

Part III - Administrative, Procedural, and Miscellaneous

Information Reporting of Customer's Basis in Securities Transactions

Notice 2009-17

PURPOSE

This notice invites public comments regarding guidance to be provided to brokers, transferors, issuers, customers, and other affected persons concerning new requirements with respect to the reporting of a customer's basis in securities transactions. The new reporting requirements are in sections 6045(g) and (h), 6045A, and 6045B of the Internal Revenue Code, which were added by section 403 of the Energy Improvement and Extension Act of 2008, Div. B of Pub. L. No. 110-343, 122 Stat. 3765 (the Act). This portion of the Act also amended section 1012 to provide new rules for determining the basis of certain securities subject to the new reporting requirements. The new reporting requirements and basis rules generally begin to take effect on January 1, 2011.

The Department of the Treasury and Internal Revenue Service propose to issue guidance on compliance with the new reporting requirements and basis rules. To assist them in drafting guidance under the new provisions, they are requesting comments from all affected persons.

BACKGROUND

Section 6045(a) requires brokers to file with the Service annual information returns showing the gross proceeds realized by customers from various sales transactions. Under new section 6045(g), every broker that is required to file a return under section 6045(a) from the sale of a covered security must include in the return the customer's adjusted basis in the security and whether any gain or loss with respect to that security is long-term or short-term.

Section 6045(g)(3)(A) provides that a "covered security" is any specified security acquired on or after the applicable date if the security (1) was acquired through a transaction in the account of which the security was held, or (2) was transferred to that account from an account in which the security was a covered security, but only if the transferee broker received a statement under section 6045A (described below) with respect to the transfer. Section 6045(g)(3)(B) provides that a "specified security" is: (1) any share of stock in a corporation (including stock of a regulated investment company); (2) any note, bond, debenture, or other evidence of indebtedness; (3) any commodity, or a contract or a derivative with respect to the commodity, if the Secretary determines that adjusted basis reporting is appropriate; and (4) any other financial instrument with respect to which the Secretary determines that adjusted basis reporting is appropriate. In the case of a short sale, section 6045(g)(5) provides that gross proceeds and basis reporting under section 6045 generally is required in the year in which the short sale is closed (rather than, as under the present law rule for gross proceeds reporting, the year in which the short sale is entered into). In addition, section

6045(h) provides that gross proceeds and basis reporting is required when there is a lapse of, or a closing transaction with respect to, an option on a specified security or an exercise of a cash-settled option on a specified security.

For stock in a corporation (other than stock in a regulated investment company or stock acquired in connection with a dividend reinvestment plan), section 6045(g)(3)(C)(i) provides that the applicable date is January 1, 2011. For stock in a regulated investment company or stock acquired in connection with a dividend reinvestment plan (for which additional rules are described below), section 6045(g)(3)(C)(ii) provides that the applicable date is January 1, 2012. For any other specified security, section 6045(g)(3)(C)(iii) provides that the applicable date is January 1, 2013, or such later date as determined by the Secretary. The reporting rules related to options transactions apply only to options granted or acquired on or after January 1, 2013, as provided in section 6045(h)(3).

The customer's adjusted basis required to be reported is determined under the following rules. Under section 6045(g)(2)(B)(i)(I), the adjusted basis of any security (other than stock in a regulated investment company or stock acquired in connection with a dividend reinvestment plan) is determined under the first-in first-out method unless the customer notifies the broker by means of making an adequate identification of the stock sold or transferred at the time of sale. Under section 6045(g)(2)(B)(i)(II), the adjusted basis of stock in a regulated investment company or stock acquired in connection with a dividend reinvestment plan is determined in accordance with the broker's default method under section 1012 unless the customer notifies the broker that

the customer elects another permitted method.

For any sale, exchange, or other disposition of a specified security on or after the applicable date, section 1012(c) provides that the conventions prescribed by regulations under section 1012 for determining adjusted basis (the first-in first-out, specific identification, and average basis conventions) apply on an account-by-account basis. Section 1012(c)(2) allows a regulated investment company, however, to elect (at the time and in the form and manner prescribed by the Secretary), on a stockholder-by-stockholder basis, to treat as covered securities all stock in the company held by the stockholder without regard to when the stock was acquired. When this election applies, the average basis of a customer's regulated investment company stock is determined by taking into account shares of stock acquired before, on, and after January 1, 2012. A similar election is allowed for any broker holding stock in a regulated investment company as a nominee of the beneficial owner of the stock.

If stock is acquired on or after January 1, 2011, in connection with a dividend reinvestment plan, section 1012(d)(1) provides that the basis of that stock is determined under one of the basis computation methods permissible for stock in a regulated investment company. Accordingly, an average cost method may be used for determining the basis of stock acquired in connection with a dividend reinvestment plan. Section 1012(d)(4)(A) provides that a dividend reinvestment plan is any arrangement under which dividends on stock are reinvested in stock identical to the stock with respect to which the dividends are paid. Section 1012(d)(4)(B) further provides that stock is treated as acquired in connection with a dividend reinvestment plan if the stock

is acquired pursuant to the plan or if the dividends paid on the stock are subject to the plan. Under section 1012(d)(3), in determining basis under this rule, the account-by-account rules of section 1012(c), including the election available to regulated investment companies, apply. The special rule for stock acquired in connection with a dividend reinvestment plan, however, applies only while the stock is held as part of the plan. If stock to which this rule applies is transferred to another account, section 1012(d)(2) provides that the stock will have a cost basis in that other account equal to its basis in the dividend reinvestment plan immediately before the transfer (with any proper adjustment for charges incurred in connection with the transfer). After the transfer, however, the transferee broker may use the otherwise applicable convention (that is, the first-in first-out method or the specific identification method) for determining which shares are sold when a sale is made of some but not all shares of a particular security.

Section 6045(g)(2)(B)(ii) provides that, unless the Secretary provides otherwise, a customer's adjusted basis in a covered security generally is determined without taking into account the effect on basis of the wash sale rules of section 1091 unless the acquisition and sale transactions resulting in a wash sale occur in the same account and are in identical securities (rather than substantially identical securities).

Section 6045(g)(4) provides that, for purposes of section 6045, an S corporation (other than a financial institution) is treated in the same manner as a partnership. This rule applies to any sale of a covered security acquired by an S corporation (other than a financial institution) after December 31, 2011. It is expected that, when this rule takes effect, brokers generally will be required to report gross proceeds and basis information

to customers that are S corporations.

The Act also amended section 6045(b) to extend the deadline from January 31 to February 15 for furnishing certain information statements to customers, effective for statements required to be furnished after December 31, 2008. Section 6045(b) provides that the statements to which the new February 15 deadline applies are (1) statements showing gross proceeds (under section 6045(a)) or substitute payments (under section 6045(d)) and (2) statements with respect to reportable items (including, but not limited to, interest, dividends, and royalties) that are furnished with consolidated reporting statements (as defined in regulations). See Notice 2009-11, 2009-5 I.R.B. 420 (providing that, with respect to reportable items from calendar year 2008, brokers have until February 17, 2009, to report all items that they customarily report on their annual composite form recipient statements).

Under new section 6045A, a broker and any other person specified in Treasury regulations that transfers to a broker a security that is a covered security when held by that broker or other person must furnish to the transferee broker a written statement that allows the transferee broker to satisfy the basis and holding period reporting requirements of section 6045(g). Section 6045A(c) provides that, unless the Secretary provides otherwise, the statement required by this rule must be furnished to the transferee broker not later than fifteen days after the date of the transfer of the covered security.

Under new section 6045B, an issuer of specified securities must file a return according to forms or regulations prescribed by the Secretary setting forth a description

of any organizational action (such as a stock split or a merger or acquisition) that affects the basis of the specified security, the quantitative effect on the basis of that specified security, and any other information required by the Secretary. Section 6045B(b) provides that this return must be filed within forty-five days after the date of the organizational action or, if earlier, by January 15 of the year following the calendar year during which the action occurred.

Additionally, section 6045B(c) provides that the issuer must furnish, according to forms or regulations prescribed by the Secretary, to the nominee with respect to that security (or to a certificate holder if there is no nominee) a written statement showing (1) the name, address, and telephone number of the information contact of the person required to file the return, (2) the information required to be included on the return with respect to the security, and (3) any other information required by the Secretary. This statement must be furnished to the nominee or certificate holder on or before January 15 of the year following the calendar year in which the organizational action took place.

Section 6045B(e) provides that the Secretary may waive the return filing and information statement requirements if the person to which the requirements apply makes publicly available, in the form and manner determined by the Secretary, the name, address, telephone number, and e-mail address of the information contact of that person, and the information about the organizational action and its effect on basis otherwise required to be included in the return.

REQUEST FOR PUBLIC COMMENTS

The Treasury Department and the Service request comments on issues that

should be addressed in guidance implementing the new requirements with respect to the reporting of a customer's basis in securities transactions. The Treasury Department and the Service request specific comments regarding:

Applicability of Reporting Requirements

1. How to determine who is a "middleman" subject to the broker reporting and transfer reporting statement requirements and how to minimize duplication of reporting by multiple brokers;
2. Who, in addition to brokers, should be treated as "applicable persons" subject to the transfer reporting requirements;
3. Whether the issuer's classification of an instrument (e.g., as stock or debt) should determine which effective date applies;

Basis Method Elections

4. How to ensure that customers are adequately informed of the broker's default basis determination method and that brokers are adequately notified of a customer's election of a different acceptable method for an account;
5. How to facilitate customer elections of acceptable basis determination methods, including average cost basis, for an account to maximize customer flexibility and minimize broker burden;
6. Whether and under what circumstances a customer may elect to change from the average cost basis method to the first-in first-out or specific identification method and, if so, what cost basis rules and adjustments should apply;

7. What it means to apply the basis determination conventions on an “account-by-account” basis;

Dividend Reinvestment Plans

8. How to determine what qualifies as an “arrangement under which dividends on any stock are reinvested in stock identical to the stock with respect to which the dividends are paid” (that is, as a “dividend reinvestment plan”);

9. How to determine which stock qualifies as “acquired in connection with” a dividend reinvestment plan, for which the average cost basis method is available beginning in 2011, and to which the later effective date of 2012 for information reporting applies;

10. Whether and to what extent the average cost basis method applies to subsequent additions to dividend reinvestment plan accounts by purchase or transfer;

11. How to maximize the utility of the single-account election for stock acquired in connection with a dividend reinvestment plan or stock held in a regulated investment company, particularly where basis and holding period information for pre-effective date stock is weak or unclear;

Reconciliation with Customer Reporting

12. How to ensure that broker reporting on Form 1099-B and customer reporting on Schedule D of Form 1040 are maximally consistent, including whether brokers should report separately for securities subject to basis reporting or report the basis of securities that are not covered securities, for example, securities purchased by their customers prior to 2011;

13. How to ensure consistency between customers making specific identification of securities sold or transferred and broker reporting;
14. How to ensure that reconciliation is possible if broker reporting should differ from customer reporting;
15. Whether customers, after a sale, may identify or change the identification of specific stock sold and, if so, for what period of time or by what deadline;

Special Rules and Mechanical Issues

16. The scope of the wash sales exception, including the definition of “identical securities” (including identical options), the wash-sale period, and any de minimis or other exceptions;
17. How to apply the rules for basis reporting of options;
18. Whether rules, including transition rules, are required to address the change in timing for reporting of short sales from the date the short sale is entered into to the date the short sale closes;
19. How to address mechanical issues relating to the computation of basis, such as adjustments for debt securities (for example, as a result of original issue discount, market discount, acquisition premium, or bond premium), gift-related adjustments, death-related adjustments, section 1043 basis rollovers, regulated investment company and real estate investment trust distributions representing return of capital, regulated investment company load adjustments, and the mark-to-market method of accounting for securities;

20. What, if any, translation conventions or computation adjustments should be allowed when securities are purchased with foreign currency in an account subject to United States taxation at the time of purchase or in an account that later becomes subject to United States taxation, for example, when an owner of securities becomes a United States citizen;

Transfer Reporting

21. What information about the transferring person, the customer, the security transferred, and the underlying lots should be required on the transfer reporting statements;

22. Whether fifteen days is the proper period for furnishing transfer reporting statements, and under what circumstances a different time period, if any, should apply;

23. Whether the basis determination rules and customer elections governing sales of securities should apply equally to transfers of securities, for example, when a customer transfers some, but not all, holdings of a security to another broker;

24. Whether electronic transfer reporting may be appropriate and, if so, whether a common format should apply;

25. Whether brokers and transferring parties may utilize reporting services of third-party intermediaries to meet their transfer reporting requirements;

26. Whether the transferring person should communicate any information or justification to the transferee broker when no transfer reporting statement is required because the security is not a covered security;

Issuer Reporting

27. What information about the issuer and organizational action should be required on the issuer returns and reporting statements;
28. How to maximize the timeliness of issuer returns and statements and promote public reporting by issuers in lieu of return filing;
29. How to account for basis-changing organizational actions by foreign issuers of securities to the extent that foreign issuers are not subject to the issuer reporting requirements;
30. How to coordinate broker transfer reporting with issuer corporate action reporting to avoid duplicate broker adjustments when accounts are transferred and whether a universal timing standard should apply;

Broker Practices and Procedures

31. To what extent a broker should verify the reasonableness of basis information and what document retention requirements should apply;
32. What procedures a broker should follow if the broker derives basis and holding period information for or from customers with respect to a security that is not a covered security, including potential reporting of such information to either the customer or the Service;
33. What procedures a transferee broker should follow if the broker does not receive a transfer reporting statement;

34. What procedures a transferee broker should follow if the broker receives transfer reporting information with respect to a security that is not a covered security, or from a transferor who is not subject to the transfer reporting requirements;
35. What procedures a broker should follow with respect to basis adjustments if an issuer report on a corporate action is insufficient or untimely; and
36. Under what circumstances penalties may apply to brokers or other reporting entities and when relief from penalties should be available.

Interested parties are invited to submit comments on this notice by Monday, March 2, 2009. Written comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2009-17), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Alternatively, comments may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m. Monday to Friday to CC:PA:LPD:PR (Notice 2009-17), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, D.C. Comments may also be transmitted electronically via the following e-mail address: Notice.Comments@irs.counsel.treas.gov. Please include "Notice 2009-17" in the subject line of any electronic communications. All comments will be available for public inspection and copying.

The principal author of this notice is Stephen Schaeffer of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this notice, please contact Stephen Schaeffer at (202) 622-4910 (not a toll-free call).