adding a new paragraph (d) to read as follows:

### §31.3101-2 Rates and computation of employee tax.

(a) Old-Age, Survivors, and Disability Insurance. The rates of employee tax for Old-Age, Survivors, and Disability Insurance (OASDI) with respect to wages received in calendar years after 1983 are as follows (these regulations do not reflect off-Code revisions to the below rates):



Calendar year	Percent
1984, 1985, 1986, or 1987	5.7
1988 or 1989	6.06
1990 and subsequent years	6.2

(b)(1) Hospital Insurance. The rates of employee tax for Hospital Insurance (HI) with respect to wages received in calendar years after 1973 are as follows:

Calendar year	Percent
1974, 1975, 1976, or 1977	0.90
1978	1.00
1979 or 1980	1.05
1981, 1982, 1983, or 1984	1.30
1985	1.35
1986 and subsequent years	1.45

(2) Additional Medicare Tax. (i) The rate of Additional Medicare Tax with respect to wages received in taxable years beginning after December 31, 2012, is as follows:

Taxable year	Percent
Beginning after December 31, 2012	0.9

(ii) Individuals are liable for Additional Medicare Tax with respect to wages received in taxable years beginning after December 31, 2012, which are in excess of:

Filing Status	Threshold
Married individual filing a joint return	\$250,000
Married individual filing a separate return	\$125,000
Any other case	\$200,000

(c) Computation of employee tax. The employee tax is computed by applying to the wages received by the employee the rates in effect at the time such wages are received.

Example. In 1989, A performed services for X which constituted employment (see §31.3121(b)-2). In 1990 A receives from X \$1,000 as remuneration for such services. The tax is payable at the 6.2 percent OASDI rate and the 1.45 percent HI rate in effect for the calendar year 1990 (the year in which the wages are received) and not at the 6.06 percent OASDI rate and the 1.45 percent HI rate which were in effect for the calendar year 1989 (the year in which the services were performed).

(d) Effective/applicability date. Paragraphs (a) (b), and (c) of this section apply to quarters beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 5. Section 31.3102-1 is amended by adding a new sentence at the end of paragraph (a) and a new paragraph (f) to read as follows:

§31.3102-1 Collection of, and liability for, employee tax; in general.

(a) \*\*\* For special rules relating to Additional Medicare Tax imposed under section 3101(b)(2), see §31.3102-4.

\* \* \* \* \*

(f) Effective/applicability date. Paragraph (a) of this section applies to quarters beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 6. Section 31.3102-4 is added to read as follows:

§31.3102-4 Special rules regarding Additional Medicare Tax.

(a) Collection of tax from employee. An employer is required to collect from each of its employees the tax imposed by section 3101(b)(2) (Additional Medicare Tax) with respect to wages for employment performed for the employer by the employee only to the extent the employer pays wages to the employee in excess of \$200,000 in a calendar year. This rule applies regardless of the employee's filing status or other income. Thus, the employer disregards any amount of wages or Railroad Retirement Tax Act (RRTA) compensation paid to the employee's spouse. The employer also disregards any RRTA compensation paid by the employer to the employee or any wages or RRTA compensation paid to the employee by another employer.

Example. H, who is married and files a joint return, receives \$100,000 in wages from his employer for the calendar year. I, H's spouse, receives \$300,000 in wages from her employer for the same calendar year. H's wages are not in excess of \$200,000, so H's employer does not withhold Additional Medicare Tax. I's employer is required to collect Additional Medicare Tax only with respect to wages it pays which are in excess of the \$200,000 threshold (that is, \$100,000) for the calendar year.

(b) Collection of amounts not withheld. To the extent the employer does not collect Additional Medicare Tax imposed on the employee by section 3101(b)(2), the employee is liable to pay the tax.

Example. J, who is married and files a joint return, receives \$190,000 in wages from his employer for the calendar year. K, J's spouse, receives \$150,000 in wages from her employer for the same calendar year. Neither J's nor K's wages are in excess of \$200,000, so neither J's nor K's employers are required to withhold Additional Medicare Tax. J and K are liable to pay Additional Medicare Tax on \$90,000 (\$340,000 minus the \$250,000 threshold for a joint return).

(c) Employer's liability for tax. If the employer deducts less than the correct amount of Additional Medicare Tax, or if it fails to deduct any part of Additional Medicare Tax, it is nevertheless liable for the correct amount of tax that it was required to

withhold, until the employee pays the tax. If an employee subsequently pays the tax that the employer failed to deduct, the tax will not be collected from the employer. The employer, however, will remain subject to any applicable penalties or additions to tax resulting from the failure to withhold as required.

(d) Effective/applicability date. This section applies to quarters beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 7. Section 31.3202-1 is amended by adding new paragraphs (g) and (h) to read as follows:

§31.3202-1 Collection of, and liability for, employee tax.

\* \* \* \* \*

(g) Special rules regarding Additional Medicare Tax. (1) An employer is required to collect from each of its employees the portion of the tax imposed by section 3201(a) (as calculated under section 3101(b)(2)) (Additional Medicare Tax) with respect to compensation for employment performed for the employer by the employee only to the extent the employer pays compensation to the employee in excess of \$200,000 in a calendar year. This rule applies regardless of the employee's filing status or other income. Thus, the employer disregards any amount of compensation or Federal Insurance Contributions Act (FICA) wages paid to the employee's spouse. The employer also disregards any FICA wages paid by the employer to the employee or any compensation or FICA wages paid to the employee by another employer.

Example. A, who is married and files a joint return, receives \$100,000 in compensation from her employer for the calendar year. B, A's spouse, receives \$300,000 in compensation from his employer for the same calendar year. A's compensation is not in excess of \$200,000, so A's employer does not withhold Additional Medicare Tax. B's employer is required to collect Additional Medicare Tax

only with respect to compensation it pays to B that is in excess of the \$200,000 threshold (that is, \$100,000) for the calendar year.

(2) To the extent the employer does not collect Additional Medicare Tax imposed on the employee by section 3201(a) (as calculated under section 3101(b)(2)), the employee is liable to pay the tax.

Example. C, who is married and files a joint return, receives \$190,000 in compensation from her employer for the calendar year. D, C's spouse, receives \$150,000 in compensation from his employer for the same calendar year. Neither C's nor D's compensation is in excess of \$200,000, so neither C's nor D's employers are required to withhold Additional Medicare Tax. C and D are liable to pay Additional Medicare Tax on \$90,000 (\$340,000 minus the \$250,000 threshold for a joint return).

(3) If the employer deducts less than the correct amount of Additional Medicare Tax, or if it fails to deduct any part of Additional Medicare Tax, it is nevertheless liable for the correct amount of tax that it was required to withhold, until the employee pays the tax. If an employee subsequently pays the tax that the employer failed to deduct, the tax will not be collected from the employer. The employer, however, will remain subject to any applicable penalties or additions to tax resulting from the failure to withhold as required.

(h) Effective/applicability date. Paragraph (g) of this section applies to quarters beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 8. Section 31.6011(a)-1 is amended by adding new paragraphs (h) and (i) to read as follows:

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

\* \* \* \* \*

(h) Returns by employees in respect of Additional Medicare Tax. An employee who is paid wages, as defined in sections 3121(a), subject to the tax under section 3101(b)(2) (Additional Medicare Tax), must make a return for the taxable year in respect of such tax. The return shall be made on Form 1040. The form to be used by residents of the U.S. Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands is Form 1040-SS, “U.S. Self-Employment Tax Return (Including Additional Child Tax Credit for Bona Fide Residents of Puerto Rico).” The form to be used by residents of Puerto Rico is either Form 1040-SS or Form 1040-PR, “Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico).”

(i) Effective/applicability date. Paragraph (h) of this section applies to taxable years beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 9. Section 31.6011(a)-2 is amended by adding new paragraphs (d) and (e) to read as follows:

§31.6011(a)-2 Returns under Railroad Retirement Tax Act.

\* \* \* \* \*

(d) Returns by employees and employee representatives in respect of Additional Medicare Tax. An employee or employee representative who is paid compensation, as defined in section 3231(e), subject to the tax under sections 3201(a) (as calculated under section 3101(b)(2)) or section 3211(a) (as calculated under section 3101(b)(2)) (Additional Medicare Tax), must make a return for the taxable year in respect of such tax. The return shall be made on Form 1040. The form to be used by residents of the

U.S. Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands is Form 1040-SS, "U.S. Self-Employment Tax Return (Including Additional Child Tax Credit for Bona Fide Residents of Puerto Rico)." The form to be used by residents of Puerto Rico is either Form 1040-SS or Form 1040-PR, "Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico)."

(e) Effective/applicability date. Paragraph (d) of this section applies to taxable years beginning after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 10. Section 31.6205-1 is amended by:

1. Revising the first sentence in paragraph (b)(2)(i).
2. Adding a new second sentence to paragraphs (b)(2)(ii) and (b)(2)(iii).
3. Adding two new sentences after the sixth sentence in paragraph (b)(3).
4. Adding a new paragraph (b)(4).
5. Revising paragraph (d)(1).
6. Adding a new paragraph (e).

The revisions and additions read as follows:

§31.6205-1 Adjustments of underpayments.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* (i) If an employer files a return on which FICA tax or RRTA tax is required to be reported, and reports on the return less than the correct amount of employee or employer FICA or RRTA tax with respect to a payment of wages or

compensation, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section, except as provided in paragraph (b)(4) of this section for Additional Medicare Tax. \* \* \*

(ii) \* \* \* However, if the employer also reported less than the correct amount of Additional Medicare Tax, the employer shall correct the underwithheld and underpaid Additional Medicare Tax in accordance with paragraph (b)(4) of this section. \* \* \*

(iii) \* \* \* However, if the employer also reported less than the correct amount of Additional Medicare Tax, the employer shall correct the underwithheld and underpaid Additional Medicare Tax in accordance with paragraph (b)(4) of this section. \* \* \*

(3) \* \* \* However, an adjustment of Additional Medicare Tax required to be withheld under section 3101(b)(2) or section 3201(a) may only be reported pursuant to this section if the error is ascertained within the same calendar year that the wages were paid to the employee, or if section 3509 applies to determine the amount of the underpayment, or if the adjustment is reported on a Form 2504 or Form 2504-WC. See paragraph (b)(4) of this section. \* \* \*

(4) Additional Medicare Tax. If an employer files a return on which FICA tax or RRTA tax is required to be reported, and reports on the return less than the correct amount of Additional Medicare Tax required to be withheld with respect to a payment of wages or compensation, and if the employer ascertains the error after filing the return, the employer shall correct the error through an interest-free adjustment as provided in this section. An adjustment of Additional Medicare Tax may only be reported pursuant to this paragraph (b)(4) if the error is ascertained within the same calendar year that the



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

\* \* \* \* \*

(d) \* \* \* (1) Federal Insurance Contributions Tax Act and Railroad Retirement Tax Act. If an employer collects less than the correct amount of employee FICA or RRTA tax from an employee with respect to a payment of wages or compensation, the employer must collect the amount of the undercollection by deducting the amount from remuneration of the employee, if any, paid after the employer ascertains the error. If an employer collects less than the correct amount of Additional Medicare Tax required to be withheld under section 3101(b)(2) or section 3201(a), the employer must collect the amount of the undercollection on or before the last day of the calendar year by deducting the amount from remuneration of the employee, if any, paid after the employer ascertains the error. Such deductions may be made even though the remuneration, for any reason, does not constitute wages or compensation. The correct amount of employee tax must be reported and paid, as provided in paragraph (b) of this section, whether or not the undercollection is corrected by a deduction made as prescribed in this paragraph (d)(1), and even if the deduction is made after the return on which the employee tax must be reported is due. If such a deduction is not made, the obligation of the employee to the employer with respect to the undercollection is a matter for settlement between the employee and the employer. If an employer makes an erroneous collection of employee tax from two or more of its employees, a separate settlement must be made with respect to each employee. An overcollection of employee tax from one employee may not be used to offset an undercollection of such tax from another employee. For provisions relating to the employer's liability for the tax, whether or not it collects the tax from the employee, see §§31.3102-1(d), 31.3102-4(c),

and 31.3202-1. This paragraph (d)(1) does not apply if section 3509 applies to determine the employer's liability.

\* \* \* \* \*

(e) Effective/applicability date. Paragraphs (b) and (d) of this section apply to adjustments made after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 11. Section 31.6402(a)-2 is amended by:

1. Revising paragraph (a)(1)(i) and the first sentence in paragraph (a)(1)(ii).
2. Re-designating paragraphs (a)(1)(iii), (a)(1)(iv), (a)(1)(v), and (a)(1)(vi), as new paragraphs (a)(1)(iv), (a)(1)(v), (a)(1)(vi), and (a)(1)(vii), respectively.
3. Adding a new paragraph (a)(1)(iii).
4. Revising newly-designated paragraphs (a)(1)(iv) and (a)(1)(v).
5. Revising paragraph (b).
6. Adding a new paragraph (c).

The revisions and additions read as follows:

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

(a) \* \* \* (1) \* \* \*

(i) Except as provided in paragraph (a)(1)(iii) of this section, any person may file a claim for credit or refund for an overpayment (except to the extent that the overpayment must be credited pursuant to §31.3503-1) if the person paid to the Internal Revenue Service (IRS) more than the correct amount of employee Federal Insurance Contributions Act (FICA) tax under section 3101 or employer FICA tax under section 3111, employee Railroad Retirement Tax Act (RRTA) tax under section 3201, employee

representative RRTA tax under section 3211, or employer RRTA tax under section 3221, or interest, addition to the tax, additional amount, or penalty with respect to any such tax.

(ii) Except as provided in paragraph (a)(1)(iii) of this section, the claim for credit or refund must be made in the manner and subject to the conditions stated in this section. \* \* \*

(iii) Additional Medicare Tax. No refund or credit to the employer will be allowed for the amount of any overpayment of Additional Medicare Tax imposed under section 3101(b)(2) or section 3201(a) (as calculated under section 3101(b)(2)), which the employer deducted or withheld from an employee.

(iv) For adjustments without interest of overpayments of FICA or RRTA taxes, including Additional Medicare Tax, see §31.6413(a)-2.

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

\* \* \* \* \*

(b) Claim by employee--(1) In general. Except as provided in (b)(3) of this section, if more than the correct amount of employee tax under section 3101 or section 3201 is collected by an employer from an employee and paid to the IRS, the employee may file a claim for refund of the overpayment if--

(i) The employee does not receive repayment or reimbursement in any manner from the employer and does not authorize the employer to file a claim and receive refund or credit,

(ii) The overcollection cannot be corrected under §31.3503-1, and

(iii) In the case of overpaid employee social security tax due to having received wages or compensation from multiple employers, the employee has not taken the overcollection into account in claiming a credit against, or refund of, his or her income tax, or if so, such claim has been rejected. See §31.6413(c)-1.

(2) Statements supporting employee's claim. (i) Except as provided in (b)(3) of this section, each employee who makes a claim under paragraph (b)(1) of this section shall submit with such claim a statement setting forth (a) the extent, if any, to which the employer has repaid or reimbursed the employee in any manner for the overcollection, and (b) the amount, if any, of credit or refund of such overpayment claimed by the employer or authorized by the employee to be claimed by the employer. The employee shall obtain such statement, if possible, from the employer, who should include in such statement the fact that it is made in support of a claim against the United States to be filed by the employee for refund of employee tax paid by such employer to the IRS. If the employer's statement is not submitted with the claim, the employee shall make the statement to the best of his or her knowledge and belief, and shall include therein an explanation of his or her inability to obtain the statement from the employer.

(ii) Except as provided in paragraph (b)(3) of this section, each individual who makes a claim under paragraph (b)(1) of this section also shall submit with such claim a statement setting forth whether the individual has taken the amount of the overcollection into account in claiming a credit against, or refund of, his or her income tax, and the amount, if any, so claimed (see §31.6413(c)-1).

(3) Additional Medicare Tax. (i) If more than the correct amount of Additional Medicare Tax under section 3101(b)(2) or section 3201(a) (as calculated under section

3101(b)(2)), is collected by an employer from an employee and paid to the IRS, the employee may file a claim for refund of the overpayment and receive a refund or credit if the overcollection cannot be corrected under §31.3503-1 and if the employee has not received repayment or reimbursement from the employer in the context of an interest-free adjustment. The claim for refund shall be made on Form 1040, "U.S. Individual Income Tax Return," by taking the overcollection into account in claiming a credit against, or refund of, tax. The form to be used by residents of the U.S. Virgin Islands, Guam, American Samoa, or the Northern Mariana Islands is Form 1040-SS, "U.S. Self-Employment Tax Return (Including Additional Child Tax Credit for Bona Fide Residents of Puerto Rico)." The form to be used by residents of Puerto Rico is either Form 1040-SS or Form 1040-PR, "Planilla para la Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia (Incluyendo el Crédito Tributario Adicional por Hijos para Residentes Bona Fide de Puerto Rico)." The employee may not authorize the employer to claim the credit or refund for the employee. See §31.6402(a)-2(a)(1)(iii).

(ii) In the case of an overpayment of Additional Medicare Tax under section 3101(b)(2) or section 3201(a) for a taxable year of an individual for which a Form 1040 (or other applicable return in the Form 1040 series) has been filed, a claim for refund shall be made by the individual on Form 1040X, "Amended U.S. Individual Income Tax Return."

(c) Effective/applicability date. This section applies to claims for refund filed after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 12. Section 31.6413(a)-1 is amended by:

1. Revising the first sentence in paragraph (a)(2)(i).
2. Re-designating paragraphs (a)(2)(ii), (a)(2)(iii), (a)(2)(iv), (a)(2)(v), (a)(2)(vi), and (a)(2)(vii), as new paragraphs (a)(2)(iii), (a)(2)(iv), (a)(2)(v), (a)(2)(vi), (a)(2)(vii), and (a)(2)(viii), respectively.
3. Adding a new paragraph (a)(2)(ii).
4. Adding a new sentence after the first sentence in newly-designated paragraph (a)(2)(iv).
5. Adding a new sentence after the second sentence in newly-designated paragraph (a)(2)(v).
6. Revising newly-designated paragraph (a)(2)(viii).
7. Adding a new paragraph (c).

The revisions and additions read as follows:

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

(a) \* \* \*

(2) \* \* \* (i) Except as provided in paragraph (a)(2)(ii) of this section, if an employer files a return for a return period on which FICA tax or RRTA tax is reported, collects from an employee and pays to the IRS more than the correct amount of the employee FICA or RRTA tax, and if the employer ascertains the error after filing the return and within the applicable period of limitations on credit or refund, the employer shall repay or reimburse the employee in the amount of the overcollection prior to the expiration of such limitations period. \* \* \*

(ii) If an employer files a return for a return period on which Additional Medicare Tax under section 3101(b)(2) or section 3201(a) is reported, collects from an employee

and pays to the IRS more than the correct amount of Additional Medicare Tax required to be withheld from wages or compensation, and if the employer ascertains the error after filing the return but before the end of the calendar year in which the wages were paid, the employer shall repay or reimburse the employee in the amount of the overcollection prior to the end of the calendar year. However, this paragraph does not apply to the extent that, after reasonable efforts, the employer cannot locate the employee.

\* \* \* \* \*

(iv) \* \* \* However, for purposes of overcollected Additional Medicare Tax under section 3101(b)(2) or section 3201(a), the employer shall reimburse the employee by applying the amount of the overcollection against the employee FICA or RRTA tax which attaches to wages or compensation paid by the employer to the employee in the calendar year in which the overcollection is made. \* \* \*

(v) \* \* \* This paragraph (a)(2)(v) does not apply for purposes of overcollected Additional Medicare Tax under section 3101(b)(2) or section 3201(a) which must be repaid or reimbursed to the employee in the calendar year in which the overcollection is made. \* \* \*

\* \* \* \* \*

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

\* \* \* \* \*

(c) Effective/applicability date. Paragraph (a) of this section applies to adjustments made after the date of publication of the Treasury decision adopting these



rules as final regulations in the **Federal Register**.

Par. 13. Section 31.6413(a)-2 is amended by:

1. Adding a new sentence after the first sentence in paragraph (a)(1).
2. Adding a new sentence after the second sentence in paragraph (b)(2)(i).
3. Adding a new paragraph (e).

The revisions and additions read as follows:

§31.6413(a)-2 Adjustments of overpayments.

(a) \* \* \*

(1) \* \* \* However, this section only applies to overcollected or overpaid

Additional Medicare Tax under section 3101(b)(2) or section 3201(a) if the employer has repaid or reimbursed the amount of the overcollection of such tax to the employee in the year in which the overcollection was made. \* \* \*

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \* (i) \* \* \* However, for purposes of Additional Medicare Tax under section

3101(b)(2) or section 3201(a), if the amount of the overcollection is not repaid or reimbursed to the employee under §31.6413(a)-1(a)(2)(ii), there is no overpayment to be adjusted under this section and the employer may only adjust an overpayment of such tax attributable to an administrative error, that is, an error involving the inaccurate reporting of the amount withheld, pursuant to this section. \* \* \*

\* \* \* \* \*

(e) Effective/applicability date. Paragraphs (a) and (b) of this section apply to adjustments made after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Steven T. Miller  
Deputy Commissioner for Services and Enforcement.