TAX COMPLIANCE AND ENFORCEMENT ISSUES WITH RESPECT TO OFFSHORE ACCOUNTS AND ENTITIES

Scheduled for a Public Hearing
Before the
SUBCOMMITTEE ON SELECT REVENUE MEASURES
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INTRODUCTION

The Subcommittee on Select Revenue Measures of the House Committee on Ways and Means has scheduled a public hearing for March 31, 2009 on issues relating to banking secrecy practices and wealthy American taxpayers. This document,[1] prepared by the staff of the Joint Committee on Taxation, provides background on withholding and information reporting requirements applicable to payments of U.S.-source portfolio investment income to nonresidents, the Internal Revenue Service ("IRS") Qualified Intermediary program, the effect of bank secrecy laws and practices on U.S tax compliance and enforcement efforts involving offshore accounts, and information exchange procedures under U.S. income tax treaties and tax information exchange agreements.

[1] This document may be cited as follows: Joint Committee on Taxation, *Tax Compliance and Enforcement Issues With Respect to Offshore Accounts and Entities* (JCX-23-09), March 30, 2009. This document can be found at www.jct.gov.

I. NONRESIDENT WITHHOLDING

Introduction

Under present law, nonresidents who receive payments of U.S.-source investment income are generally subject to U.S. withholding tax imposed at a 30 percent rate. This withholding tax serves as the only mechanism for collection of tax in the case of payments made to foreign persons who are not otherwise required to file a U.S. income tax return. There are, however, a number of significant statutory exemptions from the 30-percent withholding tax (including for interest paid on bank deposits, portfolio interest and most capital gains), and income tax treaties typically provide additional withholding tax relief.

Distinguishing U.S. from foreign persons is therefore important in this context. The IRS has a variety of enforcement tools (including information reporting and backup withholding)[2] to enforce compliance by U.S. taxpayers. The IRS faces significant enforcement challenges, however, in confirming the status of an offshore payee as a bona fide non-U.S. investor. These challenges include resource constraints (and the resulting need to rely on compliance by both U.S. and foreign intermediaries), the difficulties inherent in determining beneficial ownership of income earned through intermediate vehicles (for example, trusts or partnerships), which typically are organized under foreign law and often do not have close analogies in U.S. trust or company law practice, and disclosure limitations imposed by foreign law.

If a U.S. person can arrange to receive investment income through means that permit the U.S. person to appear to be a foreign person, the U.S. investor may be able to evade U.S. income tax entirely. This problem lies at the heart of the ongoing investigation into the role played by UBS AG ("UBS"), based in Switzerland and one of the world's largest financial institutions, in facilitating tax evasion by U.S. clients and avoidance of U.S. reporting requirements.

This section provides an overview of the nonresident withholding tax rules, particularly as those rules apply to payments of portfolio investment income by financial institutions to U.S. and nonresident customers. It then discusses briefly the enforcement challenges arising under those rules, both as a result of their substantive effect and as a matter of administration.

[2] U.S. persons may be subject in certain cases to a "backup withholding" tax with respect to payments of investment income. This backup withholding tax serves as a backstop to the regular information reporting and tax return filing requirements, and does not apply where the U.S. payee has provided an Internal Revenue Service Form W-9 to the payor or where the U.S. payee is a so-called "exempt recipient" (including a corporation, tax-exempt organization or governmental entity). See, generally, sections 3406 and 6041 through 6049 and the Treasury Regulations thereunder. Unless otherwise indicated, all section references herein are to sections of the Internal Revenue Code of 1986, as amended (the "Code"). A copy of Form W-9 is included in the Appendix hereto.

A. U.S. Tax Treatment of Payments to Nonresident Investors

Payments of U.S.-source "fixed and determinable annual or periodic" income, including interest, dividends, and similar types of investment income, that are made to foreign persons are subject to U.S. withholding tax at a 30 percent rate, unless the withholding agent can establish that the beneficial owner of the amount is eligible for an exemption from withholding or a reduced rate of withholding under an income tax treaty.[3]

The principal statutory exemptions from the 30-percent nonresident withholding tax apply to interest on bank deposits, portfolio interest and capital gains. Since 1984 the United States has imposed no tax on "portfolio interest" received by a nonresident individual or foreign corporation from sources within the United States.[4] Portfolio interest includes generally any interest (including original issue discount) other than interest received by a 10-percent shareholder,[5] certain contingent interest,[6] interest received by a controlled foreign corporation

[3] See Treas. Reg. sec. 1.1441-1(b).

[4] Secs. 871(h) and 881(c). Congress believed that the imposition of a withholding tax on portfolio interest paid on debt obligations issued by U.S. persons might impair the ability of U.S. corporations to raise capital in the Eurobond market (i.e., the global market for U.S. dollar-denominated debt obligations). Congress also anticipated that repeal of the withholding tax on portfolio interest would allow the U.S. Treasury Department direct access to the Eurobond market. See Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, JCS-41-84 (December 31, 1984), at 391-392.

[5] Sec. 871(h)(3). A 10-percent shareholder includes any person who owns 10 percent or more of the total combined voting power of all classes of stock of the corporation (in the case of a corporate obligor), or 10 percent or more of the capital or profits interest of the partnership (in the case of a partnership obligor). The attribution rules of section 318 apply for this purpose, with certain modifications.

[6] Sec. 871(h)(4). Contingent interest generally includes any interest if the amount of such interest is determined by reference to any receipts, sales or other cash flow of the debtor or a related person; any income or profits of the debtor or a related person; any change in value of any property of the debtor or a related person; or any dividend, partnership distributions, or similar payments made by the debtor or a related person, and any other type of contingent interest identified by Treasury regulation. Certain exceptions also apply.

from a related person,[7] and interest received by a bank on an extension of credit made pursuant to a loan agreement entered into in the ordinary course of its trade or business.[8]

In the case of interest paid on a debt obligation that is in registered form,[9] the portfolio interest exemption is available only to the extent that the U.S. person otherwise required to withhold tax (the "withholding agent") has received a statement made by the beneficial owner of the obligation (or a securities clearing organization, bank or other financial institution that holds customers' securities in the ordinary course of its trade or business) that the beneficial owner is not a United States person.[10] This certification of non-U.S. ownership most commonly is made on an IRS Form W-8.

U.S. tax law also contemplates that U.S. issuers (other than the United States itself) may issue debt obligations in bearer form. Historically, in such cases, a holder would present a physical interest coupon for payment free of U.S. withholding tax, without that holder being required to provide any certification of non-U.S. ownership. Now, however, so-called "bearer bonds" are typically held in "dematerialized" (or electronic) form, much like debt obligations that are issued in registered form; their "bearer" status arises solely from the fact that a holder may request a physical certificate with interest coupons from the issuer. As a practical matter, such requests for physical certificates are extremely rare. Nonetheless, the principal U.S. tax enforcement focus for "bearer bonds" rests on the historical premise that these bonds are actually held in physical form and relates to their mode of original distribution. More particularly, (i) the obligation must be offered and sold pursuant to arrangements that are reasonably designed to ensure that the obligation will be sold in connection with its original issuance only to a non-United States person, (ii) interest on the obligation must be payable only outside the United

[7] Sec. 881(c)(3)(C). A related person includes, among other things, an individual owning more than 50 percent of the stock of the corporation by value, a corporation that is a member of the same controlled group (defined using a 50-percent common ownership test), a partnership if the same persons own more than 50 percent in value of the stock of the corporation and more than 50 percent of the capital interests in the partnership, any United States shareholder (as defined in section 951(b) and generally including any U.S. person who owns 10 percent or more of the voting stock of the corporation), and certain persons related to such a United States shareholder.

[8] Sec. 881(c)(3)(A).

[9] An obligation is treated as in registered form if (i) it is registered as to both principal and interest with the issuer (or its agent) and transfer of the obligation may be effected only by surrender of the old instrument and either the reissuance by the issuer of the old instrument to the new holder or the issuance by the issuer of a new instrument to the new holder, (ii) the right to principal and stated interest on the obligation may be transferred only through a book entry system maintained by the issuer or its agent, or (iii) the obligation is registered as to both principal and interest with the issuer or its agent and may be transferred through both of the foregoing methods. Treas. Reg. sec. 5f.103-1(c).

[10] Sec. 871(h)(2)(B) and (5).

States, and (iii) the obligation must bear a legend to the effect that any United States person who holds the obligation will be subject to limitations under the U.S. income tax laws.[11]

Interest on deposits with foreign branches of domestic banks and domestic savings and loan associations is not treated as U.S.-source income and is thus exempt from U.S. withholding tax (regardless of whether the recipient is a U.S. or foreign person).[12] In addition, interest on bank deposits, deposits with domestic savings and loan associations, and certain amounts held by insurance companies are not subject to the U.S. withholding tax when paid to a foreign person, unless the interest is effectively connected with a U.S. trade or business of the recipient.[13] Similarly, interest and OID on certain short-term obligations is also exempt from the U.S. withholding tax when paid to a foreign person.[14] Consequently, there is no information reporting on Form 1042-S with respect to payments of such amounts.[15]

Gains derived from the sale of property by a nonresident individual or foreign corporation similarly are exempt from U.S. tax, unless they are effectively connected with the conduct of a U.S. trade or business. Gains derived by a nonresident alien individual are subject to U.S. taxation only if the individual is present in the United States for 183 days or more during the taxable year.[16] Foreign corporations are subject to tax only with respect to certain gains on disposal of timber, coal, or domestic iron ore and certain gains from contingent payments made in connection with sales or exchanges of patents, copyrights, goodwill, trademarks and similar intangible property.[17] Most capital gains realized by foreign investors on the sale of portfolio investment securities thus are exempt from U.S. taxation.

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[11] Secs. 871(h)(2)(A) and 163(f)(2)(A).

[12] Treas. Reg. sec. 1.1441-1(b)(4)(iii).

[13] Treas. Reg. sec. 1.1441-1(b)(4)(ii).

[14] Secs. 871(g)(1)(B), 881(a)(3); Treas. Reg. sec. 1.1441-1(b)(4)(iv).

[15] Treas. Reg. sec. 1.1461-1(c)(2)(ii)(A), (B). However, Treasury regulations require a bank to report interest on Form 1042-S if the recipient is a resident of Canada and the deposit is maintained at an office in the United States. Treas. Reg. secs. 1.6049-4(b)(5), 1.6094-8. This reporting is required to comply with the obligations of the United States under the U.S.-Canada income tax treaty. T.D. 8664, 1996-1 C.B. 292. In 2001, the IRS and Treasury Department issued proposed regulations that would require annual reporting to the IRS of U.S. bank deposit interest paid to any foreign individual. 66 Fed. Reg. 3925 (Jan. 17, 2001). The 2001 proposed regulations were withdrawn in 2002 and replaced with proposed regulations that would require reporting with respect to payments made only to residents of certain specified countries (Australia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and the United Kingdom). 67 Fed. Reg. 50,386 (Aug. 2, 2002). The proposed regulations have not been finalized.

[16] Sec. 871(a)(2). In most cases, however, an individual satisfying this presence test will be treated as a U.S. resident under section 7701(b)(3), and thus will be subject to full residence-based U.S. income taxation.

[17] Secs. 881(a), 631(b), (c).

Treasury regulations provide additional rules governing the treatment of notional principal contract payments and substitute dividend or interest payments made to nonresidents. Payments made pursuant to a notional principal contract (i.e., a derivative) are sourced in accordance with the residence of the recipient.[18] Accordingly, when such payments are made by a U.S. party to a nonresident counterparty, the payment is treated as foreign source and, as such, is generally not subject to U.S. taxation. This rule applies even the payment is calculated in whole or part by reference, for example, to U.S.-source dividends paid on an underlying reference security. However, if the nonresident counterparty is engaged in a U.S. trade or business to which the payment is effectively connected, the payment is subject to regular U.S. net income taxation (and not withholding tax) in the same manner as if paid to a U.S. resident.[19]

On the other hand, substitute payments made in lieu of interest or dividend payments pursuant to a securities lending arrangement or similar transaction are treated by regulation as having the same source and character as the payments for which they substitute (a so-called "look-through" approach). As a result, substitute interest payments made to a nonresident with respect to interest paid on a debt obligation of a U.S. obligor may qualify for the portfolio interest exemption, to the extent that they meet the conditions otherwise applicable to actual interest payments on the obligation. Substitute dividends paid to a nonresident with respect to stock of a U.S. corporation are similarly treated as U.S.-source dividends and are subject to 30-percent nonresident withholding tax.[20] Substitute payments are also eligible for treaty benefits (described below) to the same extent and subject to the same conditions as the actual payments for which they substitute.

As the above summary suggests, many forms of income or gain from U.S. investments are simply not subject to U.S. withholding tax when earned by a non-U.S. investor. On the other hand, the Code does impose withholding tax on some important classes of U.S.-source income earned by non-U.S. investors. In particular, dividends paid by U.S. corporations (but, as described above, not dividend-equivalent payments made in respect of equity derivative contracts) to foreign investors are subject to U.S. withholding tax. So, too, are nonportfolio interest payments (e.g., interest paid by a U.S. subsidiary to a foreign parent company), and certain rent and royalty payments made in respect of property used in the United States (if not incurred in connection with the conduct of a trade or business in the United States).

Even in those cases where the Code imposes the general 30-percent withholding tax on the income or gain of a foreign investor, that tentative tax liability may be reduced or eliminated by a tax treaty between the United States and the country in which the investor is domiciled. Thus, most U.S. income tax treaties provide for a zero rate of withholding tax on interest payments (other than contingent interest of the type described in section 871(h)(4)), with the result that virtually all U.S.-source interest paid to residents of a treaty country is typically

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[18] Treas. Reg. sec. 1.863-7(b)(1).

[19] Treas. Reg. sec. 1.863-7(b)(3).

[20] Treas. Reg. sections 1.861-2(a)(7) (substitute interest), 1.861-3(a)(6) (substitute dividends).

exempt from U.S. withholding tax. Most U.S. income tax treaties also reduce the rate of withholding on dividends to 15 percent (in the case of portfolio dividends) and to five percent (in the case of "direct investment" dividends paid to a 10 percent-or-greater shareholder). For royalties, the U.S. withholding rate is typically reduced to five percent or to zero in certain cases. In each case, the reduced withholding rate is available only to a beneficial owner who qualifies as a resident of the treaty country within the meaning of the treaty and otherwise satisfies any applicable limitation on benefits provisions of the treaty.

B. Why Impose Withholding Taxes?

As a practical matter, withholding taxes are the only viable collection mechanism for taxing foreign investors with respect to U.S.-source portfolio income. This observation begs the question, however, of why the United States should seek to tax this income in the first place. Some commentators have described a longstanding global consensus in the allocation of rights to tax cross-border income. Under this norm, business income is taxed by the country in which it is derived (the source country) and passive or portfolio income is taxed by the country in which the recipient of the income resides (the residence country).[21] Unlike, for example, a corporation operating a business in a source country, a portfolio investor may have no ties to the source country other than the investor's passive holding of the investment. The source country therefore may have no clear economic claim to the income.

In this allocation of taxing rights, source-based withholding tax arguably is an anomaly. The current practice of the United States not to tax U.S.-source portfolio interest income (even where the interest expense reduces the U.S. tax base) or capital gains derived by nonresidents can be said to be consistent with this norm.

U.S. tax policy with respect to U.S.-source income earned by non-U.S. portfolio investors also may be influenced by larger macroeconomic trends. This observation is particularly relevant to the exception for interest paid on bank deposits and the portfolio interest exception.

First, the financial markets are largely global; investment choices are not generally constrained by currency exchange controls, and information about global investment opportunities is relatively easy to obtain. As a result, non-U.S. investors have available to them a wide range of investment opportunities, many of which can be said to be close substitutes for one another. Thus, for example, a foreign investor who wishes to acquire a U.S. dollar-denominated debt instrument (or bank account) in practice is not required to make that investment in a U.S. issuer.

Second, and as described in detail in an earlier Joint Committee on Taxation staff pamphlet, the United States for many years has been a net importer of financial capital.[22] Measured in nominal dollars, the amount of foreign-owned assets in the United States grew at an annual rate of more than 13 percent between 1981 and 2006.[23] In 2006 the portfolio assets of foreign investors invested in the United States exceeded $10 trillion; direct assets of foreign investors in the United States (e.g., ownership by a foreign parent company of a U.S. subsidiary)

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[21] E.g., Reuven S. Avi-Yonah, The Structure of International Taxation: A Proposal for Simplification, 74 Texas Law Review 1301, 1305-08 (1996); Michael J. Graetz and Itai Grinberg, "Taxing International Portfolio Income," 56 Tax Law Review 537, 540-41 (Summer 2003).

[22] *Economic and U.S. Income Tax Issues Raised by Sovereign Wealth Fund Investment in the United States*, JCX-49-08 (June 17, 2008), at 3-20.

[23] Id. at 14.

exceeded $2 trillion.[24] Foreign ownership of U.S. investments in 2006 exceeded the converse case (U.S. investments abroad) by $2.5 trillion.[25]

Third, many other countries also are net capital importers, or wish to reduce domestic interest costs by increasing the supply of lenders. As a result, many other jurisdictions do not today impose withholding tax on interest paid by resident companies to nonresident investors. In light of the ready substitutability in the global markets of debt obligations on which withholding tax is not imposed for those instruments that are subject to withholding tax, some observers have concluded that the imposition of withholding tax on interest paid to foreign portfolio investors is unlikely to raise revenue, but is likely to affect adversely the supply of lendable funds to domestic issuers (including, in the case of the United States, the U.S. Treasury). This reasoning may in part explain the decision of the United States (and other countries) not to impose withholding tax on portfolio interest income earned by nonresident investors.

As described earlier, however, the Code does impose 30-percent withholding tax on U.S.-source dividends, rents, royalties, and other amounts derived by nonresidents. Notwithstanding the broad international tax framework of source-based taxation of business income and residence-based taxation of portfolio income, there are a few possible explanations for the persistence of these withholding taxes under domestic law. Two practical explanations are first, that source-based withholding taxes generate some revenue[26] and, second, that the 30-percent statutory withholding rate is a tool that the U.S. Treasury Department can employ in negotiations over bilateral income tax treaties. On this second point, U.S. bilateral income tax treaties generally allow, as was described previously, reduced rates of U.S. withholding tax on dividends, rents, royalties, and non-portfolio interest derived by qualified residents of the other treaty countries in exchange for similar benefits for U.S. residents with investments in those countries. Where investment flows are disproportionate between the United States and a treaty partner, the

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[24] Id. at 17. In addition, foreign governments in 2006 held official reserve assets in the United States of $2.77 trillion, up from $1.25 trillion only four years earlier. Id.

[25] Id. at 14.

[26] For tax year 2005, foreign payees received $378.4 billion of U.S.-source income, as reported on Form 1042-S, and $333.2 billion (88.0 percent) of this income was exempt from withholding. (Since interest on bank deposits is wholly exempt from withholding, these figures exclude interest income paid by U.S. banking businesses to foreign depositors.) A total of $6.7 billion in withholding tax was collected on the remaining $45.3 billion of U.S.-source income subject to withholding. This amount of withholding tax represented approximately two percent of the total amount of U.S.-source income reported on Form 1042-S. IRS Statistics of Income Bulletin, Winter 2009, Publication 1136, at 100. This amount arguably is significant in absolute terms, but of course is a small fraction of total foreign investment in the United States. For example, using the 2006 figures cited earlier of some $12 trillion in foreign portfolio and direct private investments in the United States, if one were to assume (solely for illustrative purposes) a five percent presumptive return on those investments, those investments would generate some $600 billion in (presumptive) income. $6.7 billion in withholding tax amounts to a little over one percent of that amount.

United States may also be able to obtain other types of concessions from the treaty partner in exchange for offering to reduce the U.S. withholding tax rate.

A third explanation for the persistence of withholding taxes is the difficulty of enforcing residence-based taxation of foreign-source portfolio income.[27] This portfolio income may be truly foreign source as, for example, when a Mexican resident owns shares of stock in U.S. companies, either directly or perhaps through an entity organized in a tax haven jurisdiction. Alternatively, the portfolio income may be foreign source in formal terms only as, for example, when a U.S. resident forms a foreign corporation or other entity for investing into the United States. In either case, the residence country (Mexico in the first example and the United States in the second example) may not be able to enforce residence-based taxation under its regular income tax rules. In this circumstance, tax collected at the source may be the only tax imposed on the income. The enforcement challenges presented when U.S. residents derive portfolio income through foreign entities or accounts are the subject of much of the succeeding discussion in this pamphlet.

[27] See, e.g., Reuven S. Avi-Yonah, "Memo to Congress: It's Time to Repeal the U.S. Portfolio Interest Exemption," Tax Notes International, Dec. 7, 1998, at 1817; Graetz and Grinberg, note 16, at 578 (arguing against source-based withholding taxes and expressing the view that residence-based taxation of foreign portfolio income is possible through continued unilateral and multilateral enforcement and information exchange efforts). For a general discussion of the difficulties in collecting residence-based taxes given globalization and technological developments such as electronic commerce and money, see Vito Tanzi, "Globalization, Technological Developments, and the Work of Fiscal Termites," 26 Brooklyn Journal of International Law 1261 (2001).

C. Withholding Tax Administration: Self-Certification

The U.S. withholding tax rules are administered through a system of self-certification. Thus, a nonresident investor seeking to obtain withholding tax relief for U.S.-source investment income typically must provide a certification, on IRS Form W-8, to the withholding agent in order to establish foreign status and eligibility for an exemption or reduced rate.[28]

There are four types of Form W-8,[29] three of which are designed to be filed by the beneficial owner of a payment of U.S.-source income: (1) the Form W-8BEN, which is filed by a beneficial owner of U.S.-source non-effectively-connected income, (2) the Form W-8ECI, which is filed by a beneficial owner of U.S.-source effectively-connected income,[30] and (3) the Form W-8EXP, which is filed by a beneficial owner of U.S.-source income that is an exempt organization or foreign government.[31] Each of these forms requires that the beneficial owner provide its name and address and certify that the beneficial owner is not a United States person. The Form W-8BEN also includes a certification of eligibility for treaty benefits (for completion where applicable). All certifications on Forms W-8 are made under penalties of perjury.

The United States imposes tax on the beneficial owner of income, not its formal recipient. For example, if a U.S. citizen owns securities that are held for her in "street" name at a brokerage firm, that U.S. citizen (and not the brokerage firm) is subject to tax on income from those securities. The distinction between nominal and beneficial ownership of course is important in

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[28] In general, the U.S. information reporting and backup withholding system as it applies to both domestic and foreign investors operates on the basis of offering investors an implicit choice: either the investor can furnish the requisite identifying information (e.g., a Form W-9 for domestic individual investors, or a Form W-8 for a foreign investor), or the investor can suffer withholding tax (technically, backup withholding tax in the case of a U.S. investor or, in most cases, an unidentified investor). While it is true that withholding tax protects government revenues (although not to the extent of the highest individual tax rate), it might be argued that noncompliance with these identification requirements can be evidence of more general noncompliance activity by the taxpayer, which in turn would be relevant to the IRS. As a result, it might be argued (for example) that interest should simply not be payable to a foreign account (or from a U.S. bank account) unless the requisite forms are provided. This approach would go far beyond current law, and might in turn be viewed as unduly intrusive into taxpayer privacy (with potentially adverse effects on U.S. borrowers' ability to raise funds). Alternatively, the backup withholding rate could be increased to the highest marginal tax rate applicable to individuals, or an even higher rate, in order to provide a greater incentive for compliance.

[29] Copies of the Forms W-8 and their instructions are included in the Appendix hereto.

[30] The Form W-8ECI requires that the beneficial owner specify the items of income to which the form is intended to apply and certify that those amounts are effectively connected with the conduct of a trade or business in the United States and includible in the beneficial owner's gross income for the taxable year.

[31] The Form W-8EXP requires that the beneficial owner certify as to its qualification as a foreign government, an international organization, a foreign central bank of issue or a foreign tax-exempt organization, in each case meeting certain requirements.

determining liability for tax in the case of cross-border flows as well, but the complexity and opacity of some foreign law arrangements can make compliance more difficult. [32]

The fourth type of Form W-8 is the IRS Form W-8IMY, which is filed by a payee that receives a payment of U.S.-source income as an intermediary for the beneficial owner of that income. The intermediary's Form W-8IMY must be accompanied by a Form W-8BEN, W-8EXP, or W-8ECI, as applicable,[33] furnished by the beneficial owner, unless the intermediary is a "qualified intermediary," a "withholding foreign partnership" or a "withholding foreign trust." The rules applicable to qualified intermediaries are discussed in Section II below. A withholding foreign partnership or trust is a foreign partnership or trust that has entered into an agreement with the Internal Revenue Service to collect appropriate Forms W-8 from its partners or beneficiaries and act as a U.S. withholding agent with respect to those persons.[34]

Provision of the Form W-8 also establishes an exemption from the rules that apply to many U.S. persons governing information reporting on Form 1099 and backup withholding.[35] A withholding agent that makes payments of U.S.-source amounts to a foreign person is required to report those payments, including any amounts of U.S. tax withheld, to the IRS on Forms 1042 and 1042-S.[36]

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[32] A corporation (and not its shareholders) ordinarily is treated as the beneficial owner of the corporation's income; as a result, this problem technically is not one of withholding tax noncompliance as much as it is noncompliance with the rules governing U.S. owners of controlled foreign corporations or passive foreign investment companies. Similarly, a foreign complex trust ordinarily is treated as the beneficial owner of income that it receives, and a U.S. beneficiary or grantor is not subject to tax on that income unless and until he receives a distribution. However, as described by the Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, in its 2006 report, Tax Haven Abuses: the Enablers, the Tools and Secrecy, S. Hrg. 109-797, 109th Cong., 2d Sess. (August 1, 2006), arrangements such as "trust protectors" have been employed by U.S. taxpayers to achieve substantial control over assets held in offshore trusts. The UBS case, described later in this pamphlet, also involved the use of nominee and sham entities to conceal the assets and income of U.S. taxpayers.

[33] In limited cases, the intermediary may furnish other documentary evidence of the status of the beneficial owner, rather than a Form W-8.

[34] Rev. Proc. 2003-64, 2003-32 I.R.B. 306 (July 10, 2003), provides procedures for qualification as a withholding foreign partnership or withholding foreign trust and model withholding agreements.

[35] See Treas. Reg. sec. 1.1441-1(b)(5).

[36] Treas. Reg. sec. 1.1461-1(b), (c). Copies of Form 1042, Form 1042-S and their instructions are included in the Appendix hereto.

D. Withholding Tax Enforcement Problems and Possible Solutions

Although the existence of source-based withholding taxes can be explained as a response to the difficulty of enforcing residence-based taxation of portfolio income, the withholding tax itself is difficult to enforce. This section describes several reasons for that difficulty.

1. Income categorization

As was described previously, the U.S. 30-percent withholding tax is imposed on discrete categories of income — dividends, rents, royalties, and non-portfolio interest, for example. The withholding tax treatment of a particular item of income derived by a nonresident may vary based on how the income is categorized. Particularly with the growth of financial derivatives, taxpayers have exploited problems of characterization.[37]

Perhaps the best-known example of structuring to avoid withholding tax is the use of instruments known as swaps to replicate actual ownership of stock while avoiding the withholding tax that would be imposed on dividends paid on the stock. A nonresident seeking exposure to the U.S. equity markets could purchase stock in U.S. companies. Dividends paid on this stock generally would be considered U.S.-source and therefore would be subject to withholding tax at a 30-percent (or reduced treaty) rate.[38] Instead of actually owning the stock, however, the non-U.S. investor could create synthetic ownership by holding an equity derivative contract.

For example, under a typical "total return swap," the investor would enter into an agreement with a counterparty under which returns to each party would be based on the returns generated by a notional investment in a specified dollar amount of stock. The investor would agree for a specified period to pay to the counterparty (a) interest calculated at a market rate (such as the London Interbank Offered Rate (LIBOR)) on the notional amount of stock and (b) any depreciation in the value of the stock, and the counterparty would agree for the specified period to pay the investor (c) any dividends paid on the stock and (d) any appreciation in the value of the stock.[39] This swap would be economically equivalent to a transaction in which the foreign investor actually purchased the stock from the counterparty, using funds borrowed from the counterparty, and at the end of the period sold the stock back to the counterparty and repaid the borrowing.

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[37] At the end of June 2008, the notional amount of interest rate derivatives (that is, the value of financial assets underlying the derivatives) outstanding worldwide was $458.3 trillion. Bank for International Settlements, Monetary and Economic Department, "OTC Derivatives Market Activity in the First Half of 2008" (November 2008), at 2.

[38] Secs. 861(a)(2)(A), 871(a)(1)(A), 881(a)(1).

[39] Amounts owed by each party under a total return swap typically are netted so that only one party makes an actual payment.

Although the equity swap just described has identical economic characteristics to a leveraged purchase of stock (except that the equity swap party has credit exposure to its swap counterparty), the tax treatment of the foreign investor would be different. Because the source of income from an equity swap (in tax terms, a notional principal contract) is (as described previously) determined by reference to the residence of the recipient of the income, amounts representing dividends in this example would be foreign source and therefore would not be subject to U.S. withholding tax.[40]

There may be non-tax reasons why foreign investors enter into equity swaps on U.S. stock rather than holding the underlying stock. For instance, U.S. securities law regulations forbid extending credit above certain levels for the purchase of stock, but these rules do not apply to swap transactions that replicate leveraged purchases.[41] Nonetheless, certain arrangements have been viewed as abusive. For example, a foreign investor might sell stock it owns to a U.S. counterparty shortly before a dividend is paid, simultaneously enter into a total return swap on the stock with the counterparty, and terminate the swap agreement and repurchase the stock from the counterparty shortly after the dividend is paid.[42] The IRS has sought data from large U.S. financial institutions to determine whether U.S. withholding tax should have been paid on certain swap transactions that those institutions facilitated.[43] Notwithstanding possible IRS successes in individual cases, the volume of swap transactions remains large. Financial engineering has made it difficult to collect withholding tax on cross-border dividend payments.

In response, some commentators argue that the U.S. withholding tax on nonresidents' U.S.-source dividend income should be abolished (or that attempts to collect that withholding tax are futile).[44] Arguments for why the dividend withholding tax should be abolished include the

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[40] Treas. Reg. section 1.863-7(b)(1). For a fuller discussion of sourcing and other tax issues related to derivatives transactions, see Joint Committee on Taxation, Present Law and Analysis Relating to the Tax Treatment of Derivatives (JCX-21-08), March 4, 2008. For a presentation of various hypothetical equity and interest rate swaps and stock lending transactions and a discussion of whether and when imposition of withholding tax might be appropriate, see David P. Hariton, "Equity Derivatives, Inbound Capital, and Outbound Withholding Tax," 60 Tax Lawyer 313 (Winter 2007). As a policy matter, Hariton argues that the withholding tax on U.S.-source dividends should be eliminated.

[41] See Hariton, note 32, at 324-25.

[42] For an extensive discussion of swap transactions entered into by U.S. financial institutions, offshore hedge funds, and other taxpayers, see United States Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, "Dividend Tax Abuse: How Offshore Entities Dodge Taxes on U.S. Stock Dividends," Staff Report, Sept. 11, 2008.

[43] Anita Raghavan, "IRS Probes Tax Goal of Derivatives," Wall Street Journal, July 19, 2007, C1; Anita Raghavan, "Happy Returns: How Lehman Sold Plan to Sidestep Tax Man -- Hedge Funds Use Swaps to Avoid Dividend Hit; IRS Seeks Information," Wall Street Journal, Sept. 17, 2007, A1.

[44] E.g., Hariton, note 32, at 346-50; Gregory May, "Flying on Instruments: Synthetic Investment and the Avoidance of Withholding Tax," Tax Notes, Dec. 9, 1996, at 1225.

following. First, the dividend withholding tax impedes U.S. corporations' access to global capital. Second, taxpayers seek to avoid the dividend withholding tax, and this avoidance creates its own issues. Because portfolio interest can be paid to nonresidents free of withholding tax, U.S. corporations seeking foreign financing may find their decisions distorted by a tax preference for debt rather than equity financing. Debt financing, in turn, can result in a stripping of the U.S. tax base since interest payments, unlike dividend payments, are (subject to certain limitations) deductible. Moreover, the IRS must expend resources policing the distinction between notional principal contract income, which can be derived by nonresidents free of withholding tax, and dividend income, which cannot. Eliminating the dividend withholding tax would, in this view, free up resources for other enforcement efforts.

On the other hand, some policy makers and commentators have argued that the United States should not give up on dividend withholding tax. One alternative to giving up on the tax is to enact targeted changes to prevent avoidance of the tax. One targeted measure could be to change the rule under which the source of income from a notional principal contract is determined based on the residence of the recipient of the income. A source rule similar to the source rule for dividends would treat the source of notional principal contract income as the residence jurisdiction of the payor of the income. This rule, however, could create withholding on amounts that are not actually paid (because amounts representing dividends in swaps are netted against amounts representing interest and depreciation) and could be avoided by entering into derivative transactions in which amounts representing dividends are categorized as interest and therefore qualify for the portfolio interest exemption.[45]

Another targeted measure, included in bills introduced recently in the U.S. House of Representatives and the U.S. Senate, would impose the 30-percent gross basis withholding tax on dividend-equivalent amounts paid on swap contracts.[46] This measure may raise similar concerns to those that apply to a change in the source rule for notional principal contract income — that withholding tax could be imposed on amounts not actually paid and that the provision might be avoided through the use of other forms of derivative contracts (e.g., forward contracts in which anticipated dividend payments are reflected in the forward pricing).

A more thorough approach to the problem of avoiding withholding tax by deriving income in one category rather than another would be to impose a uniform withholding tax on all deductible payments, including portfolio interest. This approach is described in more detail below.

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[45] Statement of Reuven S. Avi-Yonah, Irwin I. Cohn Professor of Law, University of Michigan Law School, Testimony Before the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means, March 5, 2008, available at http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=6821 (last accessed March 25, 2009.

[46] S. 506, 111th Cong., 1st Sess. (2009), section 108; H.R. 1265, 111th Cong., 1st Sess. (2009), section 108.

2. Treaty shopping

A second problem with enforcing withholding taxes arises from the availability of reduced rates of withholding tax under U.S. bilateral income tax treaties. Under the U.S. model tax treaty and in many actual U.S. tax treaties, the withholding tax rate on dividends is reduced to five percent when the beneficial owner of the dividends owns at least 10 percent of the voting stock of the company paying the dividends and is reduced to 15 percent in other cases; the withholding tax rate on interest that would not qualify for the U.S. portfolio interest exemption is reduced to zero (or, in the case of certain contingent interest, 15 percent); and the withholding tax on royalties is eliminated.[47] Several recent U.S. tax treaties go further than the U.S. model treaty and completely eliminate withholding tax when a subsidiary company makes dividend payments to its parent corporation (so-called "direct investment" dividends).[48]

Nonresidents receiving U.S.-source income subject to withholding tax have an incentive to take advantage of U.S. income tax treaties that reduce withholding tax. Treaty benefits, however, generally are allowed only to residents of the treaty countries. A taxpayer that is not a resident of a treaty country may attempt to benefit from a treaty by organizing an entity in a treaty jurisdiction and causing income to be routed through that entity.

For example, a corporation organized in Singapore (a non-treaty jurisdiction) that intends to make loans to a related U.S. corporation might form a corporation in Luxembourg (a treaty jurisdiction), and then arrange for the loans to be made by the Luxembourg corporation with funds ultimately supplied by the Singapore company. If the Luxembourg corporation is viewed under applicable U.S. law as the owner of the interest income paid by the U.S. affiliate, then interest on the loans will qualify for a zero or 15-percent rate of withholding tax under the U.S.-Luxembourg income tax treaty rather than the statutory 30-percent rate. This hypothetical example illustrates a practice referred to as treaty shopping.

There have been various efforts to restrict treaty shopping. The IRS has successfully litigated some cases, including a leading case involving "back-to-back" interest paid (as in the above example) from a U.S. company to a foreign affiliate in a treaty country that acted as a simple conduit for a loan from a non-treaty ultimate owner.[49] Similarly, the Treasury has negotiated extensive "limitation on benefits" provisions in treaties, and the problem has been addressed by proposed and enacted legislation and regulations.

All recent U.S. income tax treaties include comprehensive limitation on benefits provisions. These provisions are intended to ensure that only genuine residents of treaty

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[47] U.S. Model Income Tax Convention of November 15, 2006, Articles 10, 11, and 12.

[48] See, for example, Article 10(3) of the income tax treaty between the United States and the United Kingdom. Other U.S. treaties that include a zero rate of withholding tax on direct dividends are the income tax treaties with Australia, Belgium, Denmark, Finland, Germany, Iceland, Japan, and Sweden.

[49] *Aiken Industries, Inc. v. Commissioner*, 56 T.C. 925 (1971).

countries are eligible for the benefits of a treaty. Limitation on benefits provisions therefore typically include rules denying treaty benefits unless one of several tests for a genuine connection to a treaty country is satisfied. Under a typical version of one of these tests (the ownership and base erosion test), at least 50 percent of the voting power and value of the person for whom eligibility for treaty benefits is at issue must be residents of the relevant treaty country and deductible payments to persons who are not residents of either treaty country must represent less than 50 percent of the person's income.

Limitation on benefits provisions have not prevented treaty shopping in all cases. The limitation on benefits provisions in some treaties more than 10 years old (the treaty with Luxembourg, for instance, under which, as an example, a Luxembourg company may qualify for treaty benefits even if its direct owner is a resident of a zero-tax jurisdiction so long as at least 50 percent of the company's principal share class is ultimately owned by Luxembourg *or* U.S. residents) are not as restrictive as the provisions in more recent treaties. Treaty shopping using the U.S. income tax treaties with Hungary and Poland, in fact, is limited only by relatively narrow provisions in those treaties defining residency and by considerations of the domestic laws of the treaty countries. Those two treaties have no rules comparable to comprehensive limitation on benefits provisions found in other treaties.

U.S. internal law, a recent legislative proposal, and Treasury regulations have also addressed certain concerns about treaty shopping. A Code provision denies treaty benefits to certain foreign persons for payments received through certain hybrid entities.[50] A proposal included in a bill sponsored by House Ways and Means Committee Chairman Rangel would deny treaty-based reductions in withholding tax for any payment to a subsidiary of a foreign parent corporation unless the payment would qualify for treaty benefits if paid directly to the parent corporation.[51] Treasury regulations promulgated in 1995 (the anti-conduit rules) recharacterize as transactions made directly between two parties certain multi-party financing transactions entered into principally to reduce withholding tax.[52]

In light of these treaty-based and domestic law provisions to limit withholding tax reductions to genuine residents of treaty countries, the extent of treaty shopping is unclear, in part because defining treaty shopping is itself subjective.

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[50] Section 894(c).

[51] H.R. 3970, 110th Cong., 1st Sess. (2007), section 3204. Rep. Doggett introduced a similar, though more restrictive, bill. H.R. 3160, 110th Cong. 1st Sess. (2007). The provision in H.R. 3970 would allow the treaty reduction in withholding tax if the parent corporation was eligible for the benefits of an income tax treaty with the United States. By contrast, if the rate of withholding tax applicable under the U.S. income tax treaty with the parent corporation's country of residence were higher than the rate under the U.S. income tax treaty with the subsidiary's country of organization, H.R. 3160 would apply the higher rate.

[52] Treas. Reg. section 1.881-3; T.D. 8611 (Aug. 10, 1995).

3. Self-certification nature of withholding tax rules

A third enforcement difficulty originates in the basic framework of the U.S. withholding tax rules. Those rules rely on certifications by recipients of income potentially subject to withholding and by withholding agents. As described previously, recipients of income potentially subject to withholding must certify their status so that the payors of the income can determine to what extent withholding is required. Recipients must, for example, certify whether they are U.S. residents or nonresidents and, if they are nonresidents, whether they are eligible for reduced rates of withholding tax allowed by a tax treaty. Withholding agents must certify that they have withheld the proper amount of tax, often with respect to very large volumes of income flows. Proper withholding, in turn, requires the withholding agent to determine whether a payee has U.S. or foreign status; whether a payee is the beneficial owner[53] of the income or is an intermediary receiving a payment on behalf of the owner; whether the payment can be reliably associated with proper documentation; and whether, in the absence of documentation, certain presumptions require full, reduced, or zero withholding or instead require backup withholding.

Problems with withholding can result from errors related to any aspect of this self-certification process. Moreover, the self-certification system can be difficult for the IRS to audit. Applicable Treasury regulations generally do not impose an "audit" or affirmative diligence obligation on the part of domestic withholding agents in determining the validity of a Form W-8,[54] and as a practical matter U.S. withholding agents cannot verify the accuracy of every Form W-8 they receive. As a consequence, U.S. investors may be able to portray themselves successfully as foreign persons, thereby escaping U.S. income taxation.

In a December 2007 report to the Senate Finance Committee, the Government Accountability Office ("GAO") found a number of potential problems with the self-certification process.[55] Withholding agents may not know the identity of beneficial owners of income when

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[53] The beneficial owner of income is, generally, the person who is required under U.S. tax principles to include the income in gross income on a tax return. A person is not a beneficial owner of income, however, to the extent that person is receiving the income as a nominee, agent, or a custodian, or to the extent that the person is a conduit whose participation in a transaction is disregarded. Foreign partnerships, foreign simple trusts, and foreign grantor trusts are not the beneficial owners of income paid to the partnership or trust. The beneficial owner of income paid to a foreign estate is the estate itself. See Treas. Reg. sec. 1.1441-1(c)(6) and the Instructions to Form 1042-S.

[54] See, e.g., Treas. Reg. section 1.1441-1(b)(2)(vii)(A) (providing that a withholding agent generally can rely on a Form W-8 or similar documentation if, before the payment, the agent holds the documentation, can reliably determine how much of the payment relates to the documentation, and has no actual knowledge or reason to know that any of the information, certifications, or statements in or associated with the documentation are incorrect).

[55] Government Accountability Office, Report to the Committee on Finance, U.S. Senate, "*Tax Compliance: Qualified Intermediary Program Provides Some Assurance that Taxes on Foreign Investors Are Withheld and Reported, but Can Be Improved*" (GAO-08-99), December 2007 (hereafter GAO Report).

income is paid through foreign intermediaries. In particular, withholding agents may not be able to identify U.S. beneficial owners who ultimately control foreign corporations or trusts.[56] Consequently, these U.S. persons may incorrectly benefit from treaty-based reductions of withholding tax or exemptions from withholding tax altogether (because, for instance, the income in question is interest on a bank account or a bond). The problem of U.S. beneficial owners hiding behind foreign entities or accounts is central to the UBS case discussed elsewhere in this pamphlet and has been the focus of various efforts to address noncompliance with information reporting and withholding rules.

Relatedly, according to the GAO significant amounts of income have flowed to undisclosed recipients and undisclosed jurisdictions. For reasons that the IRS could not explain, according to the GAO, withholding taxes on these income flows have been imposed, in the aggregate, at rates significantly below 30 percent. Because beneficial ownership and residence information typically is the basis for reduced withholding tax rates, these reduced rates, according to GAO, suggest some amount of noncompliance. This noncompliance can be expected to have included evasion of U.S. tax by U.S. persons who have derived portfolio income through foreign intermediaries.

Potential changes to the information reporting and withholding rules to address problems arising from the self-certification nature of the rules range from modest to sweeping. In its 2007 report the GAO recommended, among other steps, that the IRS improve its enforcement efforts by making better use of data that it already collects. In particular, the GAO suggested that the IRS determine the extent to which (1) income paid by withholding agents flows through foreign intermediaries that may be providing the IRS with unreliable documentation, and (2) reductions in withholding taxes collected from funds flowing to undisclosed jurisdictions and undisclosed recipients were proper.[57]

The IRS's qualified intermediary ("QI") program has been the major initiative undertaken by the IRS to deal with the compliance issues presented by self-certification. Under this program, the IRS contracts with foreign financial institutions to enforce U.S. withholding and reporting rules. The QI program is discussed in detail in Section II.

Professor Reuven Avi-Yonah has advocated a different approach.[58] Avi-Yonah's proposal is intended to address the principal concern of this pamphlet — the failure by

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[56] As previously noted, a corporation (and not its shareholders) ordinarily is treated as the beneficial owner of the corporation's income. Similarly, a foreign complex trust ordinarily is treated as the beneficial owner of income that it receives, and a U.S. beneficiary or grantor is not subject to tax on that income unless and until he receives a distribution.

[57] GAO Report at 15-16, 21.

[58] Statement of Reuven S. Avi-Yonah, Irwin I. Cohn Professor of Law, University of Michigan Law School, Testimony Before the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means, March 5, 2008, available at http://waysandmeans.house.gov/hearings.asp?formmode=printfriendly&id=6821 (last accessed March 25,

individuals to report to the taxing authorities of their home countries income from portfolio investments derived through foreign intermediaries. Avi-Yonah argues that the United States should impose a uniform withholding tax on cross-border interest flows, other deductible payments such as royalties, and payments on derivative instruments. He suggests that this withholding tax should be imposed at a rate that would approximate the tax rate that would apply if the portfolio income were taxed on a true residence basis, a rate of 40 percent or higher. The withholding tax would be fully refundable if the beneficial owner of the income subject to withholding provided a certificate to the tax authorities in the country from which the income was derived attesting that the income was reported in the owner's home country.

Avi-Yonah's approach builds on (but goes further than) the European Union ("EU") Savings Taxation Directive.[59] That directive provides for (1) the automatic exchange of beneficial ownership and other information when a resident of one member state of the EU receives interest payments from an entity or other payor in another member state and (2) during a transitional period, imposition of a 20 percent (35 percent after June 2011) withholding tax on interest payments received by EU residents from payors located in Austria, Belgium, or Luxembourg unless the recipients of the payments agree to the exchange of information related to their accounts.[60] Avi-Yonah argues that the United States should use the EU Savings Taxation Directive as the basis for leading a coordinated effort at instituting his proposed uniform withholding tax in all member countries of the Organisation for Economic Co-operation and Development ("OECD").

Avi-Yonah's recommendations must be put in the context of the macroeconomic issues identified earlier. In particular, those recommendations might prove difficult for the United States to adopt unilaterally if withholding increases the cost of borrowing to domestic issuers, including the Federal government. Moreover, as applied to the United States those

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2009); Reuven S. Avi-Yonah, "Memo to Congress: It's Time to Repeal the U.S. Portfolio Interest Exemption," Tax Notes International, Dec. 7, 1998, at 1817.

[59] Council Directive 2003/48/EC of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payments, available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:157:0038:0048:en:PDF (last accessed March 25, 2009). To address avoidance of the Directive, the European Commission has proposed amendments that would, among other changes, extend the Directive to interest-equivalents and require payors to apply the Directive when payments are made to non-EU intermediaries on behalf of beneficial owners who reside in the EU. See Proposal for a Council Directive amending Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments, November 13, 2008, available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/personal_tax/savings_tax/savings_directive_review/COM(2008)727_en.pdf.

[60] Rules similar to the rules for Austria, Belgium, and Luxembourg apply under EU savings agreements with Andorra, Liechtenstein, San Marino, Monaco, and Switzerland and under bilateral agreements between individual EU states and the ten dependent and associated territories of the United Kingdom and the Netherlands (Anguilla, Aruba, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man, Jersey, Montserrat, the Netherlands Antilles and the Turks and Caicos Islands).

recommendations presumably would require that bearer bonds be prohibited, and arguably should require domestic withholding on interest as well. To date, at least, the United States has moved in the opposite direction, by emphasizing improved information reporting. It is worth noting, however, that repeal of the special rules for bearer bonds (under which the portfolio interest exemption is made available as long as certain foreign-targeting requirements are satisfied in connection with the original issuance) would also be consistent with the current IRS approach; the continued need for those rules is no longer entirely clear, in light of the absence of demand for actual bearer bonds and the global prevalence of electronic clearing systems.

Professor Michael J. Graetz and Itai Grinberg are not as pessimistic as Avi-Yonah about the ability of residence countries to collect tax on foreign portfolio income in the absence of refundable source-country withholding taxes.[61] Graetz have argued that source-based taxation of foreign portfolio income should be abolished and that, to address noncompliance with residence-based taxation of this income, the United States and other countries should instead engage in continued multilateral cooperation in information sharing. Graetz also have argued for unilateral efforts to address cross-border evasion. As an example of unilateral action, they view the United States' QI program as "a major step forward."

[61] Michael J. Graetz & Itai Grinberg, "Taxing International Portfolio Income," 56 Tax Law Review 537, 578-86 (Summer 2003). (More broadly, Graetz and Grinberg argue that the United States should pursue a policy of national neutrality in the taxation of foreign portfolio income and therefore should allow a deduction, not a credit, for foreign taxes imposed on that income.)

II. QUALIFIED INTERMEDIARY PROGRAM

A. Background

In April of 1996, the IRS published proposed regulations under sections 1441 and 1442 addressing certain U.S.-source income paid to foreign persons.[62] Final regulations were issued in 1997, but their effective date was twice delayed, and they became effective only as of January 1, 2001.[63] These regulations substantially revised the withholding and reporting requirements for amounts paid to foreign persons and established the Qualified Intermediary ("QI") program.[64] As described in this Section II, the revised Treasury regulations were an attempt to balance the needs of tax administration and the procedures necessary to curb tax evasion with the need to minimize the barriers and burdens placed on the financial markets.

The basic strategy adopted by the QI regulations was for the IRS to rely explicitly on certain foreign intermediaries (QIs) to enforce compliance with U.S. tax information reporting requirements. These foreign intermediaries agree to assume responsibility for obtaining documentation from their customers and to substantiate the status of their customers as the beneficial owners of U.S.-source income. In turn, the IRS agrees to permit the QIs to certify on behalf of their foreign customers, without revealing to the IRS or to other U.S. withholding agents the identity of those foreign customers. Moreover, the IRS agrees to rely on third-party private auditors to audit the compliance of the QIs with the QI program; this condition was viewed as a practical necessity if foreign banks were to agree to participate in the QI program, because these foreign institutions feared that their non-U.S. customer base would not agree to allow a foreign taxing authority (the IRS) direct access (through an IRS audit) to customer account information.

At the time the QI program was adopted, the IRS explained its scope and purpose as follows in Announcement 2000-48:

> The QI system is a significant step forward for both taxpayers and the IRS. It does, however, represent a paradigm shift to greater self-regulation. Treasury and the IRS believe that it is appropriate to allow the greatest self-regulation under circumstances in which Treasury and the IRS have the greatest confidence that such self-regulation will be effective. In pursuit of that objective, Treasury and the IRS considered allowing QI status only for businesses operating in jurisdictions with which the United States has a

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[62] 61 Fed. Reg. 17,614 (Apr. 22, 1996).

[63] T.D. 8734 (Oct. 6, 1997). The regulations specific to QIs have subsequently been amended. See T.D. 8804 (Dec. 30, 1998) (delaying effective date and providing additional transition rules); T.D. 8856 (Dec. 30, 1999) (delaying effective date); and T.D. 8881 (May 16, 2000) (providing for withholding rate pools for QIs and changing model QI agreement regulations to conform with Rev. Proc. 2000-12, which includes a provision requiring a QI to disinvest in cases in which a non-exempt U.S. customer does not waive local bank secrecy laws).

[64] Treas. Reg. sec. 1.1441-1(e)(5).

> bilateral tax treaty or tax information exchange agreement. In response to taxpayer comments, however, that approach was not adopted. Taxpayers requested that the QI system have the broadest scope possible, so that financial institutions can potentially act as qualified intermediaries in all jurisdictions in which they do business. In an attempt to balance these competing concerns, Treasury and the IRS intend to permit financial institutions to act as qualified intermediaries in accordance with the provisions of this announcement [and the model QI Agreement].[65]

The Announcement went on to explain that, as part of this "paradigm shift," the IRS's cross-border withholding tax compliance effort essentially would be built around reliance on bank regulatory "know-your-customer" rules:

> Treasury and the IRS believe it is appropriate to permit the self-regulation envisioned by the QI system only under circumstances in which Treasury and the IRS have confidence that such self-regulation may be effective. Because Treasury and the IRS regard know-your-customer (KYC) rules as a vital component of adequate self-regulation, the IRS generally will not extend the QI system to any country that does not have KYC rules or has unacceptable KYC rules. The IRS will, however, permit a branch of a financial institution (but not a separate juridical entity affiliated with the financial institution) located in such a country to act as a qualified intermediary if the branch is part of an entity organized in a country that has acceptable KYC rules and the entity agrees to apply its home country KYC rules to the branch. As is the case with any violations of the QI agreement by the branch, failure to obtain adequate documentation will cause the entity to be in default of its agreement and may cause the agreement to be terminated.[66]

Prior to the issuance of the current withholding tax regulations and the QI program, withholding agents were subject to complex rules depending on the type of income and source of income of the payment. Inconsistent rules for determining whether a payee was a U.S. or foreign person applied to different types of income, and IRS guidance was sometimes unclear. The IRS and Treasury determined that, due to the substantial growth in cross-border flows and the desire to continue a net withholding system (rather than moving to a full withholding system with refundability), it was necessary to standardize and coordinate the procedures imposed on withholding agents for verifying U.S. or foreign status for Form 1099 reporting, compliance with backup withholding rules, and administration of the nonresident withholding provisions. Additionally, Treasury was under a congressional mandate to consider options for replacing the address/self-certification method of administering income tax treaty benefits.[67]

In developing the QI program, Treasury and the IRS gave particular attention to the problems raised under prior practice by payments made through foreign intermediaries. (As

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[65] Announcement 2000-48, 2000-1 C.B. 1243.

[66] Id. After December 31, 2006, however, branches located in countries without approved know-your-customer rules are no longer permitted to operate as QIs. See Notice 2006-35, 2006-14 I.R.B. 708.

[67] See Tax Equity and Fiscal Responsibility Act of 1982, sec. 342.

previously noted, payments made through an intermediary are treated as payments made directly to the beneficial owner for whom the intermediary is collecting the payments.) Prior Treasury regulations required different documentation depending on the type of payment, whether the intermediary remitted through a U.S. office, or whether the payee had a foreign address. In cases in which withholding certificates were required, the beneficial owner certification was required to be passed up through a chain of intermediaries to the U.S. withholding agent. These procedures were difficult to implement and enforce in many cases, making it difficult to collect tax from the ultimate beneficial owner of the payments.

A QI is defined as a foreign financial institution or a foreign clearing organization, other than a U.S. branch or U.S. office of such institution or organization, which has entered into a withholding and reporting agreement (a "QI agreement") with the IRS.[68] In exchange for entering into a QI agreement, the QI is able to shield the identities of its customers from the IRS and other intermediaries (for example, other financial institutions in the chain of payment that may be business competitors of the QI) in certain circumstances and is subject to reduced information reporting duties compared to those that would be imposed in the absence of the agreement. This ability to shield customer information is limited, however, with respect to U.S. persons, because the QI is required to furnish Forms 1099 to its U.S. customers if it has assumed primary withholding responsibility for these accounts, or to provide Forms W-9 to the withholding agent in cases in which the QI has not assumed such responsibility.

A foreign financial institution that becomes a QI is not required to forward beneficial ownership information with respect to its customers to a U.S. financial institution or other withholding agent of U.S.-source investment-type income to establish their eligibility for an exemption from, or reduced rate of, U.S. withholding tax.[69] Instead, the QI is permitted to establish for itself the eligibility of its customers for an exemption or reduced rate, based on information as to residence obtained under the "know-your-customer" rules imposed by the banking laws to which the QI is subject in its home jurisdiction. The QI certifies as to eligibility on behalf of its customers, and provides withholding rate pool information to the U.S. withholding agent as to the portion of each payment that qualifies for an exemption or reduced rate of withholding. As described below, a QI may also assume responsibility for both nonresident withholding and, in the case of U.S. customers, backup withholding.

The IRS has published a model QI agreement (described in more detail below) that financial institutions wishing to become QIs are generally expected to sign.[70] A prospective QI

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[68] The definition also includes: a foreign branch or office of a U.S. financial institution or U.S. clearing organization; a foreign corporation for purposes of presenting income tax treaty claims on behalf of its shareholders; and any other person acceptable to the Internal Revenue Service. Treas. Reg. sec. 1.1441-1(e)(5)(ii).

[69] U.S. withholding agents are allowed to rely on a QI's Form W-8IMY without any underlying beneficial owner documentation. By contrast, non-QIs are required both to provide a Form W-8IMY to a U.S. withholding agent and to forward with that document Form W-8s or W-9s for each beneficial owner.

[70] Rev. Proc. 2000-12, 2000-1 C.B. 387, *supplemented by* Announcement 2000-50, 2000-1 C.B. 998, and *modified by* Rev. Proc. 2003-64, 2003-2 C.B. 306, and Rev. Proc. 2005-77, 2005-2 C.B. 1176.

must submit an application to the IRS providing certain specified information, and any additional information and documentation requested by the IRS. The application must establish to the IRS's satisfaction that the applicant has adequate resources and procedures to comply with the terms of the QI agreement.

Before entering into a QI agreement that provides for the use of documentary evidence obtained under a country's know-your-customer rules, the IRS must receive (1) that country's know-your-customer practices and procedures for opening accounts and (2) responses to 18 related items. If the IRS has already received this information, a particular prospective QI need not submit it again. The IRS web site (www.irs.gov) lists 59 countries for which it has received such information and for which the know-your-customer rules are acceptable.

Although the QI program "gives the IRS an important line of sight into the activities of U.S. taxpayers at foreign banks and financial institutions,"[71] QIs handle only a relatively small percentage of U.S.-source income flowing through foreign intermediaries. The Government Accountability Office (the "GAO") has reported that, in 2003, only 12.5 percent of income reported as paid by withholding agents was reported by QIs; in fairness, however, the QI program at that point was only in its third year.[72] Of the remaining 87.5 percent, the GAO made no determination as to the amounts flowing through direct versus indirect (i.e., nonqualified intermediary) account holdings; nor did the GAO distinguish between portfolio and direct investment flows.

The QI agreement applies only to foreign financial institutions, foreign clearing organizations, and foreign branches or offices of U.S. financial institutions or U.S. clearing organizations. However, the principles of the QI agreement may be used to conclude agreements with other persons defined as QIs. In addition, the IRS may choose to enter into a QI agreement that deviates from the model agreement.

[71] Written Testimony of Douglas H. Shulman, Commissioner, Internal Revenue Service, Hearing on Tax Issues Related to Ponzi Schemes and an Update on Offshore Tax Evasion Legislation Before the S. Comm. on Fin., 111th Cong., Mar. 17, 2009 [hereinafter Shulman 2009 SFC Testimony].

[72] Government Accountability Office, *Testimony of Michael Brostek Before the Committee on Finance, U.S. Senate: Tax Compliance: Offshore Financial Activity Creates Enforcement Issues for IRS*, GAO-09-478T (Mar. 17, 2009), at 10.

B. The Model QI Agreement

The model QI agreement describes in detail the QI's withholding and reporting obligations in numerous circumstances. Certain key aspects of the model agreement are described briefly below.[73]

Withholding and reporting

As a technical matter, all QIs are withholding agents for purposes of the nonresident withholding and reporting rules, and payors (required to withhold and report) for purposes of the backup withholding rules. However, under the QI agreement, a QI is not required to withhold on payments made to nonresident customers, or to report those payments on Form 1042-S, if the QI has not assumed primary responsibility for nonresident withholding and, instead, provides a U.S. withholding agent with a Form W-8IMY that certifies as to the status of its (unnamed) nonresident account holders. Similarly, a QI is not required to backup withhold on payments made to U.S. customers if the QI does not assume primary Form 1099 reporting and backup withholding responsibility and, instead, provides a U.S. payor with the Forms W-9 of its U.S. non-exempt recipient account holders (i.e., account holders that are U.S. persons not generally exempt from Form 1099 reporting and backup withholding). In either case, the QI must also provide the U.S. withholding agent (or U.S. payor) certain additional information about the withholding rates that should be applied to payments made to such account holders. These rates can be supplied with respect to "withholding rate pools" that aggregate payments of a single type of income (e.g., interest or dividends) that is subject to a single rate of withholding.

Alternatively, a QI may elect to assume primary nonresident withholding and reporting responsibility, primary backup withholding and Form 1099 reporting responsibility, or both. A QI that assumes such responsibility is subject to all of the related obligations imposed by the Code on U.S. withholding agents or payors.

In general, a QI is not required to disclose, either to a withholding agent or to the IRS, the identity of an account holder that is a foreign person or a U.S. person that is an exempt recipient (such as a corporation).[74] To the extent that a QI has not assumed primary Form 1099 reporting and backup withholding responsibility, the QI generally must provide to a withholding agent Forms W-9 obtained from each U.S. non-exempt recipient account holder (for example, an individual). If a U.S. non-exempt recipient has not provided a Form W-9, the QI must disclose the name, address, and taxpayer identification number (if available) to the withholding agent (and the withholding agent must apply backup withholding). However, no such disclosure is necessary if the QI is, under local law, prohibited from making the disclosure and the QI has

[73] Additional detail can be found in Joint Committee on Taxation, *Selected Issues Relating to Tax Compliance With Respect to Offshore Accounts and Entities* (JCX-65-08), July 23, 2008.

[74] This absence of a requirement to disclose a U.S. exempt recipient is consistent with the fact that exempt recipients are excluded from the scope of the general rules governing backup withholding and information reporting.

followed certain procedural requirements (including providing for backup withholding, as described further below).

Documentation of account holders

QIs agree to review and maintain documentation regarding the status of their account holders in accordance with the terms of their QI agreement and, in the case of documentary evidence obtained from direct account holders, in accordance with "know-your-customer" rules applicable under the banking laws and regulations of the jurisdiction in which the QI is located.

A QI may treat an account holder as a foreign beneficial owner of an amount if the account holder provides a valid Form W-8 (other than a Form W-8IMY) or valid documentary evidence that supports the account holder's status as a foreign person. With such documentation, a QI generally may treat an account holder as entitled to a reduced rate of withholding if all the requirements for the reduced rate are met and the documentation supports entitlement to a reduced rate. A QI may not reduce the rate of withholding if the QI knows that the account holder is not the beneficial owner of a reportable amount or payment.

If a foreign account holder is the beneficial owner of a payment, then a QI may shield the account holder's identity from U.S. custodians and the IRS. If a foreign account holder is not the beneficial owner of a payment (for example, because the account holder is a nominee), the account holder must provide the QI with a Form W-8IMY for itself along with specific information about each beneficial owner to which the payment relates. A QI that receives this information may shield the account holder's identity from a U.S. custodian, but not from the IRS.[75]

In general, if an account holder is a U.S. person, the account holder must provide the QI with a Form W-9 or appropriate documentary evidence that supports the account holder's status as a U.S. person. However, in cases in which a QI does not have sufficient documentation to determine whether an account holder is a U.S. or foreign person, the QI must apply certain presumption rules detailed in the QI agreement. These presumption rules may not be used to grant a reduced rate of nonresident withholding; instead they merely determine whether a payment should be subject to full nonresident withholding (at a 30 percent-rate), subject to backup withholding (at a 28 percent-rate), or treated as exempt from backup withholding.

In general, under these presumptions, amounts of U.S.-source investment income that are paid outside the United States to an account maintained outside the United States are presumed made to an undocumented foreign account holder. A QI must treat such an amount as subject to withholding at a 30-percent rate and report the payment to an unknown account holder on Form 1042-S.[76] However, U.S.-source deposit interest and interest or original issue discount on short-

[75] This rule restricts one of the principal benefits of the QI regime, nondisclosure of account holders, to financial institutions that have assumed the documentation and other obligations associated with QI status.

[76] Form 1042-S is the IRS form on which a withholding agent reports a foreign person's U.S.-source income that is subject to reporting to the foreign person and to the IRS.

term obligations that is paid outside the United States to an offshore account is presumed made to an undocumented U.S. non-exempt recipient account holder and thus is subject to backup withholding at a 28-percent rate.[77] Importantly, both foreign-source income and broker proceeds are presumed to be paid to a U.S. exempt recipient (and thus are exempt from both nonresident and backup withholding) in cases in which such amounts are paid outside the United States to an account maintained outside the United States.

Foreign law prohibition of disclosure

The QI agreement includes procedures to address situations in which foreign law (including by contract) prohibits the QI from disclosing the identities of U.S. non-exempt recipients (such as individuals). Separate procedures are provided for accounts established with a QI prior to January 1, 2001, and for accounts established on or after January 1, 2001.

Established prior to January 1, 2001

For accounts established prior to January 1, 2001, if the QI knows that the account holder is a U.S. non-exempt recipient, the QI must (1) request from the account holder the authority to disclose its name, address, taxpayer identification number (if available), and reportable amounts; (2) request from the account holder the authority to sell any assets that generate, or could generate, reportable payments; or (3) request that the account holder disclose itself by mandating the QI to provide a Form W-9 completed by the account holder. The QI must make these requests at least two times during each calendar year and in a manner consistent with the QI's normal communications with the account holder (or at the time and in the manner that the QI is authorized to communicate with the account holder). Until the QI receives a waiver on all prohibitions against disclosure, authorization to sell all assets that generate, or could generate, reportable payments, or a mandate from the account holder to provide a Form W-9, the QI must backup withhold on all reportable payments paid to the account holder and report those payments on Form 1099 or, in certain cases, provide another withholding agent with all of the information required for that withholding agent to backup withhold and report the payments on Form 1099.

Established on or after January 1, 2001

For any account established by a U.S. non-exempt recipient on or after January 1, 2001, the QI must (1) request from the account holder the authority to disclose its name, address, taxpayer identification number (if available), and reportable amounts; (2) request from the account holder, prior to opening the account, the authority to exclude from the account holder's account any assets that generate, or could generate, reportable payments; or (3) request that the account holder disclose itself by mandating the QI to transfer a Form W-9 completed by the account holder.

If a QI is authorized to disclose the account holder's name, address, taxpayer identification number, and reportable amounts, it must obtain a valid Form W-9 from the account

[77] These amounts are statutorily exempt from nonresident withholding when paid to non-U.S. persons.

holder, and, to the extent the QI does not have primary Form 1099 and backup withholding responsibility, provide the Form W-9 to the appropriate withholding agent promptly after obtaining the form. If a Form W-9 is not obtained, the QI must provide the account holder's name, address, and taxpayer identification number (if available) to the withholding agents from whom the QI receives reportable amounts on behalf of the account holder, together with the withholding rate applicable to the account holder. If a QI is not authorized to disclose an account holder's name, address, taxpayer identification number (if available), and reportable amounts, but is authorized to exclude from the account holder's account any assets that generate, or could generate, reportable payments, the QI must follow procedures designed to ensure that it will not hold any assets that generate, or could generate, reportable payments in the account holder's account.

Under both of these procedures, a U.S. non-exempt recipient may effectively avoid disclosure and backup withholding simply by investing in assets that generate solely foreign source income (such as bonds issued by a foreign government). Under present law, foreign source income generally is not subject to Form 1099 reporting and backup withholding or to U.S. nonresident withholding tax.[78] Thus, this feature of the QI agreement is arguably consistent with the present law framework for withholding and information reporting. Moreover, a U.S. investor seeking to avoid disclosure can hold foreign assets through an account with a foreign financial institution that is not a QI and, similarly, escape information reporting and backup withholding. On the other hand, the fact that QI status affords foreign financial institutions a number of significant benefits arguably justifies the imposition of enhanced reporting by those institutions (for example, with respect to foreign-source income) in order to assist the IRS in its enforcement efforts.

External audit procedures

The IRS generally will not audit a QI with respect to withholding and reporting obligations covered by a QI agreement if an approved external auditor conducts an audit of the QI. An external audit must be performed of the second and fifth full calendar years in which the QI agreement is in effect. In general, the IRS must receive the external auditor's report by June 30 of the year following the year being audited.

Certain requirements for the external audit are provided in the QI agreement. In general, however, the QI must permit the external auditor to have access to all relevant records of the QI, including information regarding specific account holders. In addition, the QI must permit the IRS to communicate directly with the external auditor, review the audit procedures followed by the external auditor, and examine the external auditor's work papers and reports.

[78] Non-U.S. investments can generate amounts subject to information reporting if they are not considered paid outside the U.S. under Treas. Reg. 1.6049-5(e). Payments are not considered paid outside the U.S. if the customer has transmitted instructions to an agent, branch, or office of the institution from inside the U.S. by mail, phone, electronic transmission, or otherwise, unless the transmission from the U.S. has taken place in isolated and infrequent circumstances.

In addition to the external audit requirements set forth in the QI agreement, the IRS has issued further guidance (the "QI audit guidance") for an external auditor engaged by a QI to verify the QI's compliance with the QI agreement.[79] An external auditor must conduct its audit in accordance with the procedures described in the QI agreement. However, the QI audit guidance is intended to assist the external auditor in understanding and applying those procedures. The QI audit guidance does not amend, modify, or interpret the QI agreement.

Term of a QI agreement

A QI agreement expires on December 31 of the fifth full calendar year after the year in which the QI agreement first takes effect, although it may be renewed. Either the IRS or the QI may terminate the QI agreement prior to its expiration by delivering a notice of termination to the other party. However, the IRS will not terminate a QI agreement unless there is a significant change in circumstances or an event of default occurs, and the IRS determines that the change in circumstance or event of default warrants termination. In the event that an event of default occurs, a QI is given an opportunity to cure it within a specified time.

Discussion

Since the adoption of the QI regime in 2001, more than 7,000 QI agreements have been signed. As of July 2008, there were 5,660 active QI agreements involving financial institutions in 60 countries.[80] The QI program provides a significant benefit to foreign financial institutions—in particular, the ability to obtain a reduced rate or exemption from U.S. withholding tax for their non-U.S. customers without disclosing the identities of those customers to the IRS or competing financial institutions. At the same time, however, the contractual nature of the QI program provides the IRS with an important mechanism to enforce compliance with U.S. reporting and withholding rules. For example, a foreign financial institution that is a QI is contractually required to disclose the identity of its U.S. customers to the IRS, report the payment of certain amounts to those customers and, in some circumstances, apply backup withholding. These contractual requirements extend beyond the scope of the reporting and withholding that would otherwise be required under applicable Treasury regulations. Moreover, the fact that so many of the world's major financial institutions have entered into QI agreements places a non-QI financial institution at a competitive disadvantage and creates a significant incentive for existing QIs to maintain their QI status. The IRS's ability to terminate a QI agreement in the event of noncompliance, thereby placing a financial institution at such a disadvantage, is a powerful tool for enforcing compliance and ensuring cooperation by a QI when instances of noncompliance are discovered.

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[79] Rev. Proc. 2002-55, 2002-2 C.B. 435.

[80] See Written Testimony of Douglas H. Shulman, Commissioner, Internal Revenue Service, Hearing on Tax Haven Banks and U.S. Tax Compliance Before the Permanent Subcomm. on Investigations, S. Comm. on Homeland Sec. and Governmental Affairs, 110th Cong., July 17, 2008 [hereinafter Shulman 2008 Testimony]. The difference between signed agreements and active agreements is due to mergers, acquisitions, and terminations. As of July 2008, the IRS had issued 600 default letters and had terminated 100 QI agreements.

On the other hand, the ongoing investigation into the failure by UBS to comply with the terms of its QI agreement has demonstrated certain weaknesses in the QI program as presently implemented. The UBS investigation is described briefly below, followed by a description of certain modifications to the QI program presently under consideration by the IRS to address problems identified in the UBS and other enforcement proceedings and the voluntary disclosure procedures recently announced by the IRS for individual taxpayers with unreported offshore accounts and entities.

The UBS Case

UBS, based in Switzerland and one of the world's largest financial institutions, had voluntarily entered into a QI agreement with the IRS, effective January 1, 2001, under which UBS agreed to identify and document any customers who held U.S. investments or received U.S.-source income in accounts maintained with UBS. Alternatively, if a U.S. customer refused to be identified under the QI agreement, UBS was required to apply backup withholding tax at a 28-percent rate on payments made to the customer, and to bar the customer from holding U.S. investments.

According to a report issued by the Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs of the U.S. Senate (the "PSI") on July 17, 2007 (prepared in connection with a hearing held that day), entitled *Tax Haven Banks and U.S. Tax Compliance* (the "2008 PSI Report"), many of UBS's U.S. clients refused to be identified, to have taxes withheld, or to sell their U.S. assets as required under the QI agreement. To retain these customers, UBS bankers assisted the customers in concealing their ownership of the assets held in offshore accounts by helping to create nominee and sham entities. These entities were set up in various jurisdictions, including Switzerland, Liechtenstein, Panama, the British Virgin Islands, and Hong Kong. The UBS bankers and their U.S. customers then claimed that the offshore accounts were owned by these nominee and sham entities and were not subject to the reporting requirements imposed by the QI agreement.

On July 1, 2008, a Federal district court in Florida granted the IRS permission to issue a John Doe summons to UBS seeking the names of as many as 20,000 U.S. citizens who were UBS customers for which reporting or withholding obligations may not have been met.

At the 2008 PSI hearing, Mark Branson, Chief Financial Officer, UBS Global Wealth Management and Business Banking, acknowledged in his testimony that compliance failures may have occurred and stated that UBS would take actions to ensure that the types of activities identified in the 2008 PSI Report would not recur. As part of that effort, UBS will no longer provide offshore banking services to U.S. customers; instead, such customers will be provided services only through companies licensed in the United States. Moreover, UBS will no longer permit advisors based in Switzerland to travel to the United States to meet with U.S. customers. Finally, Mr. Branson indicated that UBS would comply with the John Doe summons as it relates to the UBS accounts held by U.S. residents.

Subsequent to the 2008 PSI hearing, there have been several developments including the United States and UBS entering into a deferred prosecution agreement, the filing of a petition to enforce the John Doe summons, and an expansion of the Justice Department's investigation to

certain Swiss individuals that allegedly worked with UBS employees to help U.S. taxpayers set up offshore accounts and entities to avoid paying U.S. taxes. On February 18, 2009, the United States District Court for the Southern District of Florida accepted a deferred prosecution agreement between the United States and UBS.[81] Pursuant to this agreement, UBS waived indictment and consented to the filing of a one-count criminal information charging UBS in a conspiracy to defraud the United States and the IRS in violation of U.S. criminal law. As part of the agreement, UBS agreed to pay $780 million in fines, penalties, interest and restitution. To the extent UBS meets this, and all other, obligations under the deferred prosecution agreement, the government will recommend dismissal of the charge.

On February 19, 2009, following the acceptance of the deferred prosecution agreement, the government filed a petition to enforce the previously issued John Doe summons with the United States District Court for the Southern District of Florida. In this petition, the government requested that the court issue an order requiring UBS to disclose to the IRS the identities of the bank's U.S. customers with undeclared Swiss accounts. The lawsuit alleges that there may be as many as 52,000 undeclared accounts with approximately $14.8 billion in assets as of the mid-2000s.

On March 4, 2009, a subsequent PSI hearing on *Tax Haven Banks and U.S. Tax Compliance—Obtaining the Names of U.S. Clients with Swiss Accounts* ("the 2009 PSI hearing") was held. At this hearing, the Acting Assistant Attorney General, Tax Division, U.S. Department of Justice, John DiCicco, discussed the content of the UBS deferred prosecution agreement.[82] Specifically, Mr. DiCicco stated that UBS acknowledged that, beginning in 2000 and continuing through 2007, it participated in a scheme to defraud the United States and the IRS through its cross-border business. UBS engaged in such activities through its private bankers and managers that actively facilitated the creation of accounts in the names of offshore companies, allowing U.S. taxpayers to conceal their ownership of, or beneficial interest in, the accounts in an effort to evade U.S. tax reporting and payment requirements. Furthermore, UBS admitted that it had failed to implement effective controls to detect and prevent the unlawful activity, that it had failed to initiate an effective investigation into credible allegations of such unlawful activity, and that it had failed to take effective action to stop such activities.

In addition to making the payment to the United States of $780 million, UBS also agreed to the following conditions:

- UBS will provide the United States with voluminous and detailed records concerning accounts held directly or through beneficial arrangements by United States persons. UBS has a continuing obligation to cooperate with the criminal investigation and any

[81] See *United States v. UBS AG*, 09-60033-CR-COHN (S.D. Fl.).

[82] Written Testimony of John DiCicco, Acting Assistant Attorney General, Tax Division, U.S. Department of Justice, Hearing on Tax Haven Banks and U.S. Tax Compliance—Obtaining the Names of U.S Clients with Swiss Accounts Before the Permanent Subcomm. on Investigations, S. Comm. On Homeland Sec. and Governmental Affairs, 111th Cong., Mar. 4, 2009.

resulting prosecutions, and also to search for and turn over any additional records found concerning such accounts.

- UBS will terminate its U.S. cross-border business. As part of this process, the accounts of United States customers covered by the deferred prosecution agreement will be closed with any underlying assets liquidated. All resulting proceeds will be distributed to the U.S. owners in dollar-denominated instruments.
- UBS's challenge to the government's motion to enforce the John Doe summons, including the filing of an appeal from an adverse ruling, will not be considered a breach of the deferred prosecution agreement. Upon completion of that litigation, however, if the Court were to order UBS to produce the documents sought and hold UBS in contempt for failure to do so, UBS's noncompliance may be determined to be a material breach of the deferred prosecution agreement, permitting the government to proceed with the criminal prosecution of UBS.
- UBS's failure to comply with a term of the deferred prosecution agreement may, in the sole discretion of the government, be deemed a material breach, permitting the government to proceed with the criminal prosecution of UBS. If UBS fully complies with the deferred prosecution agreement, the criminal information will be dismissed.
- The deferred prosecution agreement only applies and provides protection for the bank as to the specific conduct set forth within the agreement.

At the 2009 PSI hearing, Mr. Branson again testified on behalf of UBS. In his testimony, he addressed the progress UBS has made with respect to the requirements under the deferred prosecution agreement.[83] Mr. Branson discussed the petition filed by the IRS to have the court enforce the John Doe summons. Mr. Branson also discussed how UBS has sought to comply with the summons without violating Swiss law. As Swiss law prohibits UBS from producing responsive information located in Switzerland, Mr. Branson explained that UBS has been able to produce only information responsive to the summons that is located in the United States. He stated his belief that UBS has now complied with the summons to the fullest extent possible without subjecting its employees to criminal prosecution in Switzerland.[84]

Mr. Branson went on to state his belief that further enforcement of the summons would be in violation of the original QI agreement and the income tax treaty between Switzerland and the United States. With respect to the QI agreement entered into between UBS and the IRS in

[83] Written Testimony of Mark Branson, Chief Financial Officer of UBS AG, Hearing on Tax Haven Banks and U.S. Tax Compliance − Obtaining the Names of U.S Clients with Swiss Accounts Before the Permanent Subcomm. on Investigations, S. Comm. On Homeland Sec. and Governmental Affairs, 111th Cong., March 4, 2009.

[84] The Swiss banking authority with the permission of the Swiss government had allowed UBS to agree to transfer approximately 250 names of United States resident account holders for which there is a reasonable suspicion of conduct constituting what Swiss law considers fraudulent acts to the Justice Department as part of the deferred prosecution agreement. See Lee Sheppard, *Don't Ask, Don't Tell, Part III: UBS's Sweet Deal,* 122 Tax Notes 1050 (2009).

2001, it expressly recognized that UBS would open and maintain accounts covered by Swiss financial privacy laws for U.S. clients who chose not to provide a Form W-9, as long as those accounts held no U.S. securities. According to Mr. Branson, as UBS legitimately maintained those accounts consistent with the QI agreement, the summons seeks client information that the IRS itself agreed would be kept confidential. Additionally, the income tax treaty between Switzerland and the United States discusses those circumstances under which client names and account information located in Switzerland may be shared with U.S. authorities. Mr. Branson, therefore, expressed his belief that the John Doe summons is inconsistent with long-standing treaty obligations and this matter should, instead, be resolved through diplomatic measures.

According to an article published in the *New York Times* on March 18, 2009, the Justice Department has extended its investigation into UBS offshore tax fraud to include independent lawyers and accountants in Switzerland and the United States who worked with UBS.[85] Three individuals currently under investigation include Beda Singenberger, a Zurich based accountant who runs a boutique finance and trust company called Sinco Trust, as well as Matthias W. Rickenbach and Andreas M. Rickenbach, two brothers that are lawyers at Rickenbach & Partner, a law firm in Zurich and Geneva. A criminal case is being built against these individuals who are suspected of having traveled with Swiss UBS bankers to the U.S. to work with American clients to evade taxes.

2008 PSI Report

The 2008 PSI Report includes several recommendations for strengthening the QI program, based primarily on its investigation of the UBS matter and a similar investigation of the Liechtenstein Global Trust Group (discussed below). First, the report recommends that QIs should be required to file Forms 1099 for all U.S. persons who are clients (whether or not the client has U.S. securities or receives U.S.-source income) and for all accounts beneficially owned by U.S. persons, even if the accounts are held in the name of a foreign corporation, trust, foundation, or other entity.

The report also recommends that the IRS close what the report describes as a gap in the QI program by expressly requiring QIs to apply to their QI reporting obligations all information obtained through their know-your-customer procedures to identify the beneficial owners of accounts. The 2008 PSI Report claims that the rules of the QI program are distinct from the know-your-customer rules that apply for due diligence purposes under the internal laws of the country in which the QI is located, although a QI must apply such know-your-customer rules as a prerequisite for entering into the QI program. As a result, the 2008 PSI Report concludes, some QIs, including UBS, have apparently taken the position that information the QI acquires about a particular customer as a result of satisfying the QI's requirements under applicable know-your-customer rules does not necessarily affect the determination of that customer's status for purposes of the QI program. Thus, for example, the report states that such a QI may take the position that it can rely on a certification of non-U.S. status (technically a Form W-8BEN)

[85] Lynnley Browning, *U.S. Extends Its Inquiry of Offshore Tax Fraud*, N.Y. Times, Mar. 18, 2009, at B3.

proffered by a foreign nominee owner (e.g., a Liechtenstein foundation) to establish that the nominee in fact is the beneficial owner of an account for withholding and reporting purposes under the QI program, even if the QI knows, as a result of satisfying the applicable know-your-customer rules, that a U.S. person is the actual beneficial owner of the account.

The better reading of the model QI agreement is that the gap identified by the 2008 PSI Report does not in fact exist, although admittedly the model QI agreement might be revised to make the point more explicitly. Very simply, a QI is a "withholding agent" for all U.S. tax purposes. The QI agreement expands the obligations of withholding agents under the relevant Treasury regulations,[86] but does not override them. Under the regulations (and, indeed, under the model QI agreement itself[87]), a withholding agent may not accept a certification of non-U.S. status (a Form W-8BEN) if the withholding agent has *actual knowledge* that the beneficial owner of the relevant income (the taxpayer) is a U.S. person. There is no obvious basis for concluding that information obtained through know-your-customer rules is irrelevant for this purpose. Moreover, the relevant Treasury regulations also provide that a withholding agent effectively must compare a Form W-8BEN that it receives with other account information in its possession, and reject the Form W-8BEN if it is inconsistent with that information.[88]

As a result, a straightforward reading of the model QI agreement, in the context of the Treasury regulations under which the QI program exists, is that a foreign QI cannot accept a Form W-8BEN certification of non-U.S. status where it has actual knowledge (whether obtained through know-your-customer rules or otherwise) that the beneficial owner of the income in question is a U.S. person or where the certification is inconsistent with other account information. The gap, to the extent one exists, is with the consistent treatment of foreign corporations, in particular, as entities separate from their owners for both know-your-customer and withholding tax purposes, but this is a different (and larger) issue.

The 2008 PSI Report also recommends that the IRS broaden QI audits to require external auditors to report evidence of fraudulent or illegal activity.[89] The report also recommends that

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[86] Principally, Treasury Regulation sections 1.1441-1 and 1.1441-7.

[87] See Section 5.10 of the model QI agreement, as set forth in Rev. Proc. 2000-12, 2000-1 C.B. 387.

[88] Treasury Regulation section 1.1441-7(b)(4).

[89] A similar recommendation was made in a 2007 report prepared by the Government Accountability Office (the "GAO") on the QI program. The report generally found that the QI program provides some assurance that tax on U.S.-source income sent offshore is properly withheld and reported. However, the report offered four recommendations for the IRS to further improve the QI program. In addition to recommending that external auditors report fraud or illegal acts, the report recommended that the IRS: (1) measure U.S. withholding agents' reliance on self-certified documentation and use that data in its compliance efforts; (2) determine why some funds are reported to unknown jurisdictions and to unidentified recipients and take appropriate steps to recover withholding taxes that should have been paid and to better ensure that U.S. taxes are withheld; and (3) require electronic filing of forms in QI agreements whenever possible. Government Accountability Office, *Tax Compliance: Qualified*

the Treasury Department penalize banks located in tax haven jurisdictions that impede U.S. tax enforcement or fail to disclose accounts held directly or indirectly by U.S. clients by terminating their QI status. The report further recommends that Congress amend section 311 of the Patriot Act to allow the Treasury Department to bar such banks from doing business with U.S. financial institutions.

Potential modifications under IRS consideration

During 2008, the IRS announced that a series of potential modifications to the QI program to address certain of the issues raised by the PSI report and the UBS investigation. These modifications are described further below. The modifications do not, however, purport to address compliance and enforcement issues relating to bank secrecy laws. Section III of this pamphlet addresses that subject.

Announcement 2008-98

On October 14, 2008, the IRS released Announcement 2008-98, 2008-44 I.R.B. 1087, which describes proposed amendments to the QI agreement and to the QI audit guidance. The announcement contains three proposed changes, which are proposed to be effective for calendar years beginning after December 31, 2009. The first proposed change relates to internal controls; it requires a QI to ensure that specific employees are responsible for oversight of the QI's performance under the QI agreement, and that those employees take steps to prevent, deter, detect, and correct failures in performance. In addition, the QI agreement will be amended to require a QI to notify the IRS whenever the QI becomes aware of a material failure of internal controls relating to its performance under the QI agreement, any employee allegations of such failures, or any investigation by regulatory authorities of such failures. The IRS does not anticipate automatically terminating a QI agreement as a result of any such notice; instead, the IRS expects prompt notification to allow the IRS and the QI to work together to remedy such failures.

The second proposed change relates to additional fact finding during the basic fact finding phase (phase 1) of a QI audit to enable the IRS to evaluate risk. The QI audit guidance will be amended to add an audit procedure testing certain accounts for characteristics that suggest that a U.S. person has authority over the account. Such information will allow the IRS in the follow up fact finding phase (phase 2) of the audit process to evaluate the risk of any failure of controls and, if necessary, to request that the external auditor perform additional audit procedures.

Furthermore, the QI audit guidance will be amended to add additional procedures for fact gathering by the external auditor relating to the IRS's evaluation of the risk of a material failure of internal controls. These procedures will include, for instance, identifying the persons charged with oversight of performance under the QI agreement and the authority given them to prevent, deter, detect, and correct such failures on the part of other operational personnel. The external

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Intermediary Program Provides Some Assurance that Taxes on Foreign Investors Are Withheld and Reported, but Can Be Improved, GAO-08-99 (Dec. 19, 2007).

auditor will be required to report any facts and circumstances observed in the course of its audit that reasonably relate to the evaluation by the IRS of the risk of a material failure of internal controls.

The third proposed change relates to oversight and review of the QI audit. The QI audit guidance will be amended to require a QI's external auditor to associate a U.S. auditor with the audit and to require the U.S. auditor to accept joint responsibility for the performance of the procedures under the QI audit guidance. It is intended that joining a U.S. auditor to the QI audit will assure appropriate application of U.S. withholding rules and enhance accuracy and accountability in the audit process.

In addition to announcing the proposed changes, Announcement 2008-98 solicited public comments regarding the proposed changes. The government asked that such comments be submitted by February 28, 2009. Several comments were received. In general, the commenters objected to the proposed changes on the grounds that the commenters believed the proposed changes would impose additional costs and burdens on QIs with no, or only marginal, benefit to the IRS. Nevertheless, in a few instances, commenters offered specific technical suggestions in the event the IRS decides not to abandon completely the proposed changes. These suggestions generally were intended to make the proposed changes more understandable and consistent with the existing model QI agreement and QI audit guidance.

IRS Commissioner's testimony

The IRS Commissioner indicated in congressional testimony before the PSI in July 2008, and more recently before the PSI and Senate Committee on Finance in March 2009, that the IRS may make several modifications to the QI program intended to further improve its effectiveness in enhancing compliance.[90]

In particular, in his 2008 PSI testimony, the Commissioner indicated that the IRS was considering changing the regulations to require QIs to look through trusts or certain other offshore entities to determine if U.S. taxpayers are the beneficial owners of the accounts. Additionally the IRS may require external auditors that conduct the audits required under the QI agreements to report to the IRS indications of fraud or other illegal acts. Currently, there is no requirement for external auditors to make such reports to the IRS. The Commissioner indicated that the IRS was engaged in discussions with the major accounting firms that perform QI audits to identify ways to enhance the detection and reporting of violations of the QI agreement.

As recommended by the 2008 PSI Report, the Commissioner testified in July 2008, and again at both March 2009 hearings, that the IRS and Treasury are also considering regulations that would expand the QI program to require information reporting on additional sources of

[90] See Shulman 2008 Testimony, *supra*; Shulman 2009 SFC Testimony, *supra*; and Written Testimony of Douglas H. Shulman, Commissioner, Internal Revenue Service, Hearing on Tax Haven Banks and Offshore Compliance—Obtaining the Names of U.S. Clients with Swiss Accounts Before the Permanent Subcomm. on Investigations, S. Comm. on Homeland Sec. and Governmental Affairs, 111th Cong., Mar. 4, 2009 [hereinafter Shulman 2009 PSI Testimony].

income for accounts held by U.S. persons. This reporting could include foreign as well as U.S.-source income; QIs are currently required to report only certain U.S.-source income received by U.S. customers who are not otherwise exempt from information reporting and backup withholding.

The Commissioner's March testimonies also include two additional measures to enhance and strengthen the QI program that are currently under consideration by the IRS and Treasury. The first is to strengthen the QI documentation rules, and the second is to require withholding for accounts in cases in which documentation is considered insufficient. The Commissioner provided little detail on either of these measures.

Since the Commissioner's July 2008 testimony, IRS and Treasury Department officials have made several public statements indicating that proposed regulations to further improve the QI program may be forthcoming in the near future. Few details, other than the release of Announcement 2008-98, discussed above, about these proposed regulations are available. However, it is possible that these proposed regulations, whenever issued, may include some, or all, of the changes the Commissioner indicated are under consideration.

Voluntary disclosure procedures

On March 26, 2009, the IRS issued a statement, together with internal field guidance, announcing voluntary disclosure procedures that may be applied to individual taxpayers with unreported offshore accounts and entities. In return for engaging in this voluntary disclosure, these taxpayers can avoid criminal prosecution. In general, the guidance provides that taxpayers who make voluntary disclosures will be required to make all delinquent filings (e.g., FBAR and other information returns), pay back-taxes and interest for six years, and an accuracy or delinquency penalty for all six years. Additionally, such taxpayers will be required to pay a penalty equal to 20 percent of the highest asset value in any unreported bank account at any time during the six-year period. The penalty amount may be reduced to only five percent if the taxpayer did not open the account, there was no account activity while the taxpayer controlled the account, and all taxes have been paid on the account. The IRS's offer took effect March 23, 2009, and is available for only six months.[91]

[91] Kristen A. Parillo & Jeremiah Coder, *IRS Reduces Penalties on Voluntarily Disclosed Offshore Accounts*, 2009 Tax Notes Today 57-2.

III. BANK SECRECY

Introduction

In connection with the implementation of the QI program in 2000, the IRS issued Announcement 2000-48 describing the approach that it intended to take in determining whether financial institutions in a particular country would be permitted to become QIs. The Announcement describes the QI program as a "paradigm shift to greater self-regulation," and states that Treasury and IRS believe that it is appropriate to permit the self-regulation envisioned by the QI system only under circumstances in which Treasury and IRS have confidence that such self-regulation may be effective.

In that regard, Announcement 2000-48 indicated that the Treasury Department and the IRS considered restricting the QI program to institutions operating in jurisdictions with which the United States has a bilateral tax treaty or tax information exchange agreement. However, in response to taxpayer requests that the QI program permit financial institutions to act as QIs in all jurisdictions in which they do business, the IRS decided not to limit the program to institutions in treaty jurisdictions.

Instead, Treasury and the IRS determined that the key criterion for qualification of a jurisdiction as eligible for the QI program was the existence of "know-your-customer rules." Announcement 2000-48 described know-your-customer rules as "a vital component of adequate self-regulation" and states that the IRS generally will not extend the QI program to any country that does not have know-your-customer rules or that has unacceptable know-your-customer rules.[92] Thus, as described earlier, the IRS, in Rev. Proc. 2000-12, required that a financial institution applying to become a QI provide detailed information regarding the know-your-customer rules applicable in each jurisdiction in which the institution wished to act as a QI.

The IRS does not require that an institution applying to become a QI provide information regarding bank secrecy or other laws that could apply in a foreign jurisdiction to restrict disclosure of the institution's customers to the IRS or otherwise affect the IRS's ability to enforce the terms of the QI agreement. Instead, Announcement 2000-48 stated that the IRS expected to apply more rigorous oversight to financial institutions or their branches in jurisdictions that are tax havens or bank secrecy jurisdictions and show an unwillingness to cooperate with the United States to reform their practices relating to transparency and the provision of tax information.. In addition, the Announcement indicated that QIs should not assume that, merely because they have an agreement covering a business in a particular jurisdiction, such jurisdiction would not later be identified as a specified tax haven or secrecy jurisdiction. However, Announcement 2000-48 indicated that any enhanced audit requirements or stricter enforcement standards would be imposed only on agreements entered into or renewed after identification of the jurisdiction as a specified tax haven or secrecy jurisdiction.

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[92] However, the IRS will permit a branch of a financial institution located in such a country to act as a QI if the branch is part of an entity organized in a country that has acceptable know-your-customer rules and the entity agrees to apply its home country know-your-customer rules to the branch.

Announcement 2000-48 further stated that the IRS expected that it would agree to renew a QI agreement or, in the case of new agreements that become effective on or after January 1, 2004, enter a new agreement for QIs in a particular country only if the IRS receives a certification from the Treasury Department that the country has effective rules and/or procedures for providing tax information to the United States for both civil tax administration and criminal tax enforcement purposes (including, for example, under an income tax treaty or a tax information exchange agreement), or has taken significant steps towards achieving such effective provision of information. As described further below, the actions taken by the Treasury Department and IRS in connection with the execution of a TIEA with Liechtenstein are consistent with this approach.

Liechtenstein

On July 17, 2008, the PSI released a report (prepared in connection with a hearing held that day) examining the business practices of the Liechtenstein Global Trust Group ("LGT") in Liechtenstein and UBS in Switzerland, both of which are alleged to have facilitated tax evasion by U.S. clients of those institutions.[93] The report describes practices employed by LGT, a leading Liechtenstein financial institution that is alleged to have assisted U.S. clients in hiding assets offshore during the period from 1998 to 2007. According to the report, those practices included maintaining U.S. client accounts that were not disclosed to U.S. tax authorities; advising U.S. clients to open accounts in the name of Liechtenstein foundations to hide their beneficial ownership of the account assets; advising clients on the use of complex offshore structures to hide ownership of assets outside of Liechtenstein; and establishing "transfer corporations" to disguise asset transfers to and from LGT accounts. According to the report, LGT also advised clients on how to structure their investments to avoid disclosure to the IRS under the QI program.[94]

The LGT inquiry originated with an investigation by German authorities into the role of LGT in facilitating the evasion of German tax.[95] On February 25, 2008, the German authorities announced that they would share the information they had obtained in regard to LGT with authorities in other countries whose residents had utilized Liechtenstein to engage in tax evasion.[96] On February 26, 2008, the IRS issued a news release stating that it was initiating

[93] Tax Haven Banks and U.S. Tax Compliance, Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs of the U.S. Senate (July 17, 2008). The UBS matter is described in Section II of this document.

[94] The QI program is discussed in detail in Section II of this document.

[95] For additional background on this investigation, see Nicholas Kulish & Carter Dougherty, *Deutsche Post Chief Under Tax Inquiry*, N.Y. Times, Feb. 15, 2008, at C4; Randall Jackson, *The Mouse that Roared: Liechtenstein's Tax Mess*, 49 Tax Notes Int'l 707 (2008) [hereafter Jackson, *The Mouse that Roared*]; Mark Landler, *Liechtenstein Seeks Man Suspected of Selling Information that Led to Tax Scandal*, N.Y. Times, Mar. 13, 2008, at C3.

[96] Jackson, *The Mouse that Roared*, *supra.*

enforcement actions involving more than 100 U.S. taxpayers to ensure that they properly reported income, and paid taxes, in connection with accounts in Liechtenstein.[97] The news release also stated that the tax authorities in Australia, Canada, France, Italy, New Zealand, Sweden, the United Kingdom, and the United States were working together to address the use of Liechtenstein accounts for tax evasion purposes.

Both the PSI report and news accounts of the IRS and other investigations into the conduct of LGT suggest that Liechtenstein's favorable treatment of foundations, together with its bank secrecy laws, was important to LGT's ability to shield client assets from discovery by U.S. and other tax authorities.[98] In Liechtenstein, according to these accounts, foundations are effectively taxed at a very low rate,[99] are permitted to benefit their founders and their founders' families,[100] and are permitted to open bank accounts in their own names outside Liechtenstein (which provides foundation owners with ready access to cash outside Liechtenstein). Efforts to trace the owners or activities of nonpublic foundations are typically precluded by Liechtenstein's bank secrecy laws. Although these foundations function effectively as foreign trusts, the U.S. clients of LGT who established these foundations apparently did not file Forms 3520 (Annual Return to Report Transactions with Foreign Trusts and Receipt of Foreign Gifts) or 3520-A (Annual Information Return of Foreign Trust with a U.S. Owner), and LGT did not disclose the existence of bank accounts opened by these foundations (whether at LGT or other financial institutions) to the IRS. The U.S. clients typically did not file the FBAR form to disclose the existence of these accounts to the Treasury Department, apparently taking the position that only the nominal owner of the accounts were required to file.

On December 8, 2008, the U.S. signed a tax information exchange agreement ("TIEA") with Liechtenstein.[101] Under the terms of this agreement, the United States may seek information from Liechtenstein on all types of U.S. federal taxes, and in both civil and criminal tax matters, without regard to whether Liechtenstein needs the information for its own tax purposes or whether the conduct being investigated would constitute a crime under its laws. According to the terms of the TIEA, however, Liechtenstein must change its banking secrecy laws that prevent it from complying with the agreement. Specifically, Article 13 of the TIEA

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[97] News Release, Internal Revenue Service, IRS and Tax Treaty Partners Target Liechtenstein Accounts, IR-2008-26 (Feb. 26, 2008).

[98] See 2008 PSI Report at 36-37; Jackson, *The Mouse that Roared*, *supra.*

[99] Foundations are generally exempt from income taxes in Liechtenstein. However, they are subject to an annual capital tax, which is generally equal to the greater of 0.1 percent of the foundation's capital or CHF 1,000 (approximately U.S. $980). Other taxes may apply, including a stamp duty on formation (equal to no more than 1.0 percent of taxable capital) and a tax on the transfer of securities (equal to 0.15 percent for Liechtenstein securities and 0.30 percent for foreign securities).

[100] Liechtenstein does not tax distributions to beneficiaries residing outside Liechtenstein.

[101] Agreement Between the Government of the United States of America and the Government of the Principality of Liechtenstein on Tax Cooperation and the Exchange of Information Relating to Taxes.

states: "Legislation necessary to comply with and give effect to the terms of this Agreement shall be enacted by December 31, 2009, to the extent necessary."[102] As a result of Liechtenstein entering into this TIEA, the U.S. has agreed to extend Liechtenstein's treatment as an eligible QI jurisdiction until December 31, 2009; prior to this agreement, that status was set to expire on December 31, 2008.

[102] In this regard, the Liechtenstein government released a statement on March 12, 2009 that it "accepts the OECD standards on transparency and information exchange in tax matters and supports the international measures against noncompliance with tax laws." Andrew Ross Sorkin, *Liechtenstein Pledges Tax Openness*, N.Y. Times Deal Book, Mar. 12, 2009.

A. Bank Secrecy: General Background

The degrees of protection afforded financial information range from the relative transparency in the United States to the traditional opacity of jurisdictions such as Switzerland, Liechtenstein or the Cayman Islands. The term "bank secrecy" generally refers to a legal standard, whether judicial or statutory in origin, which prevents governmental access to the financial information necessary to ascertain beneficial ownership and enforce tax, securities and financial regulations. The limitations may apply only to certain entities operating within the jurisdiction or may apply only to the sharing of information with a foreign jurisdiction,[103] and are often reinforced by civil or criminal penalties.

The difficulties in piercing the "bank secrecy" of tax haven jurisdictions are related to the centuries-long tradition against one jurisdiction assisting another jurisdiction with collection of its taxes. This doctrine, known as the "Revenue Rule," is rooted in common law and sovereign immunity. It is often referred to as the Lord Mansfield Rule, who stated "For no country ever takes notice of the revenue laws of another."[104] Although its vitality and scope have been questioned, most recently in *Pasquatino v. United States*,[105] the doctrine remains a cornerstone of all common law jurisdictions, as well as many others, and is abrogated only by state-to -state negotiations, in the form of multilateral or bilateral international agreements or treaties.[106] Tensions arise when the confidentiality of the information sought is in conflict with the other state's interest in obtaining information relevant to law enforcement.

In the United States, rights to financial privacy are generally governed by statute, both in tax matters and other financial information, and protect one from public dissemination of information. The government's need to have access to financial information to assist it in detecting and preventing money-laundering led to enactment of the Bank Secrecy Act of 1970,[107] which requires U.S. financial institutions to maintain records and submit reports on certain cash or cash equivalent transactions. Since 1974, federal statute has established controls over how federal agencies gather, maintain and use personal information, including financial information.[108] The Right to Financial Privacy Act ensures that the government will not have access to information without service of a valid subpoena, consent of an account holder or as

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[103] "*Tax Co-operation: Towards a Level Playing Field*," 2008 Assessment by the Global Forum on Taxation, OECD, tabulates the numerous permutations by which information that is available to the host jurisdiction may or may not be shared with a requesting state.

[104] *Holman v. Johnson*, 98 Eng. Rep. 1120 (K.B. 1775), cited in *AG of Canada v. R.J. Reynolds Tobacco Holdings, Inc.,* 268 F.3d 103*, cert. denied,* 537 U.S. 1000 (2002).

[105] 544 U.S. 349; 125 S. Ct. 1766; 161 L. Ed. 2d 619 (2005)

[106] The United States has mutual assistance in collection agreements with five treaty partners, i.e., France, Canada, Sweden, Denmark, and the Netherlands.

[107] 31 U.S.C. Secs. 5311-5314e, 5316-5332e; 12 U.S.C. secs. 1829b and 1951-1959e.

[108] Privacy Act of 1974, 5 U.S.C. sec. 552a.

provided in the Code.[109] Further prohibitions on the disclosure of tax return information were enacted in 1976.[110]

Because the United States taxes its citizens and residents on their worldwide income,[111] it frequently needs foreign-based financial information to verify the accuracy of reporting by U.S. taxpayers. Obtaining that information requires a balancing of the U.S. interest in tax enforcement with the interests of the other state in maintaining confidentiality. In *Société Internationale v. Rogers*,[112] the Supreme Court articulated a basic rule of comity, holding unanimously that a United States district court could not ignore the interests of the foreign state in determining whether it would compel production of foreign based documents. Since then, courts balancing these conflicting U.S. and foreign interests[113] have tended to give greater weight to the United States' interests in cases involving money laundering or drug dealing, than in those involving tax compliance. Thus, in *U.S. v. Bank of Nova Scotia,* the court enforced a grand jury subpoena served in the United States for records maintained in the Cayman Islands, despite claims that the bank secrecy laws of that jurisdiction would not permit production.[114] In that case, the records were sought in connection with prosecution of money laundering and possible drug dealing.

By contrast, in cases in which the only U.S. law enforcement interest was tax compliance, results have been mixed. Although the Ninth Circuit Court of Appeals has enforced a grand jury

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[109] 12 U.S.C. 3402.

[110] I.R.C. sec. 6103;

[111] *Cook v. Tait,* 265 U.S. 47 (1924)

[112] 357 U.S. 197 (1958)

[113] The balancing test is summarized in the Restatement 3rd on Foreign Relations Law as follows: (a) A court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States; (b) failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including finding of contempt, dismissal of a claim or defense, or default judgment, or may lead to a determination that the facts to which the order was addressed are as asserted by the opposing party; and (c) in deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. Restatement 3d, Foreign Relations, sec. 441(1).

[114] 691 F2d 1384 (11th Cir.1982), *cert.* denied 462 U.S. 1119 (1983).

subpoena for Swiss business records in a tax fraud case,[115] the Seventh Circuit Court of Appeals refused to enforce IRS administrative summons for Greek bank records in a tax case.[116]

In balancing the conflicting interests of the U.S. and foreign interests, courts will examine whether there exists a reasonable alternative to obtaining the requested information.[117] Another alternative means of obtaining documents from a foreign jurisdiction is through negotiations between the states, usually in the context of an income tax treaty or a tax information exchange agreements. The information exchange procedures available under treaties are described in Section IV of this document. The remainder of this Section III describes the statutory and other unilateral measures available to the IRS under present law in connection with obtaining offshore information.

[115] *United States v. Vetco*, 691 F.2d 1281 (9th Cir.1981).

[116] *United States v. First National Bank of Chicago*, 699 F. 2d 341 (7th Cir. 1983).

[117] Restatement 3d, Foreign Relations, sec. 441(1)(c).

B. Unilateral Measures to Facilitate Production of Foreign-Based Documents

In response to the difficulties in compelling production of information across borders, a variety of statutory measures have been enacted to require greater voluntary disclosure, at the risk of incurring penalties or adverse findings. These include specific authority for the Tax Court to order foreign entities invoking its jurisdiction to provide all relevant information,[118] and a statutory exclusionary rule affecting admissibility of foreign based documents that had not been produced earlier in administrative or judicial proceedings.[119] Each is a valuable tool, but is limited to the situation in which an offshore transaction has been identified and selected for examination; they do not assist in identifying an offshore transaction. In the latter situation, the IRS can make use of its authority to issue so-called "John Doe" summons, although recent experience has shown that enforcement of these summonses can be particularly difficult when the information sought is located in jurisdictions with restrictive bank secrecy laws.

1. Section 7456(b)

Any party who initiates proceedings in the United States Tax Court may be subject to an order compelling production of offshore materials that are subject to that party's control. The term control is not limited to legal control. If the party establishes to the Court's satisfaction that it is unable to produce the materials in court, it may be ordered to make the documents available for inspection wherever situated. Although the Tax Court has attempted to rely on this provision to order production of materials, despite local law prohibitions against disclosure, it has met with limited success. The orders requiring production have been used to enforce government requests for documents as well as interrogatories,[120] and may require that the party appear personally at hearings or proceedings. The sanctions for failure to comply may include entry of a default judgment, striking pleadings, or adverse findings as to the issues to which the documents relate.

2. Section 982 exclusionary rules

In 1984, Congress enacted section 982, which limits the evidentiary value of foreign-based information by barring its admissibility in a civil proceeding if it was not timely produced to the IRS in response to a formal request for foreign based documents. The provision permits a defense of reasonable cause for non-production, but specifically precludes a defense that foreign law prohibits disclosure of such information.[121] The exclusionary rule has been upheld,[122] and is useful in prompting compliance with requests for information that are otherwise difficult to enforce. Nevertheless, the exclusion is only of value in denying a taxpayer's ability to use the

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[118] Sec. 7465(b)

[119] Sec. 982

[120] *Gerling International Insurance Co. v. Commissioner,* 839 F. 2d 131 (3rd Cir. 1988); *Hong Kong Shanghai Banking Corporation v. Commissioner,* 85 T.C. (1985)

[121] Sec. 982(b)(2).

[122] *Flying Tigers Oil Co. v. Commissioner,* 92 T.C. 1261 (1989).

information in defense of its own position. It does not compel a taxpayer to produce information in its possession that would be adverse to its position or that would help the IRS develop and support an issue identified in an examination.

3. John Doe summonses

The IRS has broad statutory authority to require production of information in the course of an examination.[123] A request for information in the form of an administrative summons is enforceable if the IRS establishes its good faith, as evidenced by the four factors enunciated by the Supreme Court in *United States v. Powell*.[124] The *Powell* factors require that the information is sought for a legitimate law enforcement purpose, is of a type that will shed light on the subject of the examination, is not already in the possession of the IRS and that the IRS has complied with all applicable statutory requirements such as service of process. Subsequent to *United States v. Powell,* the legitimacy of using an administrative summons in furtherance of an investigation into criminal violations was validated in *United States v. LaSalle National Bank,*[125] in which the Supreme Court determined that the dual civil and criminal purpose was legitimate, so long as there had not yet been a commitment to refer the case for prosecution.

The use of this summons authority to obtain information from third-parties is subject to greater procedural safeguards,[126] but otherwise the same good faith elements are analyzed to determine whether the summons should be enforced. When the existence of a possibly non-compliant taxpayer is known but not his identity, as in the case of holders of offshore bank accounts, or investors in particular abusive transactions, the IRS is able to issue a summons to learn the identity of the taxpayer, but must first meet significantly greater statutory requirements, to guard against fishing expeditions.

An effort to learn the identity of unnamed "John Does" requires that the United States seek judicial review in an *ex parte* proceeding prior to issuance of the summons. In its application and supporting documents,[127] the United States must establish that the information sought pertains to an ascertainable group of persons, that there is a reasonable basis to believe that taxes have been avoided, and that the information is not otherwise available.[128] The reviewing court does not determine whether the summons will ultimately be enforceable. Once a court has determined that the predicate for issuance of a summons is met, the summons is served, and the summoned party served may challenge enforcement of the summons, based on the

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[123] Sec. 7602.

[124] *United States v. Powell*, 379 U.S. 48 (1964).

[125] 437 U.S. 298 (1978); codified in section 7609(c)

[126] Sec. 7609.

[127] Sec. 7609(h)(2) provides that the determination will be made *ex parte,* solely on the pleadings.

[128] Sec. 7609(f).

Powell factors. It is not entitled to judicial review of the ex parte ruling that permitted issuance of the summons.[129]

If a taxpayer whose liability is the subject of the summons either initiates or intervenes in a proceeding to challenge the enforcement of the summons, the limitations period for the tax year under investigation is suspended during the pendency of the proceeding.[130] The taxpayer whose identity is at issue in a John Doe summons would not initiate or intervene in a proceeding, and may not know of the proceeding. Nevertheless, enforcement of a John Doe summons is likely to be subject to time-consuming challenges, possibly warranting an extension of the limitations period.

Under current law, the limitations period for the tax year under investigation is suspended beginning six months after the service of a John Does summons, and ends with the final resolution of the response to the summons.[131] The chronology of the UBS investigation (described previously in Section II) illustrates the time-consuming nature of the process. The basis for requiring six months to elapse between service of the summons, after a court has found that there is a likelihood of non-compliance by an ascertainable group of taxpayers, is less apparent.

Offshore Credit Card Program

The Offshore Credit Card Program ("OCCP"), initiated by the IRS in 2000, illustrates the type of situation in which the IRS has sought to use John Doe summonses. The OCCP was designed to identify taxpayers who hide unreported income in offshore bank accounts and access the funds through credits cards issued by those banks. Between 2000 and 2002, the IRS issued a series of "John Doe" summonses to a variety of financial and commercial businesses to obtain information and records relating to U.S. residents who held credit, debit, or other payment cards issued by offshore banks. The IRS used the information and records obtained through those efforts to trace the identities of people using the payment cards.[132] As of July 31, 2003, the OCCP had resulted in approximately 2,800 tax returns being selected for audit, a number of which had been referred to the Criminal Investigation Division for possible action.[133] Subsequently, in January 2003, the IRS announced the Offshore Voluntary Compliance Initiative

[129] *United States v. Samuels, Kramer & Co., and First Western Government Securities, Inc.*, 712 F.2d 1342 (9th Cir. 1983), which affirmed a lower court determination that the issuance of the John Doe summons was not subject to review, but reversed and remanded to permit a limited evidentiary hearing on whether the *Powell* standard was met.

[130] Sec. 7609(e)(1).

[131] Sec. 7609(e)(2).

[132] News Release, Internal Revenue Service, IR-2003-95 (July 31, 2003); General Accounting Office, *Internal Revenue Service: Challenges Remain in Combating Abusive Tax Schemes*, GAO-04-50, at 10-11 (Nov. 19, 2003) [hereafter GAO, *Challenges Remain*].

[133] News Release, Internal Revenue Service, IR-2003-95 (July 31, 2003).

("OVCI") to encourage the voluntary disclosure of previously unreported income placed by taxpayers in offshore accounts and accessed through credit card or other financial arrangements similar to those targeted by the OCCP. Under this program, the IRS waived the civil fraud penalty and certain penalties relating to failure to file information and other returns, including the Report of Foreign Bank and Financial Accounts ("FBAR"),[134] but taxpayers remained liable for back taxes, interest, and certain accuracy-related and delinquency penalties.[135] The IRS reported that, as of July 31, 2003, it had received OVCI applications from 1,299 taxpayers who paid over $75 million in taxes and identified over 400 offshore promoters of abusive credit card or other financial arrangements.[136] Then IRS Commissioner Mark Everson discussed the limited success of the OVCI initiative at a PSI hearing on August 1, 2006. Within his testimony, he stated "In reality, we did not have a good idea of the potential universe of individuals covered by this initiative. As a result, the incentive for taxpayers to come forward and take advantage of this initiative was diminished due to the fact that we did not have the ability to identify immediately and begin examinations for all non-participating individuals."[137]

[134] News Release, Internal Revenue Service, IR-2003-48 (April 10, 2003). Taxpayers wishing to participate in the OVCI program were required to apply before April 15, 2003. The FBAR reporting requirements are discussed in Section II of this document.

[135] Rev. Proc. 2003-11, 2003-1 C.B. 311; News Release, Internal Revenue Service, IR-2003-5 (Jan. 14, 2003); GAO, *Challenges Remain*, *supra*, at 12; General Accounting Office, *Testimony of Michael Brostek Before the Committee on Finance, U.S. Senate: Taxpayer Information: Data Sharing and Analysis May Enhance Tax Compliance and Improve Immigration Eligibility Decisions*, GAO-04-972T (Nov. 19, 2003).

[136] News Release, Internal Revenue Service, IR-2003-95 (July 31, 2003).

[137] Written Testimony of Commissioner of Internal Revenue Mark Everson Before Senate Committee on Homeland Security and Governmental Affairs' Permanent Subcommittee on Investigations Hearing on Offshore Abuses: The Enablers, The Tools and Offshore Secrecy, 109th Cong., August 1, 2006.

IV. ADDRESSING CONFLICTING INTERESTS: EXCHANGE OF INFORMATION UNDER TAX TREATIES

Tax treaties establish the scope of information that can be exchanged between treaty parties. Exchange of information provisions first appeared in the late 1930s,[138] and are included in most[139] current double tax conventions to which the United States is a party. More recently, the United States started executing specific, separate tax information exchange agreements ("TIEAs"). Presently, the United States is a party to more than 80 double tax conventions and TIEAs that provide for the exchange of information upon request, and is in negotiations for several additional agreements. In addition, the United States is a member of the Convention on Mutual Administrative Assistance in Tax Matters, which includes provisions on the exchange of tax information.

Model double tax conventions adopted by the United States and the Organization for Economic Co-operation and Development (the "OECD") each include exchange of information provisions. While the OECD has adopted a model TIEA, the model presently being used by the United States Treasury Department is not publicly available.

[138] The United States' first double tax convention was entered into in 1932 with France; it did not contain an exchange of information provision. Article XV of the U.S.-Sweden Double Tax Convention, signed on March 23, 1939, included the United States' first the exchange of information provision. This was followed shortly by a second double tax convention with France, signed on July 25, 1939, which provided for the exchange of information in Article 26.

[139] The 1973 income tax treaty between the USSR and the United States does not have an exchange of information provision. It still applies to the countries of Armenia, Azerbaijan, Belarus, Georgia, Kirgizstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.

A. Exchange of Information Under Double Tax Conventions

1. U.S. Model Agreement

Article 26 of the 2006 United States Model Income Tax Convention (the "U.S. Model") establishes (in paragraph 1) the obligation of each State to obtain and provide information to the other and provides assurances (in paragraph 2) that information exchanged will be treated as secret in accordance with the same disclosure restraints as information obtained under the laws of the requesting State.

Paragraph 3 of Article 26 provides that the obligation to exchange information does not require either State to: (a) carry out administrative measures that are at variance with the laws or administrative practices of either State; (b) supply information not obtainable under the laws or administrative practice of either State; or, (c) disclose trade secrets or other information where the disclosure of such information would be contrary to public policy. Paragraph 4 of Article 26 provides that when information is requested by one State, the requested State is obligated to obtain the requested information as if the tax in question were the tax of the requested State, even if the requested State has no direct tax interest in the case to which the request relates.

Paragraph 5 provides that a requested State may not decline to provide information because that information is held by financial institutions, nominees or persons acting in an agency or fiduciary capacity. This provision effectively prevents a requested State from relying on paragraph 3 to argue that its domestic bank secrecy laws override the obligation to exchange information.

Paragraph 6 of the 2006 U.S. Model provides the form in which information is to be provided in order to ensure that the information exchanged may be introduced in judicial proceedings held in the requesting State.

Paragraph 7 of the 2006 U.S. Model provides for assistance in the collection of taxes to the extent necessary to ensure that only those persons entitled to treaty benefits actually enjoy such treaty benefits.

Paragraph 8 of the 2006 U.S. Model provides that the requested State shall allow representatives of the requesting State to enter the requested State for purposes of interviewing witnesses and examining books and records. However, such access is granted only with the consent of the person subject to examination.

Paragraph 9 of the 2006 U.S. Model provides that the competent authorities of each State may further agree to the details for the exchange of information under Article 26. Although not expressly stated, this paragraph is interpreted as authorizing the exchange of information on a routine basis, upon request with respect to a specific case, or spontaneously. In this context, a routine exchange of information covers income subject to withholding tax. A spontaneous exchange of information occurs when information discovered during a tax examination indicates possible noncompliance with the laws of the other State is delivered to the other State even thought there is no previous request.

2. OECD Model Agreement

The information exchange provisions in the OECD Model Tax Convention on Income and Capital, approved on July 17, 2008 (the "OECD Model") generally correspond to the first five paragraphs of the 2006 U.S. Model.[140] At the time the OECD Model was approved, several member countries expressly reserved with respect to paragraph 5 of Article 26 (prohibiting a requested State from declining to supply information because that information is held by a bank, other financial institution, nominee or person acting in an agency or fiduciary capacity, or because it relates to ownership interests in a person). These members were Austria, Switzerland, Luxembourg and Belgium, all of which have bank secrecy laws. Notably, each of these countries has recently announced its intention to adopt OECD standards for the exchange of tax information and transparency in order to avoid being placed on a potential new G-20 blacklist of uncooperative tax havens.[141]

3. Recent developments

Shortly after the adoption the 2006 U.S. Model, the United States executed a double tax convention with Belgium in which the exchange of information provision exceeded the scope of the 2006 U.S. Model (the "Belgium Treaty").[142] Historically, Belgium's bank secrecy rules prevented Belgian banks from providing information about their clients to tax authorities. Earlier negotiations between the United States and Belgium were abandoned because Belgium refused to make any concessions with respect to its bank secrecy rules.[143] The Belgium Treaty, which entered into force on December 28, 2007, included three innovative provisions related to the exchange of information which link continuity of certain treaty benefits to changes in Belgium's laws, including banking secrecy laws:

- The zero rate of withholding applicable to dividends under Article 10, paragraph 12(a)(i) (Dividends) will be discontinued after five years unless the Secretary certifies

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[140] Paragraph 1 of the OECD Model provides, however, for the exchange of information imposed on behalf of each respective State, or "of their political subdivisions or local authorities." In contrast, the U.S. Model is silent with respect to taxes imposed by political subdivisions and local authorities and the technical explanation specifically states that the Article 26 applies with respect to "taxes of every kind applied at the national level." The OECD Model does not incorporate paragraphs 6 through 9 (described above) of the U.S. Model.

[141] Randall Jackson, Kristen A. Parillo and David D. Stewart, *Tax Havens Agree to OECD Standards*, 53 Tax Notes Int'l 1027 (2009) [hereinafter, Tax Havens Agree].

[142] The U.S. Model was adopted on November 15, 2006. The Convention Between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income was signed on November 26, 2006.

[143] Marc Quaghebeur, *Belgium Uses Tax Treaties to Attract Investment*, 45 Tax Notes Int'l 1055, 1055 (March 19, 2007).

to the U.S. Senate that Belgium has satisfactorily met its obligations under Article 25 (Exchange of Information and Administrative Assistance);

- The zero rate of withholding applicable to dividends under Article 10, paragraph 12(a)(ii) (Dividends) may be discontinued if the United States gives written notice by June 30 of any year. However, such notice may not be given unless the United States has determined that Belgium's actions with respect to Articles 24 (Mutual Agreement Procedure) and 25 (Exchange of Information and Administrative Assistance) have materially altered the balance of benefits of the double tax treaty; and,
- The inclusion of paragraphs 5 through 8 (which, with the exception of the first sentence in paragraph 5, are not part of the 2006 US Model)[144] establish Belgium's obligations to change its tax legislation, as implied by the zero withholding rate provisions of Article 10, paragraph 12 (Dividends).[145]

However, paragraph 7 of the Protocol to the Belgium Treaty specifically provides that (a) banking records will only be exchanged upon request and (b) the requested State may decline to provide information that it does not already possess unless the request identifies both a specific taxpayer and a specific bank or financial institution. This effectively precludes the United States from learning the identity of U.S. taxpayers with Belgian interests under the Belgium Treaty. Instead, the United States would be required to rely on its domestic authority to issue a John Doe summons (discussed above in Part III).

[144] The provisions of paragraph 6 appear to correspond to commentary included in the technical explanation of the 2006 U.S. Model regarding the statute of limitations.

[145] Marc Quaghebeur, *Belgian Parliament Ratifies Belgium-US Tax Treaty*, 46 Tax Notes Int'l 768, 776 (May 21, 2007).

B. TIEAs

TIEAs are bilateral agreements governing the mutual exchange of information. Typically these agreements are executed with countries with which the United States does not have a double tax convention. The agreement with Liechtenstein, signed on December 8, 2008, is the United States' most recent TIEA.

Enactment of the Caribbean Basin Economic Recovery Act[146] (the "Act") in 1983 provided the initial catalyst for so-called tax haven countries to conclude TIEAs with the United States. Commonly referred to as the Caribbean Basin Initiative ("CBI"), Title II of the Act authorized unilateral preferential trade and tax benefits for eligible Caribbean countries,[147] including duty-free treatment of eligible products, if the country entered into a TIEA with the United States.[148] Subsequently, in 1984[149] and 1986,[150] additional incentives were enacted; the 1984 provisions were designed to encourage non-CBI countries to execute TIEAs with the United States. TIEAs are entered into by Treasury, without the advice and consent of the Senate, upon the determination by the President that the agreement as negotiated is in the national security interest of the United States.[151]

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[146] P.L. No. 98-67.

[147] See sec. 212(a)(1)(A) of the Act for the list of eligible countries. The list is updated by Rev. Rul. 2007-28, 2007-1 C.B. 1039.

[148] Alternatively, eligible CBI countries could qualify based on a double tax convention with the United States that contained an effective exchange of information program. Section 927(e)(3)(B).

[149] Pursuant to the Deficit Reduction Act, P. L. No. 98-369, a foreign sales corporation established under section 927 could be organized in any foreign country (not just CBI eligible countries) provided that the country had concluded either a TIEA or a double tax convention with the United States meeting the requirements of section 274(h)(6)(A). Section 927(e)(3) (repealed for transactions after 9/30/2000 by P.L. 105-519); Treas. Reg. secs. 1.921-2(d) (A-7, part (i)) and 1.922-1(e) (A-5, part (ii)).

[150] The Tax Reform Act of 1986, P.L. 99-514, added another incentive for eligible CBI countries by treating certain income derived from investments in that country as qualified possessions source investment income for purposes of the section 936 credit (allowing possession corporations a tax credit for U.S. taxes imposed on income earned by such corporations), provided that the eligible CBI country had concluded either a TIEA or a double tax convention with the United States meeting the requirements of section 274(h)(6)(A). Section 936(d)(4), flush language (repealed in 1996 by the Small Business Job Protection Act, P.L. 104-188, which provided for the 10-year phase out of the credit in section 936(j)).

[151] Section 274(h)(3)(C); See also, *Barquero vs. United States*, 18 F.3d 1311, 1314-1315 (5th Cir. 1994); and *Treaties and Other International Agreements: the Role of the United States Senate, A Study Prepared for the Committee on Foreign Relations, United States Senate,* Congressional Research Service, Library of Congress (January, 2001), S. Prt. 106-71.

1. U.S. TIEA Program

Initiated in 1984, the goals of the U.S. tax information exchange program are (a) assuring the accurate assessment and collection of taxes, (b) preventing fiscal fraud and tax evasion, and (c) developing improved information sources for tax matters in general. With respect to the United States, taxes covered are limited to national taxes, such that state and local taxes are not covered. The objectives of the TIEA include the prosecution of tax crimes, as well as the pursuit of civil tax claims. A State must have adequate process for obtaining information; if the State is required to enact measures providing such process, then the entry into force of the TIEA may be delayed until such requirements have been met. The requirements of the TIEA override individual State's laws and practices pertaining to disclosure of information regarding taxes, although this provision may be eliminated from a TIEA if the internal laws of the other State do not allow for bank secrecy or undisclosed (bearer) ownership of securities or shares.

2. OECD Model TIEA

In 2002, the OECD released its Agreement on Exchange of Information on Tax Matters (the "OECD Model TIEA"), together with commentary (the "Commentary"). The OECD Model TIEA was developed by the OECD Global Forum Working Group on Effective Exchange of Information, which consisted of representatives from OECD Member countries as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino.[152] It is represents the standard of the effective exchange of information for purposes of the OECD's initiative on harmful tax practices,[153] while at the same time does not seek to prescribe the precise format for achieving this standard.[154]

Article 5 (Exchange of Information Upon Request) of the OECD Model TIEA sets forth the requirements for exchanging information upon request; notably, there are no provisions for automatic and spontaneous exchanges of information. In addition, it provides that information requested with respect to a criminal matter must be exchange without regard to whether the conduct under investigation would constitute a crime under the laws of the requested State.[155] Paragraph 4 of Article 5 is intended to prohibit banks, other financial institutions and any person acting in an agency or fiduciary capacity, including nominees and trustees from claiming the right of privilege as the basis for declining an information request - unless the provisions of Article 7 (Possibility of Declining a Request) apply. This paragraph also effectively prevents any claim that bank secrecy should be considered protected as a matter of public policy (*ordre*

[152] OECD Model TIEA, Introduction, paragraph 2.

[153] OECD Model TIEA, Introduction, paragraph 3.

[154] OECD Model TIEA, Introduction, paragraph 6.

[155] Commentary to OECD Model TIEA, Article 5, paragraph 1, at (¶39-40).

public) for purposes of Article 7[156] − which as noted in the Commentary, should only be invoked in extreme cases, such as an information request motivated by political or racial persecution.[157]

3. Recent developments

The most recent TIEA completed by the United States is with Liechtenstein (the "Liechtenstein TIEA"). Signed on December 8, 2008, the Liechtenstein TIEA requires each State to provide information that is foreseeably relevant to either a civil or criminal tax matter.[158] Although Liechtenstein has publicly stated that it still retains the right for a Liechtenstein court to decide the legitimacy of the request from the United States,[159] there are no unique terms in the Liechtenstein TIEA that provide for any extraordinary review beyond the "foreseeably relevant" standard.

The Liechtenstein TIEA requires that any changes or additions to domestic laws as may be necessary to give effect to the agreement must be enacted by December 31, 2009.[160] Accordingly, the Liechtenstein TIEA is not effective until each State has notified the other that it has completed the necessary internal procedures (including enacted of legislation) required for entry into force.[161] Although there is no publicly-available list of the changes that must be made to the Liechtenstein laws for this purpose, some commentators have noted that bank secrecy laws must be changed in order to give effect to the Liechtenstein TIEA. This conclusion may be consistent with public statements by Treasury, which has said that the Liechtenstein TIEA is significant because it "pierces bank secrecy."[162]

In concluding the Liechtenstein TIEA, the United States took the additional step of agreeing to a one-year extension of Liechtenstein's eligibility as a QI jurisdiction, until December 31, 2009.[163] The IRS will not enter into a QI agreement if it has not received a specified list of items regarding the know-your-customer practices and procedures in the

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[156] Commentary to OECD Model TIEA, Article 5, paragraph 4, at (¶46).

[157] Commentary to OECD Model TIEA, Article 7, paragraph 4, at (¶91).

[158] Agreement Between the Government of the United States of America and the Government of the Principality of Liechtenstein on Tax Cooperation and the Exchange of Information Relating to Taxes, Article 1 [hereinafter, Lichtenstein TIEA].

[159] Press Release, December 8, 2009, http://www.presseportal.ch/de/pm/100000148/100574800/presse_informationsamt_liechtenstein?pre=1

[160] Lichtenstein TIEA, Article 13.

[161] Lichtenstein TIEA, Article 15.

[162] Charles Gnaedinger, *Liechtenstein, U.S. Sign Tax Information Exchange Agreement*, Tax Notes Today, December 9, 2008, citing Jesse Eggert, an attorney-adviser at the Treasury Department.

[163] Protocol to the Liechtenstein TIEA, set forth in the Appendix, paragraph 10.

jurisdiction in which the applicant is seeking QI status.[164] In this regard, the IRS publishes a list of those countries with approved know-your-customer rules; as of the last update on December 8, 2008, Liechtenstein was included on this list.[165] However, ongoing inclusion in this list is not guaranteed, and the IRS has publicly stated that QIs "should not assume that, because they have an agreement covering a business in a particular jurisdiction, such jurisdiction will not later be identified as a specified tax haven or secrecy jurisdiction."[166] For this purpose, a "specified tax haven or secrecy jurisdiction" is a jurisdiction that shows an unwillingness to cooperate with the United States to reform their practices related to transparency and the provision of tax information.[167] Thus, this temporary QI extension raises the question whether Liechtenstein may have been at risk of being identified as a specified tax haven or secrecy jurisdiction and delisted as an approved QI jurisdiction. Similarly, it raises the question whether a direct correlation should be inferred from the fact that the temporary extension ends on the same date by which Liechtenstein is required to make the necessary changes to its in domestic law by December 31, 2009 in accordance with Article 13 (Implementing Legislation).

On March 12, 2009, Liechtenstein announced that it intends comply with the OECD standards on transparency and exchange of information,[168]and to negotiate new bilateral agreements "that may go beyond OECD standards so as to provide particularly for effective exchange of information to address the global issue of tax fraud and tax evasion as well as double taxation."[169] The announcement further states that Liechtenstein is prepared "to develop comprehensive solutions to protect the legitimate tax claims of other jurisdictions according to their fiscal sovereignty and to balance legitimate interests of jurisdictions" albeit while maintaining "solid and modern bank secrecy laws."[170]

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[164] Rev. Proc. 2000-12, 2000-1 C.B. 387, at Section 3.02.

[165] See *http://www.irs.gov/businesses/international/article/0,,id=96618,00.html*.

[166] I RS Announcement 2000-48, 2000-1 C.B. 1243.

[167] Id.

[168] See *infra* Section IV.E.1.

[169] The Liechtenstein Declaration, March 12, 2009, *http://www.oecd.org/dataoecd/27/21/42340216.pdf.*

[170] Id.

C. Convention on Mutual Administrative Assistance in Tax Matters

In addition to double tax conventions and TIEAs, the Convention on Mutual Administrative Assistance in Tax Matters provides the United States with mechanisms to ensure the exchange of tax information. This multilateral treaty entered into force in 1995 and the following States are also members: Azerbaijan, Belgium, Denmark, Finland, France, Iceland, Italy, Netherlands, Norway, Poland, Sweden, and the United Kingdom.[171] Germany has signed, but not ratified, this agreement. Ukraine has signed and ratified this agreement.

[171] The United States reserved as to several articles in that treaty, including the provisions that would require collection assistance.

D. Administration of U.S. Treaty Network

In order to administer its obligations under the network of bilateral treaties, the United States has delegated the role of Competent Authority for the treaties to the IRS. The Competent Authority is responsible for resolving disputes with the other contracting state about the scope or interpretation of the treaty. With respect to exchange of information articles, the Competent Authority determines whether the agency should present a request for information to a treaty partner as well as how to respond to any requests that it receives from the treaty partner. All information exchanged flows through the offices of the Competent Authorities,[172] and is safeguarded by the domestic laws of each state as well as the secrecy clause in the exchange of information article. In the United States, the taxpayer specific information received from a treaty partner is within the scope of 'return information' for purposes of protecting it from disclosure. Nonspecific information received from a partner is also protected from publication if its disclosure would harm tax administration, as determined by the Competent Authority in consultation with his counterpart.[173] Since the entry into force of the first treaty to include an exchange of information article, the United States has exchanged information with its partners in a variety of ways.[174] The principal types of information exchanges are generally referred to as routine, spontaneous or specific exchanges. In addition, there are industry-wide exchanges with certain treaty partners, and simultaneous examinations or criminal investigations with other partners.

1. Routine exchange of information

A "routine exchange of information" is one in which the contracting states have agreed that a category of information will be shared with one another on an ongoing basis, without the need for a specific request for same, because it is of a type that is consistently relevant to the tax administration of the receiving jurisdiction. Information that is automatically shared under this authority may include information that is not taxpayer specific, such as news about changes in domestic tax legislation, or it may be comprise voluminous taxpayer filings, such as magnetic disks containing the information from Forms 1042-S, relating to U.S. source fixed or determinable income paid to persons claiming to be residents of the receiving treaty country. The type of information, when it will be provided and how frequently, are typically determined by the respective Competent Authorities after consultation. The information will then be

[172] In the United States, the requests are initially received by Tax Attaches, or, in the case of France or Canada, the Exchange of Information Team program analysts in Washington. I.R.M. par. 4.60.1.1(6)(b).

[173] Sec. 6105.

[174] In calendar year 2007, the United States made 1,429,499 disclosures of information to foreign countries under the exchange of information program. See Joint Committee on Taxation, Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 2007(JCX-47-08), June 3, 2008, at 3.

automatically provided. OECD has developed standards for the electronic format of such exchanges, to enhance their utility to tax administration.[175]

The international steps taken to standardize the information exchanged and improve its usefulness are a positive development, but there remain numerous shortcomings, both practical and legal, in the routine exchange of information. Chief among them is the failure to include taxpayer identification numbers ("TINs"), despite the strong recommendation of the OECD that member states provide such information.[176] Ideally, the information received by the IRS should either include a TIN or be subject to a process referred to as "TIN perfection" to enable the IRS to correlate account data in the information received with a valid TIN in its taxpayer databases.[177] Such an undertaking is time-consuming and costly. Other practical hurdles that limit its value are the lack of timeliness of its production, the fact that the data may not readily conform to U.S. taxable periods, the need to translate the language of the documents and the currencies, and its voluminous nature.[178]

These practical limitations are further exacerbated by the legal barriers to using the information to pursue FBAR penalties. The treaty information may only be used for a purpose consistent with the treaty. The FBAR penalties arise under Title 31 of the United States Code and are not generally within the scope of the taxes covered by the tax treaties. As a result, the treaty secrecy clause prevents sharing the information with those who investigate FBAR penalties. If foreign account information received under the treaty can be associated with a specific taxpayer's income tax accounts, it becomes tax return information, subject to the provisions of section 6103. Under section 6103, the information may be disclosed for "tax administration" purposes, as determined on a case-by-case basis. Even if the penalties are covered by the treaty, domestic legislation could prevent use of the information. Despite the likelihood that the information would readily establish the applicability of the penalties, it cannot be used for that purpose. In the face of competing priorities, it is not surprising that the IRS has made little use of the information. An adequate cost/benefit study of various means of strategically using the information is needed.

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[175] See Module 3 of "Manual On The Implementation of Exchange of Information Provisions for Tax Purposes", OECD Committee on Fiscal Affairs (23 January 2006).

[176] *OECD Recommendation on the use of Tax Identification Numbers in an International Context* [C(97)29/FINAL], recommends at Article 4: "The information referred to in Article 2 of this Memorandum shall, as much as possible, be provided in a magnetic or electronic format following the Recommendation of the Council on the Use of the Revised OECD Standard Magnetic Format for Automatic Exchange of Information [C(97)30/FINAL] or any further updated format recommended by the Council. This information shall include, as much as possible, the Tax Identification Numbers in the residence and source country of the non-resident recipients of income[.]"

[177] *Letter from Commissioner, IRS to Chairman, Senate Finance Committee* (June 12, 2006), 2006 TNT 115-17.

[178] Id.

2. Spontaneous exchange of information

A "spontaneous exchange of information" occurs when one contracting state is in possession of an item of information that it determines may be of interest to the other contracting state for the tax administration of that other state. In such an instance, the first state will spontaneously provide the information to the treaty partner. In the United States, such information would typically be identified by a revenue agent or other employee, who would forward the information to the U.S. Competent Authority offices to decide whether the information should be forwarded to the foreign jurisdiction. Information spontaneously provided by a treaty partner to the United States is generally reviewed by the Exchange of Information program analyst or Tax Attache who first receives it, who then forwards it to an appropriate field office for further action and follows up to determine the outcome of the exchange.

3. Specific exchange of information

A "specific exchange" is a formal request by one contracting state for information that is relevant to an ongoing investigation of a particular tax matter. These cases are generally taxpayer specific. Those familiar with the case prepare a request that explains the background of the tax case and the need for the information. That request is forwarded to the Competent Authority, who determines whether to issue the request. If he determines that it is an appropriate use of the treaty authority, he forwards it to his counterpart. When a contracting state receives a specific request for information, it is obligated to use its powers to obtain the information to the same extent that it would do so if it were a domestic case, even if the information obtained could not be used in a domestic case.

4. Other exchanges of information

In addition to the traditional exchanges of information described above, the treaty partners may also work together to gain expertise about specific industries and to facilitate sharing of information when there is a common interest in the information. In those instances, they may arrange a meeting of agents or officials familiar with a particular industry or economic sector to share experiences, know-how, investigative techniques, and observations about trends in that industry. These discussions do not generally address the cases of specific taxpayers. The United States has also joined in the multilateral effort to form the Joint International Tax Shelter Information Centre, in 2004. It now operates with offices in Washington, D.C., and London, England. In addition to the United States, the members are Australia, Japan, the United Kingdom and Canada. Each has a bilateral treaty with each other member. If there is sufficient commonality in an issue or a specific taxpayer, there are procedures to conduct a simultaneous examination which will involve significant cooperation between the participating tax administrations. Both the industry wide meetings and the simultaneous examinations occur under the auspices of the exchange of information program; they are not in lieu of formal exchanges. They establish a process by which extensive exchanges of information can occur, with the assistance of an Exchange of Information analyst or Tax Attache.

In addition to exchanging information with its treaty partners, assistance is provided under the mutual assistance article in the tax treaties. The United States has specifically agreed to provide mutual assistance in collection of the taxes of five treaty partners: France, Canada,

Sweden, Denmark, and the Netherlands. The United States does so under its "Mutual Assistance Collection Program" (MCAP).[179] It also provides assistance via the Mutual Legal Assistance in Criminal Matters Treaties (MLATs). Unlike the tax treaties, the role of Competent Authority for MLATs is delegated to the Department of Justice.[180]

5. Litigation in support of exchange of information program

In addition to the resources devoted to administer its Exchange of Information program, the United States has litigated extensively in support of the program against a variety of challenges to actions it took to honor its treaty obligations. These challenges have included suits seeking to obtain publication of information received under treaty exchanges, objections to enforcement of adminstrative summonses and finally, an attempt to claim that the disclosure to another tax administrator was negligent.

The IRS successfully defended its efforts to protect the secrecy of certain information in internal memoranda, including the identity of the treaty partner that had communicated with the IRS.[181] The need to safeguard the secrecy of the information in order to protect the working relationship of the treaty partners was sufficient reason to sustain the government position that documents from meetings of Competent Authorities are entitled to treaty protection.[182]

In efforts to obtain the domestic information responsive to a treaty partner's request for information, the IRS uses its authority to issue administrative summonses. Specific challenges to IRS efforts to obtain financial information requested by a treaty partner frequently centered on whether the *United States v. Powell* 'good faith' elements were satisfied, in particular the need to comply with all procedural constraints. The extent to which the United States was required to look behind the statement of its treaty partner that the information was needed in a tax matter in the foreign jurisdiction was hotly contested, with taxpayers arguing that the foreign authorities should be required to meet the standards that would apply if the investigation were conducted in the United States. As previously stated, in a domestic case, if a matter had already been referred to the Department of Justice for criminal prosecution, a third-party record keeper summons would not be enforced.[183] In *United States v. Stuart*,[184] the question presented involved a request from Canada for information relevant to an investigation in that jurisdiction. The target of the investigation argued that the Internal Revenue Service lacked good faith, because it did not

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[179] See, I.R.M. Pars. 11.3.25.5 and 11.3.25.6

[180] See, I.R.M. Pars. 11.3.28.3.2.

[181] *Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 9 (D.D.C. 2001), rev'd in part on other grounds, 1 2002 WL 1300028 (D.C. Cir. 2002)). Congress enacted section 6105, which explicitly provides that information obtained under a treaty and not taxpayer-specific is nevertheless protected information.

[182] *Tax Analysts v. Internal Revenue Service*, 217 F. Supp. 2d 23 (D. D.C. 2002)

[183] Sec. 7602(c); *United States v. LaSalle National Bank*, 437 U.S. 298 (1978).

[184] 489 U.S. 353; 109 S. Ct. 1183; 103 L. Ed. 2d 388 (1989)

attempt to ascertain whether the Canadian tax investigation that led to Canada's treaty request had reached a stage analogous to an IRS referral to the Justice Department for criminal prosecution before issuing an administrative summons. The Court held that the summons was enforceable without such inquiry, stating, "We hold that neither the 1942 Convention nor domestic legislation imposes this precondition to issuance of an administrative summons. So long as the summons meets statutory requirements and is issued in good faith, as we defined that term in *United States v. Powell*, 379 U.S. 48, 57-58 (1964), compliance is required, whether or not the Canadian tax investigation is directed toward criminal prosecution under Canadian law." Since that opinion, numerous treaty summonses have been enforced, with little controversy.

In a suit for damages based on allegedly negligent or false disclosures made by the IRS to the Japanese National Tax Administration ("NTA"), the trial court granted summary judgment for the United States, rejecting a taxpayer claim that the NTA was an unreliable protector of treaty information and that disclosure to that treaty partner constituted negligence.[185] The United States disclosed information pursuant to its treaty with Japan in the course of a simultaneous examination. Following the disclosures to the NTA, Japanese media reported that a joint examination of plaintiffs had been conducted by the IRS and the NTA. That fact was true, but the articles also contained information that was untrue. Although plaintiffs cited to numerous rumors of leaks by the NTA of information from Japanese domestic audits, and NTA's failure to maintain the confidentiality of taxpayer information, they provided no other examples of an alleged NTA leaks of US/Japan tax treaty information. Plaintiff provided expert testimony that tax information was often reported in the press in Japan, in support of its claim that the United States should have known that information provided to NTA would not be safe from further disclosure. The court concluded that the witnesses did not establish that the information made available to the press came from NTA, nor did they prove that the source of the reports was treaty information. In granting summary judgment for the United States, the court stated:

> Free and open disclosure best serves the purposes of tax treaties - - ensuring that taxpayers correctly report and pay their domestic and foreign taxes. To require the United States to guarantee the accuracy of all information conveyed to treaty partners, especially in the preliminary stages, would have a chilling effect on furthering the purposes of the treaty. The IRS would not propose simultaneous examinations for fear of lawsuits for any misinformation contained in the proposal. … The Court holds that negligently providing incorrect information in the course of a simultaneous examination does not rise to the level of actionable conduct.

According to the opinion, the IRS temporarily suspended the exchange of information with Japan under the treaty on the basis of the complaints by plaintiffs as well as earlier allegations that information had been improperly disclosed in Japan, according to an internal email placed in the record and as explained by an IRS official at his deposition.

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[185] *Aloe Vera of America, Inc. v. United States*, 2007-1 U.S. Tax Cases Par 50,325; 99 AFTR 2d 895 (USDC D. AZ 2/2/2007).

E. Attempts to Develop an International Consensus

In the current global financial crisis, greater attention to all means of restoring integrity and stability to financial institutions has led to greater scrutiny of efforts to reconcile the conflicts between jurisdictions with strict bank secrecy and those seeking information from those jurisdictions in order to enforce their own laws. At the upcoming conference of the leaders of the G-20 nations, the regulation of offshore financial centers and how to achieve international consensus on such regulation is expected to be on the agenda. In "The Turner Review: A Regulatory Response to the Global Banking Crisis", the Financial Services Authority of the United Kingdom identifies the need for global regulation of offshore financial centers as one of the action items necessary to establish a stable and effective banking system. Otherwise, improved harmonization of the regulation of major financial institutions within the jurisdictions of the G-20 nations could increase incentives for use of offshore centers. [186] The extent to which multilateral and bilateral agreements can effect the changes necessary to pierce bank secrecy merits careful consideration.

1. OECD Initiatives

OECD's work on its standards of transparency and exchange of information (the "OECD Standards") was initiated in 1996 by its Global Forum on Transparency and Exchange of Information ("the "Global Forum").

The OECD Standards require:

- Exchange of information where it is "foreseeably relevant" to the administration and enforcement of the domestic laws of a requesting State;
- No restrictions on exchange caused by bank secrecy or domestic tax interest requirements;
- Availability of reliable information and powers to obtain it;
- Respect for taxpayer rights; and
- Strict confidentiality of information exchanged.[187]

The OECD Standards were adopted by the G20 Ministers of Finance in 2004, and by the UN Committee on Experts on International Cooperation in Tax Matters in 2008.

Also initiated in 1996 was the OECD's Harmful Tax Practices Project, which is carried out through the Forum on Harmful Tax Practices ("FHTP"). FHTP focuses on: (a) eliminating

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[186] *The Turner Review: A Regulatory Response to the Global Banking Crisis*, Financial Services Authority, United Kingdom, March 2009, at 7 and 74.

[187] Overview of the OECD's Work on International Tax Evasion (A note by the OECD Secretariat) 3, (Mar. 23, 2009) [hereinafter 2009 OECD Overview].

harmful tax practices of preferential tax regimes of OECD Member states; (b) identifying tax havens and pursuing their commitments to OECD Standards; and, (c) encouraging other non-OECD counties to associate themselves with FHTP work.[188] As of 2000, FHTP had identified more than 40 tax havens. By 2005, 35 were "committed jurisdictions," i.e., jurisdictions that formally documented their commitment to the OECD Standards. While seven tax havens initially refused to become committed jurisdictions, the current list of uncooperative tax havens is now comprised of just three: Andorra, Monaco, and Liechtenstein. However, each of these countries has recently announced its intention to implement the OECD standards. It is expected that the list of uncooperative tax havens will be discussed at the upcoming G-20 meeting scheduled for April 2.

Some of the jurisdictions that have recently announced their intention to commit to the OECD Standards have bank secrecy rules. It appears from the press releases issued that none will abandon these rules. These jurisdictions include Austria, Belgium, Liechtenstein, Luxembourg and Switzerland. Rather, each has identified the parameters for lifting banking secrecy rules for purposes of exchanging information. For example, Switzerland will permit the exchange of information upon receipt of a specific, justified request; Austria will exchange information upon request if there is a criminal proceeding involving a tax matter. In contrast, Andorra's government has announced that it will repeal its bank secrecy laws by the end of 2009.

It is presently unknown if such measures will satisfy the G-20 at its April meeting and keep such jurisdictions off the list of uncooperative tax havens. It is also unknown what penalties may be imposed on such jurisdictions.

1. European Union Savings Directive

In its foundational documents, the European Union established access to information and transparency as an important principle.[189] Since then, it has attempted to address the perceived tax evasion facilitated by bank secrecy laws of its member states and others. In June 2003, the European Council issued a directive designed to ensure that all interest earned by a citizen of a member state from an account held in any other member state would be subject to a minimal direct tax ("Savings Directive"). A directive is a non-self-executing resolution of the European Council that member states must implement, whether by local legislation or regulatory action.[190] The Savings Directive ensures that interest income earned by a citizen of one jurisdiction from an institution in another jurisdiction is subject to tax by the appropriate member state by requiring both information reporting by the financial institution to the member state and automatic exchange of such information reports among the member states. Member states were required to implement the directive by July 1, 2005.

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[188] 2009 OECD Overview at 3-4.

[189] "Declaration on the right of access to information", *Treaty on European Union*, entered into force November 1, 1993, O.J. C. 191, 29 July 1992 [hereinafter Maastricht Treaty].

[190] Maastricht Treaty, Art. 249

A special longer transition period was provided for the several member countries whose jurisdictions were the least transparent among the member states. Belgium, Luxembourg and Austria do not permit exchange of information without a specific request for information on a specific taxpayer. Instead of agreeing to automatic exchange of information, they agreed to act as a withholding agent with respect to accounts in their jurisdictions. They collect tax and pay over tax to the home jurisdiction of the account holder without identifying the account holders. They are nevertheless entitled to receive the automatic exchange of information about their own citizens from the other states. [191]

[191] Council Directive 2003/48/EC of 3 June 2003, OJ L 157 (26-6-2003).

APPENDIX

Form **W-9**
(Rev. October 2007)
Department of the Treasury
Internal Revenue Service

Request for Taxpayer Identification Number and Certification

Give form to the requester. Do not send to the IRS.

Print or type See **Specific Instructions** on page 2.

Name (as shown on your income tax return)

Business name, if different from above

Check appropriate box: ☐ Individual/Sole proprietor ☐ Corporation ☐ Partnership
☐ Limited liability company. Enter the tax classification (D=disregarded entity, C=corporation, P=partnership) ▶
☐ Other (see instructions) ▶

☐ Exempt payee

Address (number, street, and apt. or suite no.)

Requester's name and address (optional)

City, state, and ZIP code

List account number(s) here (optional)

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on Line 1 to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Social security number

or

Employer identification number

Part II Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
3. I am a U.S. citizen or other U.S. person (defined below).

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the Certification, but you must provide your correct TIN. See the instructions on page 4.

Sign Here **Signature of U.S. person ▶** **Date ▶**

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Purpose of Form

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),

2. Certify that you are not subject to backup withholding, or

3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income.

Note. If a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

Definition of a U.S. person. For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

Special rules for partnerships. Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax on any foreign partners' share of income from such business. Further, in certain cases where a Form W-9 has not been received, a partnership is required to presume that a partner is a foreign person, and pay the withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid withholding on your share of partnership income.

The person who gives Form W-9 to the partnership for purposes of establishing its U.S. status and avoiding withholding on its allocable share of net income from the partnership conducting a trade or business in the United States is in the following cases:

- The U.S. owner of a disregarded entity and not the entity,

- The U.S. grantor or other owner of a grantor trust and not the trust, and
- The U.S. trust (other than a grantor trust) and not the beneficiaries of the trust.

Foreign person. If you are a foreign person, do not use Form W-9. Instead, use the appropriate Form W-8 (see Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities).

Nonresident alien who becomes a resident alien. Generally, only a nonresident alien individual may use the terms of a tax treaty to reduce or eliminate U.S. tax on certain types of income. However, most tax treaties contain a provision known as a "saving clause." Exceptions specified in the saving clause may permit an exemption from tax to continue for certain types of income even after the payee has otherwise become a U.S. resident alien for tax purposes.

If you are a U.S. resident alien who is relying on an exception contained in the saving clause of a tax treaty to claim an exemption from U.S. tax on certain types of income, you must attach a statement to Form W-9 that specifies the following five items:

1. The treaty country. Generally, this must be the same treaty under which you claimed exemption from tax as a nonresident alien.

2. The treaty article addressing the income.

3. The article number (or location) in the tax treaty that contains the saving clause and its exceptions.

4. The type and amount of income that qualifies for the exemption from tax.

5. Sufficient facts to justify the exemption from tax under the terms of the treaty article.

Example. Article 20 of the U.S.-China income tax treaty allows an exemption from tax for scholarship income received by a Chinese student temporarily present in the United States. Under U.S. law, this student will become a resident alien for tax purposes if his or her stay in the United States exceeds 5 calendar years. However, paragraph 2 of the first Protocol to the U.S.-China treaty (dated April 30, 1984) allows the provisions of Article 20 to continue to apply even after the Chinese student becomes a resident alien of the United States. A Chinese student who qualifies for this exception (under paragraph 2 of the first protocol) and is relying on this exception to claim an exemption from tax on his or her scholarship or fellowship income would attach to Form W-9 a statement that includes the information described above to support that exemption.

If you are a nonresident alien or a foreign entity not subject to backup withholding, give the requester the appropriate completed Form W-8.

What is backup withholding? Persons making certain payments to you must under certain conditions withhold and pay to the IRS 28% of such payments. This is called "backup withholding." Payments that may be subject to backup withholding include interest, tax-exempt interest, dividends, broker and barter exchange transactions, rents, royalties, nonemployee pay, and certain payments from fishing boat operators. Real estate transactions are not subject to backup withholding.

You will not be subject to backup withholding on payments you receive if you give the requester your correct TIN, make the proper certifications, and report all your taxable interest and dividends on your tax return.

Payments you receive will be subject to backup withholding if:

1. You do not furnish your TIN to the requester,

2. You do not certify your TIN when required (see the Part II instructions on page 3 for details),

3. The IRS tells the requester that you furnished an incorrect TIN,

4. The IRS tells you that you are subject to backup withholding because you did not report all your interest and dividends on your tax return (for reportable interest and dividends only), or

5. You do not certify to the requester that you are not subject to backup withholding under 4 above (for reportable interest and dividend accounts opened after 1983 only).

Certain payees and payments are exempt from backup withholding. See the instructions below and the separate Instructions for the Requester of Form W-9.

Also see *Special rules for partnerships* on page 1.

Penalties

Failure to furnish TIN. If you fail to furnish your correct TIN to a requester, you are subject to a penalty of $50 for each such failure unless your failure is due to reasonable cause and not to willful neglect.

Civil penalty for false information with respect to withholding. If you make a false statement with no reasonable basis that results in no backup withholding, you are subject to a $500 penalty.

Criminal penalty for falsifying information. Willfully falsifying certifications or affirmations may subject you to criminal penalties including fines and/or imprisonment.

Misuse of TINs. If the requester discloses or uses TINs in violation of federal law, the requester may be subject to civil and criminal penalties.

Specific Instructions

Name

If you are an individual, you must generally enter the name shown on your income tax return. However, if you have changed your last name, for instance, due to marriage without informing the Social Security Administration of the name change, enter your first name, the last name shown on your social security card, and your new last name.

If the account is in joint names, list first, and then circle, the name of the person or entity whose number you entered in Part I of the form.

Sole proprietor. Enter your individual name as shown on your income tax return on the "Name" line. You may enter your business, trade, or "doing business as (DBA)" name on the "Business name" line.

Limited liability company (LLC). Check the "Limited liability company" box only and enter the appropriate code for the tax classification ("D" for disregarded entity, "C" for corporation, "P" for partnership) in the space provided.

For a single-member LLC (including a foreign LLC with a domestic owner) that is disregarded as an entity separate from its owner under Regulations section 301.7701-3, enter the owner's name on the "Name" line. Enter the LLC's name on the "Business name" line.

For an LLC classified as a partnership or a corporation, enter the LLC's name on the "Name" line and any business, trade, or DBA name on the "Business name" line.

Other entities. Enter your business name as shown on required federal tax documents on the "Name" line. This name should match the name shown on the charter or other legal document creating the entity. You may enter any business, trade, or DBA name on the "Business name" line.

Note. You are requested to check the appropriate box for your status (individual/sole proprietor, corporation, etc.).

Exempt Payee

If you are exempt from backup withholding, enter your name as described above and check the appropriate box for your status, then check the "Exempt payee" box in the line following the business name, sign and date the form.

Generally, individuals (including sole proprietors) are not exempt from backup withholding. Corporations are exempt from backup withholding for certain payments, such as interest and dividends.

Note. If you are exempt from backup withholding, you should still complete this form to avoid possible erroneous backup withholding.

The following payees are exempt from backup withholding:

1. An organization exempt from tax under section 501(a), any IRA, or a custodial account under section 403(b)(7) if the account satisfies the requirements of section 401(f)(2),

2. The United States or any of its agencies or instrumentalities,

3. A state, the District of Columbia, a possession of the United States, or any of their political subdivisions or instrumentalities,

4. A foreign government or any of its political subdivisions, agencies, or instrumentalities, or

5. An international organization or any of its agencies or instrumentalities.

Other payees that may be exempt from backup withholding include:

6. A corporation,

7. A foreign central bank of issue,

8. A dealer in securities or commodities required to register in the United States, the District of Columbia, or a possession of the United States,

9. A futures commission merchant registered with the Commodity Futures Trading Commission,

10. A real estate investment trust,

11. An entity registered at all times during the tax year under the Investment Company Act of 1940,

12. A common trust fund operated by a bank under section 584(a),

13. A financial institution,

14. A middleman known in the investment community as a nominee or custodian, or

15. A trust exempt from tax under section 664 or described in section 4947.

The chart below shows types of payments that may be exempt from backup withholding. The chart applies to the exempt payees listed above, 1 through 15.

IF the payment is for . . .	THEN the payment is exempt for . . .
Interest and dividend payments	All exempt payees except for 9
Broker transactions	Exempt payees 1 through 13. Also, a person registered under the Investment Advisers Act of 1940 who regularly acts as a broker
Barter exchange transactions and patronage dividends	Exempt payees 1 through 5
Payments over $600 required to be reported and direct sales over $5,000[1]	Generally, exempt payees 1 through 7[2]

[1] See Form 1099-MISC, Miscellaneous Income, and its instructions.

[2] However, the following payments made to a corporation (including gross proceeds paid to an attorney under section 6045(f), even if the attorney is a corporation) and reportable on Form 1099-MISC are not exempt from backup withholding: medical and health care payments, attorneys' fees, and payments for services paid by a federal executive agency.

Part I. Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. If you are a resident alien and you do not have and are not eligible to get an SSN, your TIN is your IRS individual taxpayer identification number (ITIN). Enter it in the social security number box. If you do not have an ITIN, see *How to get a TIN* below.

If you are a sole proprietor and you have an EIN, you may enter either your SSN or EIN. However, the IRS prefers that you use your SSN.

If you are a single-member LLC that is disregarded as an entity separate from its owner (see *Limited liability company (LLC)* on page 2), enter the owner's SSN (or EIN, if the owner has one). Do not enter the disregarded entity's EIN. If the LLC is classified as a corporation or partnership, enter the entity's EIN.

Note. See the chart on page 4 for further clarification of name and TIN combinations.

How to get a TIN. If you do not have a TIN, apply for one immediately. To apply for an SSN, get Form SS-5, Application for a Social Security Card, from your local Social Security Administration office or get this form online at *www.ssa.gov*. You may also get this form by calling 1-800-772-1213. Use Form W-7, Application for IRS Individual Taxpayer Identification Number, to apply for an ITIN, or Form SS-4, Application for Employer Identification Number, to apply for an EIN. You can apply for an EIN online by accessing the IRS website at *www.irs.gov/businesses* and clicking on Employer Identification Number (EIN) under Starting a Business. You can get Forms W-7 and SS-4 from the IRS by visiting *www.irs.gov* or by calling 1-800-TAX-FORM (1-800-829-3676).

If you are asked to complete Form W-9 but do not have a TIN, write "Applied For" in the space for the TIN, sign and date the form, and give it to the requester. For interest and dividend payments, and certain payments made with respect to readily tradable instruments, generally you will have 60 days to get a TIN and give it to the requester before you are subject to backup withholding on payments. The 60-day rule does not apply to other types of payments. You will be subject to backup withholding on all such payments until you provide your TIN to the requester.

Note. Entering "Applied For" means that you have already applied for a TIN or that you intend to apply for one soon.

Caution: *A disregarded domestic entity that has a foreign owner must use the appropriate Form W-8.*

Part II. Certification

To establish to the withholding agent that you are a U.S. person, or resident alien, sign Form W-9. You may be requested to sign by the withholding agent even if items 1, 4, and 5 below indicate otherwise.

For a joint account, only the person whose TIN is shown in Part I should sign (when required). Exempt payees, see *Exempt Payee* on page 2.

Signature requirements. Complete the certification as indicated in 1 through 5 below.

1. Interest, dividend, and barter exchange accounts opened before 1984 and broker accounts considered active during 1983. You must give your correct TIN, but you do not have to sign the certification.

2. Interest, dividend, broker, and barter exchange accounts opened after 1983 and broker accounts considered inactive during 1983. You must sign the certification or backup withholding will apply. If you are subject to backup withholding and you are merely providing your correct TIN to the requester, you must cross out item 2 in the certification before signing the form.

3. Real estate transactions. You must sign the certification. You may cross out item 2 of the certification.

4. Other payments. You must give your correct TIN, but you do not have to sign the certification unless you have been notified that you have previously given an incorrect TIN. "Other payments" include payments made in the course of the requester's trade or business for rents, royalties, goods (other than bills for merchandise), medical and health care services (including payments to corporations), payments to a nonemployee for services, payments to certain fishing boat crew members and fishermen, and gross proceeds paid to attorneys (including payments to corporations).

5. Mortgage interest paid by you, acquisition or abandonment of secured property, cancellation of debt, qualified tuition program payments (under section 529), IRA, Coverdell ESA, Archer MSA or HSA contributions or distributions, and pension distributions. You must give your correct TIN, but you do not have to sign the certification.

What Name and Number To Give the Requester

For this type of account:	Give name and SSN of:
1. Individual	The individual
2. Two or more individuals (joint account)	The actual owner of the account or, if combined funds, the first individual on the account [1]
3. Custodian account of a minor (Uniform Gift to Minors Act)	The minor [2]
4. a. The usual revocable savings trust (grantor is also trustee)	The grantor-trustee [1]
b. So-called trust account that is not a legal or valid trust under state law	The actual owner [1]
5. Sole proprietorship or disregarded entity owned by an individual	The owner [3]
For this type of account:	**Give name and EIN of:**
6. Disregarded entity not owned by an individual	The owner
7. A valid trust, estate, or pension trust	Legal entity [4]
8. Corporate or LLC electing corporate status on Form 8832	The corporation
9. Association, club, religious, charitable, educational, or other tax-exempt organization	The organization
10. Partnership or multi-member LLC	The partnership
11. A broker or registered nominee	The broker or nominee
12. Account with the Department of Agriculture in the name of a public entity (such as a state or local government, school district, or prison) that receives agricultural program payments	The public entity

[1] List first and circle the name of the person whose number you furnish. If only one person on a joint account has an SSN, that person's number must be furnished.

[2] Circle the minor's name and furnish the minor's SSN.

[3] You must show your individual name and you may also enter your business or "DBA" name on the second name line. You may use either your SSN or EIN (if you have one), but the IRS encourages you to use your SSN.

[4] List first and circle the name of the trust, estate, or pension trust. (Do not furnish the TIN of the personal representative or trustee unless the legal entity itself is not designated in the account title.) Also see *Special rules for partnerships* on page 1.

Note. If no name is circled when more than one name is listed, the number will be considered to be that of the first name listed.

Secure Your Tax Records from Identity Theft

Identity theft occurs when someone uses your personal information such as your name, social security number (SSN), or other identifying information, without your permission, to commit fraud or other crimes. An identity thief may use your SSN to get a job or may file a tax return using your SSN to receive a refund.

To reduce your risk:

- Protect your SSN,
- Ensure your employer is protecting your SSN, and
- Be careful when choosing a tax preparer.

Call the IRS at 1-800-829-1040 if you think your identity has been used inappropriately for tax purposes.

Victims of identity theft who are experiencing economic harm or a system problem, or are seeking help in resolving tax problems that have not been resolved through normal channels, may be eligible for Taxpayer Advocate Service (TAS) assistance. You can reach TAS by calling the TAS toll-free case intake line at 1-877-777-4778 or TTY/TDD 1-800-829-4059.

Protect yourself from suspicious emails or phishing schemes. Phishing is the creation and use of email and websites designed to mimic legitimate business emails and websites. The most common act is sending an email to a user falsely claiming to be an established legitimate enterprise in an attempt to scam the user into surrendering private information that will be used for identity theft.

The IRS does not initiate contacts with taxpayers via emails. Also, the IRS does not request personal detailed information through email or ask taxpayers for the PIN numbers, passwords, or similar secret access information for their credit card, bank, or other financial accounts.

If you receive an unsolicited email claiming to be from the IRS, forward this message to *phishing@irs.gov.* You may also report misuse of the IRS name, logo, or other IRS personal property to the Treasury Inspector General for Tax Administration at 1-800-366-4484. You can forward suspicious emails to the Federal Trade Commission at: *spam@uce.gov* or contact them at *www.consumer.gov/idtheft* or 1-877-IDTHEFT(438-4338).

Visit the IRS website at *www.irs.gov* to learn more about identity theft and how to reduce your risk.

Privacy Act Notice

Section 6109 of the Internal Revenue Code requires you to provide your correct TIN to persons who must file information returns with the IRS to report interest, dividends, and certain other income paid to you, mortgage interest you paid, the acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA, or Archer MSA or HSA. The IRS uses the numbers for identification purposes and to help verify the accuracy of your tax return. The IRS may also provide this information to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and U.S. possessions to carry out their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You must provide your TIN whether or not you are required to file a tax return. Payers must generally withhold 28% of taxable interest, dividend, and certain other payments to a payee who does not give a TIN to a payer. Certain penalties may also apply.

Instructions for the Requester of Form W-9

(Rev. September 2007)

Request for Taxpayer Identification Number and Certification

Department of the Treasury
Internal Revenue Service

Section references are to the Internal Revenue Code unless otherwise noted.

What's New

Section 6049 contains new information reporting requirements for tax-exempt interest. For information on certification rules for tax-exempt interest payments, see Notice 2006-93 on page 798 of Internal Revenue Bulletin(I.R.B.) 2006-44 at *www.irs.gov/pub/irs-irbs/irb06-44.pdf.*

Reminders

- The backup withholding rate is 28% for reportable payments.
- The IRS website offers TIN Matching e-services for payers to validate name and TIN combinations. See *Taxpayer Identification Number (TIN) Matching* on page 4.

How Do I Know When To Use Form W-9?

Use Form W-9 to request the taxpayer identification number (TIN) of a U.S. person (including a resident alien) and to request certain certifications and claims for exemption. (See *Purpose of Form* on Form W-9.) Withholding agents may require signed Forms W-9 from U.S. exempt recipients to overcome any presumptions of foreign status. For federal purposes, a U.S. person includes but is not limited to:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- Any estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

A partnership may require a signed Form W-9 from its U.S. partners to overcome any presumptions of foreign status and to avoid withholding on the partner's allocable share of the partnership's effectively connected income. For more information, see Regulations section 1.1446-1.

Advise foreign persons to use the appropriate Form W-8. See Pub. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities, for more information and a list of the W-8 forms.

Also, a nonresident alien individual may, under certain circumstances, claim treaty benefits on scholarships and fellowship grant income. See Pub. 515 or Pub. 519, U.S. Tax Guide for Aliens, for more information.

Electronic Submission of Forms W-9

Requesters may establish a system for payees and payees' agents to submit Forms W-9 electronically, including by fax. A requester is anyone required to file an information return. A payee is anyone required to provide a taxpayer identification number (TIN) to the requester.

Payee's agent. A payee's agent can be an investment advisor (corporation, partnership, or individual) or an introducing broker. An investment advisor must be registered with the Securities Exchange Commission (SEC) under the Investment Advisers Act of 1940. The introducing broker is a broker-dealer that is regulated by the SEC and the National Association of Securities Dealers, Inc., and that is not a payer. Except for a broker who acts as a payee's agent for "readily tradable instruments," the advisor or broker must show in writing to the payer that the payee authorized the advisor or broker to transmit the Form W-9 to the payer.

Electronic system. Generally, the electronic system must:

- Ensure the information received is the information sent, and document all occasions of user access that result in the submission;
- Make reasonably certain that the person accessing the system and submitting the form is the person identified on Form W-9, the investment advisor, or the introducing broker;
- Provide the same information as the paper Form W-9;
- Be able to supply a hard copy of the electronic Form W-9 if the Internal Revenue Service requests it; and
- Require as the final entry in the submission an electronic signature by the payee whose name is on Form W-9 that authenticates and verifies the submission. The electronic signature must be under penalties of perjury and the perjury statement must contain the language of the paper Form W-9.

For Forms W-9 that are not required to be signed, the electronic system need not provide for an electronic signature or a perjury statement.

For more details, see the following.

- Announcement 98-27 on page 30 of I.R.B. 1998-15 available at *www.irs.gov/pub/irs-irbs/irb98-15.pdf*.
- Announcement 2001-91 on page 221 of I.R.B. 2001-36 available at *www.irs.gov/pub/irs-irbs/irb01-36.pdf*.

Individual Taxpayer Identification Number (ITIN)

Form W-9 (or an acceptable substitute) is used by persons required to file information returns with the IRS to get the payee's (or other person's) correct name and

TIN. For individuals, the TIN is generally a social security number (SSN).

However, in some cases, individuals who become U.S. resident aliens for tax purposes are not eligible to obtain an SSN. This includes certain resident aliens who must receive information returns but who cannot obtain an SSN.

These individuals must apply for an ITIN on Form W-7, Application for IRS Individual Taxpayer Identification Number, unless they have an application pending for an SSN. Individuals who have an ITIN must provide it on Form W-9.

Substitute Form W-9

You may develop and use your own Form W-9 (a substitute Form W-9) if its content is substantially similar to the official IRS Form W-9 and it satisfies certain certification requirements.

You may incorporate a substitute Form W-9 into other business forms you customarily use, such as account signature cards. However, the certifications on the substitute Form W-9 must clearly state (as shown on the official Form W-9) that under penalties of perjury:

1. The payee's TIN is correct,
2. The payee is not subject to backup withholding due to failure to report interest and dividend income, and
3. The payee is a U.S. person.

You may not:

1. Use a substitute Form W-9 that requires the payee, by signing, to agree to provisions unrelated to the required certifications, or
2. Imply that a payee may be subject to backup withholding unless the payee agrees to provisions on the substitute form that are unrelated to the required certifications.

A substitute Form W-9 that contains a separate signature line just for the certifications satisfies the requirement that the certifications be clearly stated.

If a single signature line is used for the required certifications and other provisions, the certifications must be highlighted, boxed, printed in bold-face type, or presented in some other manner that causes the language to stand out from all other information contained on the substitute form. Additionally, the following statement must be presented to stand out in the same manner as described above and must appear immediately above the single signature line:

"The Internal Revenue Service does not require your consent to any provision of this document other than the certifications required to avoid backup withholding."

If you use a substitute form, you are required to provide the Form W-9 instructions to the payee only if he or she requests them. However, if the IRS has notified the payee that backup withholding applies, then you must instruct the payee to strike out the language in the certification that relates to underreporting. This instruction can be given orally or in writing. See item 2 of the *Certification* on Form W-9. You can replace "defined below" with "defined in the instructions" in item 3 of the *Certification* on Form W-9 when the instructions will not be provided to the payee except upon request. For more information, see Revenue Procedure 83-89,1983-2, C.B. 613; amplified by Revenue Procedure 96-26 which is on page 22 of I.R.B. 1996-8 at *www.irs.gov/pub/irs-irbs/irb96-08.pdf*.

TIN Applied for

For interest and dividend payments and certain payments with respect to readily tradable instruments, the payee may return a properly completed, signed Form W-9 to you with "Applied For" written in Part I. This is an "awaiting-TIN" certificate. The payee has 60 calendar days, from the date you receive this certificate, to provide a TIN. If you do not receive the payee's TIN at that time, you must begin backup withholding on payments.

Reserve rule. You must backup withhold on any reportable payments made during the 60-day period if a payee withdraws more than $500 at one time, unless the payee reserves 28 percent of all reportable payments made to the account.

Alternative rule. You may also elect to backup withhold during this 60-day period, after a 7-day grace period, under one of the two alternative rules discussed below.

Option 1. Backup withhold on any reportable payments if the payee makes a withdrawal from the account after the close of 7 business days after you receive the awaiting-TIN certificate. Treat as reportable payments all cash withdrawals in an amount up to the reportable payments made from the day after you receive the awaiting-TIN certificate to the day of withdrawal.

Option 2. Backup withhold on any reportable payments made to the payee's account, regardless of whether the payee makes any withdrawals, beginning no later than 7 business days after you receive the awaiting-TIN certificate.

The 60-day exemption from backup withholding does not apply to any payment other than interest, dividends, and certain payments relating to readily tradable instruments. Any other reportable payment, such as nonemployee compensation, is subject to backup withholding immediately, even if the payee has applied for and is awaiting a TIN.

Even if the payee gives you an awaiting-TIN certificate, you must backup withhold on reportable interest and dividend payments if the payee does not certify, under penalties of perjury, that the payee is not subject to backup withholding.

If you do not collect backup withholdings from affected payees as required, you may become liable for any uncollected amount.

Payees Exempt From Backup Withholding

Even if the payee does not provide a TIN in the manner required, you are not required to backup withhold on any payments you make if the payee is:

1. An organization exempt from tax under section 501(a), any IRA where the payor is also the trustee or custodian, or a custodial account under section 403(b)(7) if the account satisfies the requirements of section 401(f)(2),
2. The United States or any of its agencies or instrumentalities,
3. A state, the District of Columbia, a possession of the United States, or any of their political subdivisions or instrumentalities,

4. A foreign government or any of its political subdivisions, agencies, or instrumentalities, or

5. An international organization or any of its agencies or instrumentalities.

Other payees that may be exempt from backup withholding include:

6. A corporation,

7. A foreign central bank of issue,

8. A dealer in securities or commodities required to register in the United States, the District of Columbia, or a possession of the United States,

9. A futures commission merchant registered with the Commodity Futures Trading Commission,

10. A real estate investment trust,

11. An entity registered at all times during the tax year under the Investment Company Act of 1940,

12. A common trust fund operated by a bank under section 584(a),

13. A financial institution,

14. A middleman known in the investment community as a nominee or custodian, or

15. A trust exempt from tax under section 664 or described in section 4947.

The following types of payments are exempt from backup withholding as indicated for items 1 through 15 above.

Interest and dividend payments. All listed payees are exempt except the payee in item 9.

Broker transactions. All payees listed in items 1 through 13 are exempt. A person registered under the Investment Advisers Act of 1940 who regularly acts as a broker is also exempt.

Barter exchange transactions and patronage dividends. Only payees listed in items 1 through 5 are exempt.

Payments reportable under sections 6041 and 6041A. Only payees listed in items 1 through 7 are generally exempt.

However, the following payments made to a corporation (including gross proceeds paid to an attorney under section 6045(f), even if the attorney is a corporation) and reportable on Form 1099-MISC, Miscellaneous Income, are not exempt from backup withholding.

- Medical and health care payments.
- Attorneys' fees.
- Payments for services paid by a federal executive agency. (See Revenue Ruling 2003-66 on page 1115 in I.R.B. 2003-26 at *www.irs.gov/pub/irs-irbs/irb03-26.pdf*.)

Payments Exempt From Backup Withholding

Payments that are not subject to information reporting also are not subject to backup withholding. For details, see sections 6041, 6041A, 6042, 6044, 6045, 6049, 6050A, and 6050N, and their regulations. The following payments are generally exempt from backup withholding.

Dividends and patronage dividends

- Payments to nonresident aliens subject to withholding under section 1441.
- Payments to partnerships not engaged in a trade or business in the United States and that have at least one nonresident alien partner.
- Payments of patronage dividends not paid in money.
- Payments made by certain foreign organizations.
- Section 404(k) distributions made by an ESOP.

Interest payments

- Payments of interest on obligations issued by individuals. However, if you pay $600 or more of interest in the course of your trade or business to a payee, you must report the payment. Backup withholding applies to the reportable payment if the payee has not provided a TIN or has provided an incorrect TIN.
- Payments described in section 6049(b)(5) to nonresident aliens.
- Payments on tax-free covenant bonds under section 1451.
- Payments made by certain foreign organizations.
- Mortgage or student loan interest paid to you.

Other types of payment

- Wages.
- Distributions from a pension, annuity, profit-sharing or stock bonus plan, any IRA where the payor is also the trustee or custodian, an owner-employee plan, or other deferred compensation plan.
- Distributions from a medical or health savings account and long-term care benefits.
- Certain surrenders of life insurance contracts.
- Distribution from qualified tuition programs or Coverdell ESAs.
- Gambling winnings if regular gambling winnings withholding is required under section 3402(q). However, if regular gambling winnings withholding is not required under section 3402(q), backup withholding applies if the payee fails to furnish a TIN.
- Real estate transactions reportable under section 6045(e).
- Cancelled debts reportable under section 6050P.
- Fish purchases for cash reportable under section 6050R.
- Certain payment card transactions by a qualified payment card agent (as described in Revenue Procedure 2004-42 and Regulations section 31.3406(g)-1(f) and if the requirements under Regulations section 31.3406(g)-1(f) are met. Revenue Procedure 2004-42 is on page 121 of I.R.B. 2004-31 which is available at *www.irs.gov/pub/irs-irbs/irb04-31.pdf*.

Joint Foreign Payees

If the first payee listed on an account gives you a Form W-8 or a similar statement signed under penalties of perjury, backup withholding applies unless:

1. Every joint payee provides the statement regarding foreign status, or

2. Any one of the joint payees who has not established foreign status gives you a TIN.

If any one of the joint payees who has not established foreign status gives you a TIN, use that number for purposes of backup withholding and information reporting.

For more information on foreign payees, see the Instructions for the Requester of Forms W-8BEN, W-8ECI, W-8EXP, and W-8IMY.

Names and TINs To Use for Information Reporting

Show the full name and address as provided on Form W-9 on the information return filed with the IRS and on the copy furnished to the payee. If you made payments to more than one payee or the account is in more than one name, enter on the first name line only the name of the payee whose TIN is shown on the information return. You may show the names of any other individual payees in the area below the first name line.

Sole proprietor. Enter the individual's name on the first name line. On the second name line, enter the business name or "doing business as (DBA)" if provided. You may not enter only the business name. For the TIN, you may enter either the individual's SSN or the employer identification number (EIN) of the business. However, the IRS encourages you to use the SSN.

LLC. For an LLC that is disregarded as an entity separate from its owner, you must show the owner's name on the first name line. On the second name line, you may enter the LLC's name. Use the owner's TIN. Do not enter the disregarded entity's EIN.

Notices From the IRS

The IRS will send you a notice if the payee's name and TIN on the information return you filed do not match the IRS's records. (See *Taxpayer Identification Number (TIN) Matching* below.) You may have to send a "B" notice to the payee to solicit another TIN. Pub. 1281, Backup Withholding for Missing and Incorrect Name/TIN(s), contains copies of the two types of "B" notices.

Taxpayer Identification Number (TIN) Matching

TIN Matching allows a payer or authorized agent who is required to file Forms 1099-B, DIV, INT, MISC, OID, and /or PATR to match TIN and name combinations with IRS records before submitting the forms to the IRS. TIN Matching is one of the e-services products that is offered, and is accessible through the IRS website. Go to *www.irs.gov* and search for "e-services." It is anticipated that payers who validate the TIN and name combinations before filing information returns will receive fewer backup withholding (CP2100) "B" notices and penalty notices.

Additional Information

For more information on backup withholding, see Pub. 1281.

Instructions for the Requester of Forms W-8BEN, W-8ECI, W-8EXP, and W-8IMY

(Rev. May 2006)

Department of the Treasury
Internal Revenue Service

Instructions for the Withholding Agent

Section references are to the Internal Revenue Code unless otherwise noted.

What's New

A Form W-8 provided by a foreign grantor trust with 5 or fewer grantors is valid even if the trust does not provide a U.S. taxpayer identification number.

Before You Begin

These instructions supplement the instructions for:

- Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding.
- Form W-8ECI, Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States.
- Form W-8EXP, Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding.
- Form W-8IMY, Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding.

For general information and the purpose of each of the forms described in these instructions, see those forms and their accompanying instructions.

Throughout these instructions, a reference to or mention of "Form W-8" includes Forms W-8BEN, W-8ECI, W-8EXP, and W-8IMY.

Requirement To Withhold

For purposes of section 1441 and 1442, a withholding agent must withhold 30% of any payment of an amount subject to withholding made to a payee that is a foreign person unless it can associate the payment with documentation (for example, Form W-8 or Form W-9) upon which it can rely to treat the payment as made to **(a)** a payee that is a U.S. person or **(b)** a beneficial owner that is a foreign person entitled to a reduced rate of withholding. However, a withholding agent making a payment to a foreign person need not withhold if the foreign person assumes responsibility for withholding on the payment as a qualified intermediary, a withholding foreign partnership, or a withholding foreign trust and has provided a valid Form W-8IMY. Withholding is also not required if the payment is made to a U.S. branch of certain foreign insurance companies or foreign banks that agree to be treated as U.S. persons and provide a valid Form W-8IMY.

Generally, an amount is subject to withholding if it is an amount from sources within the United States that is fixed or determinable annual or periodical (FDAP) income. FDAP income is all income included in gross income, including interest (and original issue discount), dividends, rents, royalties, and compensation. FDAP income does not include most gains from the sale of property (including market discount and option premiums). FDAP income also does not include items of income excluded from gross income without regard to the U.S. or foreign status of the owner of the income, such as interest under section 103(a).

Generally, a partnership that allocates effectively connected taxable income (ECTI) to a foreign person must withhold at the highest tax rate applicable to that person for the type of income allocated (for example, ordinary income or capital gains). Unless the partnership is a publicly traded partnership, the partnership must withhold in the year the ECTI is allocable to the foreign partner, rather than the year in which the distribution is made. The partnership may rely on documentation (for example, Form W-8BEN or Form W-9) to determine if the partner is foreign or domestic and the type of partner (for example, individual or corporate). A partnership that does not receive valid documentation or knows or has reason to know that the documentation is incorrect or unreliable must presume the partner is foreign.

Who Is the Withholding Agent?

Any person, U.S. or foreign, that has control, receipt, or custody of an amount subject to withholding or who can disburse or make payments of an amount subject to withholding is a withholding agent. The withholding agent may be an individual, corporation, partnership, trust, association, or any other entity, including (but not limited to) any foreign intermediary, foreign partnership, or U.S. branch of certain foreign banks and insurance companies. If several persons qualify as withholding agents for a single payment, the tax required to be withheld must only be withheld once. Generally, the person who pays (or causes to be paid) an amount subject to withholding to the foreign person (or to its agent) must withhold. See the instructions for Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, and Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, for return filing and information reporting obligations.

For ECTI allocable to a foreign partner, the partnership is generally the withholding agent and must file Form 8804, Annual Return for Partnership Withholding Tax (Section 1446), Form 8805, Foreign Partner's Information Statement of Section 1446 Withholding Tax, and Form

8813, Partnership Withholding Tax Payment Voucher (Section 1446).

Responsibilities of the Withholding Agent

If you are a withholding agent making a payment of U.S. source interest, dividends, rents, royalties, commissions, nonemployee compensation, other fixed or determinable annual or periodical gains, profits, or income, and certain other amounts (including broker and barter exchange transactions, and certain payments made by fishing boat operators), you are generally required to obtain from the payee either a Form W-9, Request for Taxpayer Identification Number and Certification, or a Form W-8. These forms are also used to establish a person's status for purposes of domestic information reporting (for example, on a Form 1099) and backup withholding. If you receive a Form W-9, you must generally make an information return on a Form 1099. If you receive a Form W-8, you are exempt from reporting on Form 1099, but you may have to file Form 1042-S and withhold under the rules applicable to payments made to foreign persons. See the Instructions for Form 1042-S for more information.

Generally, a foreign person that is a partner in a partnership that submits a Form W-8 for purposes of section 1441 or 1442 will satisfy the documentation requirements under section 1446. However, in some cases the documentation requirements for sections 1441 and 1442 do not match the documentation requirements of section 1446. For example, a partner may generally submit Form W-8BEN to establish itself as a foreign person for purposes of section 1446, but a foreign partnership or foreign grantor trust must submit Form W-8IMY and accompanying documentation as provided by Regulations sections 1.1446-1 through 1.1446-6. Also, the owner of a disregarded entity, rather than the entity itself, must submit the appropriate Form W-8 for purposes of section 1446.

Generally, you must withhold 30% from the gross amount of FDAP income paid to a foreign person unless you can reliably associate the payment with a Form W-8. You can reliably associate a payment with a Form W-8 if you hold a valid form, you can reliably determine how much of the payment relates to the form, and you have no actual knowledge or reason to know that any of the information or certifications on the form are unreliable or incorrect. In addition, a partnership that has ECTI allocable to a foreign partner is a withholding agent with respect to that income and must withhold in accordance with the provisions of Regulations sections 1.1446-1 through 1.1446-6. See the instructions to Forms 8804, 8805, and 8813.

Do not send Forms W-8 to the IRS. Instead, keep the forms in your records for as long as they may be relevant to the determination of your tax liability under section 1461.

Failure To Obtain Form W-8 or Form W-9 — Presumption Rules

If you do not receive a Form W-8 or Form W-9, or cannot otherwise determine whether a payment should be treated as made to a U.S. person or to a foreign person, use the presumption rules provided in the regulations under sections 1441, 1446, 6045, and 6049.

Requesting Form W-8

Request a Form W-8 from any person to whom you are making a payment that you presume or otherwise believe to be a foreign person. You should request the form before making a payment so that you have the form when you make the payment. A withholding agent or payer that fails to obtain a Form W-8 or Form W-9 and fails to withhold as required under the presumption rules may be assessed tax at the 30% rate or backup withholding rate of 28%, as well as interest and penalties for lack of compliance.

A partnership should request a Form W-8 or W-9 from any partner that is allocated income that is effectively connected with the conduct of the partnership's U.S. trade or business. A partnership that fails to withhold as required under section 1446, is liable for the tax required to be withheld. In addition, the partnership may be liable for interest, penalties, and additions to the tax even if there is no underlying tax liability due from a foreign partner on its allocable share of partnership ECTI.

When you receive a completed Form W-8, you must review it for completeness and accuracy. This responsibility extends to the information attached to Form W-8IMY, including beneficial owner withholding certificates or other documentation and information. The following special rules apply when requesting a specific type of Form W-8.

Form W-8BEN

Request Form W-8BEN from any foreign person or organization to which you are making a payment if it is the beneficial owner of the income, whether or not it is claiming a reduced rate of, or exemption from, withholding. In addition, if you are a partnership, request Form W-8BEN for purposes of section 1446 from any foreign partner that is allocated ECTI, other than a foreign partner that is a partnership, grantor trust, or person or organization that qualifies to file Form W-8EXP.

Also request Form W-8BEN when a payee may claim an exception from domestic information reporting as a foreign person or to establish that certain income is not effectively connected with the conduct of a U.S. trade or business.

A beneficial owner is required to enter its U.S. taxpayer identification number (TIN) on line 6 of Form W-8BEN if it is a beneficial owner that is claiming benefits under an income tax treaty or submitting the form to a partnership that conducts a trade or business in the United States.

However, a U.S. TIN is not required to be shown in order to claim treaty benefits on the following items of income:

- Dividends and interest from stocks and debt obligations that are actively traded;
- Dividends from any redeemable security issued by an investment company registered under the Investment Company Act of 1940 (mutual fund);
- Dividends, interest, or royalties from units of beneficial interest in a unit investment trust that are (or were upon issuance) publicly offered and are registered with the SEC under the Securities Act of 1933; and
- Income related to loans of any of the above securities.

A U.S. TIN is not required to claim treaty benefits if the payment is unexpected and you, the withholding agent, meet certain requirements. A payment is unexpected if

you or the beneficial owner could not have reasonably anticipated the payment during a time when an IRS individual taxpayer identification number (ITIN) could be obtained. This could be due to the nature of the payment or the circumstances in which the payment is made. A payment is not considered unexpected solely because the amount of the payment is not fixed. For more information, see Regulations section 1.1441-6(g).

Form W-8ECI

Request Form W-8ECI from any foreign person or organization to which you are making a payment if it is the beneficial owner of the income and it claims that the income is effectively connected with the conduct of a trade or business in the United States. However, request a Form W-8BEN from a foreign partner that is allocated income that is effectively connected with the conduct of the partnership's trade or business in the United States, unless the foreign partner has made an election under section 871(d) or section 882(d).

Note. If you receive a Form W-8ECI without a U.S. TIN entered on line 6, you generally may not treat the income as effectively connected with a U.S. trade or business and you must apply the appropriate presumption rules.

Your receipt of Form W-8ECI serves as a representation by the payee or beneficial owner that all the income with which that form is associated is effectively connected with the conduct of a trade or business within the United States. Therefore, if a beneficial owner provides you with a Form W-8ECI, you may treat all of the U.S. source income identified on line 9 paid to that beneficial owner as effectively connected with the conduct of a trade or business within the United States.

If you pay items of income that are not identified on line 9 by the beneficial owner as effectively connected with the conduct of a trade or business within the United States, you are generally required to obtain from the payee another type of Form W-8.

You may not treat an amount as income effectively connected with the conduct of a trade or business within the United States unless the beneficial owner gives you a valid Form W-8ECI. However, there are exceptions for income paid on notional principal contracts and payments made to certain U.S. branches.

Notional principal contracts. Withholding at a 30% rate is not required on amounts paid under the terms of a notional principal contract whether or not a Form W-8ECI is provided. However, if the income is effectively connected, it is reportable by the withholding agent on Form 1042-S. A withholding agent must treat income as effectively connected with the conduct of a U.S. trade or business, even if a Form W-8ECI has not been received, if the income is paid to a qualified business unit of a foreign person located in the United States or, if the income is paid to a qualified business unit of a foreign person located outside the United States and the withholding agent knows, or has reason to know, the payment is effectively connected with the conduct of a U.S. trade or business. However, a payment is not treated as effectively connected with the conduct of a trade or business within the United States if the payee provides a Form W-8BEN representing that the income is not effectively connected with a U.S. trade or business or makes a representation in a master agreement that governs the transactions in notional principal contracts between the parties (for example, an International Swaps and Derivatives Association Agreement), or in the confirmation on the particular notional principal contract transaction, that the payee is a U.S. person or a non-U.S. branch of a foreign person.

Payments to certain U.S. branches. A payment to a U.S. branch of certain foreign persons is presumed to be effectively connected with the conduct of a trade or business within the United States even if the foreign person (or its U.S. branch) does not give you a Form W-8ECI. U.S. branches to which this presumption applies are:

- A U.S. branch of a foreign bank subject to regulatory supervision by the Federal Reserve Board, and
- A U.S. branch of a foreign insurance company required to file a National Association of Insurance Commissioners (NAIC) annual statement with the insurance department of a state, a territory, or the District of Columbia.

However, a payment to a U.S. branch described above is not treated as effectively connected income if the branch provides a Form W-8IMY on which it indicates that the income it receives is not effectively connected with the conduct of a trade or business within the United States and that it is using Form W-8IMY either to transmit appropriate documentation for persons for whom the branch receives the payment or as evidence of its agreement with the withholding agent to be treated as a U.S. person. If Form W-8IMY is not provided and the income received by the branch is not effectively connected income, then the branch must withhold, whether the payment is collected on behalf of other persons or on behalf of another branch of the same entity.

Form W-8EXP

Request Form W-8EXP from any foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession to which you are making a payment if such person is claiming an exemption from withholding under section 115(2), 501(c), 892, or 895, or claiming a reduced rate of withholding under section 1443(b). For all other purposes, request Form W-8BEN or W-8ECI. A Form W-8EXP submitted by a foreign person for purposes of withholding under sections 1441 through 1443 will establish that partner's foreign status for purposes of section 1446. However, except as provided in section 1.1446-3(c)(3) (regarding certain tax-exempt organizations described in section 501(c)), the submission of Form W-8EXP will have no effect on whether the partner is subject to withholding under section 1446.

A withholding agent may treat a payee as an international organization without requiring a Form W-8EXP if the name of the payee is one designated as an international organization by Executive Order (pursuant to 22 U.S.C. 288 through 288(f)) and other facts surrounding the payment reasonably indicate that the beneficial owner of the payment is an international organization. With regard to amounts derived from bankers' acceptances, a withholding agent may treat a payee as a foreign central bank of issue without requiring a Form W-8EXP if the name of the payee and other facts surrounding the payment reasonably indicate that the beneficial owner of the payment is a foreign central bank of issue.

A U.S. TIN is required if the beneficial owner is claiming an exemption based solely on a claim of tax-exempt status as a foreign private foundation (or other foreign organization described under section 501(c)). However, a U.S. TIN is not required from a foreign private foundation that is subject to the 4% excise tax on gross investment income (under section 4948(a)) on income that would be exempt from withholding except for section 4948(a) (for example, portfolio income).

Form W-8IMY

Request Form W-8IMY from any person that is an intermediary (whether a qualified intermediary or a nonqualified intermediary), a withholding foreign partnership, a withholding foreign trust, or a flow-through entity. A flow-through entity includes a foreign partnership (other than a withholding foreign partnership), a foreign simple or grantor trust (other than a withholding foreign trust), and, for any payments for which a treaty benefit is claimed, any entity to the extent it is treated as fiscally transparent under section 894. Appropriate withholding certificates, documentary evidence, and withholding statements must be associated with Form W-8IMY or you must apply the presumption rules.

Note. A qualified intermediary, withholding foreign partnership, or a withholding foreign trust must provide the EIN that was issued to the entity in such capacity (its "QI-EIN," "WP-EIN," or "WT-EIN"). Otherwise, any Form W-8IMY it submits is not valid.

Request Form W-8IMY for purposes of section 1446 only from a foreign upper-tier partnership or foreign grantor trust. Generally, for purposes of section 1446, the W-8IMY submitted by these entities is used to transmit the forms of the owners of these entities. When such other forms are provided, a partnership may look through these entities to the beneficial owners when determining its section 1446 tax obligation.

Due Diligence Requirements

You are responsible for ensuring that all information relating to the type of income for which Form W-8 is submitted is complete and appears to be accurate. You may rely on the information and certifications provided on the form (including the status of the beneficial owner as an individual, corporation, etc.) unless you have actual knowledge or reason to know that the information is unreliable or incorrect. You have reason to know that the information is unreliable or incorrect if you have knowledge of relevant facts or statements contained in the withholding certificate or other documentation that would cause a reasonably prudent person in the position of the withholding agent to question the claims made. For example, if you have information in your records that contradicts information provided on the form, you may not rely on the form. If you know or have reason to know that any information is unreliable or incorrect, you must obtain a new Form W-8 or other appropriate documentation.

Financial institutions and actively traded instruments. If you are a financial institution (including a regulated investment company) paying dividends and interest from stocks and debt obligations that are actively traded, dividends from any redeemable security issued by an investment company registered under the Investment Company Act of 1940, dividends, interest, or royalties from units of beneficial interest in a unit investment trust that are (or were upon issuance) publicly offered and registered with the SEC under the Securities Act of 1933, and amounts paid with respect to loans of such securities, you have reason to know that the Form W-8 is unreliable or incorrect for payments to direct account holders if one or more of the following circumstances exist. In that case, you must either request a new form or additional documentation to substantiate the claims on the form.

1. The Form W-8 is incomplete with respect to any item that is relevant to the claims made, the form contains any information that is inconsistent with the claims made, the form lacks information necessary to establish that the beneficial owner is entitled to a reduced rate of withholding, or the withholding agent has other account information that is inconsistent with the claims made.

2. The Form W-8 is used to establish foreign status and has a permanent residence address in the United States, a mailing address in the United States, the withholding agent has a residence or mailing address in the United States as part of its account information or is notified of a new residence or mailing address in the United States. However:

a. An individual who has provided a Form W-8 may be treated as a foreign person if:

- The withholding agent has in its possession or obtains documentary evidence (which does not contain a U.S. address) that has been provided within the past 3 years, the documentary evidence supports the claim of foreign status, and the individual provides the withholding agent with a reasonable explanation, in writing, supporting his or her claim of foreign status, or
- The account is maintained at an office of the withholding agent outside the United States and the withholding agent is required to report payments to the individual annually to the tax authority of the country in which the office is located and that country has an income tax treaty in effect with the United States.

b. An entity that has provided a Form W-8 may be treated as a foreign person if the withholding agent does not know or have reason to know that it is a flow-through entity and:

- The withholding agent has in its possession or obtains documentation that substantiates that the entity is actually organized or created under the laws of a foreign country, or
- The account is maintained at an office of the withholding agent outside the United States and the withholding agent is required to report payments to the entity annually to the tax authority of the country in which the office is located and that country has an income tax treaty in effect with the United States.

3. The form is provided with respect to an offshore account and the account holder has standing instructions directing the withholding agent to pay amounts from its account to an address in, or an account maintained in, the United States, unless the account holder provides a reasonable explanation in writing that supports its foreign status.

4. The Form W-8 is used to establish residence in a treaty country and:

a. The permanent residence address is not in the treaty country or the withholding agent is notified of a new permanent residence address that is not in the treaty country. However, the beneficial owner may be treated as a resident of the treaty country if it provides a reasonable explanation for the permanent residence address outside the treaty country or the withholding agent has in its possession, or obtains, documentary evidence that establishes residency in a treaty country.

b. The mailing address is not in the treaty country or the withholding agent has a mailing address that is not in the treaty country as part of its account information. However, the beneficial owner may be treated as a resident of the treaty country if:

- The withholding agent has in its possession, or obtains, additional documentation supporting the claim of residence in the treaty country and the additional documentation does not contain an address outside the treaty country,
- The withholding agent has in its possession, or obtains, documentation that establishes that the beneficial owner is an entity organized in a treaty country (or an entity managed and controlled in a treaty country, if required by the applicable treaty),
- The withholding agent knows that the beneficial owner is a bank or insurance company that is a resident of the treaty country and the mailing address is the address of a branch of that bank or insurance company, or
- The beneficial owner provides a written statement that reasonably establishes that it is a resident of the treaty country.

c. The account holder has standing instructions for the withholding agent to pay amounts from its account to an address outside, or an account maintained outside, the treaty country unless the direct account holder provides a reasonable explanation in writing establishing the account holder's residency in a treaty country.

For additional information on the due diligence requirements applicable to withholding agents, see Regulations section 1.1441-7(b).

Dual claims. If you are making payments to a foreign entity that is simultaneously claiming a reduced rate of tax on its own behalf and on behalf of persons in their capacity as interest holders in that entity, you may, at your option, accept the dual claims even though you hold different withholding certificates that require you to treat the entity inconsistently for different payments or for different portions of the same payment. If, however, inconsistent claims are made for the same portion of a payment, you may either reject both claims and request consistent claims or you may choose which reduction to apply. For partnerships that allocate effectively connected taxable income to partners that are foreign partnerships, the rules under section 1.1446-5 apply.

Requesting a New Form W-8

Request a new Form W-8:

- Before the expiration of an existing Form W-8 (see *Period of Validity* below for more information),
- If the existing form does not support a claim of reduced rate for a type of income that the submitter of the form has not previously received, or
- If you know or have reason to know of a change in circumstances that makes any information on the current form unreliable or incorrect.

Example. A foreign investor opens an account with a broker to purchase U.S. Treasury bonds and provides Form W-8BEN to obtain the portfolio interest exemption. The investor does not complete Part II of Form W-8BEN (because he is not claiming treaty benefits). Later, the investor purchases U.S. stock and claims treaty benefits on dividend income. The investor at that time completes a new Form W-8BEN providing the information required in Part II.

Period of Validity

Form W-8BEN

Generally, a Form W-8BEN provided without a U.S. TIN will remain in effect for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form incorrect. For example, a Form W-8BEN signed on September 30, 2006, remains valid through December 31, 2009. A Form W-8BEN with a U.S. TIN will remain in effect until a change of circumstances makes any information on the form incorrect, provided that the withholding agent reports on Form 1042-S at least one payment annually to the beneficial owner.

Form W-8ECI

Generally, a Form W-8ECI will remain in effect for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form incorrect.

Form W-8EXP

Generally, a Form W-8EXP provided without a U.S. TIN will remain in effect for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year. However, in the case of an integral part of a foreign government (within the meaning of Temporary Regulations section 1.892-2T(a)(2)) or a foreign central bank of issue, a Form W-8EXP filed without a U.S. TIN will remain in effect until a change in circumstances makes any of the information on the form incorrect. A Form W-8EXP furnished with a U.S. TIN will remain in effect until a change in circumstances makes any information on the form incorrect provided that the withholding agent reports on Form 1042-S at least one payment annually to the beneficial owner.

Form W-8IMY

Generally, a Form W-8IMY remains valid until the status of the person whose name is on the certificate is changed in a way relevant to the certificate or circumstances change that make the information on the certificate no longer correct. The indefinite validity period does not extend, however, to any withholding certificates, documentary evidence, or withholding statements associated with the certificate. Moreover, it does not extend to any statements attached to the certificate if a change of circumstances makes the information on the attached statements no longer correct.

Forms Received That Are Not Dated

If a Form W-8 is valid except that the person providing the form has not dated the form, the withholding agent may date the form from the day it is received and measure the validity period from that date.

Substitute Forms W-8

You may develop and use your own Form W-8BEN, W-8ECI, W-8EXP, or W-8IMY (a substitute form) if its content is substantially similar to the IRS's official Form W-8BEN, W-8ECI, W-8EXP, or W-8IMY (to the extent required by these instructions) and it satisfies certain certification requirements. You may develop and use a substitute form that is in a foreign language, provided that the substitute form also provides the English version of the statements and information otherwise required to be included on the substitute form. You may combine Forms W-8BEN, W-8ECI, W-8EXP, and W-8IMY into a single substitute form.

The substitute form must contain instructions that adequately inform the beneficial owner of what is meant by permanent residence address and beneficial ownership. You are, however, encouraged to provide all relevant instructions, especially if the payee requests them.

You may incorporate a substitute Form W-8 into other business forms you customarily use, such as account signature cards, provided the required certifications are clearly set forth. However, you may not:

1. Use a substitute form that requires the payee, by signing, to agree to provisions unrelated to the required certifications, or
2. Imply that a person may be subject to 30% withholding or backup withholding unless that person agrees to provisions on the substitute form that are unrelated to the required certifications.

A substitute Form W-8 is valid only if it contains the same penalties of perjury statement as the official forms and the required signature. However, if the substitute form is contained in some other business form, the words "information on this form" may be modified to refer to that portion of the business form containing the substitute form information. The design of the substitute form must be such that the information and certifications that are being attested to by the penalties of perjury statement clearly stand out from any other information contained in the form.

Content of Substitute Form

Form W-8BEN

The substitute Form W-8BEN must contain all of the information required in Part I, lines 1 through 5, and line 6, if a U.S. TIN is required. The certifications in Part II must be included in a substitute form only if treaty benefits are claimed, and then only to the extent that the certifications are required. For example, if the substitute form is intended for use by individuals only, the certifications contained in boxes 9c and 9d are not required.

Penalties of perjury statement. The design of the substitute Form W-8BEN must be such that the information and certifications that are being attested to by the penalties of perjury statement clearly stand out from any other information contained on the form. Additionally, the following statement must be presented in the same manner as in the preceding sentence and must appear immediately above the single signature line: "*The Internal Revenue Service does not require your consent to any provisions of this document other than the certifications required to establish your status as a non-U.S. person and, if applicable, obtain a reduced rate of withholding.*"

Form W-8ECI

The substitute Form W-8ECI must contain all of the information required in Part I, other than lines 7 or 8. The certifications in Part II of Form W-8ECI must be included in a substitute form.

Penalties of perjury statement. The design of the substitute Form W-8ECI must be such that the information and certifications that are being attested to by the penalties of perjury statement clearly stand out from any other information contained on the form. Additionally, the following statement must be presented in the same manner as in the preceding sentence and must appear immediately above the single signature line: "*The Internal Revenue Service does not require your consent to any provisions of this document other than the certifications required to establish your status as a non-U.S. person and that the income for which this form is provided is effectively connected with the conduct of a trade or business within the United States.*"

Form W-8EXP

The substitute Form W-8EXP must contain all of the information required in Part I, lines 1 through 5, and line 6, if a U.S. TIN is required. The substitute Form W-8EXP must also contain all of the statements and certifications contained in Parts II and III, but a specific part needs to be included (in its entirety) only if it is relevant. For example, if the only beneficial owners a U.S. withholding agent has as account holders are foreign governments, the withholding agent may use a substitute Form W-8EXP that contains only the required information in Part I, plus the required statements and certifications from Part II that are related to foreign governments.

Penalties of perjury statement. The design of the substitute Form W-8EXP must be such that the information and certifications that are being attested to by the penalties of perjury statement clearly stand out from any other information contained on the form. Additionally, the following statement must be presented in the same manner as in the preceding sentence and must appear immediately above the single signature line: "*The Internal Revenue Service does not require your consent to any provisions of this document other than the certifications required to establish your status as a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession.*"

Form W-8IMY

The substitute Form W-8IMY must contain all of the information required in Part I, lines 1 through 5, and line 6, if a U.S. TIN is required. The substitute Form W-8IMY must also contain all of the statements and certifications contained in Parts II, III, IV, V, or VI, but a specific part needs to be included (in its entirety) only if it is relevant. For example, if the only intermediaries a U.S. withholding agent has as account holders are qualified

intermediaries, the withholding agent may use a substitute Form W-8IMY that contains only the required information from Part I, plus the statements and certifications from Part II. A substitute Form W-8IMY must also incorporate the same attachments as the official form. A withholding agent may also include any information in a substitute Form W-8IMY, or require any information to be associated with the form, that is reasonably related to his obligation to withhold and correctly report payments.

Penalties of perjury statement. The design of the substitute Form W-8IMY must be such that the information and certifications that are being attested to by the penalties of perjury statement clearly stand out from any other information contained on the form. Additionally, the following statement must be presented in the same manner as in the preceding sentence and must appear immediately above the single signature line: "*The Internal Revenue Service does not require your consent to any provisions of this document other than the certifications required to establish your status as a qualified intermediary, a nonqualified intermediary, a specific type of U.S. branch, a withholding foreign partnership, a withholding foreign trust, a nonwithholding foreign partnership, a nonwithholding foreign simple trust, or a nonwithholding foreign grantor trust.*"

Form **W-8BEN**
(Rev. February 2006)
Department of the Treasury
Internal Revenue Service

Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding

► **Section references are to the Internal Revenue Code.** ► **See separate instructions.**
► **Give this form to the withholding agent or payer. Do not send to the IRS.**

OMB No. 1545-1621

Do not use this form for:	**Instead, use Form:**
• A U.S. citizen or other U.S. person, including a resident alien individual	W-9
• A person claiming that income is effectively connected with the conduct of a trade or business in the United States	W-8ECI
• A foreign partnership, a foreign simple trust, or a foreign grantor trust (see instructions for exceptions)	W-8ECI or W-8IMY
• A foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession that received effectively connected income or that is claiming the applicability of section(s) 115(2), 501(c), 892, 895, or 1443(b) (see instructions)	W-8ECI or W-8EXP

Note: *These entities should use Form W-8BEN if they are claiming treaty benefits or are providing the form only to claim they are a foreign person exempt from backup withholding.*

• A person acting as an intermediary	W-8IMY

Note: *See instructions for additional exceptions.*

Part I Identification of Beneficial Owner (See instructions.)

1 Name of individual or organization that is the beneficial owner

2 Country of incorporation or organization

3 Type of beneficial owner: ☐ Individual ☐ Corporation ☐ Disregarded entity ☐ Partnership ☐ Simple trust ☐ Grantor trust ☐ Complex trust ☐ Estate ☐ Government ☐ International organization ☐ Central bank of issue ☐ Tax-exempt organization ☐ Private foundation

4 Permanent residence address (street, apt. or suite no., or rural route). **Do not use a P.O. box or in-care-of address.**

City or town, state or province. Include postal code where appropriate.

Country (do not abbreviate)

5 Mailing address (if different from above)

City or town, state or province. Include postal code where appropriate.

Country (do not abbreviate)

6 U.S. taxpayer identification number, if required (see instructions) ☐ SSN or ITIN ☐ EIN

7 Foreign tax identifying number, if any (optional)

8 Reference number(s) (see instructions)

Part II Claim of Tax Treaty Benefits (if applicable)

9 **I certify that (check all that apply):**

a ☐ The beneficial owner is a resident of ..... within the meaning of the income tax treaty between the United States and that country.

b ☐ If required, the U.S. taxpayer identification number is stated on line 6 (see instructions).

c ☐ The beneficial owner is not an individual, derives the item (or items) of income for which the treaty benefits are claimed, and, if applicable, meets the requirements of the treaty provision dealing with limitation on benefits (see instructions).

d ☐ The beneficial owner is not an individual, is claiming treaty benefits for dividends received from a foreign corporation or interest from a U.S. trade or business of a foreign corporation, and meets qualified resident status (see instructions).

e ☐ The beneficial owner is related to the person obligated to pay the income within the meaning of section 267(b) or 707(b), and will file Form 8833 if the amount subject to withholding received during a calendar year exceeds, in the aggregate, $500,000.

10 **Special rates and conditions** (if applicable—see instructions): The beneficial owner is claiming the provisions of Article ..... of the treaty identified on line 9a above to claim a ..... % rate of withholding on (specify type of income): ..... .
Explain the reasons the beneficial owner meets the terms of the treaty article: .....

Part III Notional Principal Contracts

11 ☐ I have provided or will provide a statement that identifies those notional principal contracts from which the income is **not** effectively connected with the conduct of a trade or business in the United States. I agree to update this statement as required.

Part IV Certification

Under penalties of perjury, I declare that I have examined the information on this form and to the best of my knowledge and belief it is true, correct, and complete. I further certify under penalties of perjury that:

1 I am the beneficial owner (or am authorized to sign for the beneficial owner) of all the income to which this form relates,
2 The beneficial owner is not a U.S. person,
3 The income to which this form relates is (a) not effectively connected with the conduct of a trade or business in the United States, (b) effectively connected but is not subject to tax under an income tax treaty, or (c) the partner's share of a partnership's effectively connected income, **and**
4 For broker transactions or barter exchanges, the beneficial owner is an exempt foreign person as defined in the instructions.
Furthermore, I authorize this form to be provided to any withholding agent that has control, receipt, or custody of the income of which I am the beneficial owner or any withholding agent that can disburse or make payments of the income of which I am the beneficial owner.

Sign Here ► ..... Signature of beneficial owner (or individual authorized to sign for beneficial owner) ..... Date (MM-DD-YYYY) ..... Capacity in which acting

Instructions for Form W-8BEN

(Rev. February 2006)

Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding

Department of the Treasury
Internal Revenue Service

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

For definitions of terms used throughout these instructions, see *Definitions* on pages 3 and 4.

Purpose of form. Foreign persons are subject to U.S. tax at a 30% rate on income they receive from U.S. sources that consists of:

- Interest (including certain original issue discount (OID));
- Dividends;
- Rents;
- Royalties;
- Premiums;
- Annuities;
- Compensation for, or in expectation of, services performed;
- Substitute payments in a securities lending transaction; or
- Other fixed or determinable annual or periodical gains, profits, or income.

This tax is imposed on the gross amount paid and is generally collected by withholding under section 1441 or 1442 on that amount. A payment is considered to have been made whether it is made directly to the beneficial owner or to another person, such as an intermediary, agent, or partnership, for the benefit of the beneficial owner.

In addition, section 1446 requires a partnership conducting a trade or business in the United States to withhold tax on a foreign partner's distributive share of the partnership's effectively connected taxable income. Generally, a foreign person that is a partner in a partnership that submits a Form W-8 for purposes of section 1441 or 1442 will satisfy the documentation requirements under section 1446 as well. However, in some cases the documentation requirements of sections 1441 and 1442 do not match the documentation requirements of section 1446. See Regulations sections 1.1446-1 through 1.1446-6. Further, the owner of a disregarded entity, rather than the disregarded entity itself, shall submit the appropriate Form W-8 for purposes of section 1446.

If you receive certain types of income, you must provide Form W-8BEN to:

- Establish that you are not a U.S. person;
- Claim that you are the beneficial owner of the income for which Form W-8BEN is being provided or a partner in a partnership subject to section 1446; and
- If applicable, claim a reduced rate of, or exemption from, withholding as a resident of a foreign country with which the United States has an income tax treaty.

You may also be required to submit Form W-8BEN to claim an exception from domestic information reporting and backup withholding for certain types of income that are not subject to foreign-person withholding. Such income includes:

- Broker proceeds.
- Short-term (183 days or less) original issue discount (OID).
- Bank deposit interest.
- Foreign source interest, dividends, rents, or royalties.
- Proceeds from a wager placed by a nonresident alien individual in the games of blackjack, baccarat, craps, roulette, or big-6 wheel.

You may also use Form W-8BEN to certify that income from a notional principal contract is not effectively connected with the conduct of a trade or business in the United States.

A withholding agent or payer of the income may rely on a properly completed Form W-8BEN to treat a payment associated with the Form W-8BEN as a payment to a foreign person who beneficially owns the amounts paid. If applicable, the withholding agent may rely on the Form W-8BEN to apply a reduced rate of withholding at source.

Provide Form W-8BEN to the withholding agent or payer before income is paid or credited to you. Failure to provide a Form W-8BEN when requested may lead to withholding at a 30% rate (foreign-person withholding) or the backup withholding rate.

Additional information. For additional information and instructions for the withholding agent, see the Instructions for the Requester of Forms W-8BEN, W-8ECI, W-8EXP, and W-8IMY.

Who must file. You must give Form W-8BEN to the withholding agent or payer if you are a foreign person and you are the beneficial owner of an amount subject to withholding. Submit Form W-8BEN when requested by the withholding agent or payer whether or not you are claiming a reduced rate of, or exemption from, withholding.

Do not use Form W-8BEN if:

- You are a U.S. citizen (even if you reside outside the United States) or other U.S. person (including a resident alien individual). Instead, use Form W-9, Request for Taxpayer Identification Number and Certification.
- You are a disregarded entity with a single owner that is a U.S. person and you are not a hybrid entity claiming treaty benefits. Instead, provide Form W-9.

- You are a nonresident alien individual who claims exemption from withholding on compensation for independent or dependent personal services performed in the United States. Instead, provide Form 8233, Exemption from Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual, or Form W-4, Employee's Withholding Allowance Certificate.
- You are receiving income that is effectively connected with the conduct of a trade or business in the United States, unless it is allocable to you through a partnership. Instead, provide Form W-8ECI, Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States. If any of the income for which you have provided a Form W-8BEN becomes effectively connected, this is a change in circumstances and Form W-8BEN is no longer valid. You must file Form W-8ECI. See *Change in circumstances* on this page.
- You are filing for a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession claiming the applicability of section 115(2), 501(c), 892, 895, or 1443(b). Instead, provide Form W-8EXP, Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding. However, you should use Form W-8BEN if you are claiming treaty benefits or are providing the form only to claim you are a foreign person exempt from backup withholding. You should use Form W-8ECI if you received effectively connected income (for example, income from commercial activities).
- You are a foreign flow-through entity, other than a hybrid entity, claiming treaty benefits. Instead, provide Form W-8IMY, Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding. However, if you are a partner, beneficiary, or owner of a flow-through entity and you are not yourself a flow-through entity, you may be required to furnish a Form W-8BEN to the flow-through entity.
- You are a disregarded entity for purposes of section 1446. Instead, the owner of the entity must submit the form.
- You are a reverse hybrid entity transmitting beneficial owner documentation provided by your interest holders to claim treaty benefits on their behalf. Instead, provide Form W-8IMY.
- You are a withholding foreign partnership or a withholding foreign trust within the meaning of sections 1441 and 1442 and the accompanying regulations. A withholding foreign partnership or a withholding foreign trust is a foreign partnership or trust that has entered into a withholding agreement with the IRS under which it agrees to assume primary withholding responsibility for each partner's, beneficiary's, or owner's distributive share of income subject to withholding that is paid to the partnership or trust. Instead, provide Form W-8IMY.
- You are acting as an intermediary (that is, acting not for your own account, but for the account of others as an agent, nominee, or custodian). Instead, provide Form W-8IMY.
- You are a foreign partnership or foreign grantor trust for purposes of section 1446. Instead, provide Form W-8IMY and accompanying documentation. See Regulations sections 1.1446-1 through 1.1446-6.

Giving Form W-8BEN to the withholding agent. Do not send Form W-8BEN to the IRS. Instead, give it to the person who is requesting it from you. Generally, this will be the person from whom you receive the payment, who credits your account, or a partnership that allocates income to you. Give Form W-8BEN to the person requesting it before the payment is made to you, credited to your account or allocated. If you do not provide this form, the withholding agent may have to withhold at the 30% rate, backup withholding rate, or the rate applicable under section 1446. If you receive more than one type of income from a single withholding agent for which you claim different benefits, the withholding agent may, at its option, require you to submit a Form W-8BEN for each different type of income. Generally, a separate Form W-8BEN must be given to each withholding agent.

Note. If you own the income or account jointly with one or more other persons, the income or account will be treated by the withholding agent as owned by a foreign person if Forms W-8BEN are provided by all of the owners. If the withholding agent receives a Form W-9 from any of the joint owners, the payment must be treated as made to a U.S. person.

Change in circumstances. If a change in circumstances makes any information on the Form W-8BEN you have submitted incorrect, you must notify the withholding agent or payer within 30 days of the change in circumstances and you must file a new Form W-8BEN or other appropriate form.

If you use Form W-8BEN to certify that you are a foreign person, a change of address to an address in the United States is a change in circumstances. Generally, a change of address within the same foreign country or to another foreign country is not a change in circumstances. However, if you use Form W-8BEN to claim treaty benefits, a move to the United States or outside the country where you have been claiming treaty benefits is a change in circumstances. In that case, you must notify the withholding agent or payer within 30 days of the move.

If you become a U.S. citizen or resident alien after you submit Form W-8BEN, you are no longer subject to the 30% withholding rate or the withholding tax on a foreign partner's share of effectively connected income. You must notify the withholding agent or payer within 30 days of becoming a U.S. citizen or resident alien. You may be required to provide a Form W-9. For more information, see Form W-9 and instructions.

Expiration of Form W-8BEN. Generally, a Form W-8BEN provided without a U.S. taxpayer identification number (TIN) will remain in effect for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form incorrect. For example, a Form W-8BEN signed on September 30, 2005, remains valid through December 31, 2008. A Form W-8BEN furnished with a U.S. TIN will remain in effect until a change in circumstances makes any information on the form incorrect, provided that the withholding agent reports on Form 1042-S at least one payment annually to the beneficial owner who provided the Form W-8BEN. See the instructions for line 6

beginning on page 4 for circumstances under which you must provide a U.S. TIN.

Definitions

Beneficial owner. For payments other than those for which a reduced rate of withholding is claimed under an income tax treaty, the beneficial owner of income is generally the person who is required under U.S. tax principles to include the income in gross income on a tax return. A person is not a beneficial owner of income, however, to the extent that person is receiving the income as a nominee, agent, or custodian, or to the extent the person is a conduit whose participation in a transaction is disregarded. In the case of amounts paid that do not constitute income, beneficial ownership is determined as if the payment were income.

Foreign partnerships, foreign simple trusts, and foreign grantor trusts are not the beneficial owners of income paid to the partnership or trust. The beneficial owners of income paid to a foreign partnership are generally the partners in the partnership, provided that the partner is not itself a partnership, foreign simple or grantor trust, nominee or other agent. The beneficial owners of income paid to a foreign simple trust (that is, a foreign trust that is described in section 651(a)) are generally the beneficiaries of the trust, if the beneficiary is not a foreign partnership, foreign simple or grantor trust, nominee or other agent. The beneficial owners of a foreign grantor trust (that is, a foreign trust to the extent that all or a portion of the income of the trust is treated as owned by the grantor or another person under sections 671 through 679) are the persons treated as the owners of the trust. The beneficial owners of income paid to a foreign complex trust (that is, a foreign trust that is not a foreign simple trust or foreign grantor trust) is the trust itself.

For purposes of section 1446, the same beneficial owner rules apply, except that under section 1446 a foreign simple trust rather than the beneficiary provides the form to the partnership.

The beneficial owner of income paid to a foreign estate is the estate itself.

Note. A payment to a U.S. partnership, U.S. trust, or U.S. estate is treated as a payment to a U.S. payee that is not subject to 30% withholding. A U.S. partnership, trust, or estate should provide the withholding agent with a Form W-9. For purposes of section 1446, a U.S. grantor trust or disregarded entity shall not provide the withholding agent a Form W-9 in its own right. Rather, the grantor or other owner shall provide the withholding agent the appropriate form.

Foreign person. A foreign person includes a nonresident alien individual, a foreign corporation, a foreign partnership, a foreign trust, a foreign estate, and any other person that is not a U.S. person. It also includes a foreign branch or office of a U.S. financial institution or U.S. clearing organization if the foreign branch is a qualified intermediary. Generally, a payment to a U.S. branch of a foreign person is a payment to a foreign person.

Nonresident alien individual. Any individual who is not a citizen or resident alien of the United States is a nonresident alien individual. An alien individual meeting either the “green card test” or the “substantial presence test” for the calendar year is a resident alien. Any person not meeting either test is a nonresident alien individual. Additionally, an alien individual who is a resident of a foreign country under the residence article of an income tax treaty, or an alien individual who is a bona fide resident of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa is a nonresident alien individual. See Pub. 519, U.S. Tax Guide for Aliens, for more information on resident and nonresident alien status.

Even though a nonresident alien individual married to a U.S. citizen or resident alien may choose to be treated as a resident alien for certain purposes (for example, filing a joint income tax return), such individual is still treated as a nonresident alien for withholding tax purposes on all income except wages.

Flow-through entity. A flow-through entity is a foreign partnership (other than a withholding foreign partnership), a foreign simple or foreign grantor trust (other than a withholding foreign trust), or, for payments for which a reduced rate of withholding is claimed under an income tax treaty, any entity to the extent the entity is considered to be fiscally transparent (see below) with respect to the payment by an interest holder’s jurisdiction.

For purposes of section 1446, a foreign partnership or foreign grantor trust must submit Form W-8IMY to establish the partnership or grantor trust as a look through entity. The Form W-8IMY may be accompanied by this form or another version of Form W-8 or Form W-9 to establish the foreign or domestic status of a partner or grantor or other owner. See Regulations section 1.1446-1.

Hybrid entity. A hybrid entity is any person (other than an individual) that is treated as fiscally transparent (see below) in the United States but is not treated as fiscally transparent by a country with which the United States has an income tax treaty. Hybrid entity status is relevant for claiming treaty benefits. See the instructions for line 9c on page 5.

Reverse hybrid entity. A reverse hybrid entity is any person (other than an individual) that is not fiscally transparent under U.S. tax law principles but that is fiscally transparent under the laws of a jurisdiction with which the United States has an income tax treaty. See the instructions for line 9c on page 5.

Fiscally transparent entity. An entity is treated as fiscally transparent with respect to an item of income for which treaty benefits are claimed to the extent that the interest holders in the entity must, on a current basis, take into account separately their shares of an item of income paid to the entity, whether or not distributed, and must determine the character of the items of income as if they were realized directly from the sources from which realized by the entity. For example, partnerships, common trust funds, and simple trusts or grantor trusts are generally considered to be fiscally transparent with respect to items of income received by them.

Disregarded entity. A business entity that has a single owner and is not a corporation under Regulations section 301.7701-2(b) is disregarded as an entity separate from its owner.

A disregarded entity shall not submit this form to a partnership for purposes of section 1446. Instead, the owner of such entity shall provide appropriate documentation. See Regulations section 1.1446-1.

Amounts subject to withholding. Generally, an amount subject to withholding is an amount from sources within the United States that is fixed or determinable annual or periodical (FDAP) income. FDAP income is all income included in gross income, including interest (as well as OID), dividends, rents, royalties, and compensation. FDAP income does not include most gains from the sale of property (including market discount and option premiums).

For purposes of section 1446, the amount subject to withholding is the foreign partner's share of the partnership's effectively connected taxable income.

Withholding agent. Any person, U.S. or foreign, that has control, receipt, or custody of an amount subject to withholding or who can disburse or make payments of an amount subject to withholding is a withholding agent. The withholding agent may be an individual, corporation, partnership, trust, association, or any other entity, including (but not limited to) any foreign intermediary, foreign partnership, and U.S. branches of certain foreign banks and insurance companies. Generally, the person who pays (or causes to be paid) the amount subject to withholding to the foreign person (or to its agent) must withhold.

For purposes of section 1446, the withholding agent is the partnership conducting the trade or business in the United States. For a publicly traded partnership, the withholding agent may be the partnership, a nominee holding an interest on behalf of a foreign person, or both. See Regulations sections 1.1446-1 through 1.1446-6.

Specific Instructions

TIP *A hybrid entity should give Form W-8BEN to a withholding agent only for income for which it is claiming a reduced rate of withholding under an income tax treaty. A reverse hybrid entity should give Form W-8BEN to a withholding agent only for income for which no treaty benefit is being claimed.*

Part I

Line 1. Enter your name. If you are a disregarded entity with a single owner who is a foreign person and you are not claiming treaty benefits as a hybrid entity, this form should be completed and signed by your foreign single owner. If the account to which a payment is made or credited is in the name of the disregarded entity, the foreign single owner should inform the withholding agent of this fact. This may be done by including the name and account number of the disregarded entity on line 8 (reference number) of the form. However, if you are a disregarded entity that is claiming treaty benefits as a hybrid entity, this form should be completed and signed by you.

Line 2. If you are a corporation, enter the country of incorporation. If you are another type of entity, enter the country under whose laws you are created, organized, or governed. If you are an individual, enter N/A (for "not applicable").

Line 3. Check the one box that applies. By checking a box, you are representing that you qualify for this classification. You must check the box that represents your classification (for example, corporation, partnership, trust, estate, etc.) under U.S. tax principles. Do not check the box that describes your status under the law of the treaty country. If you are a partnership or disregarded entity receiving a payment for which treaty benefits are being claimed, you must check the "Partnership" or "Disregarded entity" box. If you are a sole proprietor, check the "Individual" box, not the "Disregarded entity" box.

CAUTION *Only entities that are tax-exempt under section 501 should check the "Tax-exempt organization" box. Such organizations should use Form W-8BEN only if they are claiming a reduced rate of withholding under an income tax treaty or some code exception other than section 501. Use Form W-8EXP if you are claiming an exemption from withholding under section 501.*

Line 4. Your permanent residence address is the address in the country where you claim to be a resident for purposes of that country's income tax. If you are giving Form W-8BEN to claim a reduced rate of withholding under an income tax treaty, you must determine your residency in the manner required by the treaty. Do not show the address of a financial institution, a post office box, or an address used solely for mailing purposes. If you are an individual who does not have a tax residence in any country, your permanent residence is where you normally reside. If you are not an individual and you do not have a tax residence in any country, the permanent residence address is where you maintain your principal office.

Line 5. Enter your mailing address only if it is different from the address you show on line 4.

Line 6. If you are an individual, you are generally required to enter your social security number (SSN). To apply for an SSN, get Form SS-5 from a Social Security Administration (SSA) office or, if in the United States, you may call the SSA at 1-800-772-1213. Fill in Form SS-5 and return it to the SSA.

If you do not have an SSN and are not eligible to get one, you must get an individual taxpayer identification number (ITIN). To apply for an ITIN, file Form W-7 with the IRS. It usually takes 4-6 weeks to get an ITIN.

CAUTION *An ITIN is for tax use only. It does not entitle you to social security benefits or change your employment or immigration status under U.S. law.*

If you are not an individual or you are an individual who is an employer or you are engaged in a U.S. trade or business as a sole proprietor, you must enter an employer identification number (EIN). If you do not have an EIN, you should apply for one on Form SS-4, Application for Employer Identification Number. If you are a disregarded entity claiming treaty benefits as a hybrid entity, enter your EIN.

A partner in a partnership conducting a trade or business in the United States will likely be allocated effectively connected taxable income. The partner is

required to file a U.S. federal income tax return and must have a U.S. taxpayer identification number (TIN).

You must provide a U.S. TIN if you are:

- Claiming an exemption from withholding under section 871(f) for certain annuities received under qualified plans,
- A foreign grantor trust with 5 or fewer grantors,
- Claiming benefits under an income tax treaty, or
- Submitting the form to a partnership that conducts a trade or business in the United States.

However, a U.S. TIN is not required to be shown in order to claim treaty benefits on the following items of income:

- Dividends and interest from stocks and debt obligations that are actively traded;
- Dividends from any redeemable security issued by an investment company registered under the Investment Company Act of 1940 (mutual fund);
- Dividends, interest, or royalties from units of beneficial interest in a unit investment trust that are (or were upon issuance) publicly offered and are registered with the SEC under the Securities Act of 1933; and
- Income related to loans of any of the above securities.

You may want to obtain and provide a U.S. TIN on Form W-8BEN even though it is not required. A Form W-8BEN containing a U.S. TIN remains valid for as long as your status and the information relevant to the certifications you make on the form remain unchanged provided at least one payment is reported to you annually on Form 1042-S.

Line 7. If your country of residence for tax purposes has issued you a tax identifying number, enter it here. For example, if you are a resident of Canada, enter your Social Insurance Number.

Line 8. This line may be used by the filer of Form W-8BEN or by the withholding agent to whom it is provided to include any referencing information that is useful to the withholding agent in carrying out its obligations. For example, withholding agents who are required to associate the Form W-8BEN with a particular Form W-8IMY may want to use line 8 for a referencing number or code that will make the association clear. A beneficial owner may use line 8 to include the number of the account for which he or she is providing the form. A foreign single owner of a disregarded entity may use line 8 to inform the withholding agent that the account to which a payment is made or credited is in the name of the disregarded entity (see instructions for line 1 on page 4).

Part II

Line 9a. Enter the country where you claim to be a resident for income tax treaty purposes. For treaty purposes, a person is a resident of a treaty country if the person is a resident of that country under the terms of the treaty.

Line 9b. If you are claiming benefits under an income tax treaty, you must have a U.S. TIN unless one of the exceptions listed in the line 6 instructions above applies.

Line 9c. An entity (but not an individual) that is claiming a reduced rate of withholding under an income tax treaty must represent that it:

- Derives the item of income for which the treaty benefit is claimed, and
- Meets the limitation on benefits provisions contained in the treaty, if any.

An item of income may be derived by either the entity receiving the item of income or by the interest holders in the entity or, in certain circumstances, both. An item of income paid to an entity is considered to be derived by the entity only if the entity is not fiscally transparent under the laws of the entity's jurisdiction with respect to the item of income. An item of income paid to an entity shall be considered to be derived by the interest holder in the entity only if:

- The interest holder is not fiscally transparent in its jurisdiction with respect to the item of income, and
- The entity is considered to be fiscally transparent under the laws of the interest holder's jurisdiction with respect to the item of income. An item of income paid directly to a type of entity specifically identified in a treaty as a resident of a treaty jurisdiction is treated as derived by a resident of that treaty jurisdiction.

If an entity is claiming treaty benefits on its own behalf, it should complete Form W-8BEN. If an interest holder in an entity that is considered fiscally transparent in the interest holder's jurisdiction is claiming a treaty benefit, the interest holder should complete Form W-8BEN on its own behalf and the fiscally transparent entity should associate the interest holder's Form W-8BEN with a Form W-8IMY completed by the entity.

An income tax treaty may not apply to reduce the amount of any tax on an item of income received by an entity that is treated as a domestic corporation for U.S. tax purposes. Therefore, neither the domestic corporation nor its shareholders are entitled to the benefits of a reduction of U.S. income tax on an item of income received from U.S. sources by the corporation.

To determine whether an entity meets the limitation on benefits provisions of a treaty, you must consult the specific provisions or articles under the treaties. Income tax treaties are available on the IRS website at *www.irs.gov*.

If you are an entity that derives the income as a resident of a treaty country, you may check this box if the applicable income tax treaty does not contain a "limitation on benefits" provision.

Line 9d. If you are a foreign corporation claiming treaty benefits under an income tax treaty that entered into force before January 1, 1987 (and has not been renegotiated) on (a) U.S. source dividends paid to you by another foreign corporation or (b) U.S. source interest paid to you by a U.S. trade or business of another foreign corporation, you must generally be a "qualified resident" of a treaty country. See section 884 for the definition of interest paid by a U.S. trade or business of a foreign corporation ("branch interest") and other applicable rules.

In general, a foreign corporation is a qualified resident of a country if any of the following apply.

- It meets a 50% ownership and base erosion test.
- It is primarily and regularly traded on an established securities market in its country of residence or the United States.
- It carries on an active trade or business in its country of residence.
- It gets a ruling from the IRS that it is a qualified resident.

See Regulations section 1.884-5 for the requirements that must be met to satisfy each of these tests.

If you are claiming treaty benefits under an income tax treaty entered into force after December 31, 1986, do not check box 9d. Instead, check box 9c.

Line 9e. Check this box if you are related to the withholding agent within the meaning of section 267(b) or 707(b) and the aggregate amount subject to withholding received during the calendar year will exceed $500,000. Additionally, you must file Form 8833, Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b).

Line 10

Line 10 must be used only if you are claiming treaty benefits that require that you meet conditions not covered by the representations you make in lines 9a through 9e. However, this line should always be completed by foreign students and researchers claiming treaty benefits. See *Scholarship and fellowship grants* below for more information.

The following are additional examples of persons who should complete this line.

- Exempt organizations claiming treaty benefits under the exempt organization articles of the treaties with Canada, Mexico, Germany, and the Netherlands.
- Foreign corporations that are claiming a preferential rate applicable to dividends based on ownership of a specific percentage of stock.
- Persons claiming treaty benefits on royalties if the treaty contains different withholding rates for different types of royalties.

This line is generally not applicable to claiming treaty benefits under an interest or dividends (other than dividends subject to a preferential rate based on ownership) article of a treaty.

Nonresident alien who becomes a resident alien. Generally, only a nonresident alien individual may use the terms of a tax treaty to reduce or eliminate U.S. tax on certain types of income. However, most tax treaties contain a provision known as a "saving clause." Exceptions specified in the saving clause may permit an exemption from tax to continue for certain types of income even after the recipient has otherwise become a U.S. resident alien for tax purposes. The individual must use Form W-9 to claim the tax treaty benefit. See the instructions for Form W-9 for more information. Also see *Nonresident alien student or researcher who becomes a resident alien* later for an example.

Scholarship and fellowship grants. A nonresident alien student (including a trainee or business apprentice) or researcher who receives noncompensatory scholarship or fellowship income may use Form W-8BEN to claim benefits under a tax treaty that apply to reduce or eliminate U.S. tax on such income. No Form W-8BEN is required unless a treaty benefit is being claimed. A nonresident alien student or researcher who receives compensatory scholarship or fellowship income must use Form 8233 to claim any benefits of a tax treaty that apply to that income. The student or researcher must use Form W-4 for any part of such income for which he or she is not claiming a tax treaty withholding exemption. Do not use Form W-8BEN for compensatory scholarship or fellowship income. See *Compensation for Dependent Personal Services* in the Instructions for Form 8233.

If you are a nonresident alien individual who received noncompensatory scholarship or fellowship income and personal services income (including compensatory scholarship or fellowship income) from the same withholding agent, you may use Form 8233 to claim a tax treaty withholding exemption for part or all of both types of income.

Completing lines 4 and 9a. Most tax treaties that contain an article exempting scholarship or fellowship grant income from taxation require that the recipient be a resident of the other treaty country at the time of, or immediately prior to, entry into the United States. Thus, a student or researcher may claim the exemption even if he or she no longer has a permanent address in the other treaty country after entry into the United States. If this is the case, you may provide a U.S. address on line 4 and still be eligible for the exemption if all other conditions required by the tax treaty are met. You must also identify on line 9a the tax treaty country of which you were a resident at the time of, or immediately prior to, your entry into the United States.

Completing line 10. You must complete line 10 if you are a student or researcher claiming an exemption from taxation on your scholarship or fellowship grant income under a tax treaty.

Nonresident alien student or researcher who becomes a resident alien. You must use Form W-9 to claim an exception to a saving clause. See *Nonresident alien who becomes a resident alien* on this page for a general explanation of saving clauses and exceptions to them.

Example. Article 20 of the U.S.-China income tax treaty allows an exemption from tax for scholarship income received by a Chinese student temporarily present in the United States. Under U.S. law, this student will become a resident alien for tax purposes if his or her stay in the United States exceeds 5 calendar years. However, paragraph 2 of the first protocol to the U.S.-China treaty (dated April 30, 1984) allows the provisions of Article 20 to continue to apply even after the Chinese student becomes a resident alien of the United States. A Chinese student who qualifies for this exception (under paragraph 2 of the first protocol) and is relying on this exception to claim an exemption from tax on his or her scholarship or fellowship income would complete Form W-9.

Part III

If you check this box, you must provide the withholding agent with the required statement for income from a notional principal contract that is to be treated as income not effectively connected with the conduct of a trade or business in the United States. You should update this statement as often as necessary. A new Form W-8BEN is not required for each update provided the form otherwise remains valid.

Part IV

Form W-8BEN must be signed and dated by the beneficial owner of the income, or, if the beneficial owner is not an individual, by an authorized representative or

officer of the beneficial owner. If Form W-8BEN is completed by an agent acting under a duly authorized power of attorney, the form must be accompanied by the power of attorney in proper form or a copy thereof specifically authorizing the agent to represent the principal in making, executing, and presenting the form. Form 2848, Power of Attorney and Declaration of Representative, may be used for this purpose. The agent, as well as the beneficial owner, may incur liability for the penalties provided for an erroneous, false, or fraudulent form.

Broker transactions or barter exchanges. Income from transactions with a broker or a barter exchange is subject to reporting rules and backup withholding unless Form W-8BEN or a substitute form is filed to notify the broker or barter exchange that you are an exempt foreign person.

You are an exempt foreign person for a calendar year in which:

- You are a nonresident alien individual or a foreign corporation, partnership, estate, or trust;
- You are an individual who has not been, and does not plan to be, present in the United States for a total of 183 days or more during the calendar year; and
- You are neither engaged, nor plan to be engaged during the year, in a U.S. trade or business that has effectively connected gains from transactions with a broker or barter exchange.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to provide the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: **Recordkeeping,** 5 hr., 58 min.; **Learning about the law or the form,** 3 hr., 46 min.; **Preparing and sending the form to IRS,** 4 hr., 2 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can email us at **taxforms@irs.gov.* Please put "Forms Comment" on the subject line. Or you can write to Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6406, Washington, DC 20224. Do not send Form W-8BEN to this office. Instead, give it to your withholding agent.

Form **W-8ECI**

(Rev. February 2006)

Department of the Treasury
Internal Revenue Service

Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States

► **Section references are to the Internal Revenue Code.** ► **See separate instructions.**
► **Give this form to the withholding agent or payer. Do not send to the IRS.**

OMB No. 1545-1621

Note: *Persons submitting this form must file an annual U.S. income tax return to report income claimed to be effectively connected with a U.S. trade or business (see instructions).*

Do not use this form for:	**Instead, use Form:**
• A beneficial owner solely claiming foreign status or treaty benefits	W-8BEN
• A foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession claiming the applicability of section(s) 115(2), 501(c), 892, 895, or 1443(b)	W-8EXP

Note: *These entities should use Form W-8ECI if they received effectively connected income (e.g., income from commercial activities).*

• A foreign partnership or a foreign trust (unless claiming an exemption from U.S. withholding on income effectively connected with the conduct of a trade or business in the United States)	W-8BEN or W-8IMY
• A person acting as an intermediary	W-8IMY

Note: *See instructions for additional exceptions.*

Part I Identification of Beneficial Owner (See instructions.)

1 Name of individual or organization that is the beneficial owner

2 Country of incorporation or organization

3 Type of entity (check the appropriate box):

☐ Individual ☐ Corporation ☐ Disregarded entity
☐ Partnership ☐ Simple trust ☐ Complex trust ☐ Estate
☐ Government ☐ Grantor trust ☐ Central bank of issue ☐ Tax-exempt organization
☐ Private foundation ☐ International organization

4 Permanent residence address (street, apt. or suite no., or rural route). **Do not use a P.O. box.**

City or town, state or province. Include postal code where appropriate.

Country (do not abbreviate)

5 Business address in the United States (street, apt. or suite no., or rural route). **Do not use a P.O. box.**

City or town, state, and ZIP code

6 U.S. taxpayer identification number (required—see instructions) ☐ SSN or ITIN ☐ EIN

7 Foreign tax identifying number, if any (optional)

8 Reference number(s) (see instructions)

9 Specify each item of income that is, or is expected to be, received from the payer that is effectively connected with the conduct of a trade or business in the United States (attach statement if necessary)

Part II Certification

Sign Here

Under penalties of perjury, I declare that I have examined the information on this form and to the best of my knowledge and belief it is true, correct, and complete. I further certify under penalties of perjury that:

- I am the beneficial owner (or I am authorized to sign for the beneficial owner) of all the income to which this form relates,
- The amounts for which this certification is provided are effectively connected with the conduct of a trade or business in the United States and are includible in my gross income (or the beneficial owner's gross income) for the taxable year, **and**
- The beneficial owner is not a U.S. person.

Furthermore, I authorize this form to be provided to any withholding agent that has control, receipt, or custody of the income of which I am the beneficial owner or any withholding agent that can disburse or make payments of the income of which I am the beneficial owner.

Signature of beneficial owner (or individual authorized to sign for the beneficial owner) | Date (MM-DD-YYYY) | Capacity in which acting

Instructions for Form W-8ECI

(Rev. February 2006)

Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States

Department of the Treasury
Internal Revenue Service

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Note. For definitions of terms used throughout these instructions, see *Definitions* beginning on page 2.

Purpose of form. Foreign persons are generally subject to U.S. tax at a 30% rate on income they receive from U.S. sources. However, no withholding under section 1441 or 1442 is required on income that is, or is deemed to be, effectively connected with the conduct of a trade or business in the United States and is includible in the beneficial owner's gross income for the tax year.

The no withholding rule does not apply to personal services income and income subject to withholding under section 1445 (dispositions of U.S. real property interests) or section 1446 (foreign partner's share of effectively connected income).

If you receive effectively connected income from sources in the United States, you must provide Form W-8ECI to:

- Establish that you are not a U.S. person,
- Claim that you are the beneficial owner of the income for which Form W-8ECI is being provided, and
- Claim that the income is effectively connected with the conduct of a trade or business in the United States.

If you expect to receive both income that is effectively connected and income that is not effectively connected from a withholding agent, you must provide Form W-8ECI for the effectively connected income and Form W-8BEN (or Form W-8EXP or Form W-8IMY) for income that is not effectively connected.

If you submit this form to a partnership, the income claimed to be effectively connected with the conduct of a U.S. trade or business is subject to withholding under section 1446. If a nominee holds an interest in a partnership on your behalf, you, not the nominee, must submit the form to the partnership or nominee that is the withholding agent.

If you are a foreign partnership, a foreign simple trust, or a foreign grantor trust with effectively connected income, you may submit Form W-8ECI without attaching Forms W-8BEN or other documentation for your foreign partners, beneficiaries, or owners.

A withholding agent or payer of the income may rely on a properly completed Form W-8ECI to treat the payment associated with the Form W-8ECI as a payment to a foreign person who beneficially owns the amounts paid and is either entitled to an exemption from withholding under sections 1441 or 1442 because the income is effectively connected with the conduct of a trade or business in the United States or subject to withholding under section 1446.

Provide Form W-8ECI to the withholding agent or payer before income is paid, credited, or allocated to you. Failure by a beneficial owner to provide a Form W-8ECI when requested may lead to withholding at the 30% rate or the backup withholding rate.

Additional information. For additional information and instructions for the withholding agent, see the Instructions for the Requester of Forms W-8BEN, W-8ECI, W-8EXP, and W-8IMY.

Who must file. You must give Form W-8ECI to the withholding agent or payer if you are a foreign person and you are the beneficial owner of U.S. source income that is (or is deemed to be) effectively connected with the conduct of a trade or business within the United States.

Do not use Form W-8ECI if:

- You are a nonresident alien individual who claims exemption from withholding on compensation for independent or certain dependent personal services performed in the United States. Instead, provide Form 8233, Exemption from Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual, or Form W-4, Employee's Withholding Allowance Certificate.
- You are claiming an exemption from withholding under section 1441 or 1442 for a reason other than a claim that the income is effectively connected with the conduct of a trade or business in the United States. For example, if you are a foreign person and the beneficial owner of U.S. source income that is not effectively connected with a U.S. trade or business and are claiming a reduced rate of withholding as a resident of a foreign country with which the United States has an income tax treaty in effect, do not use this form. Instead, provide Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding.
- You are a foreign person receiving proceeds from the disposition of a U.S. real property interest. Instead, see Form 8288-B, Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests.
- You are filing for a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession claiming the applicability of section 115(2), 501(c), 892, 895, or 1443(b). Instead, provide Form W-8EXP, Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding. However, these entities should use Form W-8BEN if they are claiming treaty benefits or are providing the form only to claim exempt recipient status for backup withholding purposes. They should use Form W-8ECI if they received effectively connected income (for example, income from commercial activities).

- You are acting as an intermediary (that is, acting not for your own account or for that of your partners, but for the account of others as an agent, nominee, or custodian). Instead, provide Form W-8IMY, Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding.
- You are a withholding foreign partnership or a withholding foreign trust for purposes of sections 1441 and 1442. A withholding foreign partnership is, generally, a foreign partnership that has entered into a withholding agreement with the IRS under which it agrees to assume primary withholding responsibility for each partner's distributive share of income subject to withholding that is paid to the partnership. A withholding foreign trust is, generally, a foreign simple trust or a foreign grantor trust that has entered into a withholding agreement with the IRS under which it agrees to assume primary withholding responsibility for each beneficiary's or owner's distributive share of income subject to withholding that is paid to the trust. Instead, provide Form W-8IMY.
- You are a foreign corporation that is a personal holding company receiving compensation described in section 543(a)(7). Such compensation is not exempt from withholding as effectively connected income, but may be exempt from withholding on another basis.
- You are a foreign partner in a partnership and the income allocated to you from the partnership is effectively connected with the conduct of the partnership's trade or business in the United States. Instead, provide Form W-8BEN. However, if you made or will make an election under section 871(d) or 882(d), provide Form W-8ECI. In addition, if you are otherwise engaged in a trade or business in the United States and you want your allocable share of income from the partnership to be subject to withholding under section 1446, provide Form W-8ECI.

Giving Form W-8ECI to the withholding agent. Do not send Form W-8ECI to the IRS. Instead, give it to the person who is requesting it from you. Generally, this will be the person from whom you receive the payment, who credits your account, or a partnership that allocates income to you. Give Form W-8ECI to the person requesting it before the payment is made, credited, or allocated. If you do not provide this form, the withholding agent may have to withhold at the 30% rate or the backup withholding rate. A separate Form W-8ECI must be given to each withholding agent.

U.S. branch of foreign bank or insurance company. A payment to a U.S. branch of a foreign bank or a foreign insurance company that is subject to U.S. regulation by the Federal Reserve Board or state insurance authorities is presumed to be effectively connected with the conduct of a trade or business in the United States unless the branch provides a withholding agent with a Form W-8BEN or Form W-8IMY for the income.

Change in circumstances. If a change in circumstances makes any information on the Form W-8ECI you have submitted incorrect, you must notify the withholding agent or payer within 30 days of the change in circumstances and you must file a new Form W-8ECI or other appropriate form. For example, if during the tax year any part or all of the income is no longer effectively connected with the conduct of a trade or business in the United States, your Form W-8ECI is no longer valid. You must notify the withholding agent and provide Form W-8BEN, W-8EXP, or W-8IMY.

Expiration of Form W-8ECI. Generally, a Form W-8ECI will remain in effect for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year, unless a change in circumstances makes any information on the form incorrect. For example, a Form W-8ECI signed on September 30, 2005, remains valid through December 31, 2008. Upon the expiration of the 3-year period, you must provide a new Form W-8ECI.

Definitions

Beneficial owner. For payments other than those for which a reduced rate of withholding is claimed under an income tax treaty, the beneficial owner of income is generally the person who is required under U.S. tax principles to include the income in gross income on a tax return. A person is not a beneficial owner of income, however, to the extent that person is receiving the income as a nominee, agent, or custodian, or to the extent the person is a conduit whose participation in a transaction is disregarded. In the case of amounts paid that do not constitute income, beneficial ownership is determined as if the payment were income.

Foreign partnerships, foreign simple trusts, and foreign grantor trusts are not the beneficial owners of income paid to the partnership or trust. The beneficial owners of income paid to a foreign partnership are generally the partners in the partnership, provided that the partner is not itself a partnership, foreign simple or grantor trust, nominee or other agent. The beneficial owners of income paid to a foreign simple trust (that is, a foreign trust that is described in section 651(a)) are generally the beneficiaries of the trust, if the beneficiary is not a foreign partnership, foreign simple or grantor trust, nominee or other agent. The beneficial owners of a foreign grantor trust (that is, a foreign trust to the extent that all or a portion of the income of the trust is treated as owned by the grantor or another person under sections 671 through 679) are the persons treated as the owners of the trust. The beneficial owners of income paid to a foreign complex trust (that is, a foreign trust that is not a foreign simple trust or foreign grantor trust) is the trust itself.

Generally, these beneficial owner rules apply for purposes of sections 1441, 1442, and 1446, except that section 1446 requires a foreign simple trust to provide a Form W-8 on its own behalf rather than on behalf of the beneficiary of such trust.

The beneficial owner of income paid to a foreign estate is the estate itself.

A payment to a U.S. partnership, U.S. trust, or U.S. estate is treated as a payment to a U.S. payee. A U.S. partnership, trust, or estate should provide the withholding agent with a Form W-9. However, for purposes of section 1446, a U.S. grantor trust shall not provide the withholding agent a Form W-9. Instead, the grantor or other owner must provide Form W-8 or Form W-9 as appropriate.

Disregarded entity. A business entity that has a single owner and is not a corporation under Regulations section 301.7701-2(b) is disregarded as an entity separate from its owner.

A disregarded entity shall not submit this form to a partnership for purposes of section 1446. Instead, the owner of such entity shall provide appropriate documentation. See Regulations section 1.1446-1.

Effectively connected income. Generally, when a foreign person engages in a trade or business in the United States, all income from sources in the United States other than fixed or determinable annual or periodical (FDAP) income (for example, interest, dividends, rents, and certain similar amounts) is considered income effectively connected with a U.S. trade or business. FDAP income may or may not be effectively connected with a U.S. trade or business. Factors to be considered to determine whether FDAP income and similar amounts from U.S. sources are effectively connected with a U.S. trade or business include whether:

- The income is from assets used in, or held for use in, the conduct of that trade or business, or
- The activities of that trade or business were a material factor in the realization of the income.

There are special rules for determining whether income from securities is effectively connected with the active conduct of a U.S. banking, financing, or similar business. See section 864(c)(4)(B)(ii) and Regulations section 1.864-4(c)(5)(ii) for more information.

Effectively connected income, after allowable deductions, is taxed at graduated rates applicable to U.S. citizens and resident aliens, rather than at the 30% rate. You must report this income on your annual U.S. income tax or information return.

A partnership that has effectively connected income allocable to foreign partners is generally required to withhold tax under section 1446. The withholding tax rate on a partner's share of effectively connected income is 35%. In certain circumstances the partnership may withhold tax at the highest applicable rate to a particular type of income (for example long-term capital gain allocated to a noncorporate partner). Any amount withheld under section 1446 on your behalf, and reflected on Form 8805 issued by the partnership to you may be credited on your U.S. income tax return.

Foreign person. A foreign person includes a nonresident alien individual, a foreign corporation, a foreign partnership, a foreign trust, a foreign estate, and any other person that is not a U.S. person.

Nonresident alien individual. Any individual who is not a citizen or resident alien of the United States is a nonresident alien individual. An alien individual meeting either the "green card test" or the "substantial presence test" for the calendar year is a resident alien. Any person not meeting either test is a nonresident alien individual. Additionally, an alien individual who is a resident of a foreign country under the residence article of an income tax treaty, or an alien individual who is a bona fide resident of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa is a nonresident alien individual.

Even though a nonresident alien individual married to a U.S. citizen or resident alien may choose to be treated as a resident alien for certain purposes (for example, filing a joint income tax return), such individual is still treated as a nonresident alien for withholding tax purposes on all income except wages.

See Pub. 519, U.S. Tax Guide for Aliens, for more information on resident and nonresident alien status.

Withholding agent. Any person, U.S. or foreign, that has control, receipt, or custody of an amount subject to withholding or who can disburse or make payments of an amount subject to withholding is a withholding agent. The withholding agent may be an individual, corporation, partnership, trust, association, or any other entity including (but not limited to) any foreign intermediary, foreign partnership, and U.S. branches of certain foreign banks and insurance companies. Generally, the person who pays (or causes to be paid) an amount subject to withholding to the foreign person (or to its agent) must withhold.

Specific Instructions

Part I

Line 1. Enter your name. If you are filing for a disregarded entity with a single owner who is a foreign person, this form should be completed and signed by the foreign single owner. If the account to which a payment is made or credited is in the name of the disregarded entity, the foreign single owner should inform the withholding agent of this fact. This may be done by including the name and account number of the disregarded entity on line 8 (reference number) of Part I of the form.

If you own the income or account jointly with one or more other persons, the income or account will be treated by the withholding agent as owned by a foreign person if Forms W-8ECI are provided by all of the owners. If the withholding agent receives a Form W-9, Request for Taxpayer Identification Number and Certification, from any of the joint owners, the payment must be treated as made to a U.S. person.

Line 2. If you are filing for a corporation, enter the country of incorporation. If you are filing for another type of entity, enter the country under whose laws the entity is created, organized, or governed. If you are an individual, write "N/A" (for "not applicable").

Line 3. Check the box that applies. By checking a box, you are representing that you qualify for this classification. You must check the one box that represents your classification (for example, corporation, partnership, etc.) under U.S. tax principles. If you are filing for a disregarded entity, you must check the "Disregarded entity" box (not the box that describes the status of your single owner).

Line 4. Your permanent residence address is the address in the country where you claim to be a resident for that country's income tax. Do not show the address of a financial institution, a post office box, or an address used solely for mailing purposes. If you are an individual who does not have a tax residence in any country, your permanent residence is where you normally reside. If you are not an individual and you do not have a tax residence in any country, the permanent residence address is where you maintain your principal office.

Line 5. Enter your business address in the United States. Do not show a post office box.

Line 6. You must provide a U.S. taxpayer identification number (TIN) for this form to be valid. A U.S. TIN is a social security number (SSN), employer identification number (EIN), or IRS individual taxpayer identification number (ITIN). Check the appropriate box for the type of U.S. TIN you are providing.

If you are an individual, you are generally required to enter your SSN. To apply for an SSN, get Form SS-5 from a Social Security Administration (SSA) office. Fill in Form SS-5 and return it to the SSA.

If you do not have an SSN and are not eligible to get one, you must get an ITIN. To apply for an ITIN, file Form W-7 with the IRS. It usually takes 4-6 weeks to get an ITIN.

If you are not an individual (for example, a foreign estate or trust), or you are an individual who is an employer or who is engaged in a U.S. trade or business as a sole proprietor, use Form SS-4, Application for Employer Identification Number, to obtain an EIN. If you are a disregarded entity, enter the U.S. TIN of your foreign single owner.

Line 7. If your country of residence for tax purposes has issued you a tax identifying number, enter it here. For example, if you are a resident of Canada, enter your Social Insurance Number.

Line 8. This line may be used by the filer of Form W-8ECI or by the withholding agent to whom it is provided to include any referencing information that is useful to the withholding agent in carrying out its obligations. A beneficial owner may use line 8 to include the name and number of the account for which he or she is providing the form. A foreign single owner of a disregarded entity may use line 8 to inform the withholding agent that the account to which a payment is made or credited is in the name of the disregarded entity (see instructions for line 1 on page 3).

Line 9. You must specify the items of income that are effectively connected with the conduct of a trade or business in the United States. You will generally have to provide Form W-8BEN, Form W-8EXP, or Form W-8IMY for those items from U.S. sources that are not effectively connected with the conduct of a trade or business in the United States. See Form W-8BEN, W-8EXP, or W-8IMY, and its instructions, for more details.

If you are providing this form to a partnership because you are a partner and have made an election under section 871(d) or section 882(d), attach a copy of the election to the form. If you have not made the election, but intend to do so effective for the current tax year, attach a statement to the form indicating your intent. See Regulations section 1.871-10(d)(3).

Part II

Signature. Form W-8ECI must be signed and dated by the beneficial owner of the income, or, if the beneficial owner is not an individual, by an authorized representative or officer of the beneficial owner. If Form W-8ECI is completed by an agent acting under a duly authorized power of attorney, the form must be accompanied by the power of attorney in proper form or a copy thereof specifically authorizing the agent to represent the principal in making, executing, and presenting the form. Form 2848, Power of Attorney and Declaration of Representative, may be used for this purpose. The agent, as well as the beneficial owner, may incur liability for the penalties provided for an erroneous, false, or fraudulent form.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. If you want to receive exemption from withholding on income effectively connected with the conduct of a trade or business in the United States, you are required to provide the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: **Recordkeeping,** 3 hr., 35 min.; **Learning about the law or the form,** 3 hr., 22 min.; **Preparing the form,** 3 hr., 35 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can email us at **taxforms@irs.gov.* Please put “Forms Comment” on the subject line. Or you can write to Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6406, Washington, DC 20224. Do not send Form W-8ECI to this office. Instead, give it to your withholding agent.

Form **W-8EXP**

(Rev. February 2006)

Department of the Treasury
Internal Revenue Service

Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding

(For use by foreign governments, international organizations, foreign central banks of issue, foreign tax-exempt organizations, foreign private foundations, and governments of U.S. possessions.)

► Section references are to the Internal Revenue Code. ► See separate instructions.
► Give this form to the withholding agent or payer. Do not send to the IRS.

OMB No. 1545-1621

Do not use this form for:	**Instead, use Form:**
• Any foreign government or other foreign organization that is not claiming the applicability of section(s) 115(2), 501(c), 892, 895, or 1443(b).	W-8BEN or W-8ECI
• A beneficial owner solely claiming foreign status or treaty benefits	W-8BEN
• A foreign partnership or a foreign trust	W-8BEN or W-8IMY
• A person claimimg that income is effectively connected with the conduct of a trade or business in the United States	W-8ECI
• A person acting as an intermediary	W-8IMY

Part I Identification of Beneficial Owner (See instructions before completing this part.)

1 Name of organization

2 Country of incorporation or organization

3 Type of entity
☐ Foreign government ☐ International organization ☐ Foreign central bank of issue (not wholly owned by the foreign sovereign) ☐ Foreign tax-exempt organization
☐ Government of a U.S. possession ☐ Foreign private foundation

4 Permanent address (street, apt. or suite no., or rural route). **Do not use a P.O. box.**

City or town, state or province. Include postal code where appropriate.

Country (do not abbreviate)

5 Mailing address (if different from above)

City or town, state or province. Include postal or ZIP code where appropriate.

Country (do not abbreviate)

6 U.S. taxpayer identification number, if required (see instructions)

7 Foreign tax identifying number, if any (optional)

8 Reference number(s) (see instructions)

Part II Qualification Statement

9 For a foreign government:

a ☐ I certify that the entity identified in Part I is a foreign government within the meaning of section 892 and the payments are within the scope of the exemption granted by section 892.

Check box 9b or box 9c, whichever applies:

b ☐ The entity identified in Part I is an integral part of the government of .....

c ☐ The entity identified in Part I is a controlled entity of the government of .....

10 For an international organization:

☐ I certify that:

- The entity identified in Part I is an international organization within the meaning of section 7701(a)(18) **and**
- The payments are within the scope of the exemption granted by section 892.

11 For a foreign central bank of issue (not wholly owned by the foreign sovereign):

☐ I certify that:

- The entity identified in Part I is a foreign central bank of issue,
- The entity identified in Part I does not hold obligations or bank deposits to which this form relates for use in connection with the conduct of a commercial banking function or other commercial activity, **and**
- The payments are within the scope of the exemption granted by section 895.

(Part II and required certification continued on page 2)

Part II Qualification Statement *(continued)*

12 For a foreign tax-exempt organization, including foreign private foundations:

If any of the income to which this certification relates constitutes income includible under section 512 in computing the entity's unrelated business taxable income, attach a statement identifying the amounts.

Check either box 12a or box 12b:

a ☐ I certify that the entity identified in Part I has been issued a determination letter by the IRS dated ..... that is currently in effect and that concludes that it is an exempt organization described in section 501(c).

b ☐ I have attached to this form an opinion from U.S. counsel concluding that the entity identified in Part I is described in section 501(c).

For section 501(c)(3) organizations only, check either box 12c or box 12d:

c ☐ If the determination letter or opinion of counsel concludes that the entity identified in Part I is described in section 501(c)(3), I certify that the organization is not a private foundation described in section 509. I have attached an affidavit of the organization setting forth sufficient facts for the IRS to determine that the organization is not a private foundation because it meets one of the exceptions described in section 509(a)(1), (2), (3), or (4).

d ☐ If the determination letter or opinion of counsel concludes that the entity identified in Part I is described in section 501(c)(3), I certify that the organization is a private foundation described in section 509.

13 For a government of a U.S. possession:

☐ I certify that the entity identified in Part I is a government of a possession of the United States, or is a political subdivision thereof, and is claiming the exemption granted by section 115(2).

Part III Certification

Under penalties of perjury, I declare that I have examined the information on this form and to the best of my knowledge and belief it is true, correct, and complete. I further certify under penalties of perjury that:

- The organization for which I am signing is the beneficial owner of the income to which this form relates,
- The beneficial owner is not a U.S. person,
- For a beneficial owner that is a controlled entity of a foreign sovereign (other than a central bank of issue wholly owned by a foreign sovereign), the beneficial owner is not engaged in commercial activities within or outside the United States, **and**
- For a beneficial owner that is a central bank of issue wholly owned by a foreign sovereign, the beneficial owner is not engaged in commercial activities within the United States.

Furthermore, I authorize this form to be provided to any withholding agent that has control, receipt, or custody of the income of which I am the beneficial owner or any withholding agent that can disburse or make payments of the income of which I am the beneficial owner.

Sign Here

.....	.....	.....
Signature of authorized official	Date (MM-DD-YYYY)	Capacity in which acting

Instructions for Form W-8EXP

(Rev. February 2006)

Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding

Department of the Treasury
Internal Revenue Service

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Note. For definitions of terms used throughout these instructions, see *Definitions* on pages 2 and 3.

Purpose of form. Foreign persons are subject to U.S. tax at a 30% rate on income they receive from U.S. sources that consists of interest (including certain original issue discount (OID)), dividends, rents, premiums, annuities, compensation for, or in expectation of, services performed, or other fixed or determinable annual or periodical gains, profits, or income. This tax is imposed on the gross amount paid and is generally collected by withholding under section 1441 or 1442 on that amount. A payment is considered to have been made whether it is made directly to the beneficial owner or to another person for the benefit of the beneficial owner.

Foreign persons are also subject to tax at graduated rates on income they earn that is considered effectively connected with a U.S. trade or business. If a foreign person invests in a partnership that conducts a U.S. trade or business, the foreign person is considered to be engaged in a U.S. trade or business. The partnership is required to withhold tax under section 1446 on the foreign person's distributive share of the partnership's effectively connected taxable income.

If you receive certain types of income, you must provide Form W-8EXP to:

- Establish that you are not a U.S. person,
- Claim that you are the beneficial owner of the income for which Form W-8EXP is given, and
- Claim a reduced rate of, or exemption from, withholding as a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession.

In general, payments to a foreign government (including a foreign central bank of issue wholly-owned by a foreign sovereign) from investments in the United States in stocks, bonds, other domestic securities, financial instruments held in the execution of governmental financial or monetary policy, and interest on deposits in banks in the United States are exempt from tax under section 892 and exempt from withholding under sections 1441 and 1442. Payments other than those described above, including income derived in the U.S. from the conduct of a commercial activity, income received from a controlled commercial entity (including gain from the disposition of any interest in a controlled commercial entity), and income received by a controlled commercial entity, do not qualify for exemption from tax under section 892 or exemption from withholding under sections 1441 and 1442. See Temporary Regulations section 1.892-3T. In addition, certain distributions to a foreign government from a real estate investment trust (REIT) may not be eligible for relief from withholding and may be subject to withholding at 35% of the gain realized. For the definition of "commercial activities," see Temporary Regulations section 1.892-4T.

Amounts allocable to a foreign person from a partnership's trade or business in the United States are considered derived from a commercial activity in the United States. The partnership's net effectively connected taxable income is subject to withholding under section 1446.

In general, payments to an international organization from investment in the United States in stocks, bonds and other domestic securities, interest on deposits in banks in the United States, and payments from any other source within the United States are exempt from tax under section 892 and exempt from withholding under sections 1441 and 1442. See Temporary Regulations section 1.892-6T. Payments to a foreign central bank of issue (whether or not wholly owned by a foreign sovereign) or to the Bank for International Settlements from obligations of the United States or of any agency or instrumentality thereof, or from interest on deposits with persons carrying on the banking business, are also generally exempt from tax under section 895 and exempt from withholding under sections 1441 and 1442. In addition, payments to a foreign central bank of issue from bankers' acceptances are exempt from tax under section 871(i)(2)(C) and exempt from withholding under sections 1441 and 1442. Effectively connected income or gain from a partnership conducting a trade or business in the United States may be subject to withholding under section 1446.

Payments to a foreign tax-exempt organization of certain types of U.S. source income are also generally exempt from tax and exempt from withholding. Gross investment income of a foreign private foundation, however, is subject to withholding under section 1443(b) at a rate of 4%. Effectively connected income or gain from a partnership conducting a trade or business in the United States may be subject to withholding under section 1446.

Payments to a government of a possession of the United States are generally exempt from tax and withholding under section 115(2).

To establish eligibility for exemption from 30% tax and withholding, a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession must provide a Form W-8EXP to a withholding agent or payer with all

necessary documentation. The withholding agent or payer of the income may rely on a properly completed Form W-8EXP to treat the payment, credit, or allocation associated with the Form W-8EXP as being made to a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession exempt from withholding at the 30% rate (or, where appropriate, subject to withholding at a 4% rate).

Provide Form W-8EXP to the withholding agent or payer before income is paid, credited, or allocated to you. Failure by a beneficial owner to provide a Form W-8EXP when requested may lead to withholding at the 30% rate, the backup withholding rate, or the rate applicable under section 1446.

Additional information. For additional information and instructions for the withholding agent, see the Instructions for the Requester of Forms W-8BEN, W-8ECI, W-8EXP, and W-8IMY.

Who must file. You must give Form W-8EXP to the withholding agent or payer if you are a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession. Submit Form W-8EXP whether or not you are claiming a reduced rate of, or exemption from, U.S. tax withholding.

Do not use Form W-8EXP if:

- You are not a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession claiming the applicability of section 115(2), 501(c), 892, 895, or 1443(b). Instead, provide Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding, or Form W-8ECI, Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States. For example, if you are a foreign tax-exempt organization claiming a benefit under an income tax treaty, provide Form W-8BEN.
- You are receiving income that is effectively connected with the conduct of a trade or business in the United States. Instead, provide Form W-8ECI.
- You are a tax-exempt organization receiving unrelated business taxable income subject to withholding under section 1443(a). Instead, provide Form W-8BEN or Form W-8ECI for this portion of your income.
- You are a foreign partnership, a foreign simple trust, or a foreign grantor trust. Instead, provide Form W-8ECI or Form W-8IMY, Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding. However, a foreign grantor trust is required to provide documentation of its grantor or other owner for purposes of section 1446. See Regulations section 1.1446-1.
- You are acting as an intermediary (that is, acting not for your own account, but for the account of others as an agent, nominee, or custodian). Instead, provide Form W-8IMY.

Giving Form W-8EXP to the withholding agent. Do not send Form W-8EXP to the IRS. Instead, give it to the person who is requesting it from you. Generally, this person will be the one from whom you receive the payment, who credits your account, or a partnership that allocates income to you. Generally, a separate Form W-8EXP must be given to each withholding agent.

Give Form W-8EXP to the person requesting it before the payment is made, credited, or allocated to you or your account. If you do not provide this form, the withholding agent may have to withhold tax at the 30% rate, the backup withholding rate, or the rate applicable under section 1446. If you receive more than one type of income from a single withholding agent, the withholding agent may require you to submit a Form W-8EXP for each different type of income.

Change in circumstances. If a change in circumstances makes any information on the Form W-8EXP you have submitted incorrect, you must notify the withholding agent within 30 days of the change in circumstances and you must file a new Form W-8EXP or other appropriate form.

Expiration of Form W-8EXP. Generally, a Form W-8EXP filed without a U.S. taxpayer identification number (TIN) will remain in effect for a period starting on the date the form is signed and ending on the last day of the third succeeding calendar year. However, in the case of an integral part of a foreign government (within the meaning of Temporary Regulations section 1.892-2T(a)(2)) or a foreign central bank of issue, a Form W-8EXP filed without a U.S. TIN will remain in effect until a change in circumstances makes any of the information on the form incorrect. A Form W-8EXP furnished with a U.S. TIN will remain in effect until a change in circumstances makes any information on the form incorrect provided that the withholding agent reports on Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, at least one payment annually to the beneficial owner.

Definitions

Beneficial owner. For payments other than those for which a reduced rate of withholding is claimed under an income tax treaty, the beneficial owner of income is generally the person who is required under U.S. tax principles to include the income in gross income on a tax return. A person is not a beneficial owner of income, however, to the extent that person is receiving the income as a nominee, agent, or custodian, or to the extent the person is a conduit whose participation in a transaction is disregarded. In the case of amounts paid that do not constitute income, beneficial ownership is determined as if the payment were income.

Foreign partnerships, foreign simple trusts, and foreign grantor trusts are not the beneficial owners of income paid to the partnership or trust. The beneficial owners of income paid to a foreign partnership are generally the partners in the partnership, provided that the partner is not itself a partnership, foreign simple or grantor trust, nominee or other agent. The beneficial owners of income paid to a foreign simple trust (that is, a foreign trust that is described in section 651(a)) are generally the beneficiaries of the trust, if the beneficiary is not a foreign partnership, foreign simple or grantor trust, nominee or other agent. The beneficial owners of a foreign grantor trust (that is, a foreign trust to the extent that all or a portion of the income of the trust is treated as owned by the grantor or another person under sections 671 through 679) are the persons treated as the owners of the trust. The beneficial owners of income paid to a foreign

complex trust (that is, a foreign trust that is not a foreign simple trust or foreign grantor trust) is the trust itself.

The beneficial owner of income paid to a foreign estate is the estate itself.

These beneficial owner rules apply primarily for purposes of withholding under sections 1441 and 1442. The rules also generally apply for purposes of section 1446, with a few exceptions. See Regulations section 1.1446-1 for instances where the documentation requirements of sections 1441 and 1442 differ from section 1446.

Foreign person. A foreign person includes a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, foreign estate, foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession, and any other person that is not a U.S. person. It also includes a foreign branch or office of a U.S. financial institution or U.S. clearing organization if the foreign branch is a qualified intermediary. Generally, a payment to a U.S. branch of a foreign person is a payment to a foreign person.

Foreign government. A foreign government includes only the integral parts or controlled entities of a foreign sovereign as defined in Temporary Regulations section 1.892-2T.

An integral part of a foreign sovereign, in general, is any person, body of persons, organization, agency, bureau, fund, instrumentality, or other body, however designated, that constitutes a governing authority of a foreign country. The net earnings of the governing authority must be credited to its own account or to other accounts of the foreign sovereign, with no portion benefiting any private person.

A controlled entity of a foreign sovereign is an entity that is separate in form from the foreign sovereign or otherwise constitutes a separate juridical entity only if:

- It is wholly owned and controlled by the foreign sovereign directly or indirectly through one or more controlled entities.
- It is organized under the laws of the foreign sovereign by which it is owned.
- Its net earnings are credited to its own account or to other accounts of the foreign sovereign, with no portion of its income benefiting any private person.
- Its assets vest in the foreign sovereign upon dissolution.

A controlled entity also includes a pension trust defined in Temporary Regulations section 1.892-2T(c) and may include a foreign central bank of issue to the extent that it is wholly owned by a foreign sovereign.

A foreign government must provide Form W-8EXP to establish eligibility for exemption from withholding for payments exempt from tax under section 892.

International organization. An international organization is any public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288-288(f)). In general, to qualify as an international organization, the United States must participate in the organization pursuant to a treaty or under the authority of an Act of Congress authorizing such participation.

Amounts exempt from tax under section 892. Only a foreign government or an international organization as defined above qualifies for exemption from taxation under section 892. Section 892 generally excludes from gross income and exempts from U.S. taxation income a foreign government receives from investments in the United States in stocks, bonds, or other domestic securities; financial instruments held in the execution of governmental financial or monetary policy; and interest on deposits in banks in the United States of monies belonging to the foreign government. Income of a foreign government from any of the following sources is not exempt from U.S. taxation.

- The conduct of any commercial activity.
- A controlled commercial entity.
- The disposition of any interest in a controlled commercial entity.

For the definition of "commercial activity," see Temporary Regulations section 1.892-4T.

Section 892 also generally excludes from gross income and exempts from U.S. taxation income of an international organization received from investments in the United States in stocks, bonds, or other domestic securities and interest on deposits in banks in the United States of monies belonging to the international organization or from any other source within the United States.

Controlled commercial entity. A controlled commercial entity is an entity engaged in commercial activities (whether within or outside the United States) if the foreign government holds:

- Any interest in the entity that is 50% or more of the total of all interests in the entity, or
- A sufficient interest or any other interest in the entity which provides the foreign government with effective practical control of the entity.

An entity includes a corporation, a partnership, a trust (including a pension trust) and an estate. A partnership's commercial activities are attributable to its general and limited partners for purposes of section 892. The partnership's activities will result in the partnership having to withhold tax under section 1446 on the effectively connected taxable income allocable to a foreign government partner.

Note. A foreign central bank of issue will be treated as a controlled commercial entity only if it engages in commercial activities within the United States.

Foreign central bank of issue. A foreign central bank of issue is a bank that is by law or government sanction the principal authority, other than the government itself, to issue instruments intended to circulate as currency. Such a bank is generally the custodian of the banking reserves of the country under whose law it is organized. For purposes of section 895, the Bank of International Settlements is treated as though it were a foreign central bank of issue.

A foreign central bank of issue must provide Form W-8EXP to establish eligibility for exemption from withholding for payments exempt from tax under either section 892 or section 895.

Amounts exempt from tax under section 895. Section 895 generally excludes from gross income and exempts from U.S. taxation income a foreign central bank of issue receives from obligations of the United States (or of any agency or instrumentality thereof) or from interest on

deposits with persons carrying on the banking business unless such obligations or deposits are held for, or used in connection with, the conduct of commercial banking functions or other commercial activities of the foreign central bank of issue.

Amounts subject to withholding. Generally, an amount subject to withholding under section 1441 or 1442 is an amount from sources within the United States that is fixed or determinable annual or periodical (FDAP) income. FDAP income is all income included in gross income, including interest (as well as original issue discount (OID)), dividends, rents, royalties, and compensation. FDAP income does not include most gains from the sale of property (including market discount and option premiums).

Income is subject to withholding under section 1446 if the income is effectively connected with a partnership's trade or business in the United States and is allocable to a foreign person.

Withholding agent. Any person, U.S. or foreign, that has control, receipt, or custody of an amount subject to withholding or who can disburse or make payments of an amount subject to withholding is a withholding agent. The withholding agent may be an individual, corporation, partnership, trust, association, or any other entity including (but not limited to) any foreign intermediary, foreign partnership, and U.S. branches of certain foreign banks and insurance companies. Generally, the person who pays (or causes to be paid) an amount subject to withholding to the foreign person (or to its agent) must withhold.

Specific Instructions

Part I

Before completing Part I, complete the Worksheet for Foreign Governments, International Organizations, and Foreign Central Banks of Issue on page 6 to determine whether amounts received are or will be exempt from U.S. tax under section 892 or 895 and exempt from withholding under sections 1441 and 1442. Use the results of this worksheet to check the appropriate box in Part II. Do not give the worksheet to the withholding agent. Instead, keep it for your records.

Line 1. Enter the full name of the organization.

Line 2. Enter the country under the laws of which the foreign government or other foreign organization was created, incorporated, organized, or governed.

Line 3. Check the one box that applies. A foreign central bank of issue (wholly owned by a foreign sovereign) should check the "Foreign government" box.

Line 4. The permanent address of a foreign government, international organization, or foreign central bank of issue is where it maintains its principal office. For all other organizations, the permanent address is the address in the country where the organization claims to be a resident for tax purposes. Do not show the address of a financial institution, a post office box, or an address used solely for mailing purposes.

Line 5. Enter the mailing address only if it is different from the address shown on line 4.

Line 6. A U.S. taxpayer identification number (TIN) means an employer identification number (EIN). A U.S. TIN is generally required if you are claiming an exemption or reduced rate of withholding based solely on your claim of tax-exempt status under section 501(c) or private foundation status. Use Form SS-4, Application for Employer Identification Number, to obtain an EIN.

Line 7. If the country of residence for tax purposes has issued the organization a tax identifying number, enter it here.

Line 8. This line may be used by the filer of Form W-8EXP or by the withholding agent to whom it is provided to include any referencing information that is useful to the withholding agent in carrying out its obligations. A filer may use line 8 to include the name and number of the account for which the filer is providing the form.

Part II

Line 9. Check box 9a and box 9b or box 9c, whichever applies. Enter the name of the foreign sovereign's country on line 9b (if the entity is an integral part of a foreign government) or on line 9c (if the entity is a controlled entity). A central bank of issue (wholly owned by a foreign sovereign) should check box 9c.

Line 10. Check this box if you are an international organization. By checking this box, you are certifying to all the statements made in line 10.

Line 11. Check this box if you are a foreign central bank of issue not wholly owned by a foreign sovereign. By checking this box, you are certifying to all the statements made in line 11.

Line 12. Check the appropriate box if you are a foreign tax-exempt organization.

If you are a foreign tax-exempt organization, you must attach a statement setting forth any income that is includible under section 512 in computing your unrelated business taxable income.

Box 12a. Check this box if you have been issued a determination letter by the IRS. Enter the date of the IRS determination letter.

Box 12b. Check this box if you do not have an IRS determination letter, but are providing an opinion of U.S. counsel concluding that you are an organization described in section 501(c).

Box 12c. If you are a section 501(c)(3) organization, check this box if you are not a private foundation. You must attach to the withholding certificate an affidavit setting forth sufficient facts concerning your operations and support to enable the IRS to determine that you would be likely to qualify as an organization described in section 509(a)(1), (2), (3), or (4). See Rev. Proc. 92-94, 1992-2 C.B. 507, section 4, for information on affidavit preparation of foreign equivalents of domestic public charities.

Box 12d. Check this box if you are a section 501(c)(3) organization and you are a private foundation described in section 509.

Line 13. Check this box if you are a government of a U.S. possession. By checking this box you are certifying to the statements made in line 13.

Part III

Form W-8EXP must be signed and dated by an authorized official of the foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession, as appropriate.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to provide the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: **Recordkeeping,** 7 hr., 10 min.; **Learning about the law or the form,** 5 hr., 28 min.; **Preparing and sending the form to IRS,** 5 hr., 49 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can email us at **taxforms@irs.gov.* Please put “Forms Comment” on the subject line. Or you can write to Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6406, Washington, DC 20224. Do not send Form W-8EXP to this office. Instead, give it to your withholding agent.

WORKSHEET FOR FOREIGN GOVERNMENTS, INTERNATIONAL ORGANIZATIONS, AND FOREIGN CENTRAL BANKS OF ISSUE

(Do not give to the withholding agent. Keep for your records.)

Complete this worksheet to determine whether amounts received are or will be exempt from United States tax under section 892 or section 895 and exempt from withholding under sections 1441 and 1442.

- *Foreign governments and foreign central banks of issue, start with question **1.***
- *International organizations, go directly to question **6.***

FOREIGN GOVERNMENT	**Yes**	**No**
1 a Is the foreign government an integral part of a foreign sovereign (see **Definitions**)? (If "Yes," go to question **4**. If "No," answer question **1b**.)	❑	❑
b Is the foreign government a controlled entity of a foreign sovereign (see **Definitions**)? (If "Yes," answer question **2a**. If "No," go to question **7a**.)	❑	❑
2 a Is the controlled entity a foreign central bank of issue (see **Definitions**)? (If "Yes," answer question **2b**. If "No," go to question **3**.)	❑	❑
b Is the foreign central bank of issue engaged in commercial activities within the United States? (If "Yes," answer question **7a**. If "No," go to question **4**.)	❑	❑
3 Is the controlled entity engaged in commercial activities anywhere in the world? (If "Yes," income is **not** exempt from tax under section 892 and may be subject to withholding. **Do not** complete Form W-8EXP for such income. Instead, complete Form W-8BEN or W-8ECI. If "No," answer question **4**.)	❑	❑
4 Does the foreign government or foreign central bank of issue (wholly owned by the foreign sovereign) receive income directly or indirectly from any controlled commercial entities or income derived from the disposition of any interest in a controlled commercial entity (see **Definitions**)? (If "Yes," income is **not** exempt from tax under section 892 and may be subject to withholding. **Do not** complete Form W-8EXP for such income. Instead, complete Form W-8BEN or W-8ECI. If "No," answer question **5**.)	❑	❑
5 Is any of the income received by the foreign government or foreign central bank of issue (wholly owned by the foreign sovereign) from sources other than investments in the United States in stocks, bonds, other domestic securities (as defined in Temporary Regulations section 1.892-3T(a)(3)), financial instruments held in the execution of governmental financial or monetary policy (as defined in Temporary Regulations section 1.892-3T(a)(4) and (a)(5)), or interest on deposits in banks in the United States? (If "Yes," income is **not** exempt from tax under section 892 and may be subject to withholding. **Do not** complete Form W-8EXP for such income. Instead, complete Form W-8BEN or W-8ECI. If "No," check the appropriate box on **line 9** of Form W-8EXP.)	❑	❑
INTERNATIONAL ORGANIZATION	**Yes**	**No**
6 Is the international organization an organization in which the United States participates pursuant to any treaty or under an Act of Congress authorizing such participation and to which the President of the United States has issued an Executive Order entitling the organization to enjoy the privileges, exemptions, and immunities provided under the International Organization Immunities Act (22 U.S.C. 288, 288e, 288f)? (If "Yes," check the box on **line 10** of Form W-8EXP. If "No," income may be subject to withholding. **Do not** complete this form for such income. Instead, complete Form W-8BEN or W-8ECI.)	❑	❑
FOREIGN CENTRAL BANK OF ISSUE	**Yes**	**No**
7 a Is the entity, whether wholly or partially owned by the foreign sovereign, a foreign central bank of issue? (If "Yes," answer question **7b**. If "No," income is **not** exempt from tax under section 895 and may be subject to withholding. **Do not** complete Form W-8EXP for such income. Instead, complete Form W-8BEN or W-8ECI.)	❑	❑
b Is the income received by the foreign central bank of issue from sources other than obligations of the United States (or any agency or instrumentality thereof) or from interest on deposits with persons carrying on the banking business? (If "Yes," income is **not** exempt from tax under section 895 and may be subject to withholding. **Do not** complete Form W-8EXP for such income. Instead, complete Form W-8BEN or W-8ECI. If "No," answer question **7c**.)	❑	❑
c Are the obligations of the United States (or any agency or instrumentality thereof) or bank deposits owned by the foreign central bank of issue held for, or used in connection with, the conduct of commercial banking functions or other commercial activities by the foreign central bank of issue? (If "Yes," income is **not** exempt from tax under section 895 and may be subject to withholding. **Do not** complete Form W-8EXP for such income. Instead, complete Form W-8BEN or W-8ECI. If "No," check the box on **line 11** of Form W-8EXP.)	❑	❑

Form **W-8IMY**
(Rev. February 2006)

Department of the Treasury
Internal Revenue Service

Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding

► **Section references are to the Internal Revenue Code.** ► **See separate instructions.**
► **Give this form to the withholding agent or payer. Do not send to the IRS.**

OMB No. 1545-1621

Do not use this form for:	**Instead, use Form:**
• A beneficial owner solely claiming foreign status or treaty benefits	W-8BEN
• A hybrid entity claiming treaty benefits on its own behalf	W-8BEN
• A person claiming that income is effectively connected with the conduct of a trade or business in the United States	W-8ECI
• A disregarded entity. Instead, the single foreign owner should use	W-8BEN or W-8ECI
• A foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession claiming the applicability of section(s) 115(2), 501(c), 892, 895, or 1443(b).	W-8EXP

Part I Identification of Entity

1 Name of individual or organization that is acting as intermediary

2 Country of incorporation or organization

3 Type of entity—check the appropriate box:

- ☐ Qualified intermediary. Complete Part II.
- ☐ Nonqualified intermediary. Complete Part III.
- ☐ U.S. branch. Complete Part IV.
- ☐ Withholding foreign partnership. Complete Part V.
- ☐ Withholding foreign trust. Complete Part V.
- ☐ Nonwithholding foreign partnership. Complete Part VI.
- ☐ Nonwithholding foreign simple trust. Complete Part VI.
- ☐ Nonwithholding foreign grantor trust. Complete Part VI.

4 Permanent residence address (street, apt. or suite no., or rural route). **Do not use P.O. box.**

City or town, state or province. Include postal code where appropriate.

Country (do not abbreviate)

5 Mailing address (if different from above)

City or town, state or province. Include postal code where appropriate.

Country (do not abbreviate)

6 U.S. taxpayer identification number (if required, see instructions) ►

☐ SSN or ITIN ☐ EIN ☐ QI-EIN

7 Foreign tax identifying number, if any (optional)

8 Reference number(s) (see instructions)

Part II Qualified Intermediary

9a ☐ (All qualified intermediaries check here) I certify that the entity identified in Part I:

- Is a qualified intermediary and is not acting for its own account with respect to the account(s) identified on line 8 or in a withholding statement associated with this form **and**
- Has provided or will provide a withholding statement, as required.

b ☐ (If applicable) I certify that the entity identified in Part I has assumed primary withholding responsibility under Chapter 3 of the Code with respect to the account(s) identified on this line 9b or in a withholding statement associated with this form ►

c ☐ (If applicable) I certify that the entity identified in Part I has assumed primary Form 1099 reporting and backup withholding responsibility as authorized in its withholding agreement with the IRS with respect to the account(s) identified on this line 9c or in a withholding statement associated with this form ►

Part III Nonqualified Intermediary

10a ☐ (All nonqualified intermediaries check here) I certify that the entity identified in Part I is not a qualified intermediary and is not acting for its own account.

b ☐ (If applicable) I certify that the entity identified in Part I is using this form to transmit withholding certificates and/or other documentary evidence and has provided or will provide a withholding statement, as required.

Part IV Certain United States Branches

Note: *You may use this Part if the entity identified in Part I is a U.S. branch of a foreign bank or insurance company and is subject to certain regulatory requirements (see instructions).*

11 ☐ I certify that the entity identified in Part I is a U.S. branch and that the payments are not effectively connected with the conduct of a trade or business in the United States.

Check box 12 or box 13, whichever applies:

12 ☐ I certify that the entity identified in Part I is using this form as evidence of its agreement with the withholding agent to be treated as a U.S. person with respect to any payments associated with this certificate.

13 ☐ I certify that the entity identified in Part I:

- Is using this form to transmit withholding certificates or other documentary evidence for the persons for whom the branch receives a payment **and**
- Has provided or will provide a withholding statement, as required.

Part V Withholding Foreign Partnership or Withholding Foreign Trust

14 ☐ I certify that the entity identified in Part I:

- Is a withholding foreign partnership or a withhholding foreign trust **and**
- Has provided or will provide a withholding statement, as required.

Part VI Nonwithholding Foreign Partnership, Simple Trust, or Grantor Trust

15 ☐ I certify that the entity identified in Part I:

- Is a nonwithholding foreign partnership, a nonwithholding foreign simple trust, or a nonwithholding foreign grantor trust and that the payments to which this certificate relates are not effectively connected, or are not treated as effectively connected, with the conduct of a trade or business in the United States **and**
- Is using this form to transmit withholding certificates and/or other documentary evidence and has provided or will provide a withholding statement, as required.

Part VII Certification

Under penalties of perjury, I declare that I have examined the information on this form and to the best of my knowledge and belief it is true, correct, and complete. Furthermore, I authorize this form to be provided to any withholding agent that has control, receipt, or custody of the income for which I am providing this form or any withholding agent that can disburse or make payments of the income for which I am providing this form.

Sign Here ▶ ---------- Signature of authorized official ---------- Date (MM-DD-YYYY)

Instructions for Form W-8IMY

(Rev. February 2006)

Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding

Department of the Treasury
Internal Revenue Service

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Note. For definitions of terms used throughout these instructions, see *Definitions* on pages 2 and 3.

Foreign persons are subject to U.S. tax at a 30% rate on income they receive from U.S. sources that consists of interest (including certain original issue discount (OID)), dividends, rents, premiums, annuities, compensation for, or in expectation of, services performed, or other fixed or determinable annual or periodical (FDAP) gains, profits, or income. This tax is imposed on the gross amount paid and is generally collected by withholding under section 1441 or 1442 on that amount. A payment is considered to have been made whether it is made directly to the beneficial owner or to another person, such as an intermediary, agent, trustee, executor, or partnership, for the benefit of the beneficial owner.

Foreign persons are also subject to tax at graduated rates on income they earn that is considered effectively connected with a U.S. trade or business. If a foreign person invests in a partnership that conducts a U.S. trade or business, the foreign person is considered to be engaged in a U.S. trade or business. The partnership is required to withhold tax under section 1446 on the foreign person's distributive share of the partnership's effectively connected taxable income. The partnership may generally accept any form submitted for purposes of section 1441 or 1442, with few exceptions, to establish the foreign status of the partner. See Regulations sections 1.1446-1 through 1.1446-6 to determine whether the form submitted for purposes of section 1441 or 1442 will be accepted for purposes of section 1446.

CAUTION *For purposes of section 1446, Form W-8IMY may only be submitted by an upper-tier foreign partnership or a foreign grantor trust, both of which must furnish additional documentation for their owners.*

Additional information. For additional information and instructions for the withholding agent, see the Instructions for the Requester of Forms W-8BEN, W-8ECI, W-8EXP, and W-8IMY.

Who must file. Form W-8IMY must be provided by:

- A foreign person, or a foreign branch of a U.S. person, to establish that it is a qualified intermediary that is not acting for its own account, to represent that it has provided or will provide a withholding statement, as required, and, if applicable, to represent that it has assumed primary withholding responsibility under Chapter 3 of the Code (excluding section 1446) and/or primary Form 1099 reporting and backup withholding responsibility.
- A foreign person to establish that it is a nonqualified intermediary that is not acting for its own account, and, if applicable, that it is using the form to transmit withholding certificates and/or other documentary evidence and has provided, or will provide, a withholding statement, as required. A U.S. person cannot be a nonqualified intermediary.
- A U.S. branch of certain foreign banks or foreign insurance companies to represent that the income it receives is not effectively connected with the conduct of a trade or business within the United States and either that it is using the form **(a)** as evidence of its agreement with the withholding agent to be treated as a U.S. person with respect to any payments associated with the Form W-8IMY or **(b)** to transmit the documentation of the persons for whom it receives a payment and has provided, or will provide, a withholding statement, as required.
- A foreign partnership or a foreign simple or grantor trust to establish that it is a withholding foreign partnership or withholding foreign trust under the regulations for sections 1441 and 1442 and that it has provided, or will provide, a withholding statement, as required.
- A foreign partnership or a foreign simple or grantor trust to establish that it is a nonwithholding foreign partnership or nonwithholding foreign simple or grantor trust for purposes of section 1441 and 1442 and to represent that the income is not effectively connected with a U.S. trade or business, that the form is being used to transmit withholding certificates and/or documentary evidence, and that it has provided, or will provide, a withholding statement, as required.

Solely for purposes of providing this form, a reverse hybrid entity that is providing documentation on behalf of its interest holders to claim a reduced rate of withholding under a treaty is considered to be a nonqualified intermediary unless it has entered into a qualified intermediary agreement with the IRS.

- A foreign partnership or foreign grantor trust to establish that it is an upper-tier foreign partnership or foreign grantor trust for purposes of section 1446, and to represent that the form is being used to transmit withholding certificates and/or documentary evidence and that it has provided, or will provide, a withholding statement, as required.

This form may serve to establish foreign status for purposes of sections 1441, 1442, and 1446. However, any representations that items of income, gain, deduction, or loss are not effectively connected with a U.S. trade or business will be disregarded by a partnership receiving this form for purposes of section 1446 as the partnership will undertake its own analysis.

Do not use Form W-8IMY if:

- You are the beneficial owner of U.S. source income (other than income that is effectively connected with the conduct of a trade or business within the United States) and you need to establish that you are not a U.S. person. Instead, submit Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding.

- You are the beneficial owner of U.S. source income (other than income that is effectively connected with the conduct of a trade or business within the United States) and are claiming a reduced rate of, or exemption from, withholding as a resident of a foreign country with which the United States has an income tax treaty. Instead, provide Form W-8BEN.
- You are filing for a hybrid entity claiming treaty benefits on its own behalf, or you are filing for a reverse hybrid entity and are not claiming treaty benefits on behalf of its interest holders. Instead, provide Form W-8BEN.
- You are the beneficial owner of income that is effectively connected with the conduct of a trade or business within the United States. Instead, provide Form W-8ECI, Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States.
- You are a nonresident alien individual who claims exemption from withholding on compensation for independent or certain dependent personal services performed in the United States. Instead, provide Form 8233, Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual, or Form W-4, Employee's Withholding Allowance Certificate.
- You are filing for a disregarded entity. (A business entity that has a single owner and is not a corporation under Regulations section 301.7701-2(b) is disregarded as an entity separate from its owner.) Instead, provide Form W-8BEN or W-8ECI.
- You are filing for a foreign government, international organization, foreign central bank of issue, foreign tax-exempt organization, foreign private foundation, or government of a U.S. possession claiming the applicability of section 115(2), 501(c), 892, 895, or 1443(b). Instead, provide Form W-8EXP, Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding. However, these entities should use Form W-8BEN if they are claiming treaty benefits or are providing the form only to claim exempt recipient status for backup withholding purposes.

Giving Form W-8IMY to the withholding agent. Do not send Form W-8IMY to the IRS. Instead, give it to the person who is requesting it. Generally, this person will be the one from whom you receive the payment, who credits your account, or a partnership that allocates income to you. Give Form W-8IMY to the person requesting it before income is paid to you, credited, or allocated to your account. If you do not provide this form, the withholding agent may have to withhold at the 30% rate, backup withholding rate with respect to non effectively connected income, or the 35% rate for net effectively connected taxable income allocable to a foreign partner in a partnership. Generally, a separate Form W-8IMY must be submitted to each withholding agent.

Change in circumstances. If a change in circumstances makes any information on the Form W-8IMY (or any documentation or a withholding statement associated with the Form W-8IMY) you have submitted incorrect, you must notify the withholding agent or payer within 30 days of the changes in circumstances and you must file a new Form W-8IMY or provide new documentation or a new withholding statement.

You must update the information associated with Form W-8IMY as often as is necessary to enable the withholding agent to withhold at the appropriate rate on each payment and to report such income.

Expiration of Form W-8IMY. Generally, a Form W-8IMY remains valid until the status of the person whose name is on the certificate is changed in a way relevant to the certificate or circumstances change that make the information on the certificate no longer correct. The indefinite validity period does not extend, however, to any withholding certificates, documentary evidence, or withholding statements associated with the certificate.

Definitions

Amounts subject to withholding. Generally, an amount subject to withholding under section 1441 or 1442 is an amount from sources within the United States that is FDAP income. FDAP income is all income included in gross income, including interest (and original issue discount), dividends, rents, royalties, and compensation. FDAP income does not include most gains from the sale of property (including market discount and option premiums). FDAP income also does not include items of U.S. source income that are excluded from gross income without regard to the U.S. or foreign status of the holder, such as interest under section 103(a).

Generally, an amount subject to withholding under section 1446 is an amount that is, or is treated as, effectively connected income of a U.S. trade or business of the partnership.

Beneficial owner. For payments other than those for which a reduced rate of withholding is claimed under an income tax treaty, the beneficial owner of income is generally the person who is required under U.S. tax principles to include the income in gross income on a tax return. A person is not a beneficial owner of income, however, to the extent that person is receiving the income as a nominee, agent, or custodian, or to the extent the person is a conduit whose participation in a transaction is disregarded. In the case of amounts paid that do not constitute income, beneficial ownership is determined as if the payment were income.

Foreign partnerships, foreign simple trusts, and foreign grantor trusts are not the beneficial owners of income paid to the partnership or trust. The beneficial owners of income paid to a foreign partnership are generally the partners in the partnership, provided that the partner is not itself a partnership, foreign simple or grantor trust, nominee, or other agent. The beneficial owners of income paid to a foreign simple trust (that is, a foreign trust that is described in section 651(a)) are generally the beneficiaries of the trust, if the beneficiary is not itself a foreign partnership, foreign simple or grantor trust, nominee, or other agent. The beneficial owners of a foreign grantor trust (that is, a foreign trust to the extent that all or a portion of the income of the trust is treated as owned by the grantor or another person under sections 671 through 679) are the persons treated as the owners of the trust. The beneficial owner of income paid to a foreign complex trust (that is, a foreign trust that is not a foreign simple trust or foreign grantor trust) is the trust itself.

The beneficial owner of income paid to a foreign estate is the estate itself.

Fiscally transparent entity. An entity is treated as fiscally transparent with respect to an item of income to the extent that the interest holders in the entity must, on a current basis, take into account separately their shares of an item of income paid to the entity, whether or not distributed, and must determine the character of the items of income as if they were realized directly from the sources from which realized by the entity.

Flow-through entity. A flow-through entity is a foreign partnership (other than a withholding foreign partnership), a foreign simple or foreign grantor trust (other than a withholding foreign trust), or, for payments for which a reduced rate of withholding is claimed under an income tax treaty, any entity to the extent the entity is considered to be fiscally transparent (see earlier) with respect to the payment by an interest holder's jurisdiction.

Foreign person. A foreign person includes a nonresident alien individual, a foreign corporation, a foreign partnership, a foreign trust, a foreign estate, and any other person that is not a U.S. person. It also includes a foreign branch or office of a U.S. financial institution or U.S. clearing organization if the foreign branch is a qualified intermediary. Generally, a payment to a U.S. branch of a foreign person is a payment to a foreign person.

Hybrid entity. A hybrid entity is any person (other than an individual) that is treated as fiscally transparent (see earlier) in the United States but is not treated as fiscally transparent by a country with which the United States has an income tax treaty. Hybrid status is relevant for claiming treaty benefits.

Intermediary. An intermediary is any person that acts as a custodian, broker, nominee, or otherwise as an agent for another person, regardless of whether that other person is the beneficial owner of the amount paid, a flow-through entity, or another intermediary.

Qualified intermediary. A qualified intermediary is a person that is a party to a withholding agreement with the IRS and is:

- A foreign financial institution or a foreign clearing organization (other than a U.S. branch or U.S. office of the institution or organization),
- A foreign branch or office of a U.S. financial institution or a foreign branch or office of a U.S. clearing organization,
- A foreign corporation for purposes of presenting claims of benefits under an income tax treaty on behalf of its shareholders, or
- Any other person the IRS accepts as a qualified intermediary and who enters into a withholding agreement with the IRS.

See Rev. Proc. 2000-12 for procedures to apply to be a qualified intermediary. You can find Rev. Proc. 2000-12 on page 387 of Internal Revenue Bulletin (IRB) 2000-4 at *www.irs.gov/pub/irs-irbs/irb00-04.pdf*. Also see Notice 2001-4 (IRB 2001-2); Rev. Proc. 2003-64, Appendix 3 (IRB 2003-32); and Rev. Proc. 2004-21 (IRB 2004-14).

Nonqualified intermediary. A nonqualified intermediary is any intermediary that is not a U.S. person and that is not a qualified intermediary.

Nonwithholding foreign partnership, simple trust, or grantor trust. A nonwithholding foreign partnership is any foreign partnership other than a withholding foreign partnership. A nonwithholding foreign simple trust is any foreign simple trust that is not a withholding foreign trust. A nonwithholding foreign grantor trust is any foreign grantor trust that is not a withholding foreign trust.

Reportable amount. Solely for purposes of the statements required to be attached to Form W-8IMY, a reportable amount is an amount subject to withholding, U.S. source deposit interest (including original issue discount), and U.S. source interest or original issue discount on the redemption of short-term obligations. It does not include payments on deposits with banks and other financial institutions that remain on deposit for 2 weeks or less or amounts received from the sale or exchange (other than a redemption) of a short-term obligation that is effected outside the United States. It also does not include amounts of original issue discount arising from a sale and repurchase transaction completed within a period of 2 weeks or less, or amounts described in Regulations section 1.6049-5(b)(7), (10), or (11) (relating to certain obligations issued in bearer form). See the instructions for Forms 1042-S and 1099 to determine whether these amounts are also subject to information reporting.

Reverse hybrid entity. A reverse hybrid entity is any person (other than an individual) that is not fiscally transparent under U.S. tax law principles but that is fiscally transparent under the laws of a jurisdiction with which the United States has an income tax treaty.

Withholding agent. A withholding agent is any person, U.S. or foreign, that has control, receipt, or custody of an amount subject to withholding or who can disburse or make payments of an amount subject to withholding. The withholding agent may be an individual, corporation, partnership, trust, association, or any other entity, including (but not limited to) any foreign intermediary, foreign partnership, and U.S. branches of certain foreign banks and insurance companies. Generally, the person who pays (or causes to be paid) the amount subject to withholding to the foreign person (or to its agent) must withhold.

Withholding foreign partnership or withholding foreign trust. A withholding foreign partnership or withholding foreign trust is a foreign partnership or a foreign simple or grantor trust that has entered into a withholding agreement with the IRS in which it agrees to assume primary withholding responsibility under sections 1441 and 1442 for all payments that are made to it for certain of its partners, beneficiaries, or owners and is acting in its capacity as a withholding foreign partnership or withholding foreign trust.

See Rev. Proc. 2003-64 for procedures to apply to be a withholding foreign partnership or trust. You can find Rev. Proc. 2003-64 on page 306 of Internal Revenue Bulletin (IRB) 2003-32 at *www.irs.gov/pub/irs-irbs/irb03-32.pdf.* Also see Rev. Proc. 2004-21 (IRB 2004-14).

Specific Instructions

Part I

Line 1. Enter your name. By doing so, you are representing to the payer or withholding agent that you are not the beneficial owner of the amounts that will be paid to you.

Line 2. If you are a corporation, enter the country of incorporation. If you are another type of entity, enter the country under whose laws you are created, organized, or governed. If you are an individual, enter "N/A" (for "not applicable").

Line 3. Check the one box that applies. If you are a foreign partnership receiving the payment on behalf of your partners, check the "Withholding foreign partnership" box or the "Nonwithholding foreign partnership" box, whichever is appropriate. If you are a foreign simple trust or foreign grantor trust receiving the payment on behalf of your beneficiaries or owners, check the "Withholding foreign trust" box, the "Nonwithholding foreign simple trust" box, or the "Nonwithholding foreign grantor trust" box, whichever is appropriate. If you are a foreign partnership (or a foreign trust) receiving a payment on behalf of persons other than your partners (or beneficiaries or owners), check the "Qualified intermediary" box or the "Nonqualified intermediary" box, whichever is appropriate. A reverse hybrid entity that is providing documentation from its interest

holders to claim a reduced rate of withholding under a treaty should check the "Nonqualified intermediary" box unless it has entered into a qualified intermediary agreement with the IRS. See *Parts II Through VI* below if you are acting in more than one capacity. A partnership or grantor trust submitting Form W-8IMY solely because it is allocated income effectively connected with a U.S. trade or business as a partner in a partnership should check the box for nonwithholding foreign partnership or nonwithholding foreign grantor trust and, if it is submitting or will submit documentation for its partners or owners, it should complete Part VI. A withholding foreign partnership or a grantor trust that is a withholding foreign trust should submit a separate Form W-8IMY if it is allocated income that is effectively connected with a U.S. trade or business as a partner in a partnership and should check the box for nonwithholding foreign partnership or nonwithholding foreign grantor trust and, if it is submitting or will submit documentation for its partners or owners, it should complete Part VI.

Form W-8IMY may be submitted and accepted to satisfy documentation requirements for purposes of withholding on certain partnership allocations to foreign partners under section 1446. Section 1446 generally requires withholding when a partnership is conducting a trade or business in the United States and allocates income effectively connected with that trade or business (ECI) to foreign persons that are partners in the partnership. Section 1446 can also apply when certain income is treated as effectively connected income of the partnership and is so allocated.

An upper-tier partnership that is allocated ECI as a partner in a partnership may, in certain circumstances, have the lower-tier partnership perform its withholding obligation. Generally, this is accomplished by the upper-tier partnership submitting withholding certificates of its partners (for example, Form W-8BEN) along with a Form W-8IMY, which identifies itself as a partnership, and identifying the manner in which ECI of the upper-tier partnership will be allocated to the partners. For further information, see Regulations section 1.1446–5. A foreign grantor trust that is allocated ECI as a partner in a partnership should provide the withholding certificates of its grantor (for example, Form W-8BEN) along with its Form W-8IMY which identifies the trust as a foreign grantor trust. See Regulations section 1.1446-1(c)(ii)(E) for the rules requiring it to provide additional documentation to the partnership.

Line 4. Your permanent residence address is the address in the country where you claim to be a resident. Do not show the address of a financial institution, a post office box, or an address used solely for mailing purposes. If you do not have a tax residence in any country, the permanent residence address is where you maintain your principal office or, if you are an individual, where you normally reside.

Line 5. Enter your mailing address only if it is different from the address you show on line 4.

Line 6. You must provide an employer identification number (EIN) if you are a U.S. branch of a foreign bank or insurance company, an upper-tier partnership that is allocated ECI as a partner in a partnership, or a foreign grantor trust that is allocated ECI as a partner.

If you are acting as a qualified intermediary, withholding foreign partnership, or withholding foreign trust, check the QI-EIN box and enter the EIN that was issued to you in such capacity (your "QI-EIN," "WP-EIN," or "WT-EIN"). If you are not acting in that capacity, you must use your U.S. taxpayer identification number (TIN), if any, that is not your QI-EIN, WP-EIN, or WT-EIN.

A nonqualified intermediary, a nonwithholding foreign partnership, or a nonwithholding foreign simple or grantor trust is generally not required to provide a U.S. TIN. However, a nonwithholding foreign grantor trust with five or fewer grantors is required to provide an EIN.

Line 7. If your country of residence for tax purposes has issued you a tax identifying number, enter it here.

Line 8. This line may be used by the filer of Form W-8IMY or by the withholding agent to whom it is provided to include any referencing information that is useful to the withholding agent in carrying out its obligations. For example, a withholding agent who is required to associate a particular Form W-8BEN with this Form W-8IMY may want to use line 8 for a referencing number or code that will make the association clear.

Parts II Through VI

You should complete only one part. If you are acting in multiple capacities, you must provide separate Forms W-8IMY for each capacity. For example, if you are acting as a qualified intermediary for one account, but a nonqualified intermediary for another account, you must provide one Form W-8IMY in your capacity as a qualified intermediary, and a separate Form W-8IMY in your capacity as a nonqualified intermediary.

Part II — Qualified Intermediary

Check box 9a if you are a qualified intermediary (QI) (whether or not you assume primary withholding responsibility) for the income for which you are providing this form. By checking the box, you are certifying to all of the statements contained on line 9a.

Check box 9b only if you have assumed primary withholding responsibility under Chapter 3 of the Code (nonresident alien withholding) with respect to the accounts identified on this line or in a withholding statement associated with this form.

Check box 9c only if you have assumed primary Form 1099 reporting and backup withholding responsibility as authorized in a withholding agreement with the IRS with respect to the accounts identified on this line or in a withholding statement associated with this form.

Although a QI obtains withholding certificates or appropriate documentation from beneficial owners, payees, and, if applicable, shareholders, as specified in your withholding agreement with the IRS, a QI does not need to attach the certificates or documentation to this form. However, to the extent you have not assumed primary Form 1099 reporting or backup withholding responsibility, you must disclose the names of those U.S. persons for whom you receive reportable amounts and that are not exempt recipients (as defined in Regulations section 1.6049-4(c)(1)(ii) or under section 6041, 6042, 6045, or 6050N). You should make this disclosure by attaching to Form W-8IMY the Forms W-9 (or substitute forms) of persons that are not exempt recipients. If you do not have a Form W-9 for a non-exempt U.S. payee, you must attach to Form W-8IMY any information you do have regarding that person's name, address, and TIN.

Withholding statement of a QI. As a QI, you must provide a withholding statement to each withholding agent from which you receive reportable amounts. The withholding statement becomes an integral part of the Form W-8IMY and, therefore, the certification statement that you sign in Part VII of the form applies to the withholding statement as well as to the form. The withholding statement must:

- Designate those accounts for which you act as a QI,
- Designate those accounts for which you assumed primary withholding responsibility under Chapter 3 of the Code and/or primary Form 1099 reporting and backup withholding responsibility, and
- Provide information regarding withholding rate pools.

A withholding rate pool is a payment of a single type of income, based on the categories of income reported on Form 1042-S or Form 1099 (for example, interest or dividends), that is subject to a single rate of withholding. The withholding rate pool may be established by any reasonable method agreed upon by you and the withholding agent. For example, you may agree to establish a separate account for a single withholding rate pool or you may agree to divide a payment made to a single account into portions allocable to each withholding rate pool. You must provide the withholding rate pool information that is required for the withholding agent to meet its withholding and reporting obligations. A withholding agent may request any information reasonably necessary to withhold and report payments correctly.

If you do not assume primary Form 1099 reporting and backup withholding responsibility, you must establish a separate withholding rate pool for each U.S. non-exempt recipient account holder disclosed to the withholding agent unless the alternative procedure is used (see below). The withholding rate pools are based on valid documentation that you obtain under your withholding agreement with the IRS or, if a payment cannot be reliably associated with valid documentation, under the applicable presumption rules.

Alternative procedure for U.S. non-exempt recipients. If permitted by the QI withholding agreement with the IRS and if approved by the withholding agent, you may establish:
- A single withholding rate pool (not subject to backup withholding) for all U.S. non-exempt recipient account holders for whom you have provided Forms W-9 prior to the withholding agent making any payments. Alternatively, you may include such U.S. non-exempt recipients in a zero rate withholding pool that includes U.S. exempt recipients and foreign persons exempt from non-resident alien withholding provided all the conditions of the alternative procedure are met, and
- A separate withholding rate pool (subject to backup withholding) for all U.S. non-exempt recipient account holders for whom you have not provided Forms W-9 prior to the withholding agent making any payments.

If you elect the alternative procedure, you must provide the information required by your QI withholding agreement to the withholding agent not later than January 15 of the year following the year in which the payments are paid. Failure to provide this information may result in penalties under sections 6721 and 6722 and termination of your withholding agreement with the IRS.

Updating the statement. The statement by which you identify the relevant withholding rate pools must be updated as often as is necessary to allow the withholding agent to withhold at the appropriate rate on each payment and to correctly report the income to the IRS. The updated information becomes an integral part of Form W-8IMY.

Part III — Nonqualified Intermediary

If you are providing Form W-8IMY as a nonqualified intermediary (NQI), you must check box 10a. By checking this box, you are certifying to all of the statements on line 10a. Check box 10b if you are using this form to transmit withholding certificates or other documentation.

If you are acting on behalf of another NQI or on behalf of a foreign partnership or foreign trust that is not a withholding foreign partnership or a withholding foreign trust, you must attach to your Form W-8IMY the Form W-8IMY of the other NQI or the foreign partnership or the foreign trust together with the withholding certificates and other documentation attached to that Form W-8IMY.

Withholding statement of an NQI. In addition to valid documentation of its customers, an NQI must provide a withholding statement to obtain reduced rates of withholding for its customers and to avoid certain reporting responsibilities. The withholding statement must be provided prior to a payment and becomes an integral part of the Form W-8IMY and, therefore, the certification statement that you sign in Part VII of the form applies to the withholding statement as well as to the form. The withholding statement must:
- Contain the name, address, U.S. TIN (if any), and the type of documentation (documentary evidence, Form W-9, or type of Form W-8) for every person for whom documentation has been received and must state whether that person is a U.S. exempt recipient, a U.S. non-exempt recipient, or a foreign person. The statement must indicate whether a foreign person is a beneficial owner or an intermediary, flow-through entity, or U.S. branch and the type of recipient, based on the recipient codes reported on Form 1042-S.
- Allocate each payment by income type to every payee for whom documentation has been provided. The type of income is based on the income codes reported on Form 1042-S (or, if applicable, the income categories for Form 1099). If a payee receives income through another NQI, flow-through entity, or U.S. branch, your withholding certificate must also state the name, address, and U.S. TIN, if known, of the other NQI or U.S. branch from which the payee directly receives the payment or the flow-through entity in which the payee has a direct ownership interest. If another NQI, flow-through entity, or U.S. branch fails to allocate a payment, you must provide, for that payment, the name of the NQI, flow-through entity, or U.S. branch that failed to allocate the payment.
- If a payee is identified as a foreign person, you must specify the rate of withholding to which the payee is subject, the payee's country of residence and, if a reduced rate of withholding is claimed, the basis for that reduced rate (for example, treaty benefit, portfolio interest, exempt under section 501(c)(3), 892, or 895). The statement must also include the U.S. TIN (if required) and, if the beneficial owner is not an individual and is claiming treaty benefits, state whether the limitation on benefits and section 894 statements have been provided by the beneficial owner. You must inform the withholding agent as to which payments those statements relate.
- Contain any other information the withholding agent requests in order to fulfill its withholding and reporting obligations under Chapter 3 of the Code and/or Form 1099 reporting and backup withholding responsibility.

Alternative procedure for NQIs. Under this procedure, you may provide information allocating a payment of a reportable amount to each payee (including U.S. exempt recipients) after a payment is made. To use the alternative procedure you must inform the withholding agent on your withholding statement that you are using the procedure and the withholding agent must agree to the procedure.

This alternative procedure cannot be used for payments that are allocable to U.S. non-exempt recipients.

Under this procedure, you must provide a withholding agent with all the information required on the withholding statement (see *Withholding statement of an NQI* on this page) and all payee documentation, except the specific allocation information for each payee, prior to the payment of a reportable amount. In addition, you must provide the withholding agent with withholding rate pool information. The withholding statement must assign each payee to a withholding rate pool prior to the payment of a reportable amount. A withholding rate pool is a payment of a single type of income, based on the income codes reported on Form 1042-S (for example, interest or dividends), that is subject to a single rate of withholding. The withholding rate pool may be established by any reasonable method agreed upon by you and the withholding agent. For example, you may agree to establish a separate account for a single withholding rate pool, or you may agree to divide a payment made to a single account into portions allocable to each withholding rate pool. You must determine withholding rate pools based on valid documentation or, to the extent a payment cannot be reliably associated with valid documentation, the applicable presumption rules.

You must provide the withholding agent with sufficient information to allocate the income in each withholding rate pool to each payee (including U.S. exempt recipients) within the pool no later than January 31 of the year following the year of payment. If you fail to provide allocation information, if required, by January 31 for any withholding rate pool, you may not use this procedure for any payment made after that date for all withholding rate pools. You may remedy your failure to provide allocation information by providing the information to the withholding agent no later than February 14. See Regulations section 1.1441-1.

Part IV — Certain United States Branches

Line 11

Check the box to certify that you are either:

- A U.S. branch of a foreign bank subject to regulatory supervision by the Federal Reserve Board or
- A U.S. branch of a foreign insurance company required to file an annual statement on a form approved by the National Association of Insurance Commissioners with the insurance department of a state, a territory, or the District of Columbia.

By checking the box you are also certifying that the income you are receiving is not effectively connected with the conduct of your trade or business in the United States. You must provide your EIN on line 6 of Part I.

Line 12 or 13

If you are one of the types of U.S. branches specified in the instructions for line 11 above, then you may choose to be treated in one of two ways:

1. Check box 12 if you have an agreement with the withholding agent to which you are providing this form to be treated as a U.S. person. In this case, you will be treated as a U.S. person. Therefore, you will receive the payment free of Chapter 3 withholding but you will yourself be responsible for Chapter 3 withholding and backup withholding for any payments you make or credit to the account of persons for whom you are receiving the payment.
2. Check box 13 if you do not have an agreement with the withholding agent to be treated as a U.S. person.

Withholding statement of a U.S. branch not treated as a U.S. person. If you checked box 13, you must provide the withholding agent with a written withholding statement. The withholding statement becomes an integral part of the Form W-8IMY. The withholding statement must provide the same information outlined under *Withholding statement of an NQI* on page 5.

Part V — Withholding Foreign Partnership or Withholding Foreign Trust

Check box 14 if you are a withholding foreign partnership or a withholding foreign trust for the accounts for which you are providing this form and you are receiving the income from those accounts on behalf of your partners, beneficiaries, or owners. If you are not receiving the income on behalf of your partners, beneficiaries, or owners, do not complete Part V. Instead, complete Part II or Part III, whichever is appropriate. If you are a withholding foreign partnership or trust that is acting as a nonwithholding foreign partnership or trust for certain partners, beneficiaries, or owners, you must complete Part VI with respect to those partners, beneficiaries, or owners.

If you are acting as a withholding foreign partnership or withholding foreign trust, you must assume primary withholding responsibility for all payments that are made to you for your partners, beneficiaries, or owners for which you are required to act as a withholding foreign partnership or trust. Therefore, you are not required to provide information to the withholding agent regarding each partner's, beneficiary's, or owner's distributive share of the payment. If you are also receiving payments from the same withholding agent for persons other than your partners, beneficiaries, or owners, you must provide a separate Form W-8IMY for those payments.

Part VI — Nonwithholding Foreign Partnership, Simple Trust, or Grantor Trust

Check box 15 if you are a foreign partnership or a foreign simple or grantor trust that is not a withholding foreign partnership or a withholding foreign trust. Additionally, check box 15 if you are a withholding foreign partnership or trust acting as a nonwithholding foreign partnership or trust for certain partners, beneficiaries, or owners. By checking this box, you are certifying to both of the statements on line 15.

Note. If you are receiving income that is effectively connected with the conduct of a trade or business in the United States, provide Form W-8ECI (instead of Form W-8IMY).

If you are not receiving the income on behalf of your partners, beneficiaries, or owners, do not complete Part VI. Instead, complete Part II or Part III, whichever is appropriate.

If you are acting on behalf of an NQI or another foreign partnership or foreign trust that is not a withholding foreign partnership or a withholding foreign trust, you must associate with your Form W-8IMY the Form W-8IMY of the other foreign partnership or foreign trust together with the withholding certificates and other documentation attached to that other form.

Withholding statement of nonwithholding foreign partnership or nonwithholding foreign trust. You must provide the withholding agent with a written withholding

statement to obtain reduced rates of withholding and relief from certain reporting obligations. The withholding statement becomes an integral part of the Form W-8IMY. The withholding statement must provide the same information outlined under *Withholding statement of an NQI* on page 5.

Certain smaller and related partnerships and trusts. If you are a foreign partnership or foreign simple or grantor trust to which a QI is applying the rules of Section 4A.01 of the QI agreement, or to which a WP or WT is applying the rules of Section 10.01 of the WP or WT agreement (relating to certain smaller partnerships and trusts), you must provide the QI, WP, or WT with a Form W-8IMY; a Form W-8 from each of your partners, beneficiaries, or owners; and a withholding statement. The withholding statement must provide the same information outlined under *Withholding statement of an NQI* on page 5, except that it does not need any allocation information.

If you are a foreign partnership or foreign simple or grantor trust to which a QI is applying the rules of Section 4A.02 of the QI agreement, or to which a WP or WT is applying the rules of Section 10.02 of the WP or WT agreement (relating to certain related partnerships and trusts), you must provide the QI, WP, or WT with a Form W-8IMY and a withholding statement. The withholding statement must provide the same information outlined under *Withholding statement of an NQI* on page 5 except that it may include pooled basis information regarding direct partners, beneficiaries, or owners that are not intermediaries, flow-through entities, or U.S. non-exempt recipients.

See Rev. Proc. 2003-64 for rules regarding certain smaller and related partnerships or trusts. You can find Rev. Proc. 2003-64 on page 306 of Internal Revenue Bulletin (IRB) 2003-32 at *www.irs.gov/pub/irs-irbs/irb03-32.pdf.* Also see Rev. Proc. 2004-21 (IRB 2004–14).

Part VII — Certification

Form W-8IMY must be signed and dated by a person authorized to sign a declaration under penalties of perjury on behalf of the person whose name is on the form.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. If you are acting in any capacity described in these instructions, you are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: **Recordkeeping,** 5 hr., 58 min.; **Learning about the law or the form,** 4 hr., 38 min.; **Preparing the form,** 6 hr., 8 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can email us at **taxforms@irs.gov.* Please put “Forms Comment” on the subject line. Or you can write to Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6406, Washington, DC 20224. Do not send Form W-8IMY to this office. Instead, give it to your withholding agent.

Form **1042**
Department of the Treasury
Internal Revenue Service (77)

Annual Withholding Tax Return for U.S. Source Income of Foreign Persons

▶ See instructions.

OMB No. 1545-0096

2008

If this is an amended return, check here . . . . . ▶ ☐

Name of withholding agent	Employer identification number	For IRS Use Only	
		CC	FD
Number, street, and room or suite no. (if a P.O. box, see instructions)		RD	FF
		CAF	FP
City or town, province or state, and country (including postal code)		CR	I
		EDC	SIC

If you will not be liable for returns in the future, check here ▶ ☐ Enter date final income paid ▶ .....

Check here if you made quarter-monthly deposits using the 90% rule (see **Deposit Requirements** in the instructions) . . . ▶ ☐

Check if you are a: QI/Withholding foreign partnership or trust ☐ NQI/Flow-through entity ☐ (See instructions.)

Record of Federal Tax Liability (Do not show federal tax deposits here.)

Line No.	Period ending		Tax liability for period (including any taxes assumed on Form(s) 1000)	Line No.	Period ending		Tax liability for period (including any taxes assumed on Form(s) 1000)	Line No.	Period ending		Tax liability for period (including any taxes assumed on Form(s) 1000)
1	Jan.	7		21	May	7		41	Sept.	7	
2		15		22		15		42		15	
3		22		23		22		43		22	
4		31		24		31		44		30	
5	Jan. total			25	May total			45	Sept. total		
6	Feb.	7		26	June	7		46	Oct.	7	
7		15		27		15		47		15	
8		22		28		22		48		22	
9		29		29		30		49		31	
10	Feb. total			30	June total			50	Oct. total		
11	Mar.	7		31	July	7		51	Nov.	7	
12		15		32		15		52		15	
13		22		33		22		53		22	
14		31		34		31		54		30	
15	Mar. total			35	July total			55	Nov. total		
16	Apr.	7		36	Aug.	7		56	Dec.	7	
17		15		37		15		57		15	
18		22		38		22		58		22	
19		30		39		31		59		31	
20	Apr. total			40	Aug. total			60	Dec. total		

61 **No. of Forms 1042-S filed:** **a** On paper ..... **b** Electronically .....

62 **For all Form(s) 1042-S and 1000:** **a** Gross income paid **b** Taxes withheld or assumed

63a	Total tax liability (add monthly total lines from above)	63a		
b	Adjustments (see page 4)	63b		
c	Total **net tax** liability (combine lines 63a and 63b) . . . . . ▶			63c
64	Total paid by federal tax deposit coupons or by electronic funds transfer (or with a request for an extension of time to file) for 2008	64		
65	Enter overpayment applied as a credit from 2007 Form 1042 .	65		
66	Credit for amounts withheld by other withholding agents (see page 4)	66		
67	**Total payments.** Add lines 64 through 66 . . . . . ▶			67
68	If line 63c is larger than line 67, enter **balance due** here			68
69	If line 67 is larger than line 63c, enter **overpayment** here			69
70	Penalty for failure to deposit tax when due. Also include on line 68 or line 69 (see page 4) .			70
71	Apply overpayment on line 69 to (check one): ☐ **Credit on 2009 Form 1042 or** ☐ **Refund**			

Third Party Designee

Do you want to allow another person to discuss this return with the IRS (see page 4)? ☐ **Yes.** Complete the following. ☐ **No**

Designee's name ▶ | Phone no. ▶ | Personal identification number (PIN) ▶

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than withholding agent) is based on all information of which preparer has any knowledge.

Your signature ▶ | Date | Capacity in which acting ▶ | Daytime phone number ▶

Paid Preparer's Use Only

Preparer's signature ▶ | Date | Check if self-employed ▶ ☐ | Preparer's SSN or PTIN

Firm's name (or yours if self-employed), address, and ZIP code ▶ | EIN ▶ | Phone no.

Section references are to the Internal Revenue Code unless otherwise noted.

General Instructions

Purpose of Form

Use Form 1042 to report tax withheld on certain income of foreign persons, including nonresident aliens, foreign partnerships, foreign corporations, foreign estates, and foreign trusts.

Publicly traded partnerships (section 1446 withholding tax). For purposes of reporting on Form 1042, a publicly traded partnership (PTP) must withhold section 1446 tax on distributions of effectively connected income (ECI) to its foreign partners. A nominee that receives a distribution of ECI from a PTP and is treated as the withholding agent must use Form 1042 to report the tax withheld. For this purpose, a nominee is a domestic person holding an interest in the PTP on behalf of one or more foreign partners. For more information, see Regulations section 1.1446-4 and Pub. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities.

Who Must File

Every withholding agent or intermediary (see definitions below) who receives, controls, has custody of, disposes of, or pays any fixed or determinable annual or periodical income must file an annual return for the preceding calendar year on Form 1042. Also, any PTP or nominee making a distribution of ECI under section 1446 must file Form 1042 for the preceding calendar year.

You must file Form 1042 if either of the following apply.

- You are required to file Form(s) 1042-S (whether or not any tax was withheld or was required to be withheld). File Form 1042 even if you file Forms 1042-S electronically.
- You pay gross investment income to foreign private foundations that are subject to tax under section 4948(a).

Withholding Agent

Any person required to withhold tax is a withholding agent. A withholding agent may be an individual, trust, estate, partnership, corporation, nominee (under section 1446), government agency, association, or tax-exempt foundation, whether domestic or foreign.

Every person required to deduct and withhold any tax under Chapter 3 of the Code is liable for such tax. See section 1461.

Intermediary

An intermediary is a person who acts as a custodian, broker, nominee, or otherwise as an agent for another person, regardless of whether that other person is the beneficial owner of the amount paid, a flow-through entity, or another intermediary.

Qualified intermediary (QI). A QI is an intermediary that is a party to a withholding agreement with the IRS. An entity must indicate its status as a QI on a Form W-8IMY submitted to a withholding agent. For information on a QI withholding agreement, see Rev. Proc. 2000-12, which is on page 387 of Internal Revenue Bulletin (IRB) 2000-4 at *www.irs.gov/pub/irs-irbs/irb00-04.pdf.* Also see Notice 2001-4 (IRB 2001-2), as amended; Rev. Proc. 2003-64, Appendix 3 (IRB 2003-32); Rev. Proc. 2004-21 (IRB 2004-14); and Rev. Proc. 2005-77 (IRB 2005-51).

Withholding foreign partnership (WP) or withholding foreign trust (WT). A WP or WT is a foreign partnership or trust that has entered into a withholding agreement with the IRS in which it agrees to assume primary withholding responsibility for all payments that are made to it for its partners, beneficiaries, or owners. For information on these withholding agreements, see Rev. Proc. 2003-64, which is on page 306 of Internal Revenue Bulletin (IRB) 2003-32 at *www.irs.gov/pub/irs-irbs/irb03-32.pdf.* Also see Rev. Proc. 2004-21 (IRB 2004-14) and Rev. Proc. 2005-77 (IRB 2005-51).

Nonqualified intermediary (NQI). An NQI is any intermediary that is not a U.S. person and that is not a QI.

Where and When To File

File Form 1042 with the Ogden Service Center, P.O. Box 409101, Ogden, UT 84409, by March 16, 2009. Use Form 1042-T to transmit paper Forms 1042-S.

Extension of time to file. If you need more time to file Form 1042, you may submit Form 7004, Application for Automatic Extension of Time To File Certain Business Income Tax, Information, and Other Returns.

Form 7004 does not extend the time for payment of tax.

Additional Information

For details on withholding of tax, see Pub. 515. You can get Pub. 515 by calling 1-800-TAX-FORM (1-800-829-3676) or by downloading it from the IRS website at *www.irs.gov*.

Income Tax Withholding on Wages, Pensions, Annuities, and Certain Other Deferred Income

Use Form 941, Employer's QUARTERLY Federal Tax Return, to report income tax withheld and social security and Medicare taxes on wages paid to a nonresident alien employee.

Use Form 945, Annual Return of Withheld Federal Income Tax, to report income tax withheld under section 3405 from pensions, annuities, and certain other deferred income paid to a nonresident alien individual. However, if the recipient has elected under section 3405(a)(2) or (b)(2) not to have withholding under section 3405, these payments are subject to withholding under section 1441 and the tax withheld must be reported using Forms 1042 and 1042-S.

Use Schedule H (Form 1040), Household Employment Taxes, to report income tax withheld and social security and Medicare taxes on wages paid to a nonresident alien household employee.

Deposit Requirements

Generally, if you are not required to use the Electronic Federal Tax Payment System (EFTPS), you must deposit the tax withheld and required to be shown on Form 1042 with an authorized financial institution using your preprinted Form 8109, Federal Tax Deposit Coupon. Do not use anyone else's coupons. If you do not have your coupons when a deposit is due, call 1-800-829-4933, if you are in the United States. If overseas, call 215-516-2000 (not a toll-free number). You may also contact your local IRS office. To avoid a penalty, do not mail your deposits directly to the IRS.

The amount of tax you are required to withhold determines the frequency of your deposits. The following rules explain how often deposits must be made.

1. If at the end of any quarter-monthly period the total amount of undeposited taxes is $2,000 or more, you must deposit the taxes within 3 banking days after the end of the quarter-monthly period. (A quarter-monthly period ends on the 7th, 15th, 22nd, and last day of the month.) To determine banking days, do not count Saturdays, Sundays, legal holidays, or any local holidays observed by authorized financial institutions.

This deposit rule is considered met if:

- You deposit at least 90% of the actual tax liability for the deposit period, and
- If the quarter-monthly period is in a month other than December, you deposit any underpayment with your first deposit that is required to be made after the 15th day of the following month. Any underpayment of $200 or more for a quarter-monthly period ending in December must be deposited by January 31.

2. If at the end of any month the total amount of undeposited taxes is at least $200 but less than $2,000, you must deposit the taxes within 15 days after the end of the month. If you make a deposit of $2,000 or more during any month except December under rule 1 above, carry over any end-of-the-month balance of less than $2,000 to the next month. If you make a deposit of $2,000 or more during December, any end-of-December balance of less than $2,000 should be remitted with your Form 1042 by March 16, 2009.

3. If at the end of a calendar year the total amount of undeposited taxes is less than $200, you may either pay the taxes with your Form 1042 or deposit the entire amount by March 16, 2009.

Note. If you are requesting an extension of time to file using Form 7004, follow these rules to see if you must make a deposit of any balance due or if you can pay it with Form 7004. See Form 7004 and its instructions for more information.

Electronic deposit requirement. You must make electronic deposits of all depository tax liabilities using the Electronic Federal Tax Payment System (EFTPS) in 2009 if:

- The total deposits of such taxes in 2007 were more than $200,000, or
- You were required to use EFTPS in 2008.

If you are required to use EFTPS and fail to do so, you may be subject to a 10% penalty. If you are not required to use EFTPS, you may participate voluntarily. To enroll in or get more information about EFTPS, call 1-800-555-4477. You can also visit the EFTPS website at *www.eftps.gov.*

Depositing on time. For deposits made by EFTPS to be on time, you must initiate the transaction at least one business day before the date the deposit is due.

Completing Form 8109. If you do not use EFTPS, deposit your income tax payments using Form 8109. In most cases, you will fill out a Form 8109 following the instructions in the coupon book. However, if a deposit liability arises from a distribution reportable on Form 1042 for the prior year, darken the 4th quarter space on Form 8109. If the distribution is reportable for the current year, darken the 1st quarter space. In all cases, follow the coupon book instructions for completing the rest of the deposit coupon. To ensure proper crediting, write your taxpayer identification number, the period to which the tax deposit applies, and "Form 1042" on the check or money order.

If you prefer you may mail your coupon and payment to:

Financial Agent
Federal Tax Deposit Processing
P.O. Box 970030
St. Louis, MO 63197 U.S.A.

Make your check or money order payable to "Financial Agent."

Interest and Penalties

If you file Form 1042 late, or fail to pay or deposit the tax when due, you may be liable for penalties and interest unless you can show that the failure to file or pay was due to reasonable cause and not willful neglect.

TIP *You do not have to figure the amount of any interest or penalties you may owe. Because figuring these amounts can be complicated, we will do it for you if you want. We will send you a bill for any amount due.*

If you include interest or penalties (other than the penalty for failure to deposit tax when due) with your payment, identify and enter the amount in the bottom margin of Form 1042, page 1. Do not include interest or penalties (other than the penalty for failure to deposit tax when due) in the balance due on line 68.

Interest. Interest is charged on taxes not paid by the due date, even if an extension of time to file is granted. Interest is also charged on penalties imposed for failure to file, negligence, fraud, and substantial understatements of tax from the due date (including extensions) to the date of payment. Interest is figured at a rate determined under section 6621.

Late filing of Form 1042. The penalty for not filing Form 1042 when due (including extensions) is 5% of the unpaid tax for each month or part of a month the return is late, up to a maximum of 25% of the unpaid tax.

Late payment of tax. The penalty for not paying tax when due is usually ½ of 1% of the unpaid tax for each month or part of a month the tax is unpaid. The penalty cannot exceed 25% of the unpaid tax.

Failure to deposit tax when due. See the instructions for line 70 on page 4.

Other penalties. Penalties may be imposed for negligence, substantial understatement of tax, and fraud. See sections 6662 and 6663.

Specific Instructions

CAUTION *File only one Form 1042 consolidating all Form 1042-S recipient information, regardless of the number of different clients, branches, divisions, or types of income for which you are the withholding agent. However, if you are acting in more than one capacity (for example, you are acting as a QI for certain designated accounts and as an NQI for other accounts), file a separate Form 1042 for each capacity in which you are acting.*

Rounding off to whole dollars. You may round off cents to whole dollars. If you do round to whole dollars, you must round all amounts. To round off amounts to the nearest whole dollar, drop amounts under 50 cents and increase amounts from 50 to 99 cents to the next dollar. For example, $1.39 becomes $1 and $2.50 becomes $3. If you have to add two or more amounts to figure the amount to enter on a line, include cents when adding and only round off the total.

Employer identification number (EIN). You are generally required to enter your EIN. However, if you are filing Form 1042 as a QI, withholding foreign partnership, or withholding foreign trust, enter your QI-EIN, WP-EIN, or WT-EIN. Also, be sure to check the "QI/Withholding foreign partnership or trust" box. See *QI and NQI checkboxes* below.

If you do not have an EIN, you can apply for one online at *www.irs.gov/businesses* or by telephone at 1-800-829-4933. Also, you can file Form SS-4, Application for Employer Identification Number, by fax or mail. File amended Forms 1042-S when you receive your EIN.

To get a QI-EIN, WP-EIN, or WT-EIN, submit Form SS-4 with your application for that status. Do not send an application for a QI-EIN, WP-EIN, or WT-EIN to the addresses listed in the Instructions for Form SS-4.

Address. Include the suite, room, or other unit number after the street address. If your post office does not deliver mail to the street address and you have a P.O. box, show the box number instead of the street address.

QI and NQI checkboxes. See page 2 for definitions of intermediary, qualified intermediary (QI), withholding foreign partnership (WP), withholding foreign trust (WT), and nonqualified intermediary (NQI). See the Form 1042-S instructions for definitions of U.S. branch treated as a U.S. person and flow-through entity.

Check the "QI/Withholding foreign partnership or trust" box on page 1 if you are a QI, WP, WT, or a U.S. branch treated as a U.S. person. Check the "NQI/Flow-through entity" box if you are an NQI or a flow-through entity.

Lines 1 through 60. Except as otherwise provided in these instructions, include tax liability for the period in which the income was distributed. Do not enter any negative amounts on these lines.

A domestic partnership that has not distributed a foreign partner's distributive share of income subject to withholding under section 1441 must withhold tax on any income not distributed by the date on which the Schedule K-1 is sent or otherwise furnished to the foreign partner (or, if earlier, the due date for furnishing Schedule K-1 to the partner). Include such tax for the period that includes the date the tax was required to be withheld.

Do not include on lines 1 through 60 any tax liability attributable to adjustments of underwithheld tax on corporate distributions made in calendar year 2008 if:

- The distributing corporation made a reasonable estimate of accumulated and current earnings and profits under Regulations section 1.1441-3(c)(2)(ii)(A) and
- The distributing corporation or intermediary paid over the underwithheld tax by March 16, 2009.

Instead, include these payments of underwithheld tax on line 63b.

If you are a QI that did not assume primary withholding responsibility, enter the total amount withheld by the U.S. withholding agent(s) on line 59. Report all other amounts (that is, amounts you actually withheld) on the line that corresponds with the date the liability was incurred.

If you repaid the recipient for an amount overwithheld by reducing the amount withheld on a later payment, report the reduced amount on these lines. If you used the reimbursement procedure for overwithheld amounts, see Pub. 515.

Line 61. Enter the number of Forms 1042-S filed on paper and electronically.

Lines 62a and 62b. Enter the amounts requested with respect to all Forms 1042-S (regardless of whether the form was filed electronically or on paper) and with respect to all Forms 1000, Ownership Certificate.

Be sure to reconcile amounts on Form 1042 with amounts on Forms 1042-S (including Forms 1042-S filed electronically), to avoid unnecessary correspondence with the IRS.

Line 62a. The amount on line 62a should equal the sum of all amounts shown on Forms 1042-S, box 2, and all amounts shown as gross interest paid on Forms 1000.

Line 62b. The amount on line 62b should equal:

- The sum of all Forms 1042-S, box 9 (box 7 plus box 8), less
- The sum of all Forms 1042-S, box 10, plus
- The tax assumed from Forms 1000.

If it does not, attach a statement to Form 1042 explaining the difference.

Line 63a. The amount on line 63a must equal the sum of the monthly totals as listed on the Record of Federal Tax Liability. Do not make any adjustments on this line. Except for adjustments described in the instructions for line 63b, you may only make adjustments on the appropriate entry line of the Record of Federal Tax Liability.

Line 63b. Include on line 63b any tax liability attributable to adjustments of underwithheld tax on corporate distributions made in calendar year 2008 if:

- The distributing corporation made a reasonable estimate of accumulated and current earnings and profits under Regulations section 1.1441-3(c)(2)(ii)(A) and
- The distributing corporation or intermediary paid over the underwithheld tax by March 16, 2009.

If you are a regulated investment company (RIC) or a real estate investment trust (REIT) that paid a dividend in January subject to section 852(b)(7) or section 857(b)(9) (relating to certain dividends declared in the preceding October, November, or December), enter your additional tax liability on those dividends declared in 2008 but paid in January 2009 less any additional tax liability on those dividends declared in 2007 but paid in January 2008. Show any negative amount in brackets. Attach a statement showing your calculation.

Line 64. Enter the total tax deposits you made (including amounts paid with an extension of time to file).

Line 66. You are permitted to take a credit for amounts withheld by other withholding agents that pertain to the total net tax liability reported on line 63c. For example, you are a QI and the amount you entered on line 63c includes amounts withheld by a U.S. withholding agent. You may take a credit on line 66 for the amounts that were withheld by the U.S. withholding agent. The amount on line 66 should equal the sum of all Forms 1042-S, box 8, that you file for the year.

If you are a QI requesting a refund, you must attach the corresponding Form(s) 1042-S received to support the amount claimed on line 66. Failure to do so will result in the denial of the refund or credit being claimed. If you are a PTP or a nominee withholding under section 1446, the tax paid for a payee may only be claimed as a credit by the payee.

Lines 69 and 71. You may claim an overpayment shown on line 69 as a refund or a credit. Check the applicable box on line 71 to show which you are claiming. If you claim a credit, it can reduce your required deposits of withheld tax for 2009.

Line 70. The penalty for failure to deposit tax applies to the amount underpaid when the deposit was due. See *Deposit Requirements* on page 2. The penalty rates are 2% for deposits made 1 to 5 days late, 5% for deposits made 6 to 15 days late, and 10% for deposits made 16 or more days late. However, the penalty is 15% if the tax is not deposited within 10 days after the IRS issues the first notice demanding payment. Add the penalty to any tax due and enter the total on line 68. If you are due a refund, subtract the penalty from the overpayment you show on line 69.

For information on other penalties, see *Interest and Penalties* on page 3.

Third Party Designee

If you want to allow any individual, corporation, firm, organization, or partnership to discuss your 2008 Form 1042 with the IRS, check the "Yes" box in the Third Party Designee section of the return. Also, enter the name, phone number, and any five numbers that the designee chooses as his or her personal identification number (PIN). The authorization applies only to the tax form upon which it appears.

By checking the "Yes" box, you are authorizing the IRS to call the designee to answer any questions relating to the information reported on your tax return. You are also authorizing the designee to:

- Exchange information concerning your tax return with the IRS, and
- Request and receive written tax return information relating to your tax return including copies of specific notices, correspondence, and account transcripts.

You are not authorizing the designee to receive any refund check, bind you to anything (including additional tax liability), or otherwise represent you before the IRS. If you want to expand the designee's authorization, see Pub. 947, Practice Before the IRS and Power of Attorney.

The authorization automatically expires one year from the due date (without regard to extensions) for filing your 2008 Form 1042. If you or your designee desire to terminate the authorization, a written statement conveying your wish to revoke the authorization should be submitted to the IRS service center where the return was processed.

Amended Return

If you have to make changes to your Form 1042 after you submit it, file an amended Form 1042. Use a Form 1042 for the year you are amending. Check the "Amended Return" box at the top of the form. You must complete the entire form, including all filing information for the calendar year, and sign the return. Attach a statement explaining why you are filing an amended return (for example, you are filing because the tax liability for May was incorrectly reported due to a mathematical error).

If you are also amending Form(s) 1042-S, see *Amended Returns* in the Form 1042-S instructions.

Do not amend Form 1042 to recover taxes overwithheld in the prior year. For more information, see *Adjustment for Overwithholding* in Pub. 515.

Privacy Act and Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. Sections 1441, 1442, and 1446 (for PTPs) require withholding agents to report and pay over to the IRS taxes withheld from certain U.S. source income of foreign persons. Form 1042 is used to report the amount of withholding that must be paid over. Form 1042-S is used to report the amount of income and withholding to the payee. Section 6109 requires you to provide your employer identification number. Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and cities, states, and the District of Columbia for use in administering their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism. If you fail to provide this information in a timely manner, you may be liable for penalties and interest.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file these forms will vary depending on individual circumstances. The estimated average time is: **Recordkeeping,** 9 hr., 48 min.; **Learning about the law or the form,** 2 hr., 25 min.; **Preparing the form,** 4 hr., 33 min.; and **Copying, assembling, and sending the form to the IRS,** 32 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see *Where and When To File* on page 2.

Form **1042-S**

Department of the Treasury
Internal Revenue Service

Foreign Person's U.S. Source Income Subject to Withholding

☐ **AMENDED** ☐ **PRO-RATA BASIS REPORTING**

2009

OMB No. 1545-0096

Copy A for Internal Revenue Service

1 Income code	**2** Gross income	**3** Withholding allowances	**4** Net income	**5** Tax rate	**6** Exemption code	**7** Federal tax withheld **8** Withholding by other agents **9** Total withholding credit

10 Amount repaid to recipient	**14** Recipient's U.S. TIN, if any ► ☐ SSN or ITIN ☐ EIN ☐ QI-EIN
11 Withholding agent's EIN ► ☐ EIN ☐ QI-EIN	**15** Recipient's foreign tax identifying number, if any — **16** Country code
12a WITHHOLDING AGENT'S name	**17** NQI's/FLOW-THROUGH ENTITY'S name — **18** Country code
12b Address (number and street)	**19a** NQI's/Entity's address (number and street)
12c Additional address line (room or suite no.)	**19b** Additional address line (room or suite no.)
12d City or town, province or state, country, ZIP or foreign postal code	**19c** City or town, province or state, country, ZIP or foreign postal code
13a RECIPIENT'S name — **13b** Recipient code	**20** NQI's/Entity's U.S. TIN, if any ►
13c Address (number and street)	**21** PAYER'S name and TIN (if different from withholding agent's)
13d Additional address line (room or suite no.)	**22** Recipient account number (optional)
13e City or town, province or state, country, ZIP or foreign postal code	**23** State income tax withheld — **24** Payer's state tax no. — **25** Name of state

Form **1042-S**

Department of the Treasury
Internal Revenue Service

Foreign Person's U.S. Source Income Subject to Withholding

☐ **AMENDED** ☐ **PRO-RATA BASIS REPORTING**

2009

OMB No. 1545-0096

Copy B
for Recipient

1 Income code	**2** Gross income	**3** Withholding allowances	**4** Net income	**5** Tax rate	**6** Exemption code	**7** Federal tax withheld **8** Withholding by other agents **9** Total withholding credit
10 Amount repaid to recipient				**14** Recipient's U.S. TIN, if any ► ☐ SSN or ITIN ☐ EIN ☐ QI-EIN		
11 Withholding agent's EIN ► ☐ EIN ☐ QI-EIN				**15** Recipient's foreign tax identifying number, if any		**16** Country code
12a WITHHOLDING AGENT'S name				**17** NQI's/FLOW-THROUGH ENTITY'S name		**18** Country code
12b Address (number and street)				**19a** NQI's/Entity's address (number and street)		
12c Additional address line (room or suite no.)				**19b** Additional address line (room or suite no.)		
12d City or town, province or state, country, ZIP or foreign postal code				**19c** City or town, province or state, country, ZIP or foreign postal code		
13a RECIPIENT'S name		**13b** Recipient code		**20** NQI's/Entity's U.S. TIN, if any ►		
13c Address (number and street)				**21** PAYER'S name and TIN (if different from withholding agent's)		
13d Additional address line (room or suite no.)				**22** Recipient account number (optional)		
13e City or town, province or state, country, ZIP or foreign postal code				**23** State income tax withheld	**24** Payer's state tax no.	**25** Name of state

For Privacy Act and Paperwork Reduction Act Notice, see page 16 of the separate instructions. Cat. No. 11386R Form **1042-S** (2009)

U.S. Income Tax Filing Requirements

Generally, every nonresident alien individual, nonresident alien fiduciary, and foreign corporation with United States income, including income that is effectively connected with the conduct of a trade or business in the United States, must file a United States income tax return. However, no return is required to be filed by a nonresident alien individual, nonresident alien fiduciary, or a foreign corporation if such person was not engaged in a trade or business in the United States at any time during the tax year and if the tax liability of such person was fully satisfied by the withholding of United States tax at the source. (Corporations file Form 1120-F; all others file Form 1040NR (or Form 1040NR-EZ if eligible).) You may get the return forms and instructions at any United States Embassy or consulate or by writing to: Internal Revenue Service, 1201 N. Mitsubishi Motorway, Bloomington, IL 61705-6613

En règle générale, tout étranger non-résident, tout organisme fidéicommissaire étranger non-résident et toute société étrangère percevant un revenu aux Etats-Unis, y compris tout revenu dérivé, en fait, du fonctionnement d'un commerce ou d'une affaire aux Etats-Unis, doit soumettre aux Etats-Unis, une déclaration d'impôt sur le revenu. Cependant aucune déclaration d'impôt sur le revenu n'est exigée d'un étranger non-résident, d'un organisme fidéicommissaire étrange non-résident, ou d'une société étrangère s'ils n'ont pris part à aucun commerce ou affaire aux Etats-Unis à aucun moment pendant l'année fiscale et si les impôts dont ils sont redevables, ont été entièrement acquittés par une retenue à la source, de leur montant. (Les sociétés doivent faire leur déclaration d'impôt en remplissant le formulaire 1120-F; tous les autres redevables doivent remplir le formulaire 1040NR (ou 1040NR-EZ si éligible).) On peut se procurer formulaires de déclarations d'impôts et instructions dans toutes les Ambassades et tous les Consulats des Etats-Unis. L'on peut également s'adresser pour tous renseignements a: Internal Revenue Service, 1201 N. Mitsubishi Motorway, Bloomington, IL 61705-6613

Por regla general, todo extranjero no residente, todo organismo fideicomisario extranjero no residente y toda sociedad anónima extranjera que reciba ingresos en los Estados Unidos, incluyendo ingresos relacionados con la conducción de un negocio o comercio dentro de los Estados Unidos, deberá presentar una declaración estadounidense de impuestos sobre ingreso. Sin embargo, no se requiere declaración alguna a un individuo extranjero, una sociedad anónima extranjera u organismo fideicomisario extranjero no residente, si tal persona no ha efectuado comercio o negocio en los Estados Unidos durante el año fiscal y si la responsabilidad con los impuestos de tal persona ha sido satisfecha plenamente mediante retencion del impuesto de los Estados Unidos en la fuente. (Las sociedades anónimas envian la Forma 1120-F; todos los demás contribuyentes envian la Forma 1040NR (o la Forma 1040NR-EZ si le corresponde).) Se podrán obtener formas e instrucciones en cualquier Embajada o Consulado de los Estados Unidos o escribiendo directamente a: Internal Revenue Service, 1201 N. Mitsubishi Motorway, Bloomington, IL 61705-6613

Im allgemeinen muss jede ausländische Einzelperson, jeder ausländische Bevollmächtigte und jede ausländische Gesellschaft mit Einkommen in den Vereinigten Staaten, einschliesslich des Einkommens, welches direkt mit der Ausübung von Handel oder Gewerbe innerhalb der Staaten verbunden ist, eine Einkommensteuererklärung der Vereinigten Staaten abgeben. Eine Erklärung, muss jedoch nicht von Ausländern, ausländischen Bevollmächtigten oder ausländischen Gesellschaften in den Vereinigten Staaten eingereicht werden, falls eine solche Person während des Steuerjahres kein Gewerbe oder Handel in den Vereinigten Staaten ausgeübt hat und die Steuerschuld durch Einbehaltung der Steuern der Vereinigten Staaten durch die Einkommensquelle abgegolten ist. (Gesellschaften reichen den Vordruck 1120-F ein; alle anderen reichen das Formblatt 1040NR oder wenn passend das Formblatt 1040NR-EZ ein.) Einkommensteuererklärungen und Instruktionen können bei den Botschaften und Konsulaten der Vereiningten Staaten eingeholt werden. Um weitere Informationen wende man sich bitte an: Internal Revenue Service, 1201 N. Mitsubishi Motorway, Bloomington, IL 61705-6613

Form **1042-S**

Department of the Treasury
Internal Revenue Service

Foreign Person's U.S. Source Income Subject to Withholding

☐ **AMENDED** ☐ **PRO-RATA BASIS REPORTING**

2009

OMB No. 1545-0096

Copy C for Recipient

Attach to any Federal tax return you file

1 Income code	**2** Gross income	**3** Withholding allowances	**4** Net income	**5** Tax rate	**6** Exemption code	**7** Federal tax withheld
						8 Withholding by other agents
						9 Total withholding credit

10 Amount repaid to recipient	**14** Recipient's U.S. TIN, if any ► ☐ SSN or ITIN ☐ EIN ☐ QI-EIN	
11 Withholding agent's EIN ► ☐ EIN ☐ QI-EIN	**15** Recipient's foreign tax identifying number, if any	**16** Country code
12a WITHHOLDING AGENT'S name	**17** NQI's/FLOW-THROUGH ENTITY'S name	**18** Country code
12b Address (number and street)	**19a** NQI's/Entity's address (number and street)	
12c Additional address line (room or suite no.)	**19b** Additional address line (room or suite no.)	
12d City or town, province or state, country, ZIP or foreign postal code	**19c** City or town, province or state, country, ZIP or foreign postal code	
13a RECIPIENT'S name / **13b** Recipient code	**20** NQI's/Entity's U.S. TIN, if any ►	
13c Address (number and street)	**21** PAYER'S name and TIN (if different from withholding agent's)	
13d Additional address line (room or suite no.)	**22** Recipient account number (optional)	
13e City or town, province or state, country, ZIP or foreign postal code	**23** State income tax withheld / **24** Payer's state tax no.	**25** Name of state

For Privacy Act and Paperwork Reduction Act Notice, see page 16 of the separate instructions. Cat. No. 11386R Form **1042-S** (2009)

Explanation of Codes

Box 1. Income code.

	Code	Types of Income
Interest	**01**	Interest paid by U.S. obligors—general
	02	Interest paid on real property mortgages
	03	Interest paid to controlling foreign corporations
	04	Interest paid by foreign corporations
	05	Interest on tax-free covenant bonds
	29	Deposit interest
	30	Original issue discount (OID)
	31	Short-term OID
	33	Substitute payment—interest
Dividend	**06**	Dividends paid by U.S. corporations—general
	07	Dividends qualifying for direct dividend rate
	08	Dividends paid by foreign corporations
	34	Substitute payment—dividends
Other	**09**	Capital gains
	10	Industrial royalties
	11	Motion picture or television copyright royalties
	12	Other royalties (for example, copyright, recording, publishing)
	13	Real property income and natural resources royalties
	14	Pensions, annuities, alimony, and/or insurance premiums
	15	Scholarship or fellowship grants
	16	Compensation for independent personal services[1]
	17	Compensation for dependent personal services[1]
	18	Compensation for teaching[1]
	19	Compensation during studying and training[1]
	20	Earnings as an artist or athlete[2]
	24	Real estate investment trust (REIT) distributions of capital gains
	25	Trust distributions subject to IRC section 1445
	26	Unsevered growing crops and timber distributions by a trust subject to IRC section 1445
	27	Publicly traded partnership distributions subject to IRC section 1446
	28	Gambling winnings[6]
	32	Notional principal contract income[3]
	35	Substitute payment—other
	36	Capital gains distributions
	37	Return of capital
	50	Other income

Box 6. Exemption code (applies if the tax rate entered in box 5 is 00.00).

Code	Authority for Exemption
01	Income effectively connected with a U.S. trade or business
02	Exempt under an Internal Revenue Code section (income other than portfolio interest)
03	Income is not from U.S. sources[4]
04	Exempt under tax treaty
05	Portfolio interest exempt under an Internal Revenue Code section
06	Qualified intermediary that assumes primary withholding responsibility
07	Withholding foreign partnership or withholding foreign trust
08	U.S. branch treated as a U.S. person
09	Qualified intermediary represents income is exempt

Box 13b. Recipient code.

Code	Type of Recipient
01	Individual[2]
02	Corporation[2]
03	Partnership other than withholding foreign partnership[2]
04	Withholding foreign partnership or withholding foreign trust
05	Trust
06	Government or international organization
07	Tax-exempt organization (IRC section 501(a))
08	Private foundation
09	Artist or athlete[2]
10	Estate
11	U.S. branch treated as U.S. person
12	Qualified intermediary
13	Private arrangement intermediary withholding rate pool—general[5]
14	Private arrangement intermediary withholding rate pool—exempt organizations[5]
15	Qualified intermediary withholding rate pool—general[5]
16	Qualified intermediary withholding rate pool—exempt organizations[5]
17	Authorized foreign agent
18	Public pension fund
20	Unknown recipient

[1] If compensation that otherwise would be covered under Income Codes 16–19 is directly attributable to the recipient's occupation as an artist or athlete, use Income Code 20 instead.
[2] If Income Code 20 is used, Recipient Code 09 (artist or athlete) should be used instead of Recipient Code 01 (individual), 02 (corporation), or 03 (partnership other than withholding foreign partnership).
[3] Use appropriate Interest Income Code for embedded interest in a notional principal contract.
[4] Non-U.S. source income received by a nonresident alien is not subject to U.S. tax. Use Exemption Code 03 when entering an amount for information reporting purposes only.
[5] May be used only by a qualified intermediary.
[6] Subject to 30% withholding rate unless the recipient is from one of the treaty countries listed under *Gambling winnings (Income Code 28)* in Pub. 515.

Form **1042-S**

Department of the Treasury
Internal Revenue Service

Foreign Person's U.S. Source Income Subject to Withholding

☐ **AMENDED** ☐ **PRO-RATA BASIS REPORTING**

2009

OMB No. 1545-0096

Copy D for Recipient

Attach to any state tax return you file

1 Income code	**2** Gross income	**3** Withholding allowances	**4** Net income	**5** Tax rate	**6** Exemption code	**7** Federal tax withheld
						8 Withholding by other agents
						9 Total withholding credit

10 Amount repaid to recipient	**14** Recipient's U.S. TIN, if any ► ☐ SSN or ITIN ☐ EIN ☐ QI-EIN	
11 Withholding agent's EIN ► ☐ EIN ☐ QI-EIN	**15** Recipient's foreign tax identifying number, if any	**16** Country code
12a WITHHOLDING AGENT'S name	**17** NQI's/FLOW-THROUGH ENTITY'S name	**18** Country code
12b Address (number and street)	**19a** NQI's/Entity's address (number and street)	
12c Additional address line (room or suite no.)	**19b** Additional address line (room or suite no.)	
12d City or town, province or state, country, ZIP or foreign postal code	**19c** City or town, province or state, country, ZIP or foreign postal code	
13a RECIPIENT'S name **13b** Recipient code	**20** NQI's/Entity's U.S. TIN, if any ►	
13c Address (number and street)	**21** PAYER'S name and TIN (if different from withholding agent's)	
13d Additional address line (room or suite no.)	**22** Recipient account number (optional)	
13e City or town, province or state, country, ZIP or foreign postal code	**23** State income tax withheld / **24** Payer's state tax no. / **25** Name of state	

For Privacy Act and Paperwork Reduction Act Notice, see page 16 of the separate instructions. Cat. No. 11386R Form **1042-S** (2009)

Form **1042-S**

Department of the Treasury
Internal Revenue Service

Foreign Person's U.S. Source Income Subject to Withholding

☐ **AMENDED** ☐ **PRO-RATA BASIS REPORTING**

2009

OMB No. 1545-0096

Copy E
for Withholding Agent

1 Income code	**2** Gross income	**3** Withholding allowances	**4** Net income	**5** Tax rate	**6** Exemption code	**7** Federal tax withheld **8** Withholding by other agents **9** Total withholding credit

10 Amount repaid to recipient	**14** Recipient's U.S. TIN, if any ► ☐ SSN or ITIN ☐ EIN ☐ QI-EIN
11 Withholding agent's EIN ► ☐ EIN ☐ QI-EIN	**15** Recipient's foreign tax identifying number, if any — **16** Country code
12a WITHHOLDING AGENT'S name	**17** NQI's/FLOW-THROUGH ENTITY'S name — **18** Country code
12b Address (number and street)	**19a** NQI's/Entity's address (number and street)
12c Additional address line (room or suite no.)	**19b** Additional address line (room or suite no.)
12d City or town, province or state, country, ZIP or foreign postal code	**19c** City or town, province or state, country, ZIP or foreign postal code
13a RECIPIENT'S name — **13b** Recipient code	**20** NQI's/Entity's U.S. TIN, if any ►
13c Address (number and street)	**21** PAYER'S name and TIN (if different from withholding agent's)
13d Additional address line (room or suite no.)	**22** Recipient account number (optional)
13e City or town, province or state, country, ZIP or foreign postal code	**23** State income tax withheld — **24** Payer's state tax no. — **25** Name of state

2008

Department of the Treasury
Internal Revenue Service

Instructions for Form 1042-S

Foreign Person's U.S. Source Income Subject to Withholding

Section references are to the Internal Revenue Code unless otherwise noted.

General Instructions

Use the 2008 Form 1042-S only for income paid during 2008. Do not use the 2008 Form 1042-S for income paid during 2007.

What's New

Changes to form. Changes have been made to Form 1042-S for 2008. The major changes are as follows.

Boxes 7 through 9. These boxes are used to show the amount you withheld, the amount withheld by other withholding agents, and the total amount of tax withheld.

Box 15. This box is used to show the recipient's foreign tax identifying number, if any.

Box 22. This box is used to show the recipient's account number (optional).

Qualified intermediary branch rule. A branch of a financial institution may not act as a qualified intermediary after December 31, 2007, in a country that does not have approved know-your-customer rules. See *Qualified intermediary (QI)*, under *Definitions*, later.

Magnetic media. Beginning with tax year 2008, processing year 2009, the IRS no longer accepts tape cartridges. You cannot use magnetic media to file Form 1042-S.

Reminders

FIRE System. For files submitted on the FIRE System, it is the responsibility of the filer to check the status within 5 business days to verify the results of the transmission. The IRS no longer mails error reports for files that are bad.

Purpose of Form

Use Form 1042-S to report income described under *Amounts Subject to Reporting on Form 1042-S* on page 4 and to report amounts withheld under Chapter 3 of the Internal Revenue Code.

Also use Form 1042-S to report distributions of effectively connected income by a publicly traded partnership or nominee. See *Publicly Traded Partnerships (Section 1446 Withholding Tax)* on page 6.

Every person required to deduct and withhold any tax under Chapter 3 of the Code is liable for such tax.

Copy A is filed with the Internal Revenue Service. Copies B, C, and D are for the recipient. Copy E is for your records.

Do not use Form 1042-S to report an item required to be reported on—

- Form W-2 (wages and other compensation made to employees (other than compensation for dependent personal services for which the beneficial owner is claiming treaty benefits) including wages in the form of group-term life insurance),
- Form 1099, or
- Form 8288-A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests, or Form 8805, Foreign Partner's Information Statement of Section 1446 Withholding Tax. Withholding agents otherwise required to report a distribution partly on a Form 8288-A or Form 8805 and partly on a Form 1042-S may instead report the entire amount on Form 8288-A or Form 8805.

Who Must File

Every withholding agent (defined on page 2) must file an information return on Form 1042-S to report amounts paid during the preceding calendar year that are described under *Amounts Subject to Reporting on Form 1042-S* on page 4. However, withholding agents who are individuals are not required to report a payment on Form 1042-S if they are not making the payment as part of their trade or business and no withholding is required to be made on the payment. For example, an individual making a payment of interest that qualifies for the portfolio interest exception from withholding is not required to report the payment if the portfolio interest is paid on a loan that is not connected to the individual's trade or business. However, an individual paying an amount that has actually been subject to withholding is required to report the payment. Also, an individual paying an amount on which withholding is required must report the payment, whether or not the individual actually withholds. See *Multiple Withholding Agent Rule* on page 11 for exceptions to reporting when another person has reported the same payment to the recipient. Also see *Publicly Traded Partnerships (Section 1446 Withholding Tax)* on page 6.

You must file a Form 1042-S even if you did not withhold tax because the income was exempt from tax under a U.S. tax treaty or the Code, including the exemption for income that is effectively connected with the conduct of a trade or business in the United States, or you released the tax withheld to the recipient. For exceptions, see *Amounts That Are Not Subject to Reporting on Form 1042-S* on page 5.

Amounts paid to bona fide residents of U.S. possessions and territories are not subject to reporting on Form 1042-S if the beneficial owner of the income is a U.S. citizen, national, or resident alien.

If you are required to file Form 1042-S, you must also file Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons. See Form 1042 for more information.

Where, When, and How To File

Forms 1042-S, whether filed on paper or electronically, must be filed with the Internal Revenue Service by March 16, 2009. You are also required to furnish Form 1042-S to the recipient of the income on or before March 16, 2009.

Send any paper Forms 1042-S with Form 1042-T, Annual Summary and Transmittal of Forms 1042-S, to the address in the Form 1042-T instructions. You must use Form 1042-T to transmit paper Forms 1042-S. Use a separate Form 1042-T to transmit each type of Form 1042-S. See *Payments by U.S. Withholding Agents* beginning on page 6 and the Form 1042-T instructions for more information. If you have 250 or more Forms 1042-S to file, follow the instructions under *Electronic Reporting* on page 2.

Beginning with tax year 2008, processing year 2009, Form 1042-S can no longer be filed using magnetic media. Form 1042-S for 2008 and later years can only be filed on paper or electronically.

Extension of time to file. To request an extension of time to file Forms 1042-S, file Form 8809, Application for Extension of Time To File Information Returns. See the Form 8809 instructions for where to file that form. You should request an extension as soon as you are aware that an extension is necessary, but no later than the due date for filing Form 1042-S. By filing Form 8809, you will get an

automatic 30-day extension to file Form 1042-S. If you need more time, a second Form 8809 may be submitted before the end of the initial extended due date. See Form 8809 for more information.

If you are requesting extensions of time to file for more than 50 withholding agents or payers, you must submit the extension requests electronically. See Pub. 1187, Specifications for Filing Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, Electronically or Magnetically, for more information.

Recipient copies. You may request an extension of time to provide the statements to recipients by sending a letter to Enterprise Computing Center — Martinsburg, Information Reporting Program, Attn: Extension of Time Coordinator, 240 Murall Drive, Kearneysville, WV 25430. See *Extension of Time To File* in Pub. 515.

Electronic Reporting

If you file 250 or more Forms 1042-S, you are required to submit them electronically.

Electronic submissions are filed using the Filing Information Returns Electronically (FIRE) System. The FIRE System operates 24 hours a day, 7 days a week, at *http://fire.irs.gov*. For more information, see Pub. 1187.

The electronic filing requirement applies separately to original and amended returns. Any person, including a corporation, partnership, individual, estate, and trust, that is required to file 250 or more Forms 1042-S must file such returns electronically. The filing requirement applies individually to each reporting entity as defined by its separate taxpayer identification number (TIN). This requirement applies separately to original and amended returns. For example, if you have 300 original Forms 1042-S, they must be filed electronically. However, if 200 of those forms contained erroneous information, the amended returns may be filed on paper forms because the number of amended Forms 1042-S is less than the 250-or-more filing requirement.

If you file electronically, do not file the same returns on paper. Duplicate filing may cause penalty notices to be generated.

Note. Even though as many as 249 Forms 1042-S may be submitted on paper to the IRS, the IRS encourages filers to transmit forms electronically.

Hardship waiver. To receive a hardship waiver from the required filing of Forms 1042-S electronically, submit Form 8508, Request for Waiver From Filing Information Returns Electronically/ Magnetically. Waiver requests should be filed at least 45 days before the due date of the returns. See Form 8508 for more information.

Need assistance? For additional information and instructions on filing Forms 1042-S electronically, extensions of time to file (Form 8809), and hardship waivers (Form 8508), see Pub. 1187. You may also call the Information Reporting Program at 866-455-7438 (toll-free) or 304-263-8700 (not a toll-free number) Monday through Friday from 8:30 a.m. to 4:30 p.m. Eastern Standard time. The Information Reporting Program may also be reached by fax at 304-264-5602 (not a toll-free number).

This call site does not answer tax law questions concerning the requirements for withholding of tax on payments of U.S. source income to foreign persons under Chapter 3 of the Code. If you need such assistance, you may call 215-516-2000 (not a toll-free number) from 6:00 a.m. to 11:00 p.m. Eastern Standard time or write to: Internal Revenue Service, International Section, P.O. Box 920, Bensalem, PA 19020-8518.

Additional Information

For more information on withholding of tax, see Pub. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities. To order this publication and other publications and forms, call 1-800-TAX-FORM (1-800-829-3676). You can also download forms and publications from the IRS website at *www.irs.gov*.

Record Retention

Withholding agents should retain a copy of the information returns filed with the IRS, or have the ability to reconstruct the data, for at least 3 years after the reporting due date.

Substitute Forms

The official Form 1042-S is the standard for substitute forms. Because a substitute form is a variation from the official form, you should know the requirements of the official form for the year of use before you modify it to meet your needs. The IRS provides several means of obtaining the most frequently used tax forms. These include the Internet and CD-ROM. For details on the requirements of substitute forms, see Pub. 1179, General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, W-2G, and 1042-S.

You are permitted to use substitute payee copies of Form 1042-S (that is, copies B, C, and D) that contain more than one type of income. This will reduce the number of Forms 1042-S you send to the recipient. Under no circumstances, however, may the copy of the form filed with the IRS (copy A) contain more than one type of income.

Deposit Requirements

For information and rules concerning federal tax deposits, see *Depositing Withheld Taxes* in Pub. 515 or the Form 1042 instructions.

Definitions

Withholding agent. A withholding agent is any person, U.S. or foreign, that has control, receipt, or custody of an amount subject to withholding or who can disburse or make payments of an amount subject to withholding. The withholding agent may be an individual, corporation, partnership, trust, association, or any other entity. The term withholding agent also includes, but is not limited to, a qualified intermediary (QI), a nonqualified intermediary (NQI), a withholding foreign partnership (WP), a withholding foreign trust (WT), a flow-through entity, a U.S. branch of a foreign insurance company or foreign bank that is treated as a U.S. person, a nominee under section 1446, and an authorized foreign agent. A person may be a withholding agent even if there is no requirement to withhold from a payment or even if another person has already withheld the required amount from a payment.

Generally, the U.S. person who pays (or causes to be paid) the item of U.S. source income to a foreign person (or to its agent) must withhold. However, other persons may be required to withhold. For example, if a payment is made by a QI (whether or not it assumes primary withholding responsibility) that knows that withholding was not done by the person from which it received the payment, that QI is required to do the appropriate withholding. In addition, withholding must be done by any QI that assumes primary withholding responsibility under Chapter 3 of the Code, a WP, a WT, a U.S. branch of a foreign insurance company or foreign bank that agrees to be treated as a U.S. person, or an authorized foreign agent. Finally, if a payment is made by an NQI or a flow-through entity that knows, or has reason to know, that withholding was not done, that NQI or flow-through entity is required to withhold since it also falls within the definition of a withholding agent.

Authorized foreign agent. An agent is an authorized foreign agent only if all four of the following apply.

1. There is a written agreement between the withholding agent and the foreign person acting as agent.
2. The IRS International Section has been notified of the appointment of the agent before the first payment for which the authorized agent acts on behalf of the withholding agent. (This notification must be sent to the following address: Internal Revenue Service, International Section, P.O. Box 920, Bensalem, PA 19020-8518.)
3. The books and records and relevant personnel of the foreign agent are available to the IRS so that the IRS may evaluate the withholding agent's compliance with its withholding and reporting obligations.
4. The U.S. withholding agent remains fully liable for the acts of its agent and does not assert any of the defenses that may otherwise be available.

For further details, see Regulations section 1.1441-7(c).

Beneficial owner. For payments other than those for which a reduced rate of withholding is claimed under an income tax treaty, the beneficial owner of income is, generally, the person who is required under U.S. tax principles to include the income in gross income on a tax return. A person is not a beneficial owner of income, however, to the extent that person is receiving the income as a nominee, agent, or custodian, or to the extent the person is a conduit whose participation in a transaction is disregarded. In the case of amounts paid that do not constitute income, beneficial ownership is determined as if the payment were income.

Foreign partnerships, foreign simple trusts, and foreign grantor trusts are not the beneficial owners of income paid to the partnership or trust. The beneficial owners of income paid to a foreign partnership are generally the partners in the partnership, provided that the partner is not itself a partnership, foreign simple or grantor trust, nominee, or other agent. The beneficial owner of income paid to a foreign simple trust (a foreign trust that is described in section 651(a)) is generally the beneficiary of the trust, if the beneficiary is not a foreign partnership, foreign simple or grantor trust, nominee, or other agent. The beneficial owner of a foreign grantor trust (a foreign trust to the extent that all or a portion of the income of the trust is treated as owned by the grantor or another person under sections 671 through 679) is the person treated as the owner of the trust. The beneficial owner of income paid to a foreign complex trust (a foreign trust that is not a foreign simple trust or foreign grantor trust) is the trust itself.

The beneficial owner of income paid to a foreign estate is the estate itself.

A payment to a U.S. partnership, U.S. trust, or U.S. estate is not subject to 30% foreign-person withholding. A U.S. partnership, trust, or estate should provide the withholding agent with a Form W-9, Request for Taxpayer Identification Number and Certification. These beneficial owners rules generally apply for purposes of section 1446; however, there are exceptions.

Disregarded entity. A business entity that has a single owner and is not a corporation under Regulations section 301.7701-2(b) is disregarded as an entity separate from its owner.

Exempt recipient. Generally, an exempt recipient is any payee that is not required to provide Form W-9 and is exempt from the Form 1099 reporting requirements. See the Instructions for the Requester of Form W-9 for a list of exempt recipients.

Fiscally transparent entity. An entity is treated as fiscally transparent with respect to an item of income for which treaty benefits are claimed to the extent that the interest holders in the entity must, on a current basis, take into account separately their shares of an item of income paid to the entity, whether or not distributed, and must determine the character of the items of income as if they were realized directly from the sources from which realized by the entity. For example, partnerships, common trust funds, and simple trusts or grantor trusts are generally considered to be fiscally transparent with respect to items of income received by them.

Flow-through entity. A flow-through entity is a foreign partnership (other than a withholding foreign partnership), a foreign simple or grantor trust (other than a withholding foreign trust), or, for any payments for which a reduced rate of withholding under an income tax treaty is claimed, any entity to the extent the entity is considered to be fiscally transparent under section 894 with respect to the payment by an interest holder's jurisdiction.

Foreign person. A foreign person includes a nonresident alien individual, a foreign corporation, a foreign partnership, a foreign trust, a foreign estate, and any other person that is not a U.S. person. The term also includes a foreign branch or office of a U.S. financial institution or U.S. clearing organization if the foreign branch is a QI. Generally, a payment to a U.S. branch of a foreign person is a payment to a foreign person.

Intermediary. An intermediary is a person that acts as a custodian, broker, nominee, or otherwise as an agent for another person, regardless of whether that other person is the beneficial owner of the amount paid, a flow-through entity, or another intermediary.

Qualified intermediary (QI). A QI is an intermediary that is a party to a withholding agreement with the IRS. An entity must indicate its status as a QI on a Form W-8IMY submitted to a withholding agent. For information on a QI withholding agreement, see Rev. Proc. 2000-12, which is on page 387 of Internal Revenue Bulletin (IRB) 2000-4 at *www.irs.gov/pub/irs-irbs/irb00-04.pdf*. Also see Notice 2001-4 (IRB 2001-21), as amended; Rev. Proc. 2003-64, Appendix 3 (IRB 2003-32); Rev. Proc. 2004-21 (IRB 2004-14); and Rev. Proc. 2005-77 (IRB 2005-51).

A branch of a financial institution may not act as a QI in a country that does not have approved know-your-customer (KYC) rules. Countries having approved KYC rules are listed on the IRS website at *www.irs.gov.* Branches that operate in non-KYC approved jurisdictions are required to act as nonqualified intermediaries.

Nonqualified intermediary (NQI). An NQI is any intermediary that is not a U.S. person and that is not a QI.

Private arrangement intermediary (PAI). A QI may enter into a private arrangement with another intermediary under which the other intermediary generally agrees to perform all of the obligations of the QI. See Section 4 of Rev. Proc. 2000-12 for details.

Non-exempt recipient. A non-exempt recipient is any person who is not an exempt recipient.

Nonresident alien individual. Any individual who is not a citizen or resident of the United States is a nonresident alien individual. An alien individual meeting either the "green card test" or the "substantial presence test" for the calendar year is a resident alien. Any person not meeting either test is a nonresident alien individual. Additionally, an alien individual who is a resident of a foreign country under the residence article of an income tax treaty, or an alien individual who is a bona fide resident of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, or American Samoa, is a nonresident alien individual. See Pub. 519, U.S. Tax Guide for Aliens, for more information on resident and nonresident alien status.

Even though a nonresident alien individual married to a U.S. citizen or resident alien may choose to be treated as a resident alien for certain purposes (for example, filing a joint income tax return), such individual is still treated as a nonresident alien for withholding tax purposes.

Payer. A payer is the person for whom the withholding agent acts as a paying agent pursuant to an agreement whereby the withholding agent agrees to withhold and report a payment.

Presumption rules. The presumption rules are those rules prescribed under Chapter 3 and Chapter 61 of the Code that a withholding agent must follow to determine the status of a beneficial owner (for example, as a U.S. person or a foreign person) when it cannot reliably associate a payment with valid documentation. See, for example, Regulations sections 1.1441-1(b)(3), 1.1441-4(a), 1.1441-5(d) and (e), 1.1441-9(b)(3), 1.1446-1(c)(3), and 1.6049-5(d). Also see Pub. 515.

Publicly traded partnership (PTP). A PTP is any partnership in which interests are regularly traded on an established securities market (regardless of the number of its partners). However, it does not include a PTP treated as a corporation under section 7704.

Recipient. A recipient is any of the following:

- A beneficial owner of income.
- A QI.
- A WP or WT.
- An authorized foreign agent.
- A U.S. branch of certain foreign banks or insurance companies that is treated as a U.S. person.
- A foreign partnership or a foreign trust (other than a WP or WT), but only to the extent the income is effectively connected with its conduct of a trade or business in the United States.

- A payee who is not known to be the beneficial owner, but who is presumed to be a foreign person under the presumption rules.
- A PAI.
- A partner receiving a distribution of effectively connected income from a PTP or nominee.

A recipient does not include any of the following:
- An NQI.
- A nonwithholding foreign partnership, if the income is not effectively connected with its conduct of a trade or business in the United States.
- A disregarded entity.
- A foreign trust that is described in section 651(a) (a foreign simple trust) if the income is not effectively connected with the conduct of a trade or business in the United States.
- A foreign trust to the extent that all or a portion of the trust is treated as owned by the grantor or other person under sections 671 through 679 (a foreign grantor trust).
- A U.S. branch that is not treated as a U.S. person unless the income is, or is treated as, effectively connected with the conduct of a trade or business in the United States.

U.S. branch treated as a U.S. person. The following types of U.S. branches (of foreign entities) may reach an agreement with the withholding agent to treat the branch as a U.S. person: (a) a U.S. branch of a foreign bank subject to regulatory supervision by the Federal Reserve Board or (b) a U.S. branch of a foreign insurance company required to file an annual statement on a form approved by the National Association of Insurance Commissioners with the Insurance Department of a State, Territory, or the District of Columbia.

The U.S. branch must provide a Form W-8IMY evidencing the agreement with the withholding agent.

CAUTION *A U.S. branch that is treated as a U.S. person is treated as such solely for purposes of determining whether a payment is subject to withholding. The branch is, for purposes of information reporting, a foreign person and payments to such a branch must be reported on Form 1042-S.*

Withholding certificate. The term "withholding certificate" generally refers to Form W-8 or Form W-9.

Note. Throughout these instructions, a reference to or mention of "Form W-8" is a reference to Forms W-8BEN, W-8ECI, W-8EXP, and/or W-8IMY.

Withholding foreign partnership (WP) or withholding foreign trust (WT). A WP or WT is a foreign partnership or trust that has entered into a withholding agreement with the IRS in which it agrees to assume primary withholding responsibility for all payments that are made to it for its partners, beneficiaries, or owners. For information on these withholding agreements, see Rev. Proc. 2003-64, which is on page 306 of Internal Revenue Bulletin (IRB) 2003-32 at *www.irs.gov/pub/irs-irbs/irb03-32.pdf*. Also see Rev. Proc. 2004-21 (IRB 2004-14) and Rev. Proc. 2005-77 (IRB 2005-51).

Amounts Subject to Reporting on Form 1042-S

Amounts subject to reporting on Form 1042-S are amounts paid to foreign persons (including persons presumed to be foreign) that are subject to withholding, even if no amount is deducted and withheld from the payment because of a treaty or Code exception to taxation or if any amount withheld was repaid to the payee. Amounts subject to withholding are amounts from sources within the United States that constitute (a) fixed or determinable annual or periodical (FDAP) income; (b) certain gains from the disposal of timber, coal, or domestic iron ore with a retained economic interest; and (c) gains relating to contingent payments received from the sale or exchange of patents, copyrights, and similar intangible property. Amounts subject to withholding also include distributions of effectively connected income by a publicly traded partnership. Amounts subject to reporting include, but are not limited to, the following U.S. source items.

- **Corporate distributions.** The entire amount of a corporate distribution (whether actual or deemed) must be reported, irrespective of any estimate of the portion of the distribution that represents a taxable dividend. Any distribution, however, that is treated as gain from the redemption of stock is not an amount subject to withholding. For information on dividends paid by a qualified investment entity (QIE), see Pub. 515.
- **Interest.** This includes the portion of a notional principal contract payment that is characterized as interest.
- **Rents.**
- **Royalties.**
- **Compensation for independent personal services performed in the United States.**
- **Compensation for dependent personal services performed in the United States (but only if the beneficial owner is claiming treaty benefits).**
- **Annuities.**
- **Pension distributions and other deferred income.**
- **Most gambling winnings.** However, proceeds from a wager placed in blackjack, baccarat, craps, roulette, or big-6 wheel are not amounts subject to reporting.
- **Cancellation of indebtedness.** Income from the cancellation of indebtedness must be reported unless the withholding agent is unrelated to the debtor and does not have knowledge of the facts that give rise to the payment.
- **Effectively connected income (ECI).** ECI includes amounts that are (or are presumed to be) effectively connected with the conduct of a trade or business in the United States even if no withholding certificate is required, as, for example, with income on notional principal contracts. Note that bank deposit interest, which generally is not subject to Form 1042-S reporting, is subject to Form 1042-S reporting if it is effectively connected income. ECI of a PTP distributed to a foreign partner must be reported on Form 1042-S.
- **Notional principal contract income.** Income from notional principal contracts that the payer knows, or must presume, is effectively connected with the conduct of a U.S. trade or business is subject to reporting. The amount to be reported is the amount of cash paid on the contract during the calendar year. Any amount of interest determined under the provisions of Regulations section 1.446-3(g)(4) (dealing with interest in the case of a significant non-periodic payment) is reportable as interest and not as notional principal contract income.
- **REMIC excess inclusions.** Excess inclusions from REMICs (income code 02) and withheld tax must be reported on Form 1042-S. A domestic partnership must separately state a partner's allocable share of REMIC taxable income or net loss and the excess inclusion amount on Schedule K-1 (Form 1065). If the partnership allocates all or some portion of its allocable share of REMIC taxable income to a foreign partner, the partner must include the partner's allocated amount in income as if that amount was received on the earlier of the following dates.
  - The date of distribution by the partnership.
  - The date the foreign partner disposes of its indirect interest in the REMIC residual interest.
  - The last day of the partnership's tax year.

  The partnership must withhold tax on the portion of the REMIC amount that is an excess inclusion.

  An excess inclusion allocated to the following foreign persons must be included in that person's income at the same time as other income from the entity is included in income.
  - Shareholder of a real estate investment trust.
  - Shareholder of a regulated investment company.
  - Participant in a common trust fund.
  - Patron of a subchapter T cooperative organization.
- **Students, teachers, and researchers.** Amounts paid to foreign students, trainees, teachers, or researchers as scholarship or fellowship income, and compensation for personal services (whether or not exempt from tax under an income tax treaty), must be reported. However, amounts that are exempt from tax under section 117 are not subject to reporting.
- **Amounts paid to foreign governments, foreign controlled banks of issue, and international**

organizations. These amounts are subject to reporting even if they are exempt under section 892 or 895.

- **Foreign targeted registered obligations.** Interest paid on registered obligations targeted to foreign markets paid to a foreign person other than a financial institution or a member of a clearing organization is an amount subject to reporting.
- **Original issue discount (OID) from the redemption of an OID obligation.** The amount subject to reporting is the amount of OID actually includible in the gross income of the foreign beneficial owner of the income, if known. Otherwise, the withholding agent should report the entire amount of OID as if the recipient held the instrument from the date of original issuance. See Pub. 1212, Guide to Original Issue Discount (OID) Instruments.
- **Certain dispositions of U.S. real property interests.** See *Withholding on Dispositions of U.S. Real Property Interests by Publicly Traded Trusts and Qualified Investment Entities (QIEs)* beginning on this page.

For more details on the types of income that are subject to withholding, see Pub. 515.

Amounts That Are Not Subject to Reporting on Form 1042-S

Interest on deposits. Generally, no withholding (or reporting) is required on interest paid to foreign persons on deposits if such interest is not effectively connected with the conduct of a trade or business in the United States. For this purpose, the term "deposits" means amounts that are on deposit with a U.S. bank, savings and loan association, credit union, or similar institution, and from certain deposits with an insurance company.

Exception for interest payments to Canadian residents who are not U.S. citizens. If you pay $10 or more of U.S. source bank deposit interest to a nonresident alien who is a resident of Canada, you generally must report the interest on Form 1042-S. This reporting requirement applies to interest on a deposit maintained at a bank's office in the United States. However, this reporting requirement does not apply to interest paid on certain bearer certificates of deposit if paid outside the United States. Although you only have to report payments you make to residents of Canada, you can comply by reporting bank deposit interest to all foreign persons if that is easier.

When completing Form 1042-S, use income code 29 in box 1 and exemption code 02 in box 6.

On the statements furnished to the Canadian recipients, you must include an information contact phone number in addition to the name in box 12a on Form 1042-S. You must also include a statement that the information on the form is being furnished to the United States Internal Revenue Service and may be provided to the government of Canada.

Interest and OID from short-term obligations. Interest and OID from any obligation payable 183 days or less from the date of original issue should not be reported on Form 1042-S.

Registered obligations targeted to foreign markets. Interest on a registered obligation that is targeted to foreign markets and qualifies as portfolio interest is not subject to reporting if it is paid to a registered owner that is a financial institution or member of a clearing organization and you have received the required certifications.

Bearer obligations targeted to foreign markets. Do not file Form 1042-S to report interest not subject to withholding on bearer obligations if a Form W-8 is not required.

Notional principal contract payments that are not ECI. Amounts paid on a notional principal contract that are not effectively connected with the conduct of a trade or business in the United States should not be reported on Form 1042-S.

Accrued interest and OID. Interest paid on obligations sold between interest payment dates and the portion of the purchase price of an OID obligation that is sold or exchanged in a transaction other than a redemption is not subject to reporting unless the sale or exchange is part of a plan, the principal purpose of which is to avoid tax, and the withholding agent has actual knowledge or reason to know of such plan.

Exception for amounts previously withheld upon. A withholding agent should report on Form 1042-S any amounts, whether or not subject to withholding, that are paid to a foreign payee and that have been withheld upon, including backup withholding, by another withholding agent under the presumption rules.

Example. A withholding agent (WA) makes a payment of bank deposit interest to a foreign intermediary that is a nonqualified intermediary (NQI-B). NQI-B failed to provide any information regarding the beneficial owners to whom the payment was attributable. Under the presumption rules, WA must presume that the amounts are paid to a U.S. non-exempt recipient. WA withholds 28% of the payment under the backup withholding provisions of the Code and files a Form 1099-INT reporting the interest as paid to an unknown recipient. A copy of Form 1099-INT is sent to NQI-B. The beneficial owners of the bank deposit interest are two customers of NQI-B, X and Y. Both X and Y have provided NQI-B with documentary evidence establishing that they are foreign persons and therefore not subject to backup withholding. NQI-B must file a Form 1042-S reporting the amount of bank deposit interest paid to each of X and Y and the proportionate amount of withholding that occurred.

Withholding on Dispositions of U.S. Real Property Interests by Publicly Traded Trusts and Qualified Investment Entities (QIEs)

In general, when a publicly traded trust makes a distribution to a foreign person attributable to the disposition of a U.S. real property interest, it must withhold tax under section 1445. However, this withholding liability is shifted to the person who pays the distribution to a foreign person (or to the account of the foreign person) if the special notice requirement of Regulations section 1.1445-8(f) and other requirements of Regulations section 1.1445-8(b)(1) are satisfied.

The amount subject to withholding for a distribution by a publicly traded trust is determined under the large trust rules of Regulations section 1.1445-5(c)(3).

The rate of withholding is as follows:

1. Distribution by a publicly traded trust that makes recurring sales of growing crops and timber—10%.
2. Distribution by a publicly traded trust not described in (1) above—35%.

Special rules apply to qualified investment entities (QIEs). A QIE is any real estate investment trust (REIT) or any regulated investment company (RIC) that is a U.S. real property holding corporation. Generally, any distribution from a QIE attributable to gain from the sale or exchange of a U.S. real property interest is treated as such gain by the nonresident alien, foreign corporation, or other QIE receiving the distribution.

A distribution by a QIE to a nonresident alien or foreign corporation that is treated as gain from the sale or exchange of a U.S. real property interest by the shareholder is subject to withholding at 35%.

Any distribution by a QIE on stock regularly traded on a securities market in the United States is not treated as gain from the sale or exchange of a U.S. real property interest if the shareholder did not own more than 5% of that stock at any time during the 1-year period ending on the date of the distribution. These distributions are included in the shareholder's gross income as a dividend (income code 06) from the QIE, not as long-term capital gain.

After 2007, a RIC will be treated as a QIE only on distributions the RIC makes to a nonresident alien or foreign corporation that are attributable to distributions the RIC received from a REIT.

CAUTION *At the time these instructions went to print, Congress was considering legislation that would extend the QIE treatment for RICs. To find out if this legislation was enacted, see Pub. 515.*

Use Forms 1042-S and 1042 to report and pay over the withheld amounts. All other withholding required under section 1445 is reported and paid over using Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests, and Form 8288-A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests.

For more information on reporting income from real property interests, see *U.S. Real Property Interest* in Pub. 515.

Publicly Traded Partnerships (Section 1446 Withholding Tax)

A publicly traded partnership (PTP) (defined on page 3) that has effectively connected income, gain, or loss must pay a withholding tax on distributions of that income made to its foreign partners and file Form 1042-S using income code 27. A nominee that receives a distribution of effectively connected income from a PTP is treated as the withholding agent to the extent of the amount specified in the qualified notice received by the nominee. For this purpose, a nominee is a domestic person that holds an interest in a PTP on behalf of a foreign person. See Regulations section 1.1446-4 and Pub. 515 for details.

TIP *If you are a nominee that is the withholding agent under section 1446, enter the PTP's name and other required information in boxes 17 through 20 on Form 1042-S.*

Other partnerships that have effectively connected gross income allocable to foreign partners must pay a withholding tax under section 1446. These amounts are reported on Form 8804, Annual Return for Partnership Withholding Tax (Section 1446), and Form 8805, Foreign Partner's Information Statement of Section 1446 Withholding Tax.

Payments by U.S. Withholding Agents

In general. U.S. withholding agents making payments described under *Amounts Subject to Reporting on Form 1042-S* beginning on page 4 must file a separate Form 1042-S for each recipient who receives the income. Furthermore, withholding agents filing paper Forms 1042-S are not permitted to report multiple types of income on copy A filed with the IRS. These filers must use a separate Form 1042-S for information reportable on a single type of income.

CAUTION *These filers cannot use a single Form 1042-S to report income if that income is reportable under different income, recipient, or exemption codes, or is subject to different rates of withholding.*

A withholding agent may be permitted to use substitute payee copies of Form 1042-S (copies B, C, and D) that contain more than one type of income. See *Substitute Forms* on page 2 for details.

See *Payments Made to Persons Who Are Not Recipients* beginning on page 7 if the payment is made to a foreign person that is not a recipient.

Payments to Recipients

Payments directly to beneficial owners. A U.S. withholding agent making a payment directly to a beneficial owner must complete Form 1042-S and treat the beneficial owner as the recipient. Boxes 17 through 20 should be left blank. A U.S. withholding agent should complete box 21 only if it is completing Form 1042-S as a paying agent acting pursuant to an agreement.

Under a grace period rule, a U.S. withholding agent may, under certain circumstances, treat a payee as a foreign person while the withholding agent waits for a valid withholding certificate. A U.S. withholding agent who relies on the grace period rule to treat a payee as a foreign person must file Form 1042-S to report all payments during the period that person was presumed to be foreign even if that person is later determined to be a U.S. person based on appropriate documentation or is presumed to be a U.S. person after the grace period ends.

In the case of foreign joint owners, you may provide a single Form 1042-S made out to the owner whose status you relied upon to determine the applicable rate of withholding (the owner subject to the highest rate of withholding). If, however, any one of the owners requests its own Form 1042-S, you must furnish a Form 1042-S to the person who requests it. If more than one Form 1042-S is issued for a single payment, the aggregate amount paid and tax withheld that is reported on all Forms 1042-S cannot exceed the total amounts paid to joint owners and the tax withheld on those payments.

Payments to a qualified intermediary, withholding foreign partnership, or withholding foreign trust. A U.S. withholding agent that makes payments to a QI (whether or not the QI assumes primary withholding responsibility), a withholding foreign partnership (WP), or a withholding foreign trust (WT) should generally complete Forms 1042-S treating the QI, WP, or WT as the recipient. However, see *Payments allocated, or presumed made, to U.S. non-exempt recipients* on this page for exceptions. The U.S. withholding agent must complete a separate Form 1042-S for each withholding rate pool of the QI, WP, or WT. For this purpose, a withholding rate pool is a payment of a single type of income, determined in accordance with the income codes used to file Form 1042-S, that is subject to a single rate of withholding. A QI that does not assume primary withholding responsibility provides information regarding the proportions of income subject to a particular withholding rate to the withholding agent on a withholding statement associated with Form W-8IMY. A U.S. withholding agent making a payment to a QI, WP, or WT must use recipient code 12 (qualified intermediary) or 04 (withholding foreign partnership or withholding foreign trust). A U.S. withholding agent must not use recipient code 13 (private arrangement intermediary withholding rate pool—general), 14 (private arrangement intermediary withholding rate pool—exempt organizations), 15 (qualified intermediary withholding rate pool—general), or 16 (qualified intermediary withholding rate pool—exempt organizations). Use of an inappropriate recipient code may cause a notice to be generated.

CAUTION *A QI, WP, or WT is required to act in such capacity only for designated accounts. Therefore, such an entity may also provide a Form W-8IMY in which it certifies that it is acting as an NQI or flow-through entity for other accounts. A U.S. withholding agent that receives a Form W-8IMY on which the foreign person providing the form indicates that it is not acting as a QI, WP, or WT may not treat the foreign person as a recipient. A withholding agent must not use the EIN that a QI, WP, or WT provides in its capacity as such to report payments that are treated as made to an entity in its capacity as an NQI or flow-through entity. In that case, use the EIN, if any, that is provided by the entity on its Form W-8IMY in which it claims that it is acting as an NQI or flow-through entity.*

Payments allocated, or presumed made, to U.S. non-exempt recipients. You may be given Forms W-9 or other information regarding U.S. non-exempt recipients from a QI together with information allocating all or a portion of the payment to U.S. non-exempt recipients. You must report income allocable to a U.S. non-exempt recipient on the appropriate Form 1099 and not on Form 1042-S, even though you are paying that income to a QI.

You may also be required under the presumption rules to treat a payment made to a QI as made to a payee that is a U.S. non-exempt recipient from which you must withhold 28% of the payment under the backup withholding provisions of the Code. In this case, you must report the payment on the appropriate Form 1099. See the General Instructions for Forms 1099, 1098, 5498, and W-2G.

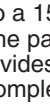
Example 1. WA, a U.S. withholding agent, makes a payment of U.S. source dividends to QI, a qualified intermediary.

QI provides WA with a valid Form W-8IMY with which it associates a withholding statement that allocates 95% of the payment to a 15% withholding rate pool and 5% of the payment to C, a U.S. individual. QI provides WA with C's Form W-9. WA must complete a Form 1042-S, showing QI as the recipient in box 13a and recipient code 12 (qualified intermediary) in box 13b, for the dividends allocated to the 15% withholding rate pool. WA must also complete a Form 1099-DIV reporting the portion of the dividend allocated to C.

Example 2. WA, a withholding agent, makes a payment of U.S. source dividends to QI, a qualified intermediary. QI provides WA with a valid Form W-8IMY with which it associates a withholding statement that allocates 40% of the payment to a 15% withholding rate pool and 40% to a 30% withholding rate pool. QI does not provide any withholding rate pool information regarding the remaining 20% of the payment. WA must apply the presumption rules to the portion of the payment (20%) that has not been allocated. Under the presumption rules, that portion of the payment is treated as paid to an unknown foreign payee. WA must complete three Forms 1042-S: one for dividends subject to 15% withholding, showing QI as the recipient in box 13a and recipient code 12 (qualified intermediary) in box 13b; one for dividends subject to 30% withholding, showing QI as the recipient in box 13a and recipient code 12 (qualified intermediary) in box 13b; and one for dividends subject to 30% withholding, showing QI as the recipient in box 13a and recipient code 20 (unknown recipient) in box 13b.

Amounts paid to certain U.S. branches. A U.S. withholding agent making a payment to a "U.S. branch treated as a U.S. person" (defined on page 4) completes Form 1042-S as follows:

- If a withholding agent makes a payment to a U.S. branch that has provided the withholding agent with a Form W-8IMY that evidences its agreement with the withholding agent to be treated as a U.S. person, the U.S. withholding agent treats the U.S. branch as the recipient.
- If a withholding agent makes a payment to a U.S. branch that has provided a Form W-8IMY to transmit information regarding recipients, the U.S. withholding agent must complete a separate Form 1042-S for each recipient whose documentation is associated with the U.S. branch's Form W-8IMY. If a payment cannot be reliably associated with recipient documentation, the U.S. withholding agent must complete Form 1042-S in accordance with the presumption rules.
- If a withholding agent cannot reliably associate a payment with a Form W-8IMY from a U.S. branch, the payment must be reported on a single Form 1042-S treating the U.S. branch as the recipient and reporting the income as effectively connected income.



The rules above apply only to U.S. branches treated as U.S. persons (defined on page 4). In all other cases, payments to a U.S. branch of a foreign person are treated as payments to the foreign person.

Amounts paid to authorized foreign agents. If a withholding agent makes a payment to an authorized foreign agent (defined on page 4), the withholding agent files Forms 1042-S for each type of income (determined by reference to the income codes used to complete Form 1042-S) treating the authorized foreign agent as the recipient, provided that the authorized foreign agent reports the payments on Forms 1042-S to each recipient to which it makes payments. If the authorized foreign agent fails to report the amounts paid on Forms 1042-S for each recipient, the U.S. withholding agent remains responsible for such reporting.

In box 13b, use recipient code 17 (authorized foreign agent).

Amounts paid to a complex trust or an estate. If a U.S. withholding agent makes a payment to a foreign complex trust or a foreign estate, a Form 1042-S must be completed showing the complex trust or estate as the recipient. Use recipient code 05 (trust) or 10 (estate). See *Payments Made to Persons Who Are Not Recipients* beginning on this page for the treatment of payments made to foreign simple trusts and foreign grantor trusts.

Dual claims. A withholding agent may make a payment to a foreign entity (for example, a hybrid entity) that is simultaneously claiming a reduced rate of tax on its own behalf for a portion of the payment and a reduced rate on behalf of persons in their capacity as interest holders in that entity on the remaining portion. If the claims are consistent and the withholding agent has accepted the multiple claims, a separate Form 1042-S must be filed for the entity for those payments for which the entity is treated as claiming a reduced rate of withholding and separate Forms 1042-S must be filed for each of the interest holders for those payments for which the interest holders are claiming a reduced rate of withholding. If the claims are consistent but the withholding agent has not chosen to accept the multiple claims, or if the claims are inconsistent, a separate Form 1042-S must be filed for the person(s) being treated as the recipient(s).

Special instructions for U.S. trusts and estates. Report the entire amount of income subject to reporting, irrespective of estimates of distributable net income.

Payments Made to Persons Who Are Not Recipients

Disregarded entities. If a U.S. withholding agent makes a payment to a disregarded entity but receives a valid Form W-8BEN or W-8ECI from a foreign person that is the single owner of the disregarded entity, the withholding agent must file a Form 1042-S in the name of the foreign single owner. The taxpayer identifying number (TIN) on the Form 1042-S, if required, must be the foreign single owner's TIN.

Example. A withholding agent (WA) makes a payment of interest to LLC, a foreign limited liability company. LLC is wholly-owned by FC, a foreign corporation. LLC is treated as a disregarded entity. WA has a Form W-8BEN from FC on which it states that it is the beneficial owner of the income paid to LLC. WA reports the interest payment on Form 1042-S showing FC as the recipient. The result would be the same if LLC was a domestic entity.

A disregarded entity can claim to be the beneficial owner of a payment if it is a hybrid entity claiming treaty benefits. See Form W-8BEN and its instructions for more information. If a disregarded entity claims on a valid Form W-8BEN to be the beneficial owner, the U.S. withholding agent must complete a Form 1042-S treating the disregarded entity as a recipient and use recipient code 02 (corporation).

Amounts paid to a nonqualified intermediary or flow-through entity. If a U.S. withholding agent makes a payment to an NQI or a flow-through entity, it must complete a separate Form 1042-S for each recipient on whose behalf the NQI or flow-through entity acts as indicated by its withholding statement and the documentation associated with its Form W-8IMY. If a payment is made through tiers of NQIs or flow-through entities, the withholding agent must nevertheless complete Form 1042-S for the recipients to which the payments are remitted. A withholding agent completing Form 1042-S for a recipient that receives a payment through an NQI or a flow-through entity must include in boxes 17 through 20 of Form 1042-S the name, country code, address, and TIN, if any, of the NQI or flow-through entity from whom the recipient directly receives the payment. A copy of the Form 1042-S need not be provided to the NQI or flow-through entity unless the withholding agent must report the payment to an unknown recipient. See *Example 4* on page 8.

If a U.S. withholding agent makes payments to an NQI or flow-through entity and cannot reliably associate the payment, or any portion of the payment, with a valid withholding certificate (Forms W-8 or W-9) or other valid appropriate documentation from a recipient (either because a recipient withholding certificate has not been provided or because the NQI or flow-through entity has failed to provide the information required on a withholding statement), the withholding agent must follow the appropriate presumption rules for that payment. If, under the presumption rules, an unknown

recipient of the income is presumed to be foreign, the withholding agent must withhold 30% of the payment and report the payment on Form 1042-S. For this purpose, if the allocation information provided to the withholding agent indicates an allocation of more than 100% of the payment, then no portion of the payment should be considered to be associated with a Form W-8, Form W-9, or other appropriate documentation. The Form 1042-S should be completed by entering "Unknown Recipient" in box 13a and recipient code 20 in box 13b.

Pro-rata reporting. If the withholding agent has agreed that an NQI may provide information allocating a payment to its account holders under the alternative procedure of Regulations section 1.1441-1(e)(3)(iv)(D) (no later than February 14, 2009) and the NQI fails to allocate more than 10% of the payment in a withholding rate pool to the specific recipients in the pool, the withholding agent must file Forms 1042-S for each recipient in the pool on a pro-rata basis. If, however, the NQI fails to timely allocate 10% or less of the payment in a withholding rate pool to the specific recipients in the pool, the withholding agent must file Forms 1042-S for each recipient for which it has allocation information and report the unallocated portion of the payment on a Form 1042-S issued to "Unknown Recipient." In either case, the withholding agent must include the NQI information in boxes 17 through 20 on that form. See *Example 6* (beginning on this page) and *Example 7* (on page 9).

The following examples illustrate Form 1042-S reporting for payments made to NQIs and flow-through entities.

Example 1. NQI, a nonqualified intermediary, has three account holders, A, B, and QI. All three account holders invest in U.S. securities that produce interest and dividends. A and B are foreign individuals and have provided NQI with Forms W-8BEN. QI is a qualified intermediary and has provided NQI with a Form W-8IMY and the withholding statement required from a qualified intermediary. QI's withholding statement states that QI has two withholding rate pools: one for interest described by income code 01 (interest paid by U.S. obligors—general) and one for dividends described by income code 06 (dividends paid by U.S. corporations—general). NQI provides WA, a U.S. withholding agent, with its own Form W-8IMY, with which it associates the Forms W-8BEN of A and B and the Form W-8IMY of QI. In addition, NQI provides WA with a complete withholding statement that allocates the payments of interest and dividends WA makes to NQI among A, B, and QI. All of the interest and dividends paid by WA to NQI is described by income code 01 (interest paid by U.S. obligors—general) and income code 06 (dividends paid by U.S. corporations—general). WA must file a total of six Forms 1042-S: two Forms 1042-S (one for interest and one for dividends) showing A as the recipient, two Forms 1042-S (one for interest and one for dividends) showing B as the recipient, and two Forms 1042-S (one for interest and one for dividends) showing QI as the recipient. WA must show information relating to NQI in boxes 17 through 20 on all six Forms 1042-S.

Example 2. The facts are the same as in Example 1, except that A and B are account holders of NQI2, which is an account holder of NQI. NQI2 provides NQI with a Form W-8IMY with which it associates the Forms W-8BEN of A and B and a complete withholding statement that allocates the interest and dividend payments it receives from NQI to A and B. NQI provides WA with its Form W-8IMY and the Forms W-8IMY of NQI2 and QI and the Forms W-8BEN of A and B. In addition, NQI associates a complete withholding statement with its Form W-8IMY that allocates the payments of interest and dividends to A, B, and QI. WA must file six Forms 1042-S: two Forms 1042-S (one for interest and one for dividends) showing A as the recipient, two Forms 1042-S (one for interest and one for dividends) showing B as the recipient, and two Forms 1042-S (one for interest and one for dividends) showing QI as the recipient. The Forms 1042-S issued to A and B must show information relating to NQI2 in boxes 17 through 20 because A and B receive their payments directly from NQI2, not NQI. The Forms 1042-S issued to QI must show information relating to NQI in boxes 17 through 20.

Example 3. FP is a nonwithholding foreign partnership and therefore a flow-through entity. FP establishes an account with WA, a U.S. withholding agent, from which FP receives interest described by income code 01 (interest paid by U.S. obligors—general). FP has three partners, A, B, and C, all of whom are individuals. FP provides WA with a Form W-8IMY with which it associates the Forms W-8BEN from each of A, B, and C. In addition, FP provides a complete withholding statement with its Form W-8IMY that allocates the interest payments among A, B, and C. WA must file three Forms 1042-S, one each for A, B, and C. The Forms 1042-S must show information relating to FP in boxes 17 through 20.

Example 4. NQI is a nonqualified intermediary. It has four customers: A, B, C, and D. NQI receives Forms W-8BEN from each of A, B, C, and D. NQI establishes an account with WA, a U.S. withholding agent, in which it holds securities on behalf of A, B, C, and D. The securities pay interest that is described by income code 01 (interest paid by U.S. obligors—general) and that may qualify for the portfolio interest exemption from withholding if all of the requirements for that exception are met. NQI provides WA with a Form W-8IMY with which it associates the Forms W-8BEN of A, B, C, and D. However, NQI does not provide WA with a complete withholding statement in association with its Form W-8IMY. Because NQI has not provided WA with a complete withholding statement, WA cannot reliably associate the payments of interest with the documentation of A, B, C, and D, and must apply the presumption rules. Under the presumption rules, WA must treat the interest as paid to an unknown recipient that is a foreign person. The payments of interest are subject to 30% withholding. WA must complete one Form 1042-S, entering "Unknown Recipient" in box 13a and recipient code 20 in box 13b. WA must include information relating to NQI in boxes 17 through 20 and must provide the recipient copies of the form to NQI. Because NQI has failed to provide all the information necessary for WA to accurately report the payments of interest to A, B, C, and D, NQI must report the payments on Form 1042-S. See *Amounts Paid by Nonqualified Intermediaries and Flow-Through Entities* on page 10. The results would be the same if WA's account holder was a flow-through entity instead of a nonqualified intermediary.

Example 5. The facts are the same as in Example 4, except that NQI provides the Forms W-8BEN of A and B, but not the Forms W-8BEN of C and D. NQI also provides a withholding statement that allocates a portion of the interest payment to A and B but does not allocate the remaining portion of the payment. WA must file three Forms 1042-S: one showing A as the recipient in box 13a, one showing B as the recipient in box 13a and one showing "Unknown Recipient" in box 13a (and recipient code 20 in box 13b) for the unallocated portion of the payment that cannot be associated with valid documentation from a recipient. In addition, WA must send the Form 1042-S for the unknown recipient to NQI. All Forms 1042-S must contain information relating to NQI in boxes 17 through 20. The results would be the same if WA's account holder was a flow-through entity instead of a nonqualified intermediary.

Example 6. NQI is a nonqualified intermediary. It has four customers: A, B, C, and D. NQI receives Forms W-8BEN from each of A, B, C, and D. NQI establishes an account with WA, a U.S. withholding agent, in which it holds securities on behalf of A, B, C, and D. The securities pay interest that is described by income code 01 (interest paid by U.S. obligors—general) and that may qualify for the portfolio interest exemption from withholding if all of the requirements for that exception are met. NQI provides WA with a Form W-8IMY with which it associates the Forms W-8BEN of A, B, C, and D. WA and NQI agree that they will apply the alternative procedures of Regulations section 1.1441-1(e)(3)(iv)(D). Accordingly, NQI provides a complete withholding statement that indicates that it has one

0% withholding rate pool. WA pays $100 of interest to NQI. NQI fails to provide WA with the allocation information by February 14, 2009. Therefore, WA must report 25% of the payment to each of A, B, C, and D using pro-rata basis reporting. Accordingly, for each of the Forms 1042-S, WA must enter $25 in box 2 (gross income),"30.00" in box 5 (tax rate), $0 in box 7 (federal tax withheld), and $0 in box 9 (total withholding credit). In addition, WA must check the PRO-RATA BASIS REPORTING box at the top of the form and include NQI's name, address, country code, and TIN, if any, in boxes 17 through 20. WA must enter "30.00" in box 5 (tax rate) because without allocation information, WA cannot reliably associate the payment of interest with documentation from a foreign beneficial owner and therefore may not apply the portfolio interest exception. See the instructions for box 6 (exemption code) on page 14 for information on completing that box.

Example 7. The facts are the same as in Example 6, except that NQI timely provides WA with information allocating 70% of the payment to A, 10% of the payment to B, and 10% of the payment to C. NQI fails to allocate any of the payment to D. Because NQI has allocated 90% of the payment made to the 0% withholding rate pool, WA is not required to report to NQI's account holders on a pro-rata basis. Instead, WA must file Forms 1042-S for A, B, and C, entering $70, $10, and $10, respectively, in box 2 (gross income), "00.00" in box 5 (tax rate), exemption code 05 (portfolio interest) in box 6, $0 in box 7 (federal tax withheld), and $0 in box 9 (total withholding credit). WA must apply the presumption rules to the $10 that NQI has not allocated and file a Form 1042-S showing "Unknown Recipient" in box 13a and recipient code 20 in box 13b. On that Form 1042-S, WA must also enter "30.00" in box 5 (tax rate) because the portfolio interest exemption is unavailable, $0 in box 7 (federal tax withheld), and $0 in box 9 (total withholding credit) because no amounts were actually withheld from the interest. In addition, WA must send the Form 1042-S for the unknown recipient to NQI. All Forms 1042-S must contain information relating to NQI in boxes 17 through 20.

Payments allocated, or presumed made, to U.S. non-exempt recipients. You may be given Forms W-9 or other information regarding U.S. non-exempt recipients from an NQI or flow-through entity together with information allocating all or a portion of the payment to U.S. non-exempt recipients. You must report income allocable to a U.S. non-exempt recipient on the appropriate Form 1099 and not on Form 1042-S, even though you are paying that income to an NQI or a flow-through entity.

You may also be required under the presumption rules to treat a payment made to an NQI or flow-through entity as made to a payee that is a U.S. non-exempt recipient from which you must withhold 28% of the payment under the backup withholding provisions of the Code. In this case, you must report the payment on the appropriate Form 1099. See the General Instructions for Forms 1099, 1098, 5498, and W-2G.

Example 1. FP is a nonwithholding foreign partnership and therefore a flow-through entity. FP establishes an account with WA, a U.S. withholding agent, from which FP receives interest described by income code 01 (interest paid by U.S. obligors—general). FP has three partners, A, B, and C, all of whom are individuals. FP provides WA with a Form W-8IMY with which it associates Forms W-8BEN from A and B and a Form W-9 from C, a U.S. person. In addition, FP provides a complete withholding statement in association with its Form W-8IMY that allocates the interest payments among A, B, and C. WA must file two Forms 1042-S, one each for A and B, and a Form 1099-INT for C.

Example 2. The facts are the same as in Example 1, except that FP does not provide any documentation from its partners. Because WA cannot reliably associate the interest with documentation from a payee, it must apply the presumption rules. Under the presumption rules, the interest is deemed paid to an unknown U.S. non-exempt recipient. WA must, therefore, apply backup withholding at 28% to the payment of interest and report the payment on Form 1099-INT. WA must file a Form 1099-INT and send a copy to FP.

Amounts Paid by Qualified Intermediaries

In general. A QI reports payments on Form 1042-S in the same manner as a U.S. withholding agent. However, payments that are made by the QI directly to foreign beneficial owners (or that are treated as paid directly to beneficial owners) may generally be reported on the basis of reporting pools. A reporting pool consists of income that falls within a particular withholding rate and within a particular income code, exemption code, or recipient code as determined on Form 1042-S. A QI may not report on the basis of reporting pools in the circumstances described in *Recipient-by-Recipient Reporting* on page 10. A QI may use a single recipient code 15 (qualified intermediary withholding rate pool—general) for all reporting pools, except for amounts paid to foreign tax-exempt recipients for which recipient code 16 should be used. Note, however, that a QI should only use recipient code 16 for pooled account holders that have claimed an exemption based on their tax-exempt status and not some other exemption (tax treaty or other Code exception). See *Amounts Paid to Private Arrangement Intermediaries* on this page, if a QI is reporting payments to a PAI.

Example 1. QI, a qualified intermediary, has four direct account holders, A and B, foreign individuals, and X and Y, foreign corporations. A and X are residents of a country with which the United States has an income tax treaty and have provided documentation that establishes that they are entitled to a lower treaty rate of 15% on withholding of dividends from U.S. sources. B and Y are not residents of a treaty country and are subject to 30% withholding on dividends. QI receives U.S. source dividends on behalf of its four customers. QI must file one Form 1042-S for the 15% withholding rate pool. This Form 1042-S must show income code 06 (dividends paid by U.S. corporations—general) in box 1, "15.00" in box 5 (tax rate), "Withholding rate pool" in box 13a (recipient's name), and recipient code 15 (qualified intermediary withholding rate pool—general) in box 13b. QI must also file one Form 1042-S for the 30% withholding rate pool that contains the same information as the Form 1042-S filed for the 15% withholding rate pool, except that it will show "30.00" in box 5 (tax rate).

Example 2. The facts are the same as in Example 1, except that Y is an organization that has tax-exempt status in the United States and in the country in which it is located. QI must file three Forms 1042-S. Two of the Forms 1042-S will contain the same information as in Example 1. The third Form 1042-S will contain information for the withholding rate pool consisting of the amounts paid to Y. This Form 1042-S will show income code 06 (dividends paid by U.S. corporations—general) in box 1, "00.00" in box 5 (tax rate), exemption code 02 (exempt under an Internal Revenue Code section (income other than portfolio interest)) in box 6, "Zero rate withholding pool—exempt organizations," or similar designation, in box 13a (recipient's name), and recipient code 16 (qualified intermediary withholding rate pool—exempt organizations) in box 13b.

Under the terms of its withholding agreement with the IRS, the QI may be required to report the amounts paid to U.S. non-exempt recipients on Form 1099 using the name, address, and TIN of the payee to the extent those items of information are known. These amounts must not be reported on Form 1042-S. In addition, amounts paid to U.S. exempt recipients are not subject to reporting on Form 1042-S or Form 1099.

Amounts Paid to Private Arrangement Intermediaries

A QI generally must report payments made to each private arrangement intermediary (PAI) (defined on page 3) as if the PAI's direct account holders were its own. Therefore, if the payment is made directly by the PAI to the recipient, the QI may report the payment on a pooled basis. A separate Form 1042-S is required for each withholding rate pool of

each PAI. The QI must, however, include the name and address of the PAI and use recipient code 13 or 14 in boxes 13a-13e. If the PAI is providing recipient information from an NQI or flow-through entity, the QI may not report the payments on a pooled basis. Instead, it must follow the same procedures as a U.S. withholding agent making a payment to an NQI or flow-through entity.

Example. QI, a qualified intermediary, pays U.S. source dividends to direct account holders that are foreign persons and beneficial owners. It also pays a portion of the U.S. source dividends to two private arrangement intermediaries, PAI1 and PAI2. The private arrangement intermediaries pay the dividends they receive from QI to foreign persons that are beneficial owners and direct account holders in PAI1 and PAI2. All of the dividends paid are subject to a 15% rate of withholding. QI must file a Form 1042-S for the dividends paid to its own direct account holders that are beneficial owners. QI must also file two Forms 1042-S, one for the dividends paid to the direct account holders of each of PAI1 and PAI2. Each of the Forms 1042-S that QI files for payments made to PAI1 and PAI2 must contain the name and address of PAI1 or PAI2 and recipient code 13 (private arrangement intermediary withholding rate pool—general) in boxes 13a-13e.

Amounts Paid to Certain Related Partnerships and Trusts

A QI that is applying the rules of Section 4A.02 of the QI agreement to a partnership or trust must file separate Forms 1042-S reflecting reporting pools for each partnership or trust that has provided reporting pool information in its withholding statement. However, the QI must file separate Forms 1042-S for partners, beneficiaries, or owners of such partnership or trust that are indirect partners, beneficiaries, or owners, and for direct partners, beneficiaries, or owners of such partnership or trust that are intermediaries or flow-through entities.

Recipient-by-Recipient Reporting

If a QI is not permitted to report on the basis of reporting pools, it must follow the same rules that apply to a U.S. withholding agent. A QI may not report the following payments on a reporting pool basis, but rather must complete Form 1042-S for each appropriate recipient.

Payments made to another QI, WP, or WT. The QI must complete a Form 1042-S treating the other QI, WP, or WT as the recipient.

Payments made to an NQI (including an NQI that is an account holder of a PAI). The QI must complete a Form 1042-S for each recipient who receives the payment from the NQI. A QI that is completing Form 1042-S for a recipient that receives a payment through an NQI must include in boxes 17 through 20 the name, country code, address, and TIN, if any, of the NQI from whom the recipient directly receives the payment.

Example. QI, a qualified intermediary, has NQI, a nonqualified intermediary, as an account holder. NQI has two account holders, A and B, both foreign persons who receive U.S. source dividends from QI. NQI provides QI with a valid Form W-8IMY, with which it associates Forms W-8BEN from A and B and a complete withholding statement that allocates the dividends paid to NQI between A and B. QI must complete two Forms 1042-S, one for A and one for B, and include information relating to NQI in boxes 17 through 20.

Payments made to a flow-through entity. The QI must complete a Form 1042-S for each recipient who receives the payment from the flow-through entity. A QI that is completing a Form 1042-S for a recipient that receives a payment through a flow-through entity must include in boxes 17 through 20 the name, country code, address, and TIN, if any, of the flow-through entity from which the recipient directly receives the payment.

Example. QI, a qualified intermediary, has FP, a nonwithholding foreign partnership, as an account holder. QI pays interest described by income code 01 (interest paid by U.S. obligors—general) to FP. FP has three partners, A, B, and C, all of whom are individuals. FP provides QI with a Form W-8IMY with which it associates the Forms W-8BEN from each of A, B, and C. In addition, FP provides a complete withholding statement in association with its Form W-8IMY that allocates the interest payments among A, B, and C. QI must file three Forms 1042-S, one each for A, B, and C. The Forms 1042-S must show information relating to FP in boxes 17 through 20.

Amounts Paid by Withholding Foreign Partnerships and Trusts

In general. Generally, a withholding foreign partnership (WP) or withholding foreign trust (WT) is required to file a separate Form 1042-S for each direct partner, beneficiary, or owner to whom the WP or WT distributes, or in whose distributive share is included, an amount subject to withholding under Chapter 3 of the Code, in the same manner as a U.S. withholding agent. However, if the WP or WT has made a pooled reporting election in its WP or WT agreement, the WP or WT may instead report payments to such direct partners, beneficiaries, or owners on the basis of reporting pools and file a separate Form 1042-S for each reporting pool. A reporting pool consists of income that falls within a particular withholding rate and within a particular income code, exemption code, and recipient code, as determined on Form 1042-S. A WP or WT may use a single recipient code 15 (qualified intermediary withholding rate pool—general) for all reporting pools, except for amounts paid to foreign tax-exempt recipients for which a separate recipient code 16 must be used. For this purpose, a foreign tax-exempt recipient includes any organization that is not subject to withholding and is not liable to tax in its country of residence because it is a charitable organization, pension fund, or foreign government.

Amounts paid to certain related partnerships and trusts. A WP or WT that is applying the rules of Section 10.02 of the WP or WT agreement to a partnership or trust must file separate Forms 1042-S reflecting reporting pools for each partnership or trust that has provided reporting pool information in its withholding statement. However, the WP or WT must apply the provisions of Regulations sections 1.1441-1 and 1.1441-5 to partners, beneficiaries, or owners of such partnership or trust that are indirect partners, beneficiaries, or owners, and to direct partners, beneficiaries, or owners of such partnership or trust that are intermediaries or flow-through entities.

Amounts Paid by Nonqualified Intermediaries and Flow-Through Entities

An NQI and a flow-through entity are withholding agents and must file Forms 1042-S for amounts paid to recipients. However, an NQI or flow-through entity is not required to file Form 1042-S if it is not required to file Form 1042-S under the *Multiple Withholding Agent Rule* on page 11. An NQI or flow-through entity must report payments made to recipients to the extent it has failed to provide to another withholding agent the appropriate documentation and complete withholding statement, including information allocating the payment to each recipient.

If another withholding agent withheld tax but did not report the payment on Form 1042-S to the recipient, even if the recipient should have been exempt from taxation, the NQI or flow-through entity must file Form 1042-S. Failure to file Forms 1042-S may not only result in penalties for the NQI or flow-through entity, but may result in the denial of any refund claim made by a recipient.

If another withholding agent has withheld tax on an amount that should have been exempt (for example, where the withholding agent applied the presumption rules because it did not receive proper documentation or other required information from the NQI or flow-through entity), the NQI or flow-through entity should report the correct tax rate and the combined amount of U.S. federal tax withheld by the NQI or flow-through entity and any other withholding agent and should enter the

applicable exemption code using the instructions for box 6 on page 14.

If another withholding agent underwithholds, even though it received proper documentation from the NQI or flow-through entity, the NQI or flow-through entity must withhold additional amounts to bring the total withholding to the correct amount. Furthermore, the NQI or flow-through entity must complete Form 1042-S and must include the correct tax rate and the combined amount of U.S. federal tax withheld by the NQI or flow-through entity.

Example 1. A foreign bank acts as a nonqualified intermediary (NQI) for four different foreign persons (A, B, C, and D) who own securities from which they receive interest. The interest is paid by a U.S. withholding agent (WA) as custodian of the securities for NQI. A, B, C, and D each own a 25% interest in the securities. NQI has furnished WA a Form W-8IMY to which it has attached Forms W-8BEN from A and B. NQI's Form W-8IMY contains an attachment stating that 25% of the securities are allocable to each of A and B, and 50% to undocumented owners. WA pays $100 of interest during the calendar year. WA treats the $25 of interest allocable to A and the $25 of interest allocable to B as portfolio interest and completes a Form 1042-S for A and for B as the recipients. WA includes information relating to NQI in boxes 17 through 20 on the Forms 1042-S for A and B. WA subjects the remaining $50 of interest to 30% withholding under the presumption rules and reports the interest on a Form 1042-S by entering "Unknown Recipient" in box 13a (and recipient code 20 in box 13b), "30.00" in box 5 (tax rate), and $15 as the amount withheld in box 7 and box 9. WA also includes information relating to NQI in boxes 17 through 20 of the Form 1042-S and sends a copy of the form to NQI. Because NQI has not provided WA with beneficial owner information for C and D, NQI must report the interest paid to C and D on Forms 1042-S. (Note that under the multiple withholding agent rule, NQI is not required to file a Form 1042-S for A or B.) The Forms 1042-S for C and D should show $25 in box 2 (gross income) and $7.50 in boxes 7 and 9. The rate of tax NQI includes on the Form 1042-S for C and D depends on the rate of withholding to which they should be subject. Thus, if C and D provided NQI with documentation prior to the payment of interest that would qualify the interest as portfolio interest, the rate entered in box 5 should be "00.00." If they do not qualify for a reduced rate of withholding, NQI should enter "30.00" in box 5. In any event, NQI must also enter "99" in box 6 (exemption code) of the Forms 1042-S it prepares for C and D. See the instructions for box 6 on page 14.

Example 2. A U.S. withholding agent (WA) makes a $100 dividend payment to a foreign bank (NQI) that acts as a nonqualified intermediary. NQI receives the payment on behalf of A, a resident of a treaty country who is entitled to a 15% rate of withholding, and B, a resident of a country that does not have a tax treaty with the United States and who is subject to 30% withholding. NQI provides WA with its Form W-8IMY to which it associates the Forms W-8BEN from both A and B and a complete withholding statement that allocates 50% of the dividend to A and 50% to B. A's Form W-8BEN claims a 15% treaty rate of withholding. B's Form W-8BEN does not claim a reduced rate of withholding. WA, however, mistakenly withholds only 15%, $15, from the entire $100 payment. WA completes a Form 1042-S for each A and B as the recipients, showing on each form $50 of dividends in box 2, a withholding rate of "15.00" in box 5 (tax rate), and $7.50 as the amount withheld in boxes 7 and 9. Under the multiple withholding agent rule, NQI is not required to file a Form 1042-S for A. However, because NQI knows (or should know) that B is subject to a 30% rate of withholding, and assuming it knows that WA only withheld 15%, the multiple withholding agent rule does not apply to the dividend paid to B and NQI must withhold an additional 15% from the payment to B. NQI must then file a Form 1042-S for B showing $50 of dividends in box 2, "30.00" in box 5 (the correct tax rate), and $7.50 withheld by NQI in box 7, $7.50 withheld by WA in box 8, and $15 in box 9 (the combined amount withheld). NQI must also enter "00" in box 6 (exemption code). See the instructions for box 6 on page 14.

Example 3. A withholding agent (WA) receives a Form W-8IMY from a nonqualified intermediary (NQI). NQI's Form W-8IMY relates to payments of bank deposit interest. NQI collects the bank deposit interest on behalf of A, B, C, and D, but does not associate Forms W-8, W-9, or other documentary evidence with the Form W-8IMY that NQI provides WA. A, B, and C are foreign persons for whom NQI has valid documentation establishing their foreign status. D is a U.S. person and has provided NQI with a Form W-9. Under the presumption rules, WA must treat the bank deposit interest as being paid to an unknown U.S. person and apply backup withholding at 28%. WA must complete one Form 1099 for an unknown payee showing 28% backup withholding. A copy of the form must be sent to NQI. Because NQI failed to provide the requisite documentation to WA and because the amounts have been subject to withholding, NQI must report the amounts paid to A, B, C, and D. Accordingly, NQI must file a Form 1042-S for each A, B, and C showing deposit interest (income code 29) as the type of payment in box 1; "00.00" in box 5 (the correct tax rate); "0" in box 7 (the amount withheld by NQI); the actual amount withheld by WA that is allocable to A, B, and C in box 8; the total withheld (box 7 plus box 8) in box 9; and exemption code 99 in box 6. (See the instructions for box 6 on page 14.) NQI must also file a Form 1099 for D to report the actual amounts paid and withheld.

Multiple Withholding Agent Rule

A withholding agent is not required to file Form 1042-S if a return is filed by another withholding agent reporting the same amount to the same recipient (the multiple withholding agent rule). If an NQI or flow-through entity has provided another withholding agent with the appropriate documentation and complete withholding statement, including information allocating the payment to each recipient, the NQI or flow-through entity may presume that the other withholding agent filed the required Forms 1042-S unless the NQI or flow-through entity knows, or has reason to know, that the required Form 1042-S reporting has not been done.

The multiple withholding agent rule does not relieve withholding agents from Form 1042-S reporting responsibility in the following circumstances.

- Any withholding agent making a payment to a QI, WP, or WT must report that payment as made to the QI, WP, or WT.
- Any U.S. withholding agent making a payment to an authorized foreign agent must report that payment to the authorized foreign agent.
- Any withholding agent making a payment to a U.S. branch treated as a U.S. person must report the payment as made to that branch.
- Any withholding agent making a payment to a flow-through entity must report the payment as made to a beneficial owner, QI, WP, or WT that has a direct or indirect interest in that entity.
- Any withholding agent that withholds an amount from a payment under Chapter 3 of the Code must report that amount to the recipient from whom it was withheld, unless the payment is reportable on another IRS form.

Furthermore, the multiple withholding agent rule does not relieve the following from Form 1042-S reporting responsibility.

- Any QI, WP, or WT required to report an amount to a withholding rate pool.
- An NQI or flow-through entity that has not transmitted a valid Form W-8 or other valid documentation to another withholding agent together with the required withholding statement.

Penalties

The following penalties apply to the person required to file Form 1042-S. The penalties apply to both paper filers and to electronic filers.

At the time these instructions went to print, Congress was considering legislation that would increase some of the penalties listed below. To find out if this legislation was enacted, see Pub. 515.

Late filing of correct Form 1042-S. A penalty may be imposed for failure to file each correct and complete Form 1042-S when due (including extensions), unless you can show that the failure was due to reasonable cause and not willful neglect. The penalty, based on when you file a correct Form 1042-S, is:

- $15 per Form 1042-S if you correctly file within 30 days; maximum penalty $75,000 per year ($25,000 for a small business). A small business, for this purpose, is defined as having average annual gross receipts of $5 million or less for the 3 most recent tax years (or for the period of its existence, if shorter) ending before the calendar year in which the Forms 1042-S are due.
- $30 per Form 1042-S if you correctly file more than 30 days after the due date but by August 1; maximum penalty $150,000 per year ($50,000 for a small business).
- $50 per Form 1042-S if you file after August 1 or you do not file correct Forms 1042-S; maximum penalty $250,000 per year ($100,000 for a small business).

If you intentionally disregard the requirement to report correct information, the penalty per Form 1042-S is increased to $100 or, if greater, 10% of the total amount of items required to be reported, with no maximum penalty.

Failure to furnish correct Form 1042-S to recipient. If you fail to provide correct statements to recipients and cannot show reasonable cause, a penalty of $50 may be imposed for each failure to furnish Form 1042-S to the recipient when due. The penalty may also be imposed for failure to include all required information or for furnishing incorrect information on Form 1042-S. The maximum penalty is $100,000 for all failures to furnish correct recipient statements during a calendar

Income Codes, Exemption Codes, and Recipient Codes

Box 1. Enter the appropriate income code.

Code	Interest Income
01	Interest paid by U.S. obligors — general
02	Interest paid on real property mortgages
03	Interest paid to controlling foreign corporations
04	Interest paid by foreign corporations
05	Interest on tax-free covenant bonds
29	Deposit interest
30	Original issue discount (OID)
31	Short-term OID
33	Substitute payment — interest

Code	Dividend Income
06	Dividends paid by U.S. corporations — general
07	Dividends qualifying for direct dividend rate
08	Dividends paid by foreign corporations
34	Substitute payment — dividends

Code	Other Income
09	Capital gains
10	Industrial royalties
11	Motion picture or television copyright royalties
12	Other royalties (e.g., copyright, recording, publishing)
13	Real property income and natural resources royalties
14	Pensions, annuities, alimony, and/or insurance premiums
15	Scholarship or fellowship grants
16	Compensation for independent personal services[1]
17	Compensation for dependent personal services[1]
18	Compensation for teaching[1]
19	Compensation during studying and training[1]
20	Earnings as an artist or athlete[2]
24	Real estate investment trust (REIT) distributions of capital gains
25	Trust distributions subject to IRC section 1445
26	Unsevered growing crops and timber distributions by a trust subject to IRC section 1445
27	Publicly traded partnership distributions subject to IRC section 1446
28	Gambling winnings[6]
32	Notional principal contract income[3]
35	Substitute payment — other
36	Capital gains distributions
37	Return of capital
50	Other income

Box 6. If the tax rate entered in box 5 is 00.00, you must generally enter the appropriate exemption code from the list below (but see the **Caution** below).

Code	Authority for Exemption
01	Income effectively connected with a U.S. trade or business
02	Exempt under an Internal Revenue Code section (income other than portfolio interest)
03	Income is not from U.S. sources[4]
04	Exempt under tax treaty
05	Portfolio interest exempt under an Internal Revenue Code section
06	Qualified intermediary that assumes primary withholding responsibility
07	Withholding foreign partnership or withholding foreign trust
08	U.S. branch treated as a U.S. person
09	Qualified intermediary represents income is exempt

Caution: *See the instructions for box 6 on page 14 for information on additional codes ("00" and "99") that may be required.*

Box 13b. Enter the appropriate recipient code.

Code	Type of Recipient
01	Individual[2]
02	Corporation[2]
03	Partnership other than a withholding foreign partnership[2]
04	Withholding foreign partnership or withholding foreign trust
05	Trust
06	Government or international organization
07	Tax-exempt organization (IRC section 501(a))
08	Private foundation
09	Artist or athlete[2]
10	Estate
11	U.S. branch treated as U.S. person
12	Qualified intermediary
13	Private arrangement intermediary withholding rate pool — general[5]
14	Private arrangement intermediary withholding rate pool — exempt organizations[5]
15	Qualified intermediary withholding rate pool — general[5]
16	Qualified intermediary withholding rate pool — exempt organizations[5]
17	Authorized foreign agent
18	Public pension fund
20	Unknown recipient

[1] If compensation that otherwise would be covered under Income Codes 16–19 is directly attributable to the recipient's occupation as an artist or athlete, use Income Code 20 instead.

[2] If Income Code 20 is used, Recipient Code 09 (artist or athlete) should be used instead of Recipient Code 01 (individual), 02 (corporation), or 03 (partnership other than withholding foreign partnership).

[3] Use appropriate Interest Income Code for embedded interest in a notional principal contract.

[4] Non-U.S. source income paid to a nonresident alien is not subject to U.S. tax. Use Exemption Code 03 when entering an amount for information reporting purposes only.

[5] May be used only by a qualified intermediary.

[6] Subject to 30% withholding rate unless the recipient is from one of the treaty countries listed under *Gambling winnings (Income Code 28)* in Pub. 515.

year. If you intentionally disregard the requirement to report correct information, each $50 penalty is increased to $100 or, if greater, 10% of the total amount of items required to be reported, with no maximum penalty.

Failure to file electronically. If you are required to file electronically but fail to do so, and you do not have an approved waiver on record, you may be subject to a $50 penalty per return unless you establish reasonable cause. The penalty applies separately to original returns and amended returns.

Avoid Common Errors

To ensure that your Forms 1042-S can be correctly processed, be sure that you:

- Carefully read the information provided in Pub. 515 and these instructions.
- If you are an electronic filer, comply with the requirements in Pub. 1187.
- Complete all required fields. At a minimum, you must enter information in boxes 1, 2, 5, 6, 7, 9, 11, 12a-12d,13a, 13b, and 16. Other boxes must be completed if the nature of the payment requires it.

Note. You may leave box 6 blank if you are applying backup withholding to the payment being reported.

- Use only income, recipient, exemption, and country codes specifically listed in these instructions.
- Use only tax rates that are allowed by statute, regulation, or treaty. Do not attempt to "blend" rates. Instead, if necessary, submit multiple Forms 1042-S to show changes in tax rate. See the Valid Tax Rate Table on page 14.

All information you enter when reporting the payment must correctly reflect the intent of statute and regulations. Generally, you should rely on the withholding documentation you have collected (Form W-8 series, Form 8233, etc.) to complete your Form 1042-S submissions.

Also note the following:

- The gross income you report in box 2 cannot be zero.
- The income code you report in box 1 must correctly reflect the type of income you pay to the recipient.
- The withholding agent's name, address, and EIN, QI-EIN, WP-EIN, or WT-EIN must be reported in boxes 11, 12a, 12b, 12c, and 12d in all cases.
- The recipient's name, recipient code, address, and TIN, if any, must be reported in boxes 13 and 14. You must generally report a foreign address. See the instructions for box 13 on page 15. If you want, you can put the recipient's account number in box 22.
- The recipient code you report in box 13b must correctly identify the recipient's status. Use recipient code 20 only if you do not know who the recipient is.

Note. If you cannot identify the recipient, the tax withheld must be 30%.

- The recipient's country code that you report in box 16 must be present and correctly coded and cannot be "US." Additionally, do not use "OC" or "UC" except as specifically allowed in these instructions.
- The exemption code you report in box 6 must correctly identify the proper tax status for the type of income you pay to the recipient.

Note. If you use exemption code 04 (exempt under tax treaty), the country code that you report in box 16 must be a valid treaty country. Countries with which the United States has a tax treaty are shown in bold italics in the country code list beginning on page 17.

You, the withholding agent, are liable for the tax if you know, or should have known, that underwithholding on a payment has occurred.

Specific Instructions for Withholding Agents

All amounts must be reported in U.S. dollars.

Rounding Off to Whole Dollars

You may round off cents to whole dollars. If you do round to whole dollars, you must round all amounts. To round off amounts to the nearest whole dollar, drop amounts under 50 cents and increase amounts from 50 to 99 cents to the next dollar. For example, $1.39 becomes $1 and $2.50 becomes $3. If you have to add two or more amounts to figure the amount to enter on a line, include cents when adding and only round off the total.

AMENDED Box at Top of Form

See *Amended Returns* on page 16.

PRO-RATA BASIS REPORTING Box

Withholding agents must check this box to notify the IRS that an NQI that used the alternative procedures of Regulations section 1.1441-1(e)(3)(iv)(D) failed to properly comply with those procedures. See *Pro-rata reporting* beginning on page 8 for additional information and examples.

Box 1, Income Code

All filers must enter the appropriate 2-digit income code from the list on page 12. Use the income code that is the most specific. For example, if you are paying bank deposit interest, you should use code 29 (deposit interest), not code 01 (interest paid by U.S. obligors—general). If you paid more than one type of income to or on behalf of the same recipient, you must complete a separate Form 1042-S for each income type.

Substitute payment income codes are to be used for all substitute payment transactions. For more information, see Regulations sections 1.861-2(a)(7) and 1.861-3(a)(6) and Notice 97-66.

Note. Although income codes are provided for deposit interest, short-term OID, and notional principal contract income, those items are not always subject to reporting on Form 1042-S. For example, bank deposit interest is reportable if it is effectively connected with the conduct of a U.S. trade or business or is paid to a resident of Canada. Short-term OID or bank deposit interest may need to be reported by an NQI or flow-through entity if those amounts are paid to foreign persons and another withholding agent backup withheld on those amounts under the presumption rules. (See *Example 3* on page 11.) Notional principal contract income is reportable if it is effectively connected with the conduct of a trade or business in the United States. For more information, see the regulations under Chapter 3 of the Code and Pub. 515.

Box 2, Gross Income

For each income type, enter the gross amount you paid to or on behalf of the recipient during calendar year 2008, including withheld tax. The following special procedures apply to the reporting of gross income.

- You must report the entire amount of a corporate distribution made with respect to stock even if you elect to reduce the amount of withholding on the distribution because all or a portion of the distribution is nontaxable or represents a capital gain dividend.
- You must report the entire amount of a payment if you do not know at the time of payment the amount that is subject to withholding because the determination of the source of the income or the calculation of the amount of income subject to tax depends upon facts that are not known at the time of payment.
- You must report the entire amount of gains relating to the disposal of timber, coal, or domestic iron ore with a retained economic interest and gains relating to contingent payments received from the sale or exchange of patents, copyrights, and similar intangible property.
- You must report only the amount of cash paid on notional principal contracts.

Box 3, Withholding Allowances

This box should only be completed if the income code reported in box 1 is 15 (scholarship or fellowship grants) or 16 (compensation for independent personal services). See Pub. 515 for more information.

Box 4, Net Income

Complete this box only if you entered an amount in box 3. Otherwise, leave it blank.

Box 5, Tax Rate

Enter the correct rate of withholding that applies to the income in box 2 (gross income) or box 4 (net income), as appropriate. (See Valid Tax Rate Table on this page.) The correct tax rate should be included even if you withheld less than that rate. For example, if an NQI is reporting dividends paid to a beneficial owner who is a resident of a country with which the United States does not have a tax treaty and a U.S. withholding agent paid the dividend and withheld only 15% (rather than the required 30%) and the NQI withholds an additional 15%, the NQI should report "30.00" in box 5. See *Example 2* on page 11.

The tax rate on dividends paid to a corporation created or organized in, or under the law of, the Commonwealth of Puerto Rico may be 10%, rather than 30%. See Pub. 515 for more information.

Enter the tax rate using the following format: two digits, a decimal, and two digits (for example, "30.00" for 30%). However, if the income is exempt from tax under a U.S. tax treaty or the Code, enter "00.00." If the tax rate is less than 10%, enter a zero before the tax rate (for example, "04.00" for 4%).

If you withheld at more than one tax rate for a specific type of income that you paid to the same recipient, you must file a separate Form 1042-S for each amount to which a separate rate was applied.

Valid Tax Rate Table

00.00	07.00	14.00	27.50
04.00	08.00	15.00	28.00
04.90	10.00	17.50	30.00
04.95	12.00	20.00	33.00
05.00	12.50	25.00	35.00

Box 6, Exemption Code

Note. If you are filing a Form 1042-S to correct certain information already provided to you by another withholding agent on a Form 1099 or Form 1042-S (for example, as required under *Amounts Paid by Nonqualified Intermediaries and Flow-Through Entities* beginning on page 10), see item 5 on this page.

Generally, if the tax rate you entered in box 5 is 00.00, you should enter the appropriate exemption code (01 through 09) from the list on page 12.

If an amount was withheld under Chapter 3 of the Code (the tax rate you entered in box 5 is greater than zero and is not due to backup withholding), enter "00" in box 6. If the tax rate you entered in box 5 is due to backup withholding, leave box 6 blank.

1. If exemption code 01 (income effectively connected with a U.S. trade or business) may apply, you must enter the recipient's U.S. TIN in box 14. If the recipient's U.S. TIN is unknown or unavailable, you must withhold tax at the foreign-person rate of 30% (30.00) and enter "00" in box 6.

2. A withholding agent should use exemption code 06 (qualified intermediary that assumes primary withholding responsibility) only if it is making a payment to a QI that has represented on its Form W-8IMY that it is assuming primary withholding responsibility under Chapter 3 of the Code.

3. A withholding agent should use exemption code 07 (withholding foreign partnership or withholding foreign trust) only if it is making a payment to a foreign partnership or trust that has represented that it is a withholding foreign partnership or trust.

4. A withholding agent should use exemption code 09 (qualified intermediary represents income is exempt) only if it makes a payment to a QI that has not assumed primary withholding responsibility under Chapter 3 of the Code or primary backup withholding responsibility, but has represented on a withholding statement associated with its Form W-8IMY that the income is exempt from withholding.

5. If you have failed to provide another withholding agent with appropriate information regarding the status of the person to whom you are making a payment, the other withholding agent may be required to withhold on the payment based on the presumption rules. If the income is in fact exempt from withholding, you must submit a Form 1042-S providing the correct information. In this situation, you must:

a. Indicate the correct rate at which the income should have been subject to withholding in box 5 (usually 00.00),

b. Enter "99" in box 6, and

c. Enter the actual amount of U.S. federal tax withheld by the other withholding agent in box 8.

You must also provide the correct recipient code and the name and address of the actual recipient in boxes 13a-e.

Boxes 7 Through 9, Federal Tax Withheld

Box 7. Enter the total amount of U.S. federal tax you actually withheld in box 7. If you did not withhold any tax, enter "-0-."

Box 8. If you are a withholding agent filing a Form 1042-S to report income that has already been subject to withholding by another withholding agent, enter the amount actually withheld by the other agent(s) in box 8.

Box 9. Enter the aggregate amount of tax withheld by you and any other withholding agent in box 9.

Boxes 7 and 9 must be completed in all cases, even if no tax has actually been withheld.

Box 10, Amount Repaid to Recipient

This box should be completed only if:

- You repaid a recipient an amount that was overwithheld, and
- You are going to reimburse yourself by reducing, by the amount of tax actually repaid, the amount of any deposit made for a payment period in the calendar year following the calendar year of withholding.

Generally, a QI should not enter an amount in box 10 unless it is a QI that has represented on its Form W-8IMY that it is assuming primary withholding responsibility under Chapter 3 of the Code.

You must also state on a timely filed Form 1042 for the calendar year of overwithholding that the filing of the Form 1042 constitutes a claim for refund.

The adjustment for amounts overwithheld do not apply to partnerships or nominees required to withhold under section 1446.

Box 11, Withholding Agent's Employer Identification Number (EIN)

You are generally required to enter your EIN. However, if you are filing Form 1042-S as a QI, withholding foreign partnership, or withholding foreign trust, enter your QI-EIN, WP-EIN, or WT-EIN and check the QI-EIN box.

If you do not have an EIN, you can apply for one online at *www.irs.gov/businesses/small* or by telephone at 1-800-829-4933. Also, you can apply for an EIN by filing Form SS-4, Application for Employer Identification Number. File amended Forms 1042-S when you receive your EIN.

To get a QI-EIN, WP-EIN, or WT-EIN, submit Form SS-4 with your application for that status. (See the definitions for *Qualified intermediary (QI)* on page 3 and *Withholding foreign partnership (WP) or withholding foreign trust (WT)* on page 4 for more information.) Do not send an application for a QI-EIN, WP-EIN, or WT-EIN to the Ogden Service Center; it will not be processed.

Box 12, Withholding Agent's Name and Address

Enter your name and address in the appropriate boxes. If your post office does not deliver mail to the street address and you have a P.O. box, show the box number instead of the street address.

If you are a nominee that is the withholding agent under section 1446, enter the PTP's name and other information in boxes 17 through 20.

Note. On statements furnished to Canadian recipients of U.S. source deposit interest, in addition to your name and address, you must include the telephone number of a person to contact. This number must provide direct access to an individual who can answer questions about the statement. The telephone number is not required on Copy A of paper forms or on electronically filed forms. You must also include a statement that the information on the form is being furnished to the United States Internal Revenue Service and may be furnished to Canada.

Box 13, Recipient's Name, Recipient Code, and Address

Name. Enter the complete name of the recipient in box 13a.

- If you do not know the name of the recipient, enter "Unknown Recipient."
- If Form 1042-S is being completed by a QI, WP, or WT for a withholding rate pool, enter "Withholding rate pool" in box 13a. No address is necessary.
- A QI reporting payments made to a PAI on a withholding rate pool basis must include the name and address of the PAI in boxes 13a through 13e.

Recipient code. Enter the recipient code from the list on page 12 in box 13b. The following special instructions apply.

- If applicable, use recipient code 09 (artist or athlete) instead of recipient code 01 (individual), 02 (corporation), or 03 (partnership other than a withholding foreign partnership).
- Use recipient code 12 if you are making a payment to a QI and 04 if you are making a payment to a WP or a WT.
- If you are making a payment to an NQI or flow-through entity, you generally must use the recipient code that applies to the type of recipient who receives the income from the NQI or flow-through entity.
- Use recipient code 03 (partnership other than a withholding foreign partnership) only if you are reporting a payment of income that is effectively connected with the conduct of a trade or business of a nonwithholding foreign partnership in the United States. Otherwise, follow the rules that apply to payments to flow-through entities.
- Use recipient code 20 (unknown recipient) only if you have not received a withholding certificate or other documentation for a recipient or you cannot determine how much of a payment is reliably associated with a specific recipient. Do not use this code because you cannot determine the recipient's status as an individual, corporation, etc. The regulations under Chapter 3 of the Code provide rules on how to determine a recipient's status when a withholding agent does not have the necessary information.
- Only QIs may use recipient codes 13 (private arrangement intermediary withholding rate pool—general), 14 (private arrangement intermediary withholding rate pool—exempt organizations), 15 (qualified intermediary withholding rate pool—general), and 16 (qualified intermediary withholding rate pool—exempt organizations). A QI should only use recipient code 14 or 16 for pooled account holders that have claimed an exemption based on their tax-exempt status and not some other exemption (for example, treaty or other Code exception). A U.S. withholding agent making a payment to a QI should use recipient code 12.

Address. You must generally enter a foreign address in boxes 13c through 13e. However, there are limited exceptions. For example, you may enter a U.S. address when reporting payments of scholarship or fellowship grants (income code 15).

For addresses outside the United States or its possessions, follow the foreign country's practice for entering the postal code.

For addresses within the United States, use the U.S. Postal Service 2-letter abbreviation for the state name. Do not enter "United States" or "U.S."

If you want to enter the recipient's account number, use box 22.

Box 14, Recipient's U.S. Taxpayer Identification Number (TIN)

You must obtain and enter a U.S. taxpayer identification number (TIN) for:

- Any recipient whose income is effectively connected with the conduct of a trade or business in the United States.

Note. For these recipients, exemption code 01 should be entered in box 6.

- Any foreign person claiming a reduced rate of, or exemption from, tax under a tax treaty between a foreign country and the United States, unless the income is an unexpected payment (as described in Regulations section 1.1441-6(g)) or consists of dividends and interest from stocks and debt obligations that are actively traded; dividends from any redeemable security issued by an investment company registered under the Investment Company Act of 1940 (mutual fund); dividends, interest, or royalties from units of beneficial interest in a unit investment trust that are (or were, upon issuance) publicly offered and are registered with the Securities and Exchange Commission under the Securities Act of 1933; and amounts paid with respect to loans of any of the above securities.
- Any nonresident alien individual claiming exemption from tax under section 871(f) for certain annuities received under qualified plans.
- A foreign organization claiming an exemption from tax solely because of its status as a tax-exempt organization under section 501(c) or as a private foundation.
- Any QI.
- Any WP or WT.
- Any nonresident alien individual claiming exemption from withholding on compensation for independent personal services.
- Any U.S. branch of a foreign bank or foreign insurance company that is treated as a U.S. person.

In all other cases, if you know the recipient's TIN or if a foreign person provides a TIN on a Form W-8, but is not required to do so, you must include the TIN on Form 1042-S.

Box 15, Recipient's Foreign Tax Identifying Number

Enter the recipient's identifying number used in the country of residence for tax purposes (optional).

Box 16, Recipient's Country Code

You must enter the code (from the list that begins on page 17) for the country of which the recipient claims residency under that country's tax laws. Enter "OC" (other country) only when the country of residence does not appear on the list or the payment is made to an international organization (for example, the United Nations). Enter "UC" (unknown country) only if the payment is to an unknown recipient. If you are making a payment to a QI, WP, or WT or if you are a QI, WP, or WT and are making a payment to a QI, WP, or WT withholding rate pool, enter the country code of the QI, WP, or WT.

If exemption code 04 (exempt under tax treaty) appears in box 6 or if a reduced rate of withholding based on a tax treaty is entered in box 5, the country code entered in box 16 must be a country with which the United States has entered into an income tax treaty.

Boxes 17 Through 20, NQI's/Flow-Through Entity's Name, Country Code, Address, and TIN

If you are reporting amounts paid to a recipient whose withholding certificates or other documentation has been submitted to you with a Form W-8IMY provided by an NQI or flow-through entity, you must include the name, address, and TIN, if any, of the NQI or flow-through entity with whose Form W-8IMY the recipient's Form W-8 or other documentation is associated.

Note. An NQI or flow-through entity will leave these boxes blank unless it is making the payment to an NQI or flow-through entity.

For box 18, you must enter the country code from the list beginning on page 17 for the country where the NQI or flow-through entity is located.

If you are a nominee that is the withholding agent under section 1446, enter the PTP's name and other information in these boxes.

Box 21, Payer's Name and Taxpayer Identification Number (TIN)

See the definition of a payer on page 3. Include the payer's name and TIN if different from that in boxes 11 and 12.

Box 22, Recipient's Account Number

You may use this box to enter the account number assigned by you to the recipient.

Boxes 23 Through 25, State Income Tax Withheld and Related Information

Include in these boxes information relating to any state income tax withheld.

Amended Returns

If you filed a Form 1042-S with the IRS and later discover you made an error on it, you must correct it as soon as possible. To correct a previously filed Form 1042-S, you will need to file an amended Form 1042-S.

You may be required to submit amended Forms 1042-S electronically. See Electronic Reporting on page 2 and Pub. 1187.

If any information you correct on Form(s) 1042-S changes the information you previously reported on Form 1042, you must also correct the Form 1042 by filing an amended return. To do this, see the Form 1042 instructions.

If you are filing electronically, see *Amended Returns* in Pub. 1187.

If you are not filing electronically, follow these steps to amend a previously filed Form 1042-S.

Step 1. Prepare a paper Form 1042-S.

- Enter all the correct information on the form, including the recipient name and address, money amounts, and codes.
- Enter an "X" in the AMENDED box at the top of the form.

AMENDED box. Enter an "X" in the AMENDED box of Copy A only if you are amending a Form 1042-S you previously filed with the IRS. Enter an "X" in the AMENDED box you give to the recipient only if you are correcting a Form 1042-S previously furnished to the recipient. You must provide statements to recipients showing the corrections as soon as possible.

Step 2. File the amended paper Form 1042-S with a Form 1042-T. See the Form 1042-T instructions for information on filing these forms.

If you fail to correct Form(s) 1042-S, you may be subject to a penalty. See Penalties *beginning on page 11.*

Privacy Act and Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. Sections 1441, 1442, and 1446 (for PTPs) require withholding agents to report and pay over to the IRS taxes withheld from certain U.S. source income of foreign persons. Form 1042-S is used to report the amount of income and withholding to the payee. Form 1042 is used to report the amount of withholding that must be paid over to the IRS. Section 6109 requires you to provide your taxpayer identification number (SSN, EIN, or ITIN). Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and cities, states, and the District of Columbia for use in administering their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism. If you fail to provide this information in a timely manner, you may be liable for penalties and interest.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is 36 minutes.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see *Where, When, and How To File* on page 1.

Country Codes

Select the appropriate code from the following list and enter it in box 16 (country code of recipient). Also use the following codes to complete box 18 (country code of NQI), if applicable. See the instructions for box 16 (and box 18 if applicable) on page 15 before selecting a country code. **Note.** Countries bolded and italicized are those with which the United States had entered into an income tax treaty at the time these instructions were printed.

Country	Code
Afghanistan	AF
Akrotiri	AX
Albania	AL
Algeria	AG
American Samoa	AQ
Andorra	AN
Angola	AO
Anguilla	AV
Antarctica	AY
Antigua and Barbuda	AC
Argentina	AR
Armenia[1]	AM
Aruba	AA
Ashmore and Cartier Islands[2]	AT
Australia	AS
Austria	AU
Azerbaijan[1]	AJ
Bahamas, The	BF
Bahrain	BA
Baker Island	FQ
Bangladesh	BG
Barbados	BB
Belarus[1]	BO
Belgium	BE
Belize	BH
Benin	BN
Bermuda	BD
Bhutan	BT
Bolivia	BL
Bosnia-Herzegovina	BK
Botswana	BC
Bouvet Island	BV
Brazil	BR
British Indian Ocean Territory	IO
Brunei	BX
Bulgaria	BU
Burkina Faso	UV
Burma	BM
Burundi	BY
Cambodia	CB
Cameroon	CM
Canada	CA
Cape Verde	CV
Cayman Islands	CJ
Central African Republic	CT
Chad	CD
Chile	CI
China	CH
Christmas Island[2]	KT
Clipperton Island	IP
Cocos (Keeling) Islands[2]	CK
Colombia	CO
Comoros	CN
Congo (Brazzaville)	CF
Congo, Democratic Republic of (Kinshasa)	CG
Cook Islands	CW
Coral Sea Islands Territory[2]	CR
Costa Rica	CS
Cote D'Ivoire (Ivory Coast)	IV
Croatia	HR
Cuba	CU
Cyprus	CY
Czech Republic	EZ
Denmark	DA
Dhekelia	DX
Djibouti	DJ
Dominica	DO
Dominican Republic	DR
Ecuador	EC
Egypt	EG
El Salvador	ES
Equatorial Guinea	EK
Eritrea	ER
Estonia	EN
Ethiopia	ET
Falkland Islands (Islas Malvinas)	FK
Faroe Islands	FO
Fiji	FJ
Finland	FI
France	FR
French Guiana[3]	FG
French Polynesia	FP
French Southern and Antarctic Lands	FS
Gabon	GB
Gambia, The	GA
Georgia[1]	GG
Germany	GM
Ghana	GH
Gibraltar	GI
Great Britain (United Kingdom)	UK
Greece	GR
Greenland	GL
Grenada	GJ
Guadeloupe[3]	GP
Guam	GQ
Guatemala	GT
Guernsey	GK
Guinea	GV
Guinea-Bissau	PU
Guyana	GY
Haiti	HA
Heard Island and McDonald Islands	HM
Holy See	VT
Honduras	HO
Hong Kong[5]	HK
Howland Island	HQ
Hungary	HU
Iceland	IC
India	IN
Indonesia	ID
Iran	IR
Iraq	IZ
Ireland	EI
Isle of Man	IM
Israel	IS
Italy	IT
Jamaica	JM
Jan Mayen	JN
Japan	JA
Jarvis Island	DQ
Jersey	JE
Johnston Atoll	JQ
Jordan	JO
Kazakhstan	KZ
Kenya	KE
Kingman Reef	KQ
Kiribati	KR
Korea, North	KN
Korea, South	KS
Kosovo	KV
Kuwait	KU
Kyrgyzstan[1]	KG
Laos	LA
Latvia	LG
Lebanon	LE
Lesotho	LT
Liberia	LI
Libya	LY
Liechtenstein	LS
Lithuania	LH
Luxembourg	LU
Macau	MC
Macedonia	MK
Madagascar (Malagasy Republic)	MA
Malawi	MI
Malaysia	MY
Maldives	MV
Mali	ML
Malta	MT
Marshall Islands	RM
Martinique[3]	MB
Mauritania	MR
Mauritius	MP
Mayotte	MF
Mexico	MX
Micronesia, Federated States of	FM
Midway Islands	MQ
Moldova[1]	MD
Monaco	MN
Mongolia	MG
Montenegro	MJ
Montserrat	MH
Morocco	MO
Mozambique	MZ
Namibia	WA
Nauru	NR
Navassa Island	BQ
Nepal	NP
Netherlands	NL
Netherlands Antilles	NT
New Caledonia	NC
New Zealand	NZ
Nicaragua	NU
Niger	NG
Nigeria	NI
Niue	NE
Norfolk Island[2]	NF
Northern Ireland[4]	UK
Northern Mariana Islands	CQ
Norway	NO
Oman	MU
Pakistan	PK
Palau	PS
Palmyra Atoll	LQ
Panama	PM
Papua New Guinea	PP
Paracel Islands	PF
Paraguay	PA
Peru	PE
Philippines	RP
Pitcairn Island	PC
Poland	PL
Portugal	PO
Puerto Rico	RQ
Qatar	QA

Reunion[3]	RE
Romania	RO
Russia	RS
Rwanda	RW
St. Barthelemy	TB
St. Helena	SH
St. Kitts (St. Christopher and Nevis)	SC
St. Lucia	ST
St. Martin	RN
St. Pierre and Miquelon	SB
St. Vincent and the Grenadines	VC
Samoa	WS
San Marino	SM
Sao Tome and Principe	TP
Saudi Arabia	SA
Senegal	SG
Serbia	RB
Seychelles	SE
Sierra Leone	SL
Singapore	SN
Slovak Republic (Slovakia)	LO
Slovenia	SI
Solomon Islands	BP
Somalia	SO
South Africa	SF
South Georgia and the South Sandwich Islands	SX
Spain	SP
Spratly Islands	PG
Sri Lanka	CE
Sudan	SU
Suriname	NS
Svalbard	SV
Swaziland	WZ
Sweden	SW
Switzerland	SZ
Syria	SY
Taiwan	TW
Tajikistan[1]	TI
Tanzania	TZ
Thailand	TH
Timor-Leste	TT
Togo	TO
Tokelau	TL
Tonga	TN
Trinidad and Tobago	TD
Tunisia	TS
Turkey	TU
Turkmenistan[1]	TX
Turks and Caicos Islands	TK
Tuvalu	TV
Uganda	UG
Ukraine	UP
United Arab Emirates	AE
United Kingdom (England, Wales, Scotland, No. Ireland)	UK
Uruguay	UY
Uzbekistan[1]	UZ
Vanuatu	NH
Venezuela	VE
Vietnam	VM
Virgin Islands (British)	VI
Virgin Islands (U.S.)	VQ
Wake Island	WQ
Wallis and Futuna	WF
Western Sahara	WI
Yemen	YM
Zambia	ZA
Zimbabwe	ZI
Other Country	OC
Unknown Country	UC

[1] These countries are parties to the United States treaty with the Commonwealth of Independent States.

[2] These countries are covered under the United States treaty with Australia.

[3] These countries are covered under the United States treaty with France.

[4] Northern Ireland is covered under the United States treaty with the United Kingdom.

[5] Hong Kong is not covered under the United States treaty with China.