

## **HIGHLIGHTS OF THIS ISSUE**

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

### **SPECIAL ANNOUNCEMENT**

#### **Announcement 2003-49, page 339.**

**Annual accounting periods; approval.** This announcement discusses some of the changes that the Service and Treasury Department have made in finalizing procedures for certain individuals to obtain the automatic approval of the Commissioner to change their annual accounting period to a calendar year.

### **INCOME TAX**

#### **Rev. Rul. 2003-84, page 289.**

**Regulated investment company (RIC).** This ruling provides that, for purposes of qualifying as a regulated investment company (RIC) under the tax law, a RIC shall treat its investment in refunded bonds as an investment in government securities, to the extent that the acquisition of the refunded bonds would be treated under Rule 5b-3 under the Investment Company Act of 1940 as an acquisition of the Government securities placed in escrow to fund payment of principal and interest on the refunded bonds.

#### **Rev. Rul. 2003-86, page 290.**

**Noncustomary services provided to REIT tenants by a joint venture between a taxable REIT subsidiary and an independent contractor.** This ruling provides that a joint venture between a taxable REIT subsidiary and an independent contractor to provide noncustomary services to REIT tenants will not cause rents paid by tenants to fail to qualify as "rents from real property" under section 856 of the Code.

#### **T.D. 9067, page 287.**

#### **REG-116914-03, page 338.**

Temporary and proposed regulations under section 83 of the Code clarify and amend existing regulations to address the transfers of compensatory stock options to related persons. The regulations provide that the transfer of a compensatory stock option to a related person will not be treated as an arm's length transaction for purposes of section 1.83-7 of the regulations.

#### **Notice 2003-50, page 295.**

This notice announces that regulations issued under section 269B of the Code will provide that a foreign corporation that is stapled to a domestic corporation will be treated as a domestic corporation for purposes of the definition of an includible corporation under section 1504(b) when applying sections 1.904(i)-1 and 1.861-11T(d)(6). Notice 89-94 modified.

#### **Notice 2003-52, page 296.**

This notice clarifies the application of section 911 of the Code to U.S. citizens and residents earning income in Iraq attributable to services performed by such individuals. As long as individuals whose activities in Iraq are permitted by a specific or general license issued by Treasury's Office of Foreign Assets Control, those individuals are not subject to the limitations of section 911(d)(8)(A).

(Continued on the next page)

Announcement of Declaratory Judgment Proceedings Under Section 7428 begins on page 345.

Announcements of Disbarments and Suspensions begin on page 339.

Finding Lists begin on page ii.



**Rev. Proc. 2003–64, page 306.**

This procedure contains the final withholding foreign partnership (WP) and withholding foreign trust (WT) agreements. The WP and WT agreements are designed to simplify withholding and reporting obligations for payments of income made to foreign partnerships and foreign simple or grantor trusts. This procedure also contains rules regarding withholding and reporting on certain small or related foreign partnerships and foreign simple or grantor trusts that do not enter into WP or WT agreements. Section III.C. of Notice 2001–4 superseded for 2004 and subsequent calendar years. Rev. Proc. 2000–12 modified.

## EMPLOYEE PLANS

**Rev. Rul. 2003–85, page 291.**

**Excise tax; terminating defined benefit plan; reversion.**

This ruling describes the treatment of a transfer from a terminating defined benefit plan to a defined contribution plan of an amount that is in excess of 25 percent of the potential amount otherwise available for reversion.

**Rev. Rul. 2003–88, page 292.**

**Section 4971; running of statute of limitations; and filing of form.** This ruling states that the filing of a Form 5330, and not the filing of a Form 5500, starts the running of the statute of limitations with respect to the excise taxes described in section 4971 of the Code.

**Notice 2003–49, page 294.**

**EGTRRA; employee plans' user fees.** This notice describes when a plan's EGTRRA remedial amendment period under section 401(b) of the Code is considered to begin for purposes of determining if a determination letter application is exempt from user fees. Notice 2002–1 amplified.

## EXEMPT ORGANIZATIONS

**Announcement 2003–52, page 345.**

Hispanic Association of Lucent Technologies Employees, Inc., of Naperville, IL, no longer qualifies as an organization to which contributions are deductible under section 170 of the Code.

## ADMINISTRATIVE

**Rev. Proc. 2003–61, page 296.**

This procedure provides guidance for taxpayers seeking equitable relief from income tax liability under section 66(c) or section 6015(f) of the Code. Rev. Proc. 2000–15 superseded.

**Rev. Proc. 2003–62, page 299.**

**Changes in accounting periods; automatic approval for individuals.** Procedures are provided by which certain individuals may obtain automatic approval of the Commissioner to change their annual accounting period under section 442 of the Code to the calendar year. Rev. Proc. 66–50 modified, amplified, and superseded, and Rev. Proc. 81–40 modified and superseded.

**Rev. Proc. 2003–63, page 304.**

**Depreciation of cable television distribution systems.**

This procedure provides a safe harbor method under which the Service will treat a node and fiber optic cable used in a cable television distribution system providing one-way and two-way communication services as the unit of property for computing depreciation under sections 167 and 168 of the Code. Rev. Proc. 2002–9 modified and amplified.

**Rev. Proc. 2003–65, page 336.**

**REIT loans; real estate asset; interest.** This procedure sets forth a safe harbor under which a loan made by a real estate investment trust (REIT) that is secured either by a partnership interest in a partnership or by the sole membership interest in a disregarded entity will be treated as a real estate asset for purposes of sections 856(c)(4)(A) and 856(c)(5)(B) of the Code and the interest on the loan will be treated as interest on an obligation secured by a mortgage on real property or on an interest in real property for purposes of section 856(c)(3).

# The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

## Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are consolidated semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations,

court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

### **Part I.—1986 Code.**

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

### **Part II.—Treaties and Tax Legislation.**

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

### **Part III.—Administrative, Procedural, and Miscellaneous.**

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

### **Part IV.—Items of General Interest.**

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The first Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the first Bulletin of the succeeding semiannual period, respectively.

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# Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

## Section 66.—Treatment of Community Income

26 CFR 1.66-4(b): *Equitable relief from the federal income tax liability resulting from the operation of community property law.*

This revenue procedure provides guidance for taxpayers seeking equitable relief from income tax liability under section 66(c) or section 6015(f). See Rev. Proc. 2003-61, page 296.

## Section 83.—Property Transferred in Connection With Performance of Services

T.D. 9067

### DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

#### Transfers of Compensatory Options

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains regulations that provide rules governing transfers of certain compensatory stock options (nonstatutory stock options). The regulations affect persons who have been granted nonstatutory stock options, as well as service recipients who may be entitled to deductions related to the options. The text of the temporary regulations also serves as the text of the proposed regulations (REG-116914-03) on this subject in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective July 2, 2003.

*Applicability Dates:* For dates of applicability, see §§1.83-7(d) and 1.83-7T(d).

FOR FURTHER INFORMATION CONTACT: Stephen Tackney (202) 622-6030 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

#### Background

These regulations amend 26 CFR part 1. Section 83 of the Internal Revenue Code (Code) provides that if, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of (1) the fair market value of the property (determined without regard to lapse restrictions) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over (2) the amount (if any) paid for such property, is included in the gross income of the service provider in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture.

Section 83(e)(4) provides that section 83 does not apply to the transfer of property pursuant to the exercise of an option with a readily ascertainable fair market value at the date of grant.

Section 83(e)(3) provides that section 83 does not apply to the transfer of an option without a readily ascertainable fair market value. Under §1.83-7(a), section 83 generally applies to the transfer of the property subject to the option at the time of exercise.

Section 1.83-7(a) further provides that section 83 applies to the transfer of money or other property received upon the sale or disposition in an arm's length transaction of an option without a readily ascertainable fair market value at the time of grant.

Recent transactions promoted by certain parties have raised issues concerning when a transfer of an option to a related person, typically a family member or an entity a substantial interest in which is owned by the option holder or family members, is an arm's length transaction. See Notice 2003-47, 2003-30 I.R.B. 132. The determination of whether a transfer to a related person is an arm's length transaction requires scrutiny of the facts and circumstances surrounding the transfer. Furthermore, if conducted under the terms promoted, Treasury and the IRS believe

these transfers will rarely constitute an arm's length transaction.

#### Explanation of Provisions

The regulations provide that a sale or other disposition of a nonstatutory stock option to a related person will not be treated as a transaction that closes the application of section 83 with respect to the option. For these purposes, a person is related to the service provider if (I) the person and the service provider bear a relationship to each other that is specified in section 267(b) or 707(b)(1), subject to the modifications (i) that "20 percent" is used in place of "50 percent" each place it appears in section 267(b) and section 707(b)(1) and (ii) that section 267(c)(4) is applied as if the family of an individual includes the spouse of any member of the family, or (II) the service provider and such person are engaged in trades or businesses under common control (within the meaning of section 52(a) and (b)); provided that a person is not related to the service provider if the person is the service recipient with respect to the option or the grantor of the option. The regulations do not alter the treatment of the sale or disposition of an option in an arm's length transaction with an unrelated person. In those circumstances, section 83 applies to the transfer of money or other property received in the exchange.

#### Special Analyses

It has been determined that these regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, these regulations are being submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

## Drafting Information

The principal author of these temporary regulations is Stephen Tackney of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

\* \* \* \* \*

## Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

### PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:  
*Authority:* 26 U.S.C. 7805 \* \* \*.

Par. 2. Section 1.83-7 is amended by adding paragraph (d) to read as follows:

#### *§1.83-7 Taxation of nonqualified stock options.*

\* \* \* \* \*

(d) *Effective dates.* This section applies for periods before July 2, 2003. For periods on or after July 2, 2003, see §1.83-7T.

Par. 3. Section 1.83-7T is added to read as follows:

#### *§1.83-7T Taxation of nonqualified stock options (Temporary).*

(a) *In general.* If there is granted to an employee or independent contractor (or beneficiary thereof) in connection with the performance of services, an option to which section 421 (relating generally to certain qualified and other options) does not apply, section 83(a) shall apply to such grant if the option has a readily ascertainable fair market value (determined in accordance with paragraph (b) of this section) at the time the option is granted. The person who performed such services realizes compensation upon such grant at the time and in the amount determined under section 83(a). If section 83(a) does not apply to the grant of such an option because the option does not have a readily ascertainable fair market value at the time of grant, sections 83(a) and 83(b) shall apply at the time the option is exercised or otherwise disposed of, even though the

fair market value of such option may have become readily ascertainable before such time. If the option is exercised, sections 83(a) and 83(b) apply to the transfer of property pursuant to such exercise, and the employee or independent contractor realizes compensation upon such transfer at the time and in the amount determined under section 83(a) or 83(b). If the option is sold or otherwise disposed of in an arm's length transaction, sections 83(a) and 83(b) apply to the transfer of money or other property received in the same manner as sections 83(a) and 83(b) would have applied to the transfer of property pursuant to an exercise of the option. The preceding sentence does not apply to a sale or other disposition of the option to a person related to the service provider that occurs on or after July 2, 2003. For this purpose, a person is related to the service provider if—

(1) The person and the service provider bear a relationship to each other that is specified in section 267(b) or 707(b)(1), subject to the modifications that the language “20 percent” is used instead of “50 percent” each place it appears in sections 267(b) and 707(b)(1), and section 267(c)(4) is applied as if the family of an individual includes the spouse of any member of the family; or

(2) The person and the service provider are engaged in trades or businesses under common control (within the meaning of section 52(a) and (b)); provided that a person is not related to the service provider if the person is the service recipient with respect to the option or the grantor of the option.

(b) and (c) For further guidance, see §1.83-7(b) and (c).

(d) *Effective dates.* This section applies on or after July 2, 2003. For dates before July 2, 2003, see §1.83-7.

Robert E. Wenzel,  
*Deputy Commissioner of  
Internal Revenue.*

Approved June 26, 2003.

Pamela F. Olson,  
*Assistant Secretary of the Treasury.*

(Filed by the Office of the Federal Register on July 1, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 2, 2003, 68 F.R. 39453)

## Section 167.—Depreciation

*26 CFR 1.167(a)-11: Depreciation based on class lives and asset depreciation ranges for property placed in service after December 31, 1970.*

A safe harbor method is provided under which the Service will treat a node and fiber optic cable used in a cable television distribution system providing one-way and two-way communication services as the unit of property for computing depreciation under sections 167 and 168 of the Internal Revenue Code. See Rev. Proc. 2003-63, page 304.

## Section 168.—Accelerated Cost Recovery System

A safe harbor method is provided under which the Service will treat a node and fiber optic cable used in a cable television distribution system providing one-way and two-way communication services as the unit of property for computing depreciation under sections 167 and 168 of the Internal Revenue Code. See Rev. Proc. 2003-63, page 304.

## Section 442.—Change of Annual Accounting Period

*26 CFR 1.442-1: Change of annual accounting period.*

What significant changes were made in finalizing Notice 2002-75, which provided proposed procedures for certain individuals to obtain automatic approval of the Commissioner to change their annual accounting period under section 442 to the calendar year. See Announcement 2003-49, page 339.

## Section 446.—General Rule for Methods of Accounting

*26 CFR 1.1446-1: General rule for methods of accounting.*

A safe harbor method is provided under which the Service will treat a node and fiber optic cable used in a cable television distribution system providing one-way and two-way communication services as the unit of property for computing depreciation under sections 167 and 168 of the Internal Revenue Code. See Rev. Proc. 2003-63, page 304.

## Section 481.—Adjustments Required by Changes in Method of Accounting

A safe harbor method is provided under which the Service will treat a node and fiber optic cable used in a cable television distribution system providing one-way and two-way communication services as the unit of property for computing depreciation under

## Section 851.—Definition of Regulated Investment Company

26 CFR 1.851-2: Limitations.  
(Also § 851(b)(3).)

**Regulated investment company (RIC).** This ruling provides that, for purposes of qualifying as a regulated investment company (RIC) under the tax law, a RIC shall treat its investment in refunded bonds as an investment in Government securities, to the extent that the acquisition of the refunded bonds would be treated under Rule 5b-3 under the Investment Company Act of 1940 as an acquisition of the Government securities placed in escrow to fund payment of principal and interest on the refunded bonds.

### Rev. Rul. 2003-84

#### ISSUE

If one or more government securities have been placed in escrow to fund payment of principal and interest on a bond and if Rule 5b-3, 17 CFR 270.5b-3, under the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.* (“the 1940 Act”), would treat acquisition of the bond as an acquisition of a Government Security within the meaning of the 1940 Act, is the bond a government security for purposes of § 851(b)(3)?

#### FACTS

*R*, a domestic corporation, is registered under the 1940 Act as a diversified management company and elects to be treated as a RIC under subchapter M, part 1, of the Code. *R* invests primarily in bonds issued by states and municipalities.

*R* invests in certain bonds that, together with other bonds (collectively, the “refunded bonds”), have been refunded through a transaction in which Government Securities, as defined in § 2(a)(16) of the 1940 Act, were placed in escrow for the purpose of providing the funds needed to make all future payments of principal and interest on the refunded bonds. Pursuant to an agreement between the issuer of the refunded bonds and the escrow agent,

the deposit in escrow is irrevocable, and the Government Securities are pledged only to payment of the debt service of the refunded bonds. The escrow agreement prohibits any substitution for the deposited Government Securities unless the substituted securities are also Government Securities. Either the refunded bonds have received the highest rating from a nationally recognized statistical rating organization, or an independent certified public accountant has certified to the escrow agent that the escrowed securities will satisfy all scheduled payments of principal, interest, and applicable premiums on the refunded bonds.

Section 5(b)(1) of the 1940 Act imposes certain asset diversification requirements on diversified investment companies for purposes of the securities laws. To be classified as a diversified investment company under § 5(b)(1), a fund is required to invest at least 75 percent of its assets in cash and cash items, Government Securities, securities of other investment companies, and other securities generally limited in respect of any one issuer to an amount not greater than 5 percent of the value of its total assets and to not more than 10 percent of the outstanding voting securities of the issuer. The remaining 25 percent of the fund's assets may be invested in any manner.

Section 2(a)(16) of the 1940 Act defines the term Government Security for purposes of the 1940 Act as meaning—

[A]ny security issued or guaranteed as to principal or interest by the United States, or by a person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing.

15 U.S.C. 80a-2. The statute does not make any specific reference to refunded securities. Effective August 15, 2001, however, the term Refunded Security is defined, and the treatment of Refunded Securities is governed, by Rule 5b-3. See Securities and Exchange Commission (SEC) Release No. IC-25058, 66 FR 36156 (July 11, 2001). This rule applies if a fund acquires a Refunded Security, that is, a security the payment of which has been fully funded within the meaning of Rule 5b-3(c)(4) by escrowed Government Securities. “For purposes of section 5 of

the [1940] Act . . . , the acquisition of a Refunded Security is deemed to be an acquisition of the escrowed Government Securities.” Rule 5b-3(b). The effect of this Rule is that investments in Refunded Securities are treated as investments in Government Securities for purposes of the definition of a diversified investment company in section 5 of the 1940 Act.

#### LAW AND ANALYSIS

Section 851(b) provides that certain requirements must be satisfied in order for a domestic corporation to be taxed as a RIC under subchapter M, part I. Section 851(b)(3) imposes certain asset diversification requirements with respect to a corporation's total assets that must be satisfied as of the close of each quarter of the corporation's taxable year.

Section 851(b)(3)(A) requires that at least 50 percent of the value of a corporation's total assets must be represented by cash and cash items (including receivables), Government securities, securities of other RICs, and other securities generally limited in respect of any one issuer to an amount not greater in value than 5 percent of the value of the total assets of the corporation and to not more than 10 percent of the outstanding voting securities of such issuer.

Section 851(b)(3)(B) provides that not more than 25 percent of the corporation's total assets may be invested in the securities (other than Government securities and the securities of other RICs) of any one issuer, or of two or more issuers that the corporation controls and that are determined, under regulations, to be engaged in the same or similar trades or businesses or related trades or businesses.

Section 851(c)(5) provides that, for purposes of § 851(b)(3), all terms not specifically defined in § 851(c) shall have the same meaning as when used in the 1940 Act, as amended. The term “government security” is not specifically defined in § 851.

The RIC diversification rules of subchapter M are substantially similar in structure and purpose to those of the 1940 Act. Both sets of rules impose numerical limitations on the percentages and types of assets that may be held by an investment company. Both are intended to protect the investor from the risks of

loss and of illiquidity inherent in the concentration of assets in the securities of a single or a small number of issuers. See H.R. Rep. No. 2020, 86th Cong., 2d Sess. 820–26. In view of the commonality of structure and purpose of both sets of rules and in view of the need for RICs simultaneously to comply with both, the diversification provisions of the Code and those of the 1940 Act should be interpreted consistently.

As a result of Rule 5b–3(b), *R*'s investment in certain of the refunded bonds is treated as an investment in Government Securities for purposes of the diversification requirements under the 1940 Act. Accordingly, for each calendar quarter the end of which occurs after the refunding transaction that created the escrow deposit, the refunded bonds are government securities for purposes of § 851(b)(3), regardless of whether the RIC acquired the refunded bonds before or after that refunding transaction.

## HOLDING

For purposes of applying the diversification requirements under § 851(g)(3), a RIC's investment in refunded bonds is an investment in government securities to the extent that an acquisition of the refunded bonds would be treated by Rule 5b–3 as an acquisition of the Government Securities that were deposited in the escrow for the bonds.

## DRAFTING INFORMATION

The principal author of this revenue ruling is Susan Thompson Baker of the Office of the Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue ruling, contact her at (202) 622–3940 (not a toll-free call).

## Section 856.—Definition of Real Estate Investment Trust

If a taxable REIT subsidiary of a REIT and an independent contractor from whom the REIT does not derive income from a joint venture to provide noncustomary services to tenants of the REIT, will rents paid to the REIT by tenants fail to qualify as "rents from real property" under section 856 of the Code. See Rev. Rul. 2003-86, page 290.

26 CFR 1.856–3: Definitions relating to real estate investment trusts.

26 CFR 1.856–5: Treatment of interest by real estate investment trusts.

26 CFR 301.7701–3: Classification of certain business entities.

If a REIT under certain circumstances makes a loan that is secured either by a partnership interest in a partnership or by the sole membership interest in a disregarded entity, how will the loan and interest be treated under section 856? See Rev. Proc. 2003-65, page 336.

26 CFR 1.856–4: Rents from Real Property.

**Noncustomary services provided to REIT tenants by a joint venture between a taxable REIT subsidiary and an independent contractor.** This ruling provides that a joint venture between a taxable REIT subsidiary and an independent contractor to provide noncustomary services to REIT tenants will not cause rents paid by tenants to fail to qualify as "rents from real property" under section 856 of the Code.

## Rev. Rul. 2003–86

### ISSUE

If a joint venture partnership between a taxable REIT subsidiary (TRS) of a real estate investment trust (REIT) and a corporation that qualifies as an independent contractor of the REIT under § 856(d)(3)(B) of the Internal Revenue Code provides noncustomary services to tenants of the REIT in the situation described below, will rents paid by the tenants to the REIT fail to qualify as rents from real property under § 856(d)?

### FACTS

*R* is a corporation that has elected and qualifies to be treated as a REIT under subchapter M of Chapter 1 of the Code. *R* owns and operates rental apartment properties in several major metropolitan areas. In 2002, *R* formed a wholly owned corporation, *T*, to provide services to tenants of its properties. *R* and *T* filed Form 8875 to jointly elect for *T* to be treated as a TRS of *R* effective as of the date of *T*'s formation. The services provided to tenants by *T* are services that are not customarily provided to tenants of rental apartment properties in the metropolitan areas in which *R*'s properties are located.

*X* is a corporation unrelated, either directly or indirectly, to either *R* or *T*. *X* qualifies as an independent contractor under § 856(d)(3)(B). *X* provides various services to *R*'s tenants and tenants of other rental apartments in the areas where *R*'s properties are located. The services provided by *X* are noncustomary in the areas where *R*'s properties are located and are primarily for the convenience of tenants.

*X* and *T* formed *P*, which is treated as a partnership for federal income tax purposes, to provide the noncustomary services that formerly were separately provided to *R*'s tenants by either *X* or *T*. *X* and *T* made equal capital contributions to *P*. *X* and *T* share in all items of *P*'s income, gain, loss, and deduction in proportion to their capital contributions. *R*'s tenants contract directly with *P* for services. *R* does not receive any payments related to the services from *P*, *X* or tenants. *R* receives quarterly dividends from *T*.

## LAW AND ANALYSIS

To qualify as a REIT, an entity must derive at least 95 percent of its gross income from sources listed in § 856(c)(2) and at least 75 percent of its gross income from sources listed in § 856(c)(3). "Rents from real property" are among the sources listed in both of those sections. Section 856(d)(1) defines rents from real property to include rents from interests in real property, charges for services customarily rendered in connection with the rental of real property, and rent attributable to certain leased personal property. However, § 856(d)(2)(C) excludes "impermissible tenant service income" from the definition of rents from real property.

Section 856(d)(7)(A) defines "impermissible tenant service income" to include, with respect to any real or personal property, any amount received or accrued directly or indirectly by a REIT for services furnished or rendered by the REIT to tenants of the property. Section 856(d)(7)(B) provides that if impermissible tenant service income from a property for any tax year exceeds 1 percent of all amounts received or accrued directly or indirectly by the REIT during the tax year from the property, the impermissible tenant service income from the property shall include all amounts received or accrued from the property for the tax year.

Section 856(d)(7)(C)(i) provides that services furnished or rendered through a TRS or an independent contractor from whom the REIT does not derive or receive any income are not treated as furnished, rendered, or provided by the REIT for purposes of § 856(d)(7)(A). Thus, services rendered by a TRS do not give rise to impermissible tenant service income, and services rendered by an independent contractor do not give rise to impermissible tenant service income if the REIT does not receive or derive income from the independent contractor.

*R*'s tenants contract directly with *P* to perform noncustomary services. Thus, *R* does not receive directly any payments related to the services from *P*. Also, *R* does not directly or indirectly receive income from *X*, an independent contractor. *T* is entitled to its share of income from the performance of services in proportion to its interest in *P*, and *R* may indirectly receive this income in the form of dividends from *T*. Under § 856(d)(7)(A), amounts received directly or indirectly by a REIT for services furnished or rendered to tenants constitute impermissible tenant service income. However, § 856(d)(7)(C)(i) provides an exception for services furnished or rendered through a TRS. *R*'s only interest in *P* is through *T*, which is a TRS. Accordingly, the services provided by *P* are treated as provided by *T* to the extent of *T*'s interest in *P*. Therefore, *R* will not be treated as providing impermissible tenant services to its tenants.

#### HOLDING

Under the circumstances described above, a joint venture partnership between a TRS of a REIT and a corporation that qualifies as an independent contractor of the REIT under § 856(d)(3)(B) may provide noncustomary services to tenants of the REIT without causing the rents paid by the tenants to the REIT to fail to qualify as rents from real property under § 856(d).

#### DRAFTING INFORMATION

The principal author of this revenue ruling is Jonathan D. Silver of the Office of

Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue ruling, contact Mr. Silver at (202) 622-3920 (not a toll-free call).

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### Section 4971.—Taxes on Failure to Meet Minimum Funding Standards

Whether the filing of a Form 5330 or the filing of a Form 5500 starts the running of the statute of limitations within the meaning of section 6501 of the Internal Revenue Code with respect to the excise taxes described in section 4971. See Rev. Rul. 2003-88, page 292.

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### Section 4980.—Tax on Reversion of Qualified Plan Assets to Employer

**Excise tax; terminating defined benefit plan; reversion.** This ruling describes the treatment of a transfer from a terminating defined benefit plan to a defined contribution plan of an amount that is in excess of 25 percent of the potential amount otherwise available for reversion.

#### Rev. Rul. 2003-85

#### ISSUE

If a defined benefit plan is terminated, and an amount in excess of 25 percent of the maximum amount otherwise available for reversion is transferred from the terminating defined benefit plan to a defined contribution plan, what is the tax treatment of the amount transferred to the defined contribution plan and of any reversion to the employer from the terminating defined benefit plan?

#### FACTS

Company M maintains Plan A, a defined benefit plan qualified under § 401(a) of the Internal Revenue Code. On March 1, 2002, the Board of Directors of Company M adopted resolutions to terminate Plan A, effective July 1, 2002, and to adopt Plan B, a defined contribution plan. Company M did not amend Plan A in connection with the termination of the plan to provide for any increases in the accrued benefits of the participants.

All employees of Company M are eligible to participate in Plan B upon attainment of age 21 and completion of 1 year of service. Of the 1,000 participants with accrued benefits under Plan A that remained as employees of Company M as of July 1, 2002 (the termination date of Plan A), 95 percent were participants in Plan B on that date.

After satisfaction of all liabilities of Plan A, Company M could have received a reversion of \$60X of surplus assets (determined without regard to § 4980(d)). After satisfaction of all the plan liabilities and before taking a reversion of the surplus assets under Plan A, Company M transferred \$20X to Plan B. Plan B provides for the receipt and immediate allocation of excess assets in the form of a direct transfer from the terminating Plan A. The allocation of the excess assets will satisfy the requirements of §§ 401(a)(4) and 415.

#### LAW

Section 61 defines gross income as all income from whatever source derived (subject to certain exceptions). Section 111(a) provides that gross income does not include income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of the tax imposed by sections 1 through 1400L.

Section 4980(a) provides for a 20 percent excise tax on the amount of any reversion from a qualified plan. Section 4980(d)(1) provides, in pertinent part, that the excise tax under § 4980(a) is increased to 50 percent with respect to any employer reversion from a qualified plan unless the employer establishes or maintains a qualified replacement plan or the plan provides *pro rata* benefit increases described in § 4980(d)(3).

Section 4980(c)(2) generally defines "employer reversion" as the amount of cash and the fair market value of other property received (directly or indirectly) by an employer from the qualified plan.

Under § 4980(d)(2), a plan is a "qualified replacement plan" if it is established or maintained by the employer in connection with a qualified plan termination (replacement plan) and certain additional requirements are met. Under § 4980(d)(2)(A), in



order for the replacement plan to be a qualified replacement plan, at least 95 percent of the active participants in the terminated plan who remain as employees of the employer after the termination are active participants in the replacement plan. Section 4980(d)(2)(C) provides rules for the allocation of the amount transferred.

Under § 4980(d)(2)(B), in order for the replacement plan to be a qualified replacement plan, a direct transfer must be made from the terminated plan to the replacement plan before any employer reversion, and the transfer must be in an amount equal to the excess (if any) of (I) 25 percent of the maximum amount the employer could receive as an employer reversion (determined without regard to § 4980(d)) over (II) the present value of the aggregate increases in the accrued benefits under the terminated plan of any participants or beneficiaries under a plan amendment which is adopted within 60 days before the plan termination and which takes effect immediately upon plan termination.

Section 4980(d)(2)(B)(iii) provides that, in the case of any amount transferred under § 4980(d)(2)(B)(i) from a terminated plan to a qualified replacement plan, such amount (I) shall not be includible in the gross income of the employer, (II) no deduction shall be allowable with respect to such transfer, and (III) such transfer shall not be treated as an employer reversion for purposes of § 4980.

## HOLDINGS

1. Plan B is a qualified replacement plan for purposes of § 4980(d).

2. In accordance with § 4980(d)(2)(B)(iii), the direct transfer from Plan A to Plan B of \$20X, an amount that is at least 25 percent of the maximum amount which the employer could receive as an employer reversion, is treated as follows:

(a) the amount transferred is not includible in the gross income of the employer,

(b) no deduction is allowable with respect to the amount transferred, and

(c) the amount transferred is not treated as an employer reversion for purposes of § 4980.

3. The \$40X that the employer receives is subject to the 20 percent excise tax under § 4980(a) and is includible in income under § 61.

## DRAFTING INFORMATION

The principal drafters of this revenue ruling are Steven Linder of the Employee Plans, Tax Exempt and Government Entities Division and Vernon Carter of the Office of the Division Counsel/Associate Chief Counsel (TEGE). For further information regarding this revenue ruling, please contact the Employee Plans' taxpayer assistance telephone service at 1-877-829-5500 (a toll-free number) between the hours of 8:00 a.m. and 6:30 p.m. Eastern Time, Monday through Friday. Mr. Linder may be reached at (202) 283-9888; Mr. Carter may be reached at (202) 622-6060. The telephone numbers in the preceding sentence are not toll-free.

## Section 6015.—Relief From Joint and Several Liability on a Joint Return

*26 CFR 1.6015-4: Equitable relief from joint and several liability.*

This revenue procedure provides guidance for taxpayers seeking equitable relief from income tax liability under section 66(c) or section 6015(f). See Rev. Proc. 2003-61, page 296.

## Section 6501.—Limitations on Assessment and Collection

*(Also, § 4971.)*

**Section 4971; running of statute of limitations; and filing of form.** This ruling states that the filing of a Form 5330, and not the filing of a Form 5500, starts the running of the statute of limitations with respect to the excise taxes described in section 4971 of the Code.

## Rev. Rul. 2003-88

### ISSUE

What starts the running of the statute of limitations for purposes of the excise taxes imposed by § 4971 of the Internal Revenue Code on failure to satisfy the minimum funding standards of § 412?

## FACTS

Employer X maintains a defined benefit pension plan ("the Plan") qualified under § 401(a) that is subject to the requirements of § 412. The Plan has an accumulated funding deficiency under § 412 as of the end of the 2002 plan year. As a result, X is liable for the initial excise tax under § 4971(a) for failure to meet the minimum funding standards. Form 5500 is timely filed for the Plan for the 2002 plan year and the form discloses the amount of the accumulated funding deficiency. However, X fails to file Form 5330 to report the excise tax liability on the accumulated funding deficiency.

## LAW AND ANALYSIS

Section 4971 imposes excise taxes on the failure to satisfy the minimum funding standards of § 412. The amount of the taxes, for which the employer is liable, is related to the amount of an accumulated funding deficiency, as defined in § 412(a), and, in the case of a plan to which § 412(m)(5) applies, to the amount of an unpaid liquidity shortfall under § 4971(f). Although the determination of whether there is an accumulated funding deficiency is made at the end of the plan year, the tax on the accumulated funding deficiency is imposed for the taxable year (of the employer who maintains the plan) in which the plan year ends.

Section 6501(a) provides that, except as otherwise provided in that section, the amount of any tax imposed by Title 26 of the United States Code (which includes § 4971) shall be assessed within three years after the return was filed (whether or not the return was filed on or after the date prescribed), and no proceeding in court without assessment for the collection of the tax shall be begun after the expiration of that period. Section 6501(a) further provides that, for this purpose, the term "return" means the return required to be filed by the taxpayer.

However, there are exceptions to the three year rule in § 6501(a). Section 6501(e)(3) provides that, except as otherwise provided in § 6501(c), in the case of a return of a tax imposed under a provision of subtitle D (which includes § 4971), if the return omits an item of the tax properly includible thereon that exceeds 25 percent

of the amount of the tax reported thereon, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within six years after the return is filed. However, § 6501(e)(3) also provides that in determining the amount of tax omitted from the return, there shall not be taken into account any amount of tax imposed by chapter 43 (which includes § 4971) that is omitted from the return if the transaction giving rise to the tax is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the Treasury or his delegate of the existence and nature of the item.

Section 6501(c) provides several rules that take precedence over the provisions of § 6501(e)(3). Section 6501(c)(3) provides that in the case of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time. Also, § 6501(c)(4) provides that if both the taxpayer and the Secretary of the Treasury or his delegate have consented in writing before the expiration of the time prescribed in that section, the tax may be assessed at any time before the expiration of the period of extension.

Section 6058(a) requires employers that maintain certain funded plans of deferred compensation, including plans qualified under § 401(a), to file an annual information return. Section 301.6058-1(a)(1) of the Procedure and Administration Regulations provides that the annual return of the plan is the appropriate *Annual Return/Report of Employee Benefit Plan* (Form 5500 series). Section 54.6011-1(a) of the Excise Tax Regulations, however, requires any employer liable for tax under § 4971 to file Form 5330, *Return of Excise Taxes Related to Employee Benefit Plans*. Generally, filing a Form 5500 does not

start the § 6501 statute of limitations for assessment for taxes. Absent a specific statutory or regulatory exception, Form 5500 is not designated for the reporting of tax. Section 6501(l)(1) provides an exception for taxes imposed by § 4975. Section 6501(l)(1) states, in pertinent part, that for purposes of § 4975, the return to be used for purposes of starting the running of the statute of limitations on assessments shall be the return filed by the plan for the year in which the act giving rise to the liability occurred. No such exception exists for § 4971. Therefore, the general rule of § 6501(a) applies. The return used for purposes of the statute of limitations for § 4971 is Form 5330, as designated by § 54.6011-1(a). Disclosure of information on Form 5500 does not commence the running of the statute of limitations under § 6501 because only disclosure on the return required to report and pay the tax (Form 5330) is relevant.

If an accumulated funding deficiency or unpaid liquidity shortfall is disclosed on the Form 5330 or in an attached statement, the statute of limitations for collecting the tax imposed by § 4971 expires three years after the filing of the Form 5330 in which the deficiency or unpaid liquidity shortfall is disclosed. If an accumulated funding deficiency or unpaid liquidity shortfall is not disclosed on the Form 5330 or in a statement attached to the Form 5330, the statute of limitations on assessment is six years. However, either of these periods may be extended by a written agreement for an agreed-upon period of time. If Form 5330 has not been filed for a year in which an accumulated funding deficiency or unpaid liquidity shortfall occurs, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time after the date prescribed for filing the return.

In each case, the statute of limitations is determined without regard to whether the accumulated funding deficiency or unpaid liquidity shortfall has been disclosed on Form 5500.

#### HOLDING

The filing of Form 5330 starts the running of the statute of limitations for purposes of the excise taxes imposed by § 4971 on failure to satisfy the minimum funding standards of § 412. If an accumulated funding deficiency or unpaid liquidity shortfall is disclosed on Form 5330 or in an attached statement, the three-year statute of limitations of § 6501(a) applies. However, if the deficiency or unpaid liquidity shortfall is not disclosed on Form 5330 or in an attached statement, the six-year statute of limitations of § 6501(e)(3) applies. If Form 5330 is not filed for that year, § 6501(c)(3) permits the tax to be assessed at any time after the date prescribed for filing the return. Because X has failed to file Form 5330 to disclose the accumulated funding deficiency, the tax under § 4971 may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time.

#### DRAFTING INFORMATION

The principal author of this revenue ruling is James Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue ruling, please contact the Employee Plans' taxpayer assistance telephone service at 1-877-829-5500 (a toll-free number), between the hours of 8:00 a.m. and 6:30 p.m. Eastern time, Monday through Friday. Mr. Flannery may be reached at 1-202-283-9888 (not a toll-free number).

# Part III. Administrative, Procedural, and Miscellaneous

## Elimination of User Fees for Certain Determination Letter Requests Pursuant to Section 620 of the Economic Growth and Tax Relief Reconciliation Act of 2001

### Notice 2003-49

#### I. Purpose

This notice provides guidance on the application of section 620 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16 (EGTRRA), regarding elimination of user fees for certain determination letter requests. The guidance in this notice amplifies the guidance in Notice 2002-1, 2002-1 C.B. 283, by describing when the EGTRRA remedial amendment period begins for purposes of determining if a determination letter application is eligible for elimination of the user fee. The guidance in Notice 2002-1 and this notice will help a plan sponsor determine if it is required to pay a user fee for a determination letter application.

#### II. Background

Beginning January 1, 2002, section 620 of EGTRRA eliminated the requirement for payment of user fees for certain requests to the Internal Revenue Service for determination letters with respect to the qualified status of a pension, profit-sharing, stock bonus, annuity, or employee stock ownership plan maintained solely by one or more eligible employers<sup>1</sup> or the exempt status of any trust which is part of the plan. However, section 620 of EGTRRA did not eliminate user fees for any determination letter request made after the later of (a) the fifth plan year the plan is in existence or (b) the end of any remedial amendment period with respect to the plan beginning within the first 5 plan years.

Notice 2002-1 provides guidance on section 620 of EGTRRA, including guidance on who is an eligible employer, when a plan is in existence, and the types of determination letter requests that are eligible for elimination of the user fee. Notice 2002-1, Q&A-12, provides guidance on when the GUST<sup>2</sup> remedial amendment period begins for purposes of determining if a user fee is eliminated.

Notice 2001-42, 2001-2 C.B. 70, provides a remedial amendment period for EGTRRA ending no earlier than the end of the 2005 plan year. The EGTRRA remedial amendment period is available to plans that timely adopt good faith plan amendments for EGTRRA.

Rev. Proc. 2003-8, 2003-1 I.R.B. 236, provides guidance for complying with the Service's user fee program as it pertains to requests for determination letters on matters under the jurisdiction of the Commissioner, Tax Exempt and Government Entities (TE/GE). Form 8717, *User Fee for Employee Plan Determination Letter Request*, is used as an attachment to a determination letter application to transmit the payment of the required user fee or to certify exemption from the fee pursuant to section 620 of EGTRRA.

#### III. Beginning of EGTRRA Remedial Amendment Period for User Fee Purposes

For a defined contribution plan, the earliest date on which the plan's EGTRRA remedial amendment period could have begun is January 1, 2002. The first day of the 5-year period ending on January 1, 2002, is January 2, 1997. Thus, if a determination letter application for a defined contribution plan is filed within the plan's EGTRRA remedial amendment period, the application may be eligible for elimination of the user fee provided the plan was first in existence *after* January 1, 1997.

For a defined benefit plan, the earliest date on which the plan's EGTRRA remedial amendment period could have begun is January 2, 2001. (Although EGTRRA is generally effective for years beginning after December 31, 2001, section 611(a) of EGTRRA, which increased the defined benefit dollar limit under § 415 of the Code, is effective for limitation years ending after December 31, 2001. January 2, 2001, is the earliest date section 611(a) of EGTRRA could be effective for a plan and, thus, the earliest date on which a defined benefit plan's EGTRRA remedial amendment period could have begun.) The first day of the 5-year period ending on January 2, 2001, is January 3, 1996. Thus, if a determination letter application for a defined benefit plan is filed within the plan's EGTRRA remedial amendment period, the application may be eligible for elimination of the user fee provided the plan was first in existence *after* January 2, 1996.

The guidance in this notice amplifies but does not supersede the guidance in Notice 2002-1. Thus, pursuant to Q&A-12 of Notice 2002-1, if a determination letter application for a plan is filed within the plan's GUST remedial amendment period, the application may be eligible for elimination of the user fee provided the plan was first in existence *on or after* December 9, 1989.

#### IV. Effect on Other Documents

Notice 2002-1 is amplified.

#### DRAFTING INFORMATION

The principal drafter of this notice is James Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans' taxpayer assistance telephone service at 1-877-829-5500 between the hours of 8:00 a.m. and 6:30 p.m. Eastern

<sup>1</sup> In general, an employer is an eligible employer if the employer had (i) at least one employee who was not a highly compensated employee (within the meaning of § 414(q) of the Internal Revenue Code) and who participated in the plan for the plan year preceding the determination letter request, and (ii) no more than 100 employees who received at least \$5,000 of compensation from the employer for the calendar year preceding the request. See Q&A-5 through Q&A-10 of Notice 2002-1.

<sup>2</sup> The term "GUST" refers to the following:

- the Uruguay Round Agreements Act, Pub. L. 103-465;
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353;
- the Small Business Job Protection Act of 1996, Pub. L. 104-188;
- the Taxpayer Relief Act of 1997, Pub. L. 105-34;
- the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206; and
- the Community Renewal Tax Relief Act of 2000, Pub. L. 106-554.

Time, Monday through Friday (a toll-free number). Mr. Flannery may be reached at 1-202-283-9888 (not a toll-free number).

## Treatment of Foreign Stapled Entity Under Section 269B as Domestic for Purposes of Sections 904(i) and 864(e)

### Notice 2003-50

This notice modifies Notice 89-94, 1989-2 C.B. 416.

Section 269B provides that, except as provided in regulations, if a domestic corporation and a foreign corporation are stapled entities, the foreign corporation will be treated as a domestic corporation for U.S. income tax purposes. Section 269B(a)(1). Two entities are stapled entities if more than 50 percent in value of the beneficial ownership in each of such entities consists of stapled interests. Section 269B(c)(2). Interests are stapled interests if, by reason of form of ownership, restrictions on transfer, or other terms and conditions, in connection with the transfer of one of the interests the other interest is also transferred or required to be transferred. Section 269B(c)(3).

Notice 89-94 announced that regulations issued under section 269B will provide that a stapled foreign corporation, treated as a domestic corporation under section 269B(a)(1), will nevertheless be treated as a foreign corporation for purposes of the definition of an includible corporation under section 1504(b). Thus, losses of a stapled foreign corporation will not be allowed to offset income of any member of an affiliated group, unless a valid section 1504(d) election is in effect with respect to the stapled foreign corporation.

Section 904(i) provides that if two or more domestic corporations would be members of the same affiliated group if (i) section 1504(b) were applied without regard to the exceptions contained therein, and (ii) the constructive ownership rules of section 1563(e) applied for purposes of section 1504(a), the Secretary is authorized to issue regulations that provide for resourcing the income of any of such domestic corporations or for modifications to the consolidated return regulations to

the extent that such resourcing or modifications are necessary to prevent the avoidance of the provisions of this subpart (sections 901 to 908). Section 904(i) was enacted to prevent a consolidated group of corporations from manipulating its foreign tax credit limitation by utilizing techniques to disaffiliate a subsidiary. *See* H.R. Rep. No. 101-247, at 1292-93 (1989).

The regulations under section 904(i) provide that two includible corporations that are "affiliates" (as defined in § 1.904(i)-1(b)(1)) must consistently elect either to credit or to deduct foreign income taxes paid or accrued (or deemed paid) for the taxable year and require the affiliates to determine their foreign tax credit limitations on a combined basis. § 1.904(i)-1(a), (d). In order to be an "affiliate" under § 1.904(i)-1(b), a corporation must be an includible corporation under section 1504(b). *See* § 1.904(i)-1(b)(1)(i) and -1(b)(2).

Section 864(e)(1) requires the members of an affiliated group to allocate and apportion interest expense as if all members of the group were a single corporation. Section 864(e)(5) provides that, except for certain financial institutions, the term "affiliated group" has the same meaning as in section 1504 (determined without regard to section 1504(b)(4)). Section 864(e)(1) was enacted because Congress was concerned that the separate company approach for allocating and apportioning expenses did not reflect economic reality. Instead, consideration of the expenses of an entire group of corporations that file a consolidated income tax return is a more appropriate approach. In addition, Congress wanted to prevent an affiliated group from manipulating its foreign tax credit limitation by adjusting the location of borrowing within the affiliated group. H.R. Rep. No. 99-426, at 374-75 (1985); S. Rep. No. 99-313, at 346-47 (1986).

Sections 1.861-11 and 1.861-11T contain rules for allocating and apportioning interest expense of an affiliated group. For purposes of these rules, the definition of an "affiliated corporation" is expanded to include any "includible corporation" (as defined in section 1504(b) without regard to section 1504(b)(4)) if 80 percent of the vote or value of all the stock is owned directly or indirectly by an includible corporation or by members of an affiliated

group. § 1.861-11T(d)(6). This expanded definition was intended to prevent taxpayers from avoiding application of section 864(e)(1) through disaffiliation of one member or the creation of two affiliated groups.

Treasury and the IRS are aware that certain taxpayers have imposed transfer restrictions on the stock of an 80 percent or greater owned foreign corporation and taken the position that such stock is stapled to the stock of an 80 percent or greater owned domestic corporation. If the interests of the corporations are treated as stapled for purposes of section 269B, then although the foreign corporation generally is treated as a domestic corporation, Notice 89-94 announced that regulations will be issued that would treat it as a foreign corporation for purposes of the definition of an includible corporation under section 1504(b) and therefore not an includible corporation.

This notice announces that regulations issued under section 269B will provide that a foreign corporation that is stapled to a domestic corporation will be treated as a domestic corporation for purposes of the definition of an includible corporation under section 1504(b) when applying §§ 1.904(i)-1 and 1.861-11T(d)(6). The provisions of the regulations described in the preceding sentence will be effective for taxable years beginning after July 22, 2003. In the case of structures completed on or after July 22, 2003, such provisions will be effective for taxable years including July 22, 2003.

The IRS will continue to apply principles of existing law to determine whether interests are stapled for purposes of section 269B. For example, under a substance-over-form analysis, restrictions on transferability of ownership interests may be disregarded for tax purposes if the interests are held by the same person or related persons. Finally, Treasury and the IRS are considering issuing further guidance under section 269B, including guidance on situations where the interests of two or more entities are held by the same person or related persons.

### EFFECT ON OTHER NOTICES

Notice 89-94, 1989-2 C.B. 416, is modified.

## DRAFTING INFORMATION

The principal authors of this notice are Kenneth Allison and Bethany Ingwalson of the Associate Chief Counsel (International). However, other personnel from the IRS and Treasury participated in its development. For further information regarding this notice, contact Mr. Allison at (202) 622-3860 or Ms. Ingwalson at (202) 622-3850 (not toll-free calls).

## Guidance on the Application of Section 911 to U.S. Individuals Working in Iraq

### Notice 2003-52

This notice clarifies the application of section 911 of the Internal Revenue Code (the "Code") to U.S. citizens and residents earning income in Iraq attributable to services performed by such individuals.

Section 911(a) of the Code allows a "qualified individual" to elect to exclude from gross income his or her "foreign earned income" (as defined in section 911(b)) and "housing cost amount" (as defined in section 911(c)). Section 911(d)(1) generally defines a "qualified individual" as a citizen or resident of the United States whose tax home is in a foreign country and who meets certain requirements of residence or presence in a foreign country.

Section 911(d)(8)(A) of the Code provides generally that if travel with respect to any foreign country (or any transaction in connection with such travel) is proscribed by certain regulations during any period, then: (1) foreign earned income does not include income from sources within that country attributable to services performed during that period; (2) housing expenses do not include any expenses allocable to such period for housing in that country, or for housing of the taxpayer's spouse or dependents in another country while the taxpayer is present in that country; and (3) an individual is not treated as a *bona fide* resident of, or as present in, a foreign country for any day during which the individual was present in that country.

Section 911(d)(8)(B) of the Code provides that the regulations described in section 911(d)(8) are those promulgated pursuant to the Trading With the Enemy

Act, 50 U.S.C. App. 1 *et seq.*, or the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. 1701 *et seq.*, that include provisions generally prohibiting U.S. citizens and residents from engaging in transactions related to travel to, from, or within a foreign country. Section 911(d)(8)(C), however, provides that the limitations of section 911(d)(8)(A) do not apply to any individual during any period in which such individual's activities are not in violation of the regulations described in section 911(d)(8)(B).

In 1991, Treasury's Office of Foreign Assets Control ("OFAC") issued the Iraqi Sanctions Regulations, 31 C.F.R. part 575. The Iraqi Sanctions Regulations were issued pursuant to IEEPA, among other authorities. Specifically, 31 C.F.R. sec. 575.207 provides that "[e]xcept as otherwise authorized, no U.S. person may engage in any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq, or to activities by any U.S. citizen or permanent resident alien within Iraq," with narrow exceptions. Following promulgation of the Iraqi Sanctions Regulations, the Service issued Rev. Rul. 92-63, 1992-2 C.B. 195, which lists Iraq as one of the countries subject to the limitations under section 911(d)(8) of the Code.

In recent months, OFAC has issued several specific and general licenses that authorize individuals to engage in transactions related to travel to Iraq or to activities within Iraq. Pursuant to the terms of the Iraqi Sanctions Regulations, individuals whose activities in Iraq are permitted by a specific or general license issued by OFAC are not in violation of the Iraqi Sanctions Regulations with respect to the activities permitted by the license. 31 C.F.R. sec. 575.501(c). Accordingly, under section 911(d)(8)(C) of the Code, the limitations of section 911(d)(8)(A) do not apply to such individuals with respect to such licensed activities. Such individuals are eligible for the exclusion under section 911 of the Code provided that they meet the other requirements of that section.

For further information on this notice, contact Kate Hwa at (202) 622-3840 (not a toll-free call).

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.

(Also Part I, sections 66, 6015.)

## Rev. Proc. 2003-61

### SECTION 1. PURPOSE AND SCOPE

.01 *Purpose.* This revenue procedure provides guidance for a taxpayer seeking equitable relief from income tax liability under section 66(c) or section 6015(f) of the Internal Revenue Code (a "requesting spouse"). Section 4.01 of this revenue procedure provides the threshold requirements for any request for equitable relief. Section 4.02 of this revenue procedure sets forth the conditions under which the Internal Revenue Service ordinarily will grant equitable relief under section 6015(f) from an underpayment of income tax reported on a joint return. Section 4.03 of this revenue procedure provides a nonexclusive list of factors for consideration in determining whether relief should be granted under section 6015(f) because it would be inequitable to hold a requesting spouse jointly and severally liable for an underpayment of income tax on a joint return where the conditions of section 4.02 are not met, or for a deficiency. The factors in section 4.03 also will apply in determining whether to relieve a spouse from income tax liability resulting from the operation of community property law under the equitable relief provision of section 66(c).

.02 *Scope.* This revenue procedure applies to spouses who request either equitable relief from joint and several liability under section 6015(f), or equitable relief under section 66(c) from income tax liability resulting from the operation of community property law.

### SECTION 2. BACKGROUND

.01 Section 6013(d)(3) provides that married taxpayers who file a joint return under section 6013 will be jointly and severally liable for the income tax arising from that joint return. For purposes of section 6013(d)(3) and this revenue procedure, the term "tax" includes penalties, additions to tax, and interest. See sections 6601(e)(1) and 6665(a)(2).

.02 Section 3201(a) of the Internal Revenue Service Restructuring and Reform

Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 734 (RRA), enacted section 6015, which provides relief in certain circumstances from the joint and several liability imposed by section 6013(d)(3). Section 6015(b) and (c) specifies two sets of circumstances under which relief from joint and several liability is available. If relief is not available under section 6015(b) or (c), section 6015(f) authorizes the Secretary to grant equitable relief if, taking into account all the facts and circumstances, the Secretary determines that it is inequitable to hold a requesting spouse liable for any unpaid tax or any deficiency (or any portion of either). Section 66(c) provides relief from income tax liability resulting from the operation of community property law to taxpayers domiciled in a community property state who do not file a joint return. Section 3201(b) of RRA amended section 66(c) to add an equitable relief provision similar to section 6015(f).

.03 Section 6015 provides relief only from joint and several liability arising from a joint return. If an individual signs a joint return under duress, the election to file jointly is not valid and there is no valid joint return. The individual is not jointly and severally liable for any income tax liabilities arising from that return. Therefore, section 6015 does not apply.

.04 Under section 6015(b) and (c), relief is available only from a proposed or assessed deficiency. Section 6015(b) and (c) does not authorize relief from an underpayment of income tax reported on a joint return. Section 66(c) and section 6015(f) permit equitable relief for an underpayment of income tax. The legislative history of section 6015 provides that Congress intended for the Secretary to exercise discretion in granting equitable relief if a requesting spouse “does not know, and had no reason to know, that funds intended for the payment of tax were instead taken by the other spouse for such other spouse's benefit.” H.R. Conf. Rep. No. 105-599, at 254 (1998). Congress also intended for the Secretary to exercise the equitable relief authority under section 6015(f) in other situations if, “taking into account all the facts and circumstances, it is inequitable to hold an individual liable for all or part of any unpaid tax or deficiency arising from a joint return.” *Id.*

### SECTION 3. CHANGES

This revenue procedure supersedes Revenue Procedure 2000-15, changing the following:

.01 Section 4.01 of this revenue procedure adds a new threshold requirement under section 4.01(7).

.02 Section 4.03(2)(a)(iii) of this revenue procedure revises the weight given to the knowledge or reason to know factor.

.03 Section 4.04 of this revenue procedure broadens the availability of refunds if equitable relief is granted under section 66(c) or section 6015(f).

### SECTION 4. GENERAL CONDITIONS FOR RELIEF

.01 *Eligibility for equitable relief.* A requesting spouse must satisfy all of the following threshold conditions to be eligible to submit a request for equitable relief under section 6015(f). With the exception of conditions (1) and (2), a requesting spouse must satisfy all of the following threshold conditions to be eligible to submit a request for equitable relief under section 66(c). The Service may relieve a requesting spouse who satisfies all the applicable threshold conditions set forth below of all or part of the income tax liability under section 66(c) or section 6015(f), if, taking into account all the facts and circumstances, the Service determines that it would be inequitable to hold the requesting spouse liable for the income tax liability. The threshold conditions are as follows:

(1) The requesting spouse filed a joint return for the taxable year for which he or she seeks relief.

(2) Relief is not available to the requesting spouse under section 6015(b) or (c).

(3) The requesting spouse applies for relief no later than two years after the date of the Service's first collection activity after July 22, 1998, with respect to the requesting spouse. *See* Treas. Reg. § 1.6015-5(b)(2)(i) for the definition of collection activity.

(4) No assets were transferred between the spouses as part of a fraudulent scheme by the spouses.

(5) The nonrequesting spouse did not transfer disqualified assets to the requesting spouse. If the nonrequesting spouse transferred disqualified assets to the requesting spouse, relief will be available

only to the extent that the income tax liability exceeds the value of the disqualified assets. For this purpose, the term “disqualified asset” has the meaning given the term by section 6015(c)(4)(B).

(6) The requesting spouse did not file or fail to file the return with fraudulent intent.

(7) The income tax liability from which the requesting spouse seeks relief is attributable to an item of the individual with whom the requesting spouse filed the joint return (the “nonrequesting spouse”), unless one of the following exceptions applies:

(a) *Attribution solely due to the operation of community property law.* If an item is attributable or partially attributable to the requesting spouse solely due to the operation of community property law, then for purposes of this revenue procedure, that item (or portion thereof) will be considered to be attributable to the nonrequesting spouse.

(b) *Nominal ownership.* If the item is titled in the name of the requesting spouse, the item is presumptively attributable to the requesting spouse. This presumption is rebuttable. For example, H opens an individual retirement account (IRA) in W's name and forges W's signature on the IRA in 1998. Thereafter, H makes contributions to the IRA and in 2002 takes a taxable distribution from the IRA. H and W file a joint return for the 2002 taxable year, but do not report the taxable distribution on their joint return. The Service later proposes a deficiency relating to the taxable IRA distribution and assesses the deficiency against H and W. W requests relief from joint and several liability under section 6015. W establishes that W did not contribute to the IRA, sign paperwork relating to the IRA, or otherwise act as if W were the owner of the IRA. W thereby rebutted the presumption that the IRA is attributable to W.

(c) *Misappropriation of funds.* If the requesting spouse did not know, and had no reason to know, that funds intended for the payment of tax were misappropriated by the nonrequesting spouse for the nonrequesting spouse's benefit, the Service will consider granting equitable relief although the underpayment may be attributable in part or in full to an item of the requesting spouse. The Service will consider relief in this case only to the extent that the funds

intended for the payment of tax were taken by the nonrequesting spouse.

(d) *Abuse not amounting to duress.* If the requesting spouse establishes that he or she was the victim of abuse prior to the time the return was signed, and that, as a result of the prior abuse, the requesting spouse did not challenge the treatment of any items on the return for fear of the nonrequesting spouse's retaliation, the Service will consider granting equitable relief although the deficiency or underpayment may be attributable in part or in full to an item of the requesting spouse.

.02 *Circumstances under which the Service ordinarily will grant equitable relief under section 6015(f) with respect to underpayments on joint returns.*

(1) If an income tax liability reported on a joint return is unpaid, the Service ordinarily will grant equitable relief under section 6015(f) (subject to the limitations of paragraph (2) below) in cases in which all of the following elements are satisfied:

(a) On the date of the request for relief, the requesting spouse is no longer married to, or is legally separated from, the nonrequesting spouse, or has not been a member of the same household as the nonrequesting spouse at any time during the 12-month period ending on the date of the request for relief.

(b) On the date the requesting spouse signed the joint return, the requesting spouse had no knowledge or reason to know that the nonrequesting spouse would not pay the income tax liability. The requesting spouse must establish that it was reasonable for the requesting spouse to believe that the nonrequesting spouse would pay the reported income tax liability. If a requesting spouse would otherwise qualify for relief under this section, except for the fact that the requesting spouse's lack of knowledge or reason to know relates only to a portion of the unpaid income tax liability, then the requesting spouse may receive relief to the extent that the income tax liability is attributable to that portion.

(c) The requesting spouse will suffer economic hardship if the Service does not grant relief. For purposes of this revenue procedure, the Service will base its determination of whether the requesting spouse will suffer economic hardship on rules similar to those provided in Treas. Reg. § 301.6343-1(b)(4). After the requesting spouse is deceased, there can

be no economic hardship. See *Jonson v. Commissioner*, 118 T.C. 106, 126 (2002), appeal docketed, No. 02-9009 (10<sup>th</sup> Cir. May 24, 2002) (taxpayer appeal filed on other grounds).

(2) Relief under this section 4.02 is subject to the following limitation: If the Service adjusts the joint return to reflect an understatement of income tax, relief will be available only to the extent of the income tax liability shown on the joint return prior to the Service's adjustment.

.03 *Factors for determining whether to grant equitable relief.*

(1) *Applicability.* This section 4.03 applies to requesting spouses who did not file a joint return in a community property state, who request relief under section 66(c), and satisfy the applicable threshold conditions of section 4.01. This section 4.03 also applies to requesting spouses who filed a joint return, request relief under section 6015, and satisfy the threshold conditions of section 4.01, but do not qualify for relief under section 4.02.

(2) *Factors.* The following is a nonexclusive list of factors that the Service will consider in determining whether, taking into account all the facts and circumstances, it is inequitable to hold the requesting spouse liable for all or part of the unpaid income tax liability or deficiency, and full or partial equitable relief under section 66(c) or section 6015(f) should be granted. No single factor will be determinative of whether to grant equitable relief in any particular case. Rather, the Service will consider and weigh all relevant factors, regardless of whether the factor is listed in this section 4.03.

(a) Factors that may be relevant to whether the Service will grant equitable relief include, but are not limited to, the following:

(i) *Marital status.* Whether the requesting spouse is separated (whether legally separated or living apart) or divorced from the nonrequesting spouse. A temporary absence, such as an absence due to incarceration, illness, business, vacation, military service, or education, shall not be considered separation for purposes of this revenue procedure if it can be reasonably expected that the absent spouse will return to a household maintained in anticipation of his or her return. See Treas. Reg. § 1.6015-3(b)(3)(i) for the definition of a temporary absence.

(ii) *Economic hardship.* Whether the requesting spouse would suffer economic hardship (within the meaning of section 4.02(1)(c) of this revenue procedure) if the Service does not grant relief from the income tax liability.

(iii) *Knowledge or reason to know.*

(A) *Underpayment cases.* In the case of an income tax liability that was properly reported but not paid, whether the requesting spouse did not know and had no reason to know that the nonrequesting spouse would not pay the income tax liability.

(B) *Deficiency cases.* In the case of an income tax liability that arose from a deficiency, whether the requesting spouse did not know and had no reason to know of the item giving rise to the deficiency. Reason to know of the item giving rise to the deficiency will not be weighed more heavily than other factors. Actual knowledge of the item giving rise to the deficiency, however, is a strong factor weighing against relief. This strong factor may be overcome if the factors in favor of equitable relief are particularly compelling. In those limited situations, it may be appropriate to grant relief under section 66(c) or section 6015(f) even though the requesting spouse had actual knowledge of the item giving rise to the deficiency.

(C) *Reason to know.* For purposes of (A) and (B) above, in determining whether the requesting spouse had reason to know, the Service will consider the requesting spouse's level of education, any deceit or evasiveness of the nonrequesting spouse, the requesting spouse's degree of involvement in the activity generating the income tax liability, the requesting spouse's involvement in business and household financial matters, the requesting spouse's business or financial expertise, and any lavish or unusual expenditures compared with past spending levels.

(iv) *Nonrequesting spouse's legal obligation.* Whether the nonrequesting spouse has a legal obligation to pay the outstanding income tax liability pursuant to a divorce decree or agreement. This factor will not weigh in favor of relief if the requesting spouse knew or had reason to know, when entering into the divorce decree or agreement, that the nonrequesting spouse would not pay the income tax liability.

(v) *Significant benefit.* Whether the requesting spouse received significant benefit (beyond normal support) from the unpaid income tax liability or item giving rise to the deficiency. See Treas. Reg. § 1.6015-2(d).

(vi) *Compliance with income tax laws.* Whether the requesting spouse has made a good faith effort to comply with income tax laws in the taxable years following the taxable year or years to which the request for relief relates.

(b) Factors that, if present in a case, will weigh in favor of equitable relief, but will not weigh against equitable relief if not present in a case, include, but are not limited to, the following:

(i) *Abuse.* Whether the nonrequesting spouse abused the requesting spouse. The presence of abuse is a factor favoring relief. A history of abuse by the nonrequesting spouse may mitigate a requesting spouse's knowledge or reason to know.

(ii) *Mental or physical health.* Whether the requesting spouse was in poor mental or physical health on the date the requesting spouse signed the return or at the time the requesting spouse requested relief. The Service will consider the nature, extent, and duration of illness when weighing this factor.

*.04 Refunds.*

(1) *Deficiency cases.* In a case involving a deficiency, a requesting spouse is eligible for a refund of certain payments made pursuant to an installment agreement

that the requesting spouse entered into with the Service, if the requesting spouse has not defaulted on the installment agreement. Only installment payments made after the date the requesting spouse filed the request for relief are eligible for refund. Additionally, the requesting spouse must establish that he or she provided the funds for which he or she seeks a refund. For purposes of this revenue procedure, a requesting spouse is not in default if the Service did not issue a notice of default to the requesting spouse or take any action to terminate the installment agreement.

(2) *Underpayment cases.* In a case involving an underpayment of income tax, a requesting spouse is eligible for a refund of separate payments that he or she made after July 22, 1998, if the requesting spouse establishes that he or she provided the funds used to make the payment for which he or she seeks a refund. A requesting spouse is not eligible for refunds of payments made with the joint return, joint payments, or payments that the nonrequesting spouse made.

(3) *Other limitations.* The availability of refunds is subject to the refund limitations of section 6511.

**SECTION 5. PROCEDURE**

A requesting spouse seeking equitable relief under section 66(c) or section 6015(f) must file Form 8857, *Request for Innocent Spouse Relief (and Separation of Liability, and Equitable Relief)*, or other

similar statement signed under penalties of perjury, within two years of the first collection activity against the requesting spouse. See Treas. Reg. § 1.6015-5(b)(2)(i) for the definition of collection activity.

**SECTION 6. EFFECT ON OTHER DOCUMENTS**

Revenue Procedure 2000-15, 2000-1 C.B. 447, is superseded.

**SECTION 7. EFFECTIVE DATE**

This revenue procedure is effective for requests for relief filed on or after November 1, 2003. In addition, this revenue procedure is effective for requests for relief pending on November 1, 2003, for which no preliminary determination letter has been issued as of November 1, 2003.

**DRAFTING INFORMATION**

The principal author of this revenue procedure is Robin M. Tuczak of the Office of Associate Chief Counsel, Procedure and Administration (Administrative Provisions and Judicial Practice Division). For further information regarding this revenue procedure, contact Ms. Tuczak at (202) 622-4940 (not a toll-free call).

26 CFR 601.204: Changes in accounting periods and methods of accounting. (Also Part I, § 442; 1.442-1.)

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**SECTION 1. PURPOSE**

.01 This revenue procedure provides the exclusive procedure under § 442 of the Internal Revenue Code and § 1.442-1(b) of the Income Tax Regulations for individuals within its scope filing federal income tax returns on a fiscal year basis to obtain automatic approval to change their annual accounting period to a calendar year. This revenue procedure modifies, amplifies, and supersedes Rev. Proc. 66-50,

1966-2 C.B. 1260, and modifies and supersedes Rev. Proc. 81-40, 1981-2 C.B. 604. An individual that complies with all of the applicable provisions of this revenue procedure will be deemed to have established a business purpose and to have obtained the approval of the Commissioner of Internal Revenue to change the individual's annual accounting period to a calendar year under § 442 and the regulations thereunder.

**SECTION 2. BACKGROUND**

.01 *Taxable Year Defined.*

(1) *In general.* Section 441(b) and § 1.441-1(b)(1) provide that the term “taxable year” generally means the taxpayer's annual accounting period, if it is a calendar or fiscal year, or, if applicable, the taxpayer's required taxable year.

(2) *Annual accounting period.* Section 441(c) and § 1.441-1(b)(3) provide that the term “annual accounting period”

means the annual period (calendar year or fiscal year) on the basis of which the taxpayer regularly computes its income in keeping its books.

*.02 Change in Taxable Year.*

(1) *In general.* Section 1.442-1(a)(1) generally provides that a taxpayer that wants to change its annual accounting period and use a new taxable year must obtain the approval of the Commissioner.

(2) *Annualization of short period income.* Section 443(b) and § 1.443-1(b)(1)(i) generally provide that if a return is made for a short period resulting from a change of an annual accounting period, the taxable income for the short period must be placed on an annual basis by multiplying the income by 12 and dividing the result by the number of months in the short period. Unless § 443(b)(2) and § 1.443-1(b)(2) apply, the tax for the short period generally is the same part of the tax computed on an annual basis as the number of months in the short period is of 12 months. Section 443(c) generally requires a similar adjustment to the deduction for personal exemptions.

(3) *No retroactive change in annual accounting period.* Unless specifically authorized by the Commissioner, a taxpayer may not request, or otherwise make, a retroactive change in annual accounting period.

*.03 Approval of a Change.* Section 1.442-1(b) provides, in part, that in order to secure the approval of the Commissioner to change an annual accounting period, a taxpayer must file an application, generally on Form 1128, *Application to Adopt, Change, or Retain a Tax Year*, with the Commissioner within such time and in such manner as is provided in administrative procedures published by the Commissioner. In general, a change in annual accounting period will be approved if the taxpayer establishes a business purpose for the requested annual accounting period and agrees to the Commissioner's prescribed terms, conditions, and adjustments for effecting the change.

*.04 Special Rule for Newly Married Couples.* Section 1.442-1(d) provides a special rule under which a newly married husband or wife may obtain automatic approval to change his or her annual accounting period in order to use the annual accounting period of the other spouse so

that a joint return may be filed for the first or second taxable year of that spouse ending after the date of the marriage. Generally, this change is made by filing a federal income tax return for the short period, and not by filing a Form 1128.

### SECTION 3. SIGNIFICANT CHANGES

Significant changes to Rev. Proc. 66-50, as modified by Rev. Proc. 81-40, include:

.01 Section 4.01 of this revenue procedure provides that this revenue procedure is the exclusive procedure for individuals within its scope to automatically change their annual accounting period to the calendar year;

.02 Section 4.02 of this revenue procedure does not limit the scope of this revenue procedure to individuals who receive only certain listed types of income;

.03 Section 4.02(2) of this revenue procedure retains the general rule of Rev. Proc. 66-50 that precluded the use of the automatic change procedures by individuals deriving income from interests in pass-through entities, but provides that interests in pass-through entities will be disregarded in certain circumstances;

.04 Section 6 of this revenue procedure conforms the terms and conditions applicable to annual accounting period changes by individuals under this revenue procedure to those of: Rev. Proc. 2002-37, 2002-1 C.B. 1030, as clarified and modified by Notice 2002-72, 2002-46 I.R.B. 843, and as modified by Rev. Proc. 2003-34, 2003-18 I.R.B. 856; Rev. Proc. 2002-38, 2002-1 C.B. 1037, as clarified and modified by Notice 2002-72; and Rev. Proc. 2002-39, 2002-1 C.B. 1046, as clarified and modified by Notice 2002-72 and as modified by Rev. Proc. 2003-34. These terms and conditions include:

(1) a limitation on the carryback of net operating losses over \$50,000 or general business credits that are generated in the short period; and

(2) a requirement that certain related entities concurrently change their annual accounting period to the new calendar taxable year of the individual owner; and

.05 Section 7.02 of this revenue procedure extends the due date for filing a Form

1128 under this automatic revenue procedure to the due date of the individual's federal income tax return (including extensions) for the first effective year, as defined in section 5.03.

### SECTION 4. SCOPE

*.01 Applicability.* Except as provided in section 4.02, this revenue procedure, which is the exclusive procedure for individuals within its scope, applies to an individual requesting automatic approval to change the individual's annual accounting period to a calendar year.

*.02 Inapplicability.* This revenue procedure does not apply to:

(1) *Newly married couples subject to § 1.442-1(d).* An individual that is permitted to change to the annual accounting period of the individual's spouse under § 1.442-1(d). See section 2.04 of this revenue procedure.

(2) *Interest in a pass-through entity.* An individual that has an interest in a pass-through entity as of the end of the short period. However, an interest in a pass-through entity will be disregarded for this purpose if any of the following conditions are met:

(a) the pass-through entity would be required under the Code or regulations to change its taxable year to the new calendar taxable year of the individual (or, if applicable in the case of a controlled foreign corporation (CFC) to a taxable year that begins one month earlier than the new calendar taxable year of the individual). See section 6.07 of this revenue procedure for a special term and condition related to this exception;

(b) the pass-through entity is a fiscal-year partnership that is owned equally (50-percent) by two partners, one or both of whom are individuals, and the individual and the partnership both want to change to the calendar taxable year of the other 50-percent partner. See section 6.07 of this revenue procedure for a special term and condition related to this exception;

(c) the new calendar taxable year of the individual would result in no change in, or less deferral (as described in § 1.706-1(b)(3)) of income from the pass-through entity than the present taxable year of the individual. If the pass-through entity is a partnership, CFC,

or foreign personal holding company (FPHC), the individual should compare the existing deferral period (between the pass-through entity's and the individual's current taxable years) with the new deferral period (between the new required year of the pass-through entity and the individual's new calendar taxable year). See section 4.04 of this revenue procedure for an example of this rule; or

(d) for pass-through entities not qualifying for the exceptions in section 4.02(2)(a), (b), or (c) of this revenue procedure, the pass-through entity in which the individual has an interest has been in existence for at least three taxable years and the interest is *de minimis*. For this purpose, an interest in a pass-through entity is *de minimis* only if, for each of the prior three taxable years of the individual:

(i) the amount of income (including ordinary income or loss, capital gain or losses, rents, royalties, interest, dividends, and deduction equivalent of credits) from such pass-through entity is less than or equal to the lesser of (A) 5 percent of the individual's gross income (without adjustments) from all sources for those taxable years, or (B) \$500,000; and

(ii) the amount of the individual's gross income (without adjustments) from all such pass-through entities is, in the aggregate, less than or equal to the amounts described in (A) and (B) above. See section 4.04 of this revenue procedure for an example of this rule.

**.03 Nonautomatic Changes.** Individuals that are not eligible to obtain automatic approval for a change in accounting period under this revenue procedure, applicable regulations, or any other published administrative procedures, must secure prior approval from the Commissioner for a change in annual accounting period pursuant to § 442 and the regulations thereunder. See Rev. Proc. 2002-39.

**.04 Example** (i) F, an individual having a taxable year ending June 30, wants to change F's taxable year to the calendar year. F has interests in the capital and profits of five partnerships, IJK, LMN, OPQ, RST, and UVW. All of the partnerships have been in existence for at least three taxable years. F's interest in IJK is greater than 50 percent. IJK uses a majority interest taxable year of June 30. F's interest in LMN is 50 percent; the other 50 percent

interest is owned by G, an individual filing federal income tax returns on a calendar year basis. LMN also wants to change its taxable year to a calendar year. LMN uses a June 30 taxable year under the least aggregate deferral rules of § 1.706-1(b)(3). F's interests in OPQ, RST, and UVW are 15 percent, 10 percent, and 5 percent, respectively. OPQ uses its majority interest taxable year under § 706(b)(4), which ends May 31; RST and UVW each use their respective majority interest taxable years under § 706(b)(4), which end December 31. F's distributive share of income/(loss) from OPQ for each of the prior three taxable years is \$5,000, \$(1,000), and \$2,000, respectively. F's gross income for each of those same taxable years from all sources was \$150,000.

(ii) F's interests in F's pass-through entities will be disregarded only if each pass-through entity satisfies one of the exceptions enumerated under section 4.02(2) of this revenue procedure. F's interest in IJK may be disregarded under the exception in section 4.02(2)(a), because F is the majority interest partner in IJK. F's interest in LMN may be disregarded under the exception in section 4.02(2)(b), because both F and LMN are changing to the calendar taxable year, which is the taxable year of individual G, the other 50 percent partner. F's interests in RST and UVW may each be disregarded under the exception in section 4.02(2)(c), because F's new taxable year would result in less deferral than F's old taxable year (a new deferral period of 0 months as compared to the prior deferral period of 6 months from December 31 and June 30). Because F is not the majority interest partner in OPQ, and because F's new taxable year would not result in less deferral from this partnership, F's interest in OPQ may be disregarded only if the *de minimis* exception in section 4.02(2)(d) is satisfied. In this case, the income from OPQ for each of the prior three taxable years was less than the lesser of: (A) 5 percent of F's total gross income from all sources (\$150,000 x 5% = \$7,500); or (B) \$500,000. Consequently, F's interest in OPQ may be disregarded under the *de minimis* exception in section 4.02(2)(d). Because all of F's pass-through interests are disregarded under section 4.02(2), F is eligible to change under this revenue procedure.

## SECTION 5. DEFINITIONS

The following definitions apply solely for the purpose of this revenue procedure:

**.01 Individual.** In the case of married individuals, for any year in which a husband and wife file separate federal income tax returns, the term "individual" includes only the husband or wife who is applying to change his or her annual accounting period under this revenue procedure. For any year in which a husband and wife file a joint federal income tax return, the term "individual" includes both spouses, even if only one spouse is applying to change an annual accounting period under this revenue procedure.

**.02 Pass-through Entity.** For purposes of this revenue procedure the term "pass-through entity" means a partnership; a trust; an estate; a common trust fund (as defined in § 584); a CFC (as defined in § 957), but only if the individual is a U.S. shareholder (as defined in § 951(b)); an FPHC (as defined in § 552), but only if the individual is a U.S. shareholder (as defined in § 551(a)); a passive foreign investment company (PFIC), but only if the individual has elected to treat such PFIC as a qualified electing fund (as defined in § 1295); and a closely-held real estate investment trust (as defined in § 6655(e)(5)(B)), but only to the extent the individual is described in § 6655(e)(5)(A).

**.03 First Effective Year.** The first effective year is the first taxable year for which a change in annual accounting period is effective. Thus, in the case of a change, the first effective year is the short period required to effect the change. The first effective year is also the first taxable year for complying with all the terms and conditions set forth in this revenue procedure necessary to effect the change in annual accounting period.

**.04 Short Period.** An individual's short period is the period beginning with the day following the last day of the old taxable year and ending with the day preceding the first day of the new taxable year.

## SECTION 6. TERMS AND CONDITIONS OF CHANGE

**.01 In General.** A change in annual accounting period filed under this revenue procedure must be made pursuant to the

terms and conditions provided in this revenue procedure.

.02 *Short Period Tax Return.* The individual must file a federal income tax return for the short period required to effect a change in annual accounting period by the due date of that return, including extensions, pursuant to § 1.443-1(a). The individual's taxable income for the short period must be annualized and the tax must be computed in accordance with the provisions of §§ 443(b) and (c), and §§ 1.443-1(b) and (c).

.03 *Record Keeping.* The books of the individual (records reflecting income adequately and clearly on the basis of an annual accounting period) must be closed as of the last day of the first effective year.

.04 *Subsequent Year Tax Returns.* Returns for subsequent taxable years generally must be made on the basis of a full 12 months ending on the last day of the new calendar taxable year, unless the individual secures the approval of the Commissioner to change that taxable year.

.05 *Creation of Net Operating Loss.* If the individual generates a net operating loss (NOL) in the short period required to effect a change in annual accounting period, the individual may not carry the NOL back, but must carry it over in accordance with the provisions of § 172, beginning with the first taxable year after the short period. However, except as otherwise provided in the Code or regulations, the short period NOL must be carried back or carried over in accordance with § 172 if it is either: (a) \$50,000 or less, or (b) less than the NOL generated for the full 12-month period beginning with the first day of the short period. The individual must wait until this 12-month period has expired to determine whether the individual qualifies for the exception in (b) above.

.06 *Creation of General Business Credits.* If there is an unused general business credit or any other unused credit generated in the short period, the individual must carry that unused credit forward. An unused credit from the short period may not be carried back.

.07 *Concurrent Change for Related Entities.* If an individual's interest in a pass-through entity is disregarded pursuant to section 4.02(2) because the related entity will be required to change its taxable year to the individual's new calendar taxable

year (or, if applicable, in the case of a CFC, to a taxable year beginning one month earlier than the individual's new taxable year), the related entity must change its taxable year concurrently either under Rev. Proc. 2002-37 or Rev. Proc. 2002-38, whichever is applicable. The related party is required to change notwithstanding the testing date provisions in § 706(b)(4) or 898(c)(1)(C)(ii).

## SECTION 7. GENERAL APPLICATION PROCEDURES

.01 *Approval.* Approval is hereby granted to any individual within the scope of this revenue procedure to change the individual's annual accounting period, provided the individual complies with all the applicable provisions of this revenue procedure. Approval is granted beginning with the first effective year. Individuals granted approval under this revenue procedure to change their annual accounting period are deemed to have established a business purpose for the change to the satisfaction of the Commissioner.

### .02 *Filing Requirements.*

(1) *Where to file.* An individual who wants to change the individual's annual accounting period pursuant to the provisions of this revenue procedure must complete and file a Form 1128 with the Director, Internal Revenue Service Center, Attention: ENTITY CONTROL, where the individual files the individual's federal income tax return. No copies of Form 1128 are required to be sent to the national office. The individual also must attach a copy of the Form 1128 to the individual's federal income tax return filed for the short period required to effect the change.

(2) *When to file.* A Form 1128 filed pursuant to this revenue procedure will be considered timely filed for purposes of § 1.442-1(b)(1) only if it is filed on or before the due date (including extensions) for filing the federal income tax return for the short period required to effect such change.

(3) *Label.* In order to assist in the processing of the change in annual accounting period, reference to this revenue procedure must be made a part of the Form 1128 by either typing or legibly printing the following statement at the top of page 1 of the Form 1128: "FILED UNDER REV. PROC. 2003-62."

(4) *Signature requirements.* The Form 1128 must be signed by the individual. If an individual is treated as including the husband and wife under section 5.01 of this revenue procedure, the Form 1128 must be signed by both the husband and the wife.

(5) *No user fee.* A user fee is not required for an application filed under this revenue procedure and, except as provided in section 8.01 of this revenue procedure, the receipt of an application filed under this revenue procedure generally will not be acknowledged.

## SECTION 8. REVIEW OF APPLICATION

.01 *Service Center Review.* A Service Center may deny a change of annual accounting period under this revenue procedure only if: (a) the Form 1128 is not filed timely, or (b) the individual fails to meet the scope or any term and condition of this revenue procedure. If the change is denied, the Service Center will return the Form 1128 with an explanation of the reason for the denial.

.02 *Review of Director.* The appropriate director may ascertain if the change in annual accounting period was made in compliance with all the applicable provisions of this revenue procedure. Individuals changing their annual accounting period pursuant to this revenue procedure without complying with all the provisions (including the terms and conditions) of this revenue procedure ordinarily will be deemed to have initiated the change in annual accounting period without the approval of the Commissioner. Upon examination, an individual that has initiated an unauthorized change of annual accounting period may be denied the change. For example, an individual may be required to recompute the individual's taxable income or loss in accordance with the individual's former taxable year.

## SECTION 9. EFFECTIVE DATE AND TRANSITION RULE

.01 *Effective Date.* This revenue procedure generally is effective for all changes in annual accounting periods for which the first effective year ends on or after July 7, 2003. However, if the time period for filing Form 1128 with respect to a taxable year

set forth in section 7.02(2) of this revenue procedure has not yet expired, an individual within the scope of this revenue procedure may elect early application of the revenue procedure by providing the notification set forth in section 7.02(3) on the top of page 1 of Form 1128 and by satisfying the other procedural requirements of section 7.

.02 *Transition Rule.* If an individual within the scope of this revenue procedure filed an application with the national office and the application is pending with the national office on July 7, 2003, the individual may obtain approval under this revenue procedure. However, the national office will process the application in accordance with the authority under which it was filed, unless by the later of August 21, 2003, or the issuance of the letter ruling granting or denying approval for the change, the individual notifies the national office that the individual wants to use this revenue procedure. If the individual timely notifies the national office that the individual wants to use this revenue procedure, the national office may require the individual to make appropriate modifications to the application to comply with the applicable provisions of this revenue procedure. In addition, any user fee that was submitted with the application will be refunded to the individual.

## SECTION 10. EFFECT ON OTHER DOCUMENTS

This revenue procedure modifies, amplifies, and supersedes Rev. Proc. 66-50, 1966-2 C.B. 1260, and modifies and supersedes Rev. Proc. 81-40, 1981-2 C.B. 604.

## DRAFTING INFORMATION

The principal authors of this revenue procedure are Roy A. Hirschhorn and Jeffrey S. Marshall of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, contact Mr. Hirschhorn or Mr. Marshall at (202) 622-4960 (not a toll-free call).

*26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.*  
(Also Part I, §§ 167, 168, 446, 481; 1.167(a)-11, 1.446-1.)

## Rev. Proc. 2003-63

### SECTION 1. PURPOSE

This revenue procedure provides a safe harbor method under which the Internal Revenue Service will treat a fiber optic node and trunk line consisting of fiber optic cable used in a cable television distribution system providing one-way and two-way communication services as the unit of property for computing depreciation under §§ 167 and 168 of the Internal Revenue Code.

### SECTION 2. BACKGROUND

.01 Cable television companies provide broadcast and video programming to subscribers. In recent years, many companies have upgraded their systems to provide new cable services such as digital television, internet access through a cable modem, and telephony. Upgraded systems use fiber optic cable because optic fibers have immense capacity and are reliable, and transmissions over them are not susceptible to interference by outside signals. The fiber optic strands of glass (optic fibers) within fiber optic cables carry analog or digital signals in the form of light waves. In comparison, coaxial cable carries radio frequency signals. Bandwidth is the range of radio frequencies or light spectrum available for use by cable television distribution systems for transmission.

.02 The design of cable television distribution systems varies considerably throughout the country. Programming normally originates from an antenna, satellite, microwave, film, or videotape and is fed into the headend. The headend is electronic equipment that receives programming signals and combines, amplifies, and converts the programming signals for transmission throughout the system. The distribution plant conveys the programming signals from the headend to subscribers. The distribution plant generally consists of optic transmission and receiver devices, fiber optic cable (used as trunk lines), fiber optic transfer nodes

(“nodes” containing optical receivers and reverse optical transmitters), coaxial cable (used as feeder or distribution cables), amplifiers, taps, and coaxial drop cables to the subscribers' properties.

.03 A fiber optic cable usually contains several bundles of optic fibers. Many cable television distribution systems dedicate one bundle from the headend to each node. The nodes are the point of interface between the fiber optic cable and the feeder or distribution cables, which carry the signals to, and past, subscribers' properties. Fiber optic cable and node function together as an integrated unit. Nodes, however, are not usually interconnected or dependent on one another; each node operates independently of other nodes.

.04 Subscribers generally cannot receive two-way communication services until the node serving them is connected to the equipment necessary for the services. In order to provide two-way communication services, usually two optic fibers are connected between the headend and the node, even though the bundle of fibers dedicated to the node may contain more than two fibers. Typically, one optic fiber is used for transmitting data downstream from the headend to subscribers and another optic fiber is used for transmitting data upstream from subscribers.

.05 Section 167(a) provides that there shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, and wear and tear of property used in a trade or business or held for the production of income.

.06 The depreciation deduction provided by § 167(a) for tangible property placed in service after 1986 generally is determined under § 168. Section 168 prescribes two methods of accounting for computing depreciation: the general depreciation system in § 168(a); and the alternative depreciation system (ADS) in § 168(g). Under either depreciation system, the depreciation deduction is computed by using a prescribed depreciation method, recovery period, and convention.

.07 Rev. Proc. 87-56, 1987-2 C.B. 674, as clarified and modified by Rev. Proc. 88-22, 1988-1 C.B. 785, sets forth the class lives of property that are necessary to compute depreciation under § 168. Rev. Proc. 87-56 prescribes asset class 48.41, “CATV [Cable Television]-Headend,” which includes assets

such as towers, antennas, preamplifiers, converters, modulation equipment, and program non-duplication systems. This asset class has a class life of 11 years, which means that the property in this asset class is classified as 7-year property under § 168(e)(1) with an applicable recovery period of 7 years under § 168(c) and a recovery period of 11 years under § 168(g).

.08 Rev. Proc. 87-56 prescribes Asset Class 48.42, "CATV-Subscriber Connection and Distribution Systems," which includes assets such as trunk and feeder cable, connecting hardware, amplifiers, power equipment, passive devices, directional taps, pedestals, pressure taps, drop cables, matching transformers, multiple set connector equipment, and converters. This asset class has a class life of 10 years, which means that the property in this asset class is classified as 7-year property under § 168(e)(1) with an applicable recovery period of 7 years under § 168(c) and a recovery period of 10 years under § 168(g). Rev. Proc. 87-56 excludes from CATV asset classes 48.41 and 48.42 assets used to provide subscribers with two-way communication services.

.09 Rev. Proc. 87-56 assigns a class life of 24 years to property described in asset classes 48.31 to 48.45 that is comparable to property described in asset class 48.14, "Telephone Distribution Plant," and used for two-way exchange of voice and data communication which is the equivalent of telephone communication. Comparable equipment does not include cable television equipment used primarily for one-way communication. See also § 168(e)(3)(E)(ii) and § 168(g)(3)(B), under which any telephone distribution plant and comparable equipment used for two-way exchange of voice and data communications is 15-year property with an applicable recovery period of 15 years under § 168(c) and a recovery period of 24 years under § 168(g).

.10 Under § 1.167(a)-11(b)(4)(iii)(b) of the Income Tax Regulations, property is included in the asset guideline class for the activity in which the property is primarily used. Property is classified according to primary use even though the activity in which such property is primarily used is insubstantial in relation to all the taxpayer's activities.

.11 Property is first placed in service in the taxable year in which the property is

placed in a condition or state of readiness and availability for a specifically assigned function, whether in a trade or business, in the production of income, in a tax-exempt activity, or in a personal activity. See § 1.46-3(d)(1)(ii).

### SECTION 3. SCOPE

.01 *Applicability.* This revenue procedure applies to taxpayers operating cable television distribution systems designed to provide one-way and two-way communication services to subscribers.

.02 *One-way and two-way communication services.* For purposes of this revenue procedure, one-way communication services involve services in which broadcast and video programming signals are sent only downstream, that is, from the headend to subscribers; and two-way communication services involve services in which property is used for the two-way exchange between the headend and subscribers of voice and data communications which is the equivalent of telephone communication. Internet access through a cable modem and telephony (including IP (internet protocol) telephony also known as voice-over IP) are examples of two-way communication services.

### SECTION 4. SAFE HARBOR METHOD

.01 *Unit of Property.* The unit of property for calculating depreciation under §§ 167 and 168 is a node and the fiber optic cable to that node, exclusive of any fiber optic cable previously considered placed in service under section 4.03 of this revenue procedure and any optic fibers sold by a taxpayer. Thus, for example, if a taxpayer has a fiber optic cable containing 20 bundles of 6 optic fibers (120 total optic fibers) and connects 2 optic fibers to a node, the fiber optic cable (including all 120 optic fibers) is a component of the unit of property.

.02 *Determining primary use.* In determining whether the unit of property described in section 4.01 of this revenue procedure is primarily used, within the meaning of § 1.167(a)-11(b)(4)(iii)(b), for providing one-way or two-way communication services, a cable television company must determine primary use by using any reasonable manner that is consistently applied to the taxpayer's units

of property described in section 4.01 of this revenue procedure. If the unit of property is primarily used for providing one-way communication services, the unit of property is assigned to asset class 48.42, "CATV-Subscriber Connection and Distribution Systems," and classified as 7-year property under § 168(e)(1) with an applicable recovery period of 7 years under § 168(c) and a recovery period of 10 years under § 168(g). However, if the unit of property is primarily used for providing two-way communications services, § 168(e)(3)(E)(ii) classifies the unit of property as 15-year property with an applicable recovery period of 15 years under § 168(c) and a recovery period of 24 years under § 168(g). For purposes of this revenue procedure, a cable television company may determine primary use based on either: the node within the unit of property described in section 4.01 of this revenue procedure; or the applicable cable television distribution system for each headend, provided the cable television company maintains its books and records based on each headend.

(1) *Reasonable manner.* A reasonable manner includes, but is not limited to, determining primary use by gross receipts or by subscriber count for each service within the applicable cable television distribution system. However, for purposes of this safe harbor method, determining primary use by bandwidth is not considered reasonable.

(2) *Change in primary use.* If the primary use of the unit of property described in section 4.01 of this revenue procedure changes from providing either one-way communication services to two-way communication services, or two-way communication services to one-way communication services, § 168(i)(5) applies beginning in the year of the change in use.

.03 *Placed in service.* The unit of property described in section 4.01 of this revenue procedure is considered placed in service for depreciation purposes when placed in a condition or state of readiness and availability for its specifically assigned function. The specifically assigned function of a cable television company's distribution system is to provide services to subscribers. Thus, when a node is connected to the equipment necessary for providing one-way or two-way communication services to subscribers or potential subscribers, the property is considered

placed in service for purposes of §§ 167 and 168. Although a fiber optic cable may contain more optic fibers than are necessary to serve a single node, all optic fibers in the unit of property are considered placed in service when the node is ready and available as described above and connected to at least one optic fiber in the fiber optic cable.

.04 *Consistent treatment.* Taxpayers using the unit of property described in section 4.01 of this revenue procedure must use it for all of a headend's nodes and fiber optic cable. Except as provided in section 4.02 of this revenue procedure, taxpayers are required to treat the unit of property consistently for all purposes under §§ 167 and 168 and the regulations thereunder.

## SECTION 5. CHANGE IN METHOD OF ACCOUNTING AND AUDIT PROTECTION

.01 *Change in method of accounting.* A change in a taxpayer's depreciation treatment of cable television distribution systems (as described in section 4 of this revenue procedure) is a change in method of accounting to which §§ 446(e) and 481 apply. If a taxpayer within the scope of this revenue procedure wants to change to the safe harbor method provided in this revenue procedure for cable television distribution systems (as described in section 4 of this revenue procedure) that are owned by the taxpayer at the beginning of the year of change, the taxpayer must follow the automatic change in method of accounting provisions in Rev. Proc. 2002-9, 2002-1 C.B. 327 (as modified and amplified by Rev. Proc. 2002-19, 2002-1 C.B. 696, amplified, clarified, and modified by Rev. Proc. 2002-54, 2002-35 I.R.B. 432, and modified and clarified by Announcement 2002-17, 2002-1 C.B. 561) or any successor, with the following modifications:

(1) The scope limitations in section 4.02 of Rev. Proc. 2002-9 do not apply to a taxpayer that wants to change to the safe harbor method for either its first or second taxable year ending after December 31, 2001; and

(2) To assist the Service in processing changes in method of accounting under this section of the revenue procedure, and to ensure proper handling, section

6.02(4)(a) of Rev. Proc. 2002-9 is modified to require that a Form 3115 filed under this revenue procedure include the statement: "Automatic Change Filed Under Rev. Proc. 2003-63." This statement should be legibly printed or typed on the appropriate line on the Form 3115.

.02 *Audit protection.* If a taxpayer currently uses a method consistent with the safe harbor method (as described in section 4 of this revenue procedure), the method of accounting for depreciation of the taxpayer's property described in section 4.01 will not be raised as an issue by the Service in a taxable year that ends before August 11, 2003. Also, if a taxpayer currently uses a method consistent with the safe harbor method (as described in section 4 of this revenue procedure) and its use of that method is an issue under consideration (within the meaning of section 3.09 of Rev. Proc. 2002-9) for taxable years in examination, before an appeals office, or before the U.S. Tax Court in a taxable year that ends before August 11, 2003, that issue will not be further pursued by the Service.

## SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2002-9 is modified and amplified to include this change in method of accounting in section 2 of the APPENDIX.

## SECTION 7. EFFECTIVE DATE

This revenue procedure is effective on August 11, 2003.

## SECTION 8. DRAFTING INFORMATION

The principal author of this revenue procedure is Paul Handleman of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure, contact Mr. Handleman at (202) 622-3040 (not a toll-free call).

# Application Procedures and Final Agreement for Withholding Foreign Partnerships and Withholding Foreign Trusts; Additional Guidance for Qualified Intermediaries Regarding Withholding on Small or Related Foreign Partnerships and Trusts.

## Rev. Proc. 2003-64

### SECTION 1. PURPOSE AND SCOPE

.01 *Guidance to Simplify Partnership and Trust Withholding and Reporting Obligations.* The provisions of this revenue procedure are designed to simplify withholding and reporting obligations for payments of income made to foreign partnerships and foreign simple or grantor trusts. This revenue procedure contains the final withholding foreign partnership (WP) and withholding foreign trust (WT) agreements, described in Treasury Regulation § 1.1441-5(c)(2)(ii) and (e)(5)(v), and the application procedures for entering into such agreements. This revenue procedure also amends the Qualified Intermediary ("QI") withholding agreement ("QI agreement"), contained in Rev. Proc. 2000-12, 2000-1 C.B. 387, to add new section 4A. New Section 4A of the QI agreement provides additional rules for QIs regarding withholding and reporting on certain small or related foreign partnerships and foreign simple or grantor trusts that do not enter into WP or WT agreements. Similar rules are also incorporated into the final WP and WT agreements. A WP or WT agreement entered into during a calendar year may be made effective as of the first day of that calendar year. A QI may apply the provisions of section 4A as of the beginning of the 2003 calendar year.

.02 *Extension of Transitional Relief in Notice 2001-4.* Pending development of the WP agreement, the IRS and Treasury provided transitional relief for foreign partnerships for calendar year 2001. See Section IV of Notice 2001-4, 2001-1 C.B. 267. The IRS and Treasury extended the transitional relief through calendar year 2002. See Notice 2002-66, 2002-42 I.R.B. 715. The guidance provided in this

revenue procedure makes further extensions of this transitional relief for foreign partnerships unnecessary. Section III.C of Notice 2001-4 provides documentation and reporting relief for foreign simple and grantor trusts. The rules of Section III.C. of Notice 2001-4 will no longer apply after 2003 because the more comprehensive guidance for trusts in this revenue procedure make those rules unnecessary. For the year 2003 a QI may apply the rules of Section III.C. of Notice 2001-4 or the rules of this revenue procedure.

## SECTION 2. COMMENTS ON PROPOSED WP AND WT AGREEMENTS

*.01 Proposed WP and WT Agreements.* The IRS and Treasury issued proposed WP and WT agreements in Notice 2002-41, 2002-1 C.B. 1153. The proposed WP and WT agreements provided streamlined procedures designed to simplify documentation and reporting. Under the provisions of the proposed WP and WT agreements, a WP or WT would be permitted to provide the withholding agent with a Form W-8IMY as a WP or WT without attached documentation from partners, beneficiaries or owners. The WP or WT would receive payments from the withholding agent in gross and would withhold and deposit tax, if any, based on the Forms W-8 or W-9 that it receives from its partners, beneficiaries or owners. The WP or WT would report payments to, and tax withheld from, its direct foreign partners, beneficiaries or owners on Form 1042-S on an individual basis or, by election, on a pooled basis. Thus, a WP or WT would be relieved of the requirement to disclose to a withholding agent any documentation and payment information for partners, beneficiaries or owners. A withholding agent would be relieved of the responsibility for collecting documentation, withholding and reporting payment information for partners, beneficiaries or owners of a WP or WT.

The financial community generally responded favorably to the simplified procedures for documentation, reporting and audit provided under the proposed WP and WT agreements. The financial community provided some comments about specific provisions of the proposed agreements.

The financial community also raised concerns that the WP and WT agreements may not be as appropriate for certain foreign partnerships and trusts and provided suggestions for modification. In response, the IRS and Treasury have amended several provisions of the WP and WT agreements. The IRS and Treasury have also developed a new set of provisions for certain smaller foreign partnerships and trusts and for certain foreign partnerships and trusts that are related to a QI, WP, or WT. Notwithstanding the new rules below for certain small or related partnerships and trusts, the IRS and Treasury intend that the WP and WT agreements may be entered into in all circumstances in which a foreign entity acting on behalf of its partners, beneficiaries or owners provides Form W-8IMY as proper documentation. It is anticipated that the majority of foreign partnerships and trusts with substantial reportable income will seek to enter into WP or WT agreements.

*.02 Specific Provisions of the WP and WT Agreements.* One category of comments from the financial community addressed specific provisions of the WP and WT agreements. The financial community recommended the following: (1) the term of the WP agreement should coincide with the term of the partnership if a partnership with a limited term elects pooled reporting; (2) the WP agreement should not terminate following a termination of the partnership under section 708(b)(1)(B) (termination of partnership upon sale or exchange of 50 percent or more of the total interest in partnership capital and profits); (3) ordering rules should be added to the WP and WT agreements to clarify the partnership's or trust's withholding obligations on distributions; and (4) the validity period of Form W-8BEN should be extended beyond three years. In addition, commentators suggested that, in certain circumstances, one or more of the following provisions of the WP and WT agreements should be modified to more closely parallel the QI agreement: (1) documentation limited to Forms W-8 and W-9, (2) application only to direct partners, beneficiaries or owners, (3) frequency of audits when pooled reporting is elected, and (4) automatic termination.

The IRS and Treasury continue to believe that, in general, the simplified procedures contained in the WP and WT

agreements are appropriate given the particular circumstances of partnerships and trusts, and that these simplified procedures will reduce administrative and audit costs as well as the risk of errors in performing under the agreements. Therefore, the final WP and WT agreements are substantially the same as originally proposed. For example, the WP and WT agreements continue to require partners, beneficiaries or owners to be documented solely with Forms W-8 and W-9 and do not permit reliance on the presumption rules. The IRS and Treasury do not believe it is appropriate to modify the documentation requirements to match those applicable to QIs given the significant differences between foreign partnerships and trusts and QIs. Unlike QIs, foreign partnerships and trusts generally are not subject to know-your-customer (KYC) rules. Therefore, the IRS is unable to rely on regulators to ensure that a WP or WT is properly documenting its partners, beneficiaries or owners.

Where appropriate, however, certain provisions of the WP and WT agreements have been modified to be more similar to provisions in the QI agreement. The WP and WT agreements have been modified as follows in response to comments by the financial community.

*Term of the Agreement.* The WP or WT agreement continues in force indefinitely unless the WP or WT has elected to report on Form 1042-S on a pooled basis. As originally proposed, the term of the agreement of a WP or WT that elected pooled reporting was six years and was renewable. The six year renewable term continues to be available. In addition, the WP or WT may elect to use a longer non-renewable term of up to fifteen years. This optional longer term was added in response to comments that investment partnerships or trusts are often formed with limited terms, usually ranging from ten to fifteen years and that having the term of the WP or WT agreement coincide with the term of the trust or partnership would facilitate compliance. See Sections 9.01 and 9.02 of the WP and WT agreements, Appendices 1 and 2.

*Automatic Termination.* If the WP or WT fails to document any partner, beneficiary or owner with Form W-8 or W-9 by the time withholding is required under the agreement, then, unless the WP or



WT cures its failure, the agreement will automatically terminate effective December 31st of the year in which the failure is discovered. In response to comments, the final WP or WT agreements, first, extend the date for curing documentation failures from January 31 to March 15 and, second, add an alternative method for curing. Thus, the final WP and WT agreements allow reinstatement as of the date the agreement is terminated not only if the WP or WT is able to obtain documentation for undocumented partners, beneficiaries or owners before March 15 of the year following the year in which the agreement automatically terminated, but, alternatively, if all undocumented partners have ceased to be partners in WP before March 15 of the year following the year in which the agreement automatically terminated. No change was made in response to the comment that the WP agreement should not terminate following a termination of the partnership under section 708(b)(1)(B). Consistent with the application of section 708(b)(1)(B) in numerous other areas, the WP agreement must terminate in this case because section 708(b)(1)(B) terminates the partnership for tax purposes.

*Withholding on Distributions.* The WP or WT receives payments from the withholding agent in gross and withholds and deposits tax, if any, based on the Forms W-8 or W-9 that it receives from its partners, beneficiaries or owners. The WP or WT must withhold on the date it makes a distribution to a direct foreign partner, beneficiary or owner that includes an amount subject to withholding. Comments suggested that ordering rules should be added to the WP and WT agreements to clarify the partnership's or trust's withholding obligations on distributions. Rather than developing a complex set of ordering rules, a provision has been added to the final WP and WT agreements that allows the WP or WT to determine the amount of withholding on a distribution based on a reasonable estimate of the partner, beneficiary or owner's distributive share of income subject to withholding for the year. See Section 3.03 of the WP and WT agreements, Appendices 1 and 2.

*Application to Direct Partners, Beneficiaries or Owners.* As originally proposed, the WP and WT agreements provided that

a partnership or trust could act as a WP or WT only for its direct partners, beneficiaries or owners that were not intermediaries or flow-through entities. The WP or WT could elect to report on Forms 1042-S on a pooled basis for its direct partners, beneficiaries or owners. For all its indirect partners, beneficiaries or owners, however, the WP or WT was required to pass documentation up to the withholding agent. Thus individual Form 1042-S reporting was required for each indirect partner, beneficiary, or owner. The IRS and Treasury believe it is appropriate to modify these rules only in specific situations. Thus, the final WP and WT agreements contain two new provisions. As discussed in Section 3.03 of this revenue procedure, the first provision may be applied to indirect partners, beneficiaries or owners that are small partnerships and trusts. This provision contains streamlined rules similar to the U.S. rules for joint account holders. As discussed in Section 3.04 of this revenue procedure, the second provision may be applied to indirect partners, beneficiaries or owners that are partnerships or trusts that are related to the WP or WT. This provision contains rules similar to those for private arrangement intermediaries (PAIs) under the QI agreement. Under both provisions, the indirect account holders must be documented with Forms W-8 (and not any other documentation). See Section 10 of the WP and WT agreements, Appendices 1 and 2.

*Frequency of Audit.* Unless the WP or WT has elected to report on Form 1042-S on a pooled basis, it will be subject to audit only if selected for audit by the IRS. Under the proposed agreement if pooled reporting was elected, the external audit occurred every two years and examined the two previous years. In response to comments that a WP's or WT's audit coverage should match that of a QI, the WP and WT agreements have been amended to conform the audit cycle for the six year agreement to the audit cycle under the QI agreement. Therefore, if the WP or WT elects pooled reporting and a six year term, it must agree to have the external auditor conduct an audit of the second and fifth full calendar year that the agreement is in effect. The two year audit cycle has been retained, however, for a WP or WT that

elects pooled reporting and a non-renewable term of up to fifteen years. See Sections 8.03 and 8.04 of the WP and WT agreements, Appendices 1 and 2.

*Validity Period of Form W-8.* This revenue procedure does not include any modifications to address comments from the financial community regarding the extension of the validity period of Form W-8BEN. The IRS and Treasury will continue to study these comments.

*.03 Certain Smaller Partnerships and Trusts.* The financial community has suggested that the proposed WP and WT agreements are less suitable for smaller partnerships and family trusts. Commentators provided information indicating that a significant portion of foreign partnerships or trusts with accounts with QIs are small partnerships or trusts that receive minimal U.S. source income and may not have the resources to undertake documentation, withholding and reporting responsibilities at their own level. Commentators noted that the partners, beneficiaries or owners of these partnerships and trusts generally are foreign persons that are all from the same country or otherwise subject to the same rate of withholding on U.S. source income.

Commentators recommended that the IRS establish a threshold, below which a QI would be able to handle the documentation, reporting (including pooled reporting) and withholding obligations under simplified rules, subject to verification through additional documentation requirements. Commentators suggested that, to the extent all partners, beneficiaries or owners are not entitled to the same rate of withholding, the QI, WP, or WT could be required to withhold at the highest applicable rate without a withholding statement (or to obtain a withholding statement and apply the different rates), and to perform pooled reporting on Form 1042-S. Commentators noted that the QI could then be responsible for monitoring the account to ensure that documentation is received and, in the event the account holder received reportable amounts above a certain threshold, waivers of confidentiality could be obtained to allow the QI to report on Form 1042-S on an individual basis. Similar comments were also submitted for situations in which these smaller partnerships and trusts were partners, beneficiaries or

owners of larger foreign partnerships or trusts that become WPs or WTs.

In response to these comments, the IRS and Treasury have developed a new provision that may be applied to a small foreign partnership or simple or grantor trust that is an account holder of a QI. This provision appears in new section 4A of the QI agreement. See Appendix 3. Similar rules, applicable to a foreign partnership or simple or grantor trust that is a partner, beneficiary or owner of a WP or WT, are incorporated into the WP and WT agreements. See Section 10 of the WP and WT agreements, Appendices 1 and 2. This provision is not available to partnerships or trusts if any partner, beneficiary or owner is a U.S. person or a passthrough partner, beneficiary or owner. Below is a summary of the relevant rules.

*Income Threshold.* The QI, WP, or WT may apply this provision only to a foreign partnership or trust that receives from it less than \$200,000 of reportable amounts for a calendar year.

*Written Agreement.* The partnership or trust must agree in writing that it will make available to the QI's, WP's, or WT's auditor, if requested, records that establish that documentation was provided for all of its partners, beneficiaries or owners.

*Documentation.* A QI must obtain either Form W-8 or other documentation provided in its QI agreement from each partner, beneficiary or owner. A WP or WT must obtain a Form W-8 from each partner, beneficiary or owner. Additionally, the small partnership or trust must provide a Form W-8IMY with the required withholding statement. The withholding statement, however, need not provide any allocation information.

*Withholding.* Similar to the U.S. rules for joint account holders, a QI, WP, or WT must allocate payments to the partner, beneficiary or owner that is subject to the highest rate of withholding. The QI, WP, or WT may report the reportable amounts received during the calendar year by these small partnerships or trusts in its Form 1042-S reporting pools for direct account holders. Under the regulations that would otherwise apply, the partnership or trust must provide the QI, WP, or WT a withholding statement that, among other things, allocates the payment to each of the partners in the partnership. The withholding agent must withhold and report for

each partner, beneficiary, or owner, separately to the IRS. The new provision simplifies these procedures by relieving the partnership or trust of the responsibility for providing allocation information and by allowing the QI, WP, or WT to allocate payments to the partner, beneficiary or owner that is subject to the highest rate of withholding.

*Refunds.* A QI, WP, or WT may not include any payments made to such small foreign partnership or trust in any collective refund claim pursuant to the general provisions of QI, WP, or WT agreements. Instead, if a partner, beneficiary, or owner is subject to a lower withholding rate than the other partners, beneficiaries or owners, that partner, beneficiary or owner may file a refund claim directly with the IRS if the time period has elapsed for the QI, WP, or WT to apply the reimbursement or set-off procedures. To apply for such a refund, the partner, beneficiary or owner must have an individual Form 1042-S. Upon request, a QI, WP, or WT may file a separate Form 1042-S for any partner, beneficiary or owner. A QI, WP, or WT may do so only if the partnership or trust has provided a withholding statement that includes allocation information for the requesting partner, beneficiary or owner and the partnership or trust has agreed to provide additional information requested by the QI's, WP's, or WT's auditor to substantiate the information.

*Timing.* A QI, WP, or WT may generally apply these special rules to a foreign partnership or trust on a year-by-year basis.

*Failure to Provide Records.* A QI, WP, or WT may not apply these rules to a partnership or trust if the partnership or trust has failed to make available to the QI's, WT's or WP's auditor requested records within 90 days after the request. Upon such failure, the QI, WP, or WT must treat such partnership or trust under the general rules, must correct its withholding and must file corrected Forms 1042 and 1042-S for the individual partners, beneficiaries or owners.

#### *.04 Certain Related Partnerships and Trusts.*

Additionally, commentators suggested that the rules for indirect account holders should be modified for certain partnerships and trusts that are related to a QI, WP, or WT. Commentators suggested that

these partnerships or trusts (such as sponsored funds) were able to determine allocations and withholding amounts in accordance with U.S. tax rules but that the QI, WP, or WT should retain the withholding and reporting responsibility.

In response to these comments, the IRS and Treasury have developed new rules that allow a foreign partnership or trust that is related to a QI, WP, or WT to provide the QI, WP, or WT the information necessary for the QI, WP, or WT to withhold and report on reportable amounts. The partnership or trust, however, retains the documentation identifying its partners, beneficiaries or owners. Under these rules, the partnership or trust acts as the QI's, WP's, or WT's agent in applying the QI, WP or WT agreement to its partners, beneficiaries or owners. The QI, WP or WT, however, must remain liable for the actions performed by the partnership or trust. These provisions appear in new section 4A.02 of the QI agreement (see Appendix 3) and in Section 10.02 of the WP and WT agreements (see Appendices 1 and 2). Below is a summary of these rules.

*Related Partnership or Trust.* To address compliance concerns, a QI, WP, or WT may apply these procedures to a foreign partnership or trust only if the QI, or an affiliate of the QI, or WP or WT is a general partner of the partnership or a trustee of the trust.

*Written Agreement.* The QI, WP or WT and the partnership or trust must agree, in writing, that the partnership or trust will act as agent of the QI, WP, or WT under the QI, WP or WT agreement and will make available, upon request, to the QI's, WP's, or WT's auditor records that establish compliance with the relevant provisions of the QI, WP, or WT agreement.

*Documentation.* The related foreign partnership or trust must provide the QI, WP, or WT with a Form W8-IMY together with a withholding statement providing information necessary for the QI, WP, or WT to fulfill its withholding, reporting and filing obligations. The withholding statement may include pooled information for direct partners, beneficiaries or owners that are not intermediaries or flow-through entities. The partnership or trust need not provide to the QI, WP or WT the underlying documentation for such partners, beneficiaries or owners. However the partnership or trust must provide to the QI, WP

or WT the underlying documentation for indirect partners, beneficiaries or owners of such partnerships or trusts, or for direct partners, beneficiaries or owners that are intermediaries, flow-through entities or U.S. nonexempt recipients.

*Liability.* By entering into the agreement with the related foreign partnership or trust, the QI, WP, or WT agrees that it is not assigning liability for performance of any of its obligations under its QI, WP, or WT agreement. Similar to the rules that apply to a PAI under a QI agreement, the QI, WP, or WT and the related foreign partnership or trust are jointly and severally liable for any tax, penalties, and interest for the partnership's or trust's failure to meet any obligations that arise out of its agreement with the QI, WP, or WT.

*Withholding and Reporting.* The related foreign partnership or trust must not assume withholding or reporting responsibility. Withholding and reporting responsibility remains with the QI, WP, or WT. The QI, WP, or WT must file separate Forms 1042-S for each related foreign partnership or trust to which it is applying these rules reflecting pooled basis information. The QI, WP, or WT must apply the specific payee reporting provisions of the regulations to indirect partners, beneficiaries or owners, and to direct partners, beneficiaries or owners that are U.S. non-exempt recipients. See Treas. Reg. § 1.1441-1 and 1.1441-5.

*Timing.* A QI, WP, or WT may generally apply these special rules to a related foreign partnership or trust on a year-by-year basis.

*Failure to Provide Records.* A QI, WP, or WT may not apply these rules to a partnership or trust if the partnership or trust has failed to make available to the QI's, WT's or WP's auditor requested records within 90 days after the request. Upon such failure, the QI, WP, or WT must treat such partnership or trust under the general rules, must correct its withholding and must file corrected Forms 1042 and 1042-S for the individual partners, beneficiaries or owners.

*.04 Modifications.* The IRS will consider modifications of the QI agreement and the WP or WT agreements only in rare and unusual circumstances. The IRS will not accept, however, any changes that it determines would provide a QI, partnership or trust with a competitive advantage

over other similarly situated QI's, partnerships or trusts. In its sole discretion, the IRS may agree, or refuse, to adopt the suggested modifications for a particular case.

### SECTION 3. APPLICATION PROCEDURES FOR FINAL WP OR WT AGREEMENTS

*.01 Contents of the Application Package.* A prospective WP or WT must submit an application to become a WP or WT. The application package must include the information specified in this Section 3.01 and any additional information and documentation requested by the IRS:

(1) A statement identifying what type of entity the applicant is (*i.e.*, a foreign partnership or a foreign simple or grantor trust) and that it requests to enter into a WP or WT agreement with the IRS.

(2) The applicant's name, address, and employer identification number(s) (EIN), if any.

(3) The country in which the applicant was created or organized and a description of the applicant's business.

(4) A list of the titles of those persons who will be the responsible parties for performance under the WP or WT agreement and the names, addresses, and telephone numbers of those persons as of the date the application is submitted.

(5) A list describing, as of the date the application is submitted, the type of partners, beneficiaries or owners (*e.g.*, U.S., foreign, treaty benefit claimant, or intermediary or flow-through entity), the number of partners, beneficiaries or owners within each type, and the estimated value of U.S. investments that the WP or WT agreement will cover.

(6) A completed Form SS-4 (*Application for Employer Identification Number*) to apply for a withholding foreign partnership or trust Employer Identification Number (WP-EIN, WT-EIN) to be used solely for WP or WT reporting and filing purposes. An applicant must apply for a WP-EIN or WT-EIN even if it already has another EIN. The WP-EIN or WT-EIN will be in addition to any EIN the WP or WT already has, which should be retained.

(7) Two copies of the completed WP or WT agreements, as set forth in Appendix 1 or 2 of this revenue procedure, executed as provided in Section 3.03.

*.02 Requesting Modifications.* A partnership or trust that seeks modifications to the WP or WT agreement must complete and execute an application in accordance with the instructions in Sections 3.01 and 3.03. In addition to the information required under Section 3.01, the application must include (1) information describing the partnership's or trust's unique facts and circumstances, (2) suggested modifications to the agreement based on those unique facts and circumstances, and (3) an analysis of the feasibility of any such suggested modifications. In its sole discretion, the IRS may agree, or refuse, to modify the WP or WT agreement.

*.03 Executing the WP or WT Agreement.* To apply for WP or WT status, a foreign partnership or trust must submit a completed application package, as provided in Section 3.01 (and Section 3.02 if applicable), including the Form SS-4 and the two signed copies of the WP or WT agreement, to:

Internal Revenue Service  
LMSB:FS:QI  
290 Broadway  
New York, NY 10007-1867  
USA

Upon acceptance, the IRS will return one executed copy of the WP or WT agreement to the partnership or trust. The IRS may develop procedures to expedite processing of these applications.

### SECTION 4. AMENDMENT TO QI AGREEMENT

This revenue procedure amends the QI agreement, contained in Rev. Proc. 2000-12, to add new section 4A, contained in Appendix 3 of this revenue procedure. Pursuant to Section 12.02 of the QI agreement, this amendment applies not only to QI agreements entered into on or after the effective date of this revenue procedure but also to all existing QI agreements. A QI may apply the provisions of section 4A as of the beginning of the 2003 calendar year.

### SECTION 5. EFFECT ON OTHER DOCUMENTS

Section III.C. of Notice 2001-4 is superseded for calendar year 2004 and subsequent calendar years. Rev. Proc. 2000-12

is modified to add to the QI Agreement a new section 4A, as set forth in Appendix 3 of this revenue procedure.

## SECTION 6. EFFECTIVE DATE

This revenue procedure is effective July 10, 2003.

## SECTION 7. FURTHER INFORMATION

For further information regarding this Notice, contact Carl Cooper and Valerie

Mark Lippe of the Office of the Associate Chief Counsel (International), Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, D.C. 20224. Mr. Cooper or Ms. Mark Lippe may be contacted by telephone at 202-622-3840 (not a toll-free call).

## Appendices

Appendix 1.	Withholding Foreign Partnership Agreement
Appendix 2.	Withholding Foreign Trust Agreement
Appendix 3.	Amendment to Qualified Intermediary Withholding Agreement

## APPENDIX 1

### Withholding Foreign Partnership Agreement

#### SECTION 1. PURPOSE AND SCOPE

- Sec. 1.01. General Obligations
- Sec. 1.02. Parties to the Agreement

#### SECTION 2. DEFINITIONS

- Sec. 2.01. Agreement
- Sec. 2.02. Amounts Subject to NRA Withholding
- Sec. 2.03. Chapter 3 of the Code
- Sec. 2.04. Chapter 61 of the Code
- Sec. 2.05. External Auditor
- Sec. 2.06. Flow-Through Entity
- Sec. 2.07. Foreign Person
- Sec. 2.08. Form W-8
- Sec. 2.09. Form W-9
- Sec. 2.10. Form 1042
- Sec. 2.11. Form 1042-S
- Sec. 2.12. Form 1065
- Sec. 2.13. Intermediary
- Sec. 2.14. Nonwithholding Foreign Partnership
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- Sec. 2.17. Partnership and Partner; Direct Partner; Indirect Partner; Pass-through Partner
- Sec. 2.18. Payment
- Sec. 2.19. Pooled Reporting (PR) Election
- Sec. 2.20. Reduced Rate of Withholding
- Sec. 2.21. Reportable Amount
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- Sec. 2.23. Schedule K-1
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- Sec. 2.26. U.S. Person
- Sec. 2.27. Withholding Agent
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- Sec. 2.31. Other Terms

#### SECTION 3. WITHHOLDING RESPONSIBILITY

- Sec. 3.01. NRA Withholding Responsibility
- Sec. 3.02. Timing of Withholding
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- Sec. 4.07. Documentation from Pass-through Partners
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- Sec. 4.09. Documentation for U.S. Non-Exempt Recipients
- Sec. 4.10. Documentation Validity
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#### SECTION 5. WITHHOLDING FOREIGN PARTNERSHIP WITHHOLDING CERTIFICATE

- Sec. 5.01. WP Withholding Certificate
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#### SECTION 6. TAX RETURN OBLIGATIONS

- Sec. 6.01. Form 1042 Filing Requirement
- Sec. 6.02. Form 1042-S Reporting: General Rule
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#### SECTION 7. ADJUSTMENTS FOR OVER- AND UNDER-WITHHOLDING; REFUNDS

- Sec. 7.01. Adjustments for NRA Overwithholding by WP
- Sec. 7.02. Collective Credit or Refund Procedures for NRA Overwithholding
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Sec. 7.05. Special Rule Regarding Failure to Deposit Penalties

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- Sec. 8.01. In General
- Sec. 8.02. Designation of External Auditor
- Sec. 8.03. Timing of External Audits: General Rule
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## SECTION 9. EXPIRATION, TERMINATION AND DEFAULT

- Sec. 9.01. Term of Agreement: General Rule
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## SECTION 10. CERTAIN PARTNERSHIPS AND TRUSTS

- Sec. 10.01. Certain Smaller Partnerships and Trusts
- Sec. 10.02. Certain Related Partnerships and Trusts

## SECTION 11. MISCELLANEOUS PROVISIONS

THIS AGREEMENT is made in duplicate under and in pursuance of section 1441 of the Internal Revenue Code of 1986, as amended, (the "Code") and Treasury Regulation § 1.1441-5(c)(2) by and between \_\_\_\_\_, (referred to as "WP"), and the INTERNAL REVENUE SERVICE (the "IRS"):

**WHEREAS**, WP has submitted an application in accordance with Revenue Procedure 2003-64 to be a withholding foreign partnership for purposes of Treas. Reg. § 1.1441-5(c)(2);

**WHEREAS**, WP and the IRS desire to enter into an agreement to establish WP's rights and obligations regarding documentation, withholding, information reporting, tax return filing, deposits, and adjustment procedures under sections 1441, 1442, 1443, 1461, 6031, 6302, 6402, and 6414 of the Code with respect to certain types of payments;

*NOW, THEREFORE*, in consideration of the following terms, representations, and conditions, the parties agree as follows:

## SECTION 1. PURPOSE AND SCOPE

**Sec. 1.01. General Obligations.** Except as otherwise provided in this Agreement, WP's obligations with respect to income distributed to, or included in the distributive shares of, its partners are governed by the Code and the regulations thereunder. Except as provided in Section 10 of this Agreement, WP may act in its capacity as a withholding foreign partnership pursuant to this Agreement only for payments of amounts subject to NRA withholding that are distributed to, or included in the distributive shares of, its direct partners. WP is required to act as a withholding foreign partnership for all such amounts paid to WP, or included in WP's distributive share, by any withholding agent to which WP has provided a Form W-8IMY that represents that WP is acting as a withholding foreign partnership with respect to such amounts. WP must act as a withholding foreign partnership for any such amounts paid with respect to such a Form W-8IMY that are distributed to, or included in the distributive shares of, its direct foreign partners. WP may also act as a withholding foreign partnership for such amounts that are distributed to, or included in the distributive shares of, its direct partners that are U.S. persons. WP may not act as a withholding foreign partnership, but must act as a nonwithholding foreign partnership, for amounts subject to NRA withholding that are distributed to, or included in the distributive shares of, passthrough partners or indirect partners, except as provided under Section 10 of this Agreement.

**Sec. 1.02. Parties to the Agreement.** This Agreement applies to WP and the IRS.

## SECTION 2. DEFINITIONS

For purposes of this Agreement, the terms listed below are defined as follows:

**Sec. 2.01. Agreement.** "Agreement" means this Agreement between WP and the IRS. All appendices to this Agreement and WP's application to become a withholding foreign partnership are incorporated into this Agreement by reference.

**Sec. 2.02. Amounts Subject to NRA Withholding.** An "amount subject to NRA withholding" is an amount described in Treas. Reg. § 1.1441-2(a). An amount subject to NRA withholding shall not include interest paid as part of the purchase price of an obligation sold between interest payment dates or original issue discount paid as part of the purchase price of an obligation sold in a transaction other than the redemption of such obligation, unless the sale is part of a plan the principal purpose of which is to avoid tax and WP has actual knowledge or reason to know of such plan.

**Sec. 2.03. Chapter 3 of the Code.** Any reference to "chapter 3 of the Code" means sections 1441, 1442, 1443, 1461, 1463, and 1464 of the Code.

**Sec. 2.04. Chapter 61 of the Code.** Any reference to "chapter 61 of the Code" means sections 6031, 6041, 6042, 6045, 6049, and 6050N of the Code.

**Sec. 2.05. External Auditor.** An "external auditor" is any approved auditor listed in Appendix A of this Agreement that WP engages to perform the audits required by Section 8 of this Agreement.

**Sec. 2.06. Flow-Through Entity.** A flow-through entity is a foreign partnership described in Treas. Reg. § 301.7701-2 or 3 (other than a withholding foreign partnership), a foreign trust that is described in section 651(a) of the Code (other than a withholding foreign trust), or a foreign trust all or a portion of which is treated as owned by the grantor or other person under sections 671 through 679 of the Code (other than a withholding foreign trust). For an item of income for which a treaty benefit is claimed, an entity is also a flow-through entity to the extent it is treated as fiscally transparent under section 894 and the regulations thereunder.

**Sec. 2.07. Foreign Person.** A "foreign person" is any person that is not a "United States person" and includes a "nonresident

alien individual,” a “foreign corporation,” a “foreign partnership,” a “foreign trust,” and a “foreign estate,” as those terms are defined in section 7701 of the Code.

**Sec. 2.08. Form W-8.** “Form W-8” means a valid IRS Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding*; IRS Form W-8ECI, *Certificate of Foreign Person's Claim for Exemption From Withholding on Income Effectively Connected With the Conduct of a Trade or Business in the United States*; IRS Form W-8EXP, *Certificate of Foreign Governments and Other Foreign Organizations for United States Tax Withholding*; and IRS Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Partnership, and Certain U.S. Branches for United States Tax Withholding*, as appropriate. It also includes any acceptable substitute form.

**Sec. 2.09. Form W-9.** “Form W-9” means a valid IRS Form W-9, *Request for Taxpayer Identification Number and Certification*, or any acceptable substitute.

**Sec. 2.10. Form 1042.** “Form 1042” means an IRS Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*.

**Sec. 2.11. Form 1042-S.** “Form 1042-S” means an IRS Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*.

**Sec. 2.12. Form 1065.** “Form 1065” means an IRS Form 1065, *U.S. Return of Partnership Income*, and the Schedules K-1 associated with that form.

**Sec. 2.13. Intermediary.** An “intermediary” means any person that acts on behalf of another person, such as a custodian, broker, nominee, or other agent.

**Sec. 2.14. Nonwithholding Foreign Partnership.** A “nonwithholding foreign partnership” is any foreign partnership that is not acting as a withholding foreign partnership.

**Sec. 2.15. NRA Withholding.** For purposes of this Agreement, “nonresident alien (NRA) withholding” is any withholding required under chapter 3 of the Code (other than sections 1445 or 1446), whether the payment subject to withholding is made to an individual or to an entity.

**Sec. 2.16. Overwithholding.** The term “overwithholding” means the excess of the amount actually withheld over the amount

required to be withheld under chapter 3 of the Code.

**Sec. 2.17. Partnership and Partner; Direct Partner; Indirect Partner; Passthrough Partner.** The terms “partnership” and “partner” are defined in section 7701(a)(2) of the Code and the regulations thereunder. A direct partner is a partner, other than an intermediary or flow-through entity that is not itself a withholding foreign partnership or withholding foreign trust, for which WP acts as a withholding foreign partnership. An indirect partner is a person that owns a partnership interest in WP through one or more passthrough partners. A passthrough partner is a direct or indirect partner in WP that is an intermediary or flow-through entity. As provided in Section 2.06 of this Agreement, a withholding foreign partnership or withholding foreign trust is not a flow-through entity and thus is not a passthrough partner.

**Sec. 2.18. Payment.** A “payment” is considered made to a person if that person realizes income whether or not such income results from an actual transfer of cash or other property. See Treas. Reg. § 1.1441-2(e).

**Sec. 2.19. Pooled Reporting (PR) Election.** A “pooled reporting (PR) election” is defined in Section 6.03.

**Sec. 2.20. Reduced Rate of Withholding.** A “reduced rate of withholding” means a rate of withholding that is less than 30 percent, either as a result of a reduction in withholding under the Code or as a result of a reduction in withholding under an income tax treaty.

**Sec. 2.21. Reportable Amount.** A “reportable amount” means an amount subject to NRA withholding (as defined in Section 2.02 of this Agreement); U.S. source deposit interest; and U.S. source interest or original issue discount paid on the redemption of short-term obligations. The term does not include payments on deposits with banks and other financial institutions that remain on deposit for two weeks or less. It also does not include amounts of original issue discount arising from a sale and repurchase transaction completed within a period of two weeks or less, or amounts described in Treas. Reg. § 1.6049-5(b)(7), (10), or (11) (relating

to certain foreign targeted registered obligations and certain obligations issued in bearer form).

**Sec. 2.22. Reporting Pool.** A reporting pool is defined in Section 6.03 of this Agreement.

**Sec. 2.23. Schedule K-1.** “Schedule K-1” or “K-1” is the schedule associated with the Form 1065 that itemizes an individual Partner's Share of Income, Credits, Deductions, etc.

**Sec. 2.24. TIN.** A “TIN” is a U.S. taxpayer identification number.

**Sec. 2.25. Underwithholding.** “Underwithholding” means the excess of the amount required to be withheld under chapter 3 of the Code over the amount actually withheld.

**Sec. 2.26. U.S. Person.** A “United States (or U.S.) person” is a person described in section 7701(a)(30) of the Code, the U.S. government (including an agency or instrumentality thereof), a State of the United States (including an agency or instrumentality thereof), or the District of Columbia (including an agency or instrumentality thereof).

**Sec. 2.27. Withholding Agent.** A “withholding agent” has the same meaning as set forth in Treas. Reg. § 1.1441-7(a) and includes a payor. As used in this Agreement, the term generally refers to the person making a payment to a withholding foreign partnership.

**Sec. 2.28. Withholding Foreign Partnership (or WP).** A “withholding foreign partnership” is a person, described in Treas. Reg. § 1.1441-5(c)(2), that has entered into a withholding agreement with the IRS to be treated as a withholding foreign partnership and is acting in its capacity as a withholding foreign partnership.

**Sec. 2.29. Withholding Foreign Partnership (or WP) EIN.** A “withholding foreign partnership EIN” or “WP-EIN” means the employer identification number assigned by the IRS to a withholding foreign partnership. WP's WP-EIN is only to be used when WP is acting as a withholding foreign partnership. For example, WP must give a withholding agent its non-WP EIN, if any, rather than its WP-EIN, if it is not acting as a withholding foreign partnership and a taxpayer identification number is required.

**Sec. 2.30. Withholding Statement.** The term “withholding statement” is defined in Section 5.02 of this Agreement.

**Sec. 2.31. Other Terms.** Any term not defined in this section has the same meaning that it has under the Code, the income tax regulations under the Code, or any applicable income tax treaty.

### **SECTION 3. WITHHOLDING RESPONSIBILITY**

**Sec. 3.01. NRA Withholding Responsibility.** WP is subject to the withholding and reporting provisions applicable to withholding agents under chapter 3 of the Code. Under chapter 3, a withholding agent must withhold 30 percent of any payment of an amount subject to NRA withholding made to a partner that is a foreign person unless the withholding agent can reliably associate the payment with documentation upon which it can rely to treat the payment as made to a payee that is a U.S. person or as made to a beneficial owner that is a foreign person entitled to a reduced rate of withholding. When it is acting as a withholding foreign partnership, WP must assume NRA withholding responsibility for amounts subject to NRA withholding that are distributed to, or included in the distributive share of, any direct partner, and WP must withhold the amount required to be withheld under chapter 3 of the Code. WP must provide a Form W-8IMY that certifies to a withholding agent that makes a payment of such amounts that WP is acting as a withholding foreign partnership, and WP must identify such amounts on the withholding statement associated with that Form W-8IMY. WP is not required to withhold when it pays such amounts to another withholding foreign partnership or withholding foreign trust that has certified to WP on Form W-8IMY that it is acting as a withholding foreign partnership or withholding foreign trust with respect to such identified amounts. WP is not required to act as a withholding foreign partnership for all amounts that it receives from a withholding agent. Except as provided in Section 10 of this Agreement, WP may not act as a withholding foreign partnership for amounts distributed to, or included in the distributive share of, passthrough partners or indirect partners. WP must act as

a nonwithholding foreign partnership for such amounts. When WP is not acting as a withholding foreign partnership, WP must: 1) provide to the withholding agent a Form W-8IMY with Part VI completed; 2) identify such amounts on the withholding statement associated with that Form W-8IMY; and 3) provide the documentation and information required by Treas. Reg. § 1.1441-5(c)(3)(iii) and (iv).

**Sec. 3.02. Timing of Withholding.** WP must withhold on the date it makes a distribution to a direct foreign partner that includes an amount subject to NRA withholding. To the extent a direct foreign partner's distributive share of income subject to withholding has not actually been distributed to the direct foreign partner, WP must withhold on the direct foreign partner's distributive share on the earlier of the date that the statement required under section 6031(b) of the Code (schedule K-1) is mailed or otherwise provided to the partner or the due date for furnishing the statement (whether or not WP is required to prepare and furnish the statement).

**Sec. 3.03. Withholding on Distributions.** WP may determine the amount of withholding on a distribution based on a reasonable estimate of the partner's distributive share of income subject to withholding for the year. WP must correct the estimated withholding to reflect the partner's actual distributive share on the earlier of the date that the statement required under section 6031(b) of the Code (schedule K-1) is mailed or otherwise provided to the partner or the due date for furnishing the statement (whether or not WP is required to furnish the statement). If that date is after the due date for the WP's Forms 1042 and 1042-S (including extensions) for the calendar year, WP may withhold and report any adjustments required by the corrected information in the following calendar year.

**Sec. 3.04. Deposit Requirements.** WP must deposit amounts withheld under chapter 3 of the Code with a Federal Reserve bank or authorized financial institution at the time and in the manner provided under section 6302 of the Code (see Treas. Reg. § 1.6302-2(a) or § 31.6302-1(h)).

### **SECTION 4. DOCUMENTATION REQUIREMENTS**

**Sec. 4.01. Documentation Requirements.** WP agrees to obtain, review, and maintain Forms W-8 and W-9 in accordance with this Section 4. WP must obtain a Form W-8 or W-9 from every direct partner prior to the time that withholding is required. WP agrees to make documentation (together with any associated withholding statements and other documents or information) available upon request for inspection by WP's external auditor. WP represents that none of the laws to which it is subject prohibits disclosure of the identity of any partner or corresponding partner information to WP's external auditor. WP may rely on the Forms W-8 and W-9 it obtains under this Section 4 as the basis for determining its withholding and reporting obligations.

**Sec. 4.02. Documentation for Foreign Partners.** WP may treat a direct partner as a foreign beneficial owner if the direct partner provides a Form W-8 that supports such status. WP may treat a direct partner that has provided a Form W-8 as entitled to a reduced rate of NRA withholding if all the requirements for a reduced rate are met and the Form W-8 provided by the direct partner supports entitlement to a reduced rate. Sections 4.03 through 4.06 of this Agreement describe the specific documentation requirements necessary for obtaining a reduced rate of withholding in certain circumstances.

**Sec. 4.03. Treaty Claims.** WP may not reduce the rate of withholding based on a direct partner's claim of treaty benefits unless WP obtains from the partner a Form W-8BEN with Part II of the form properly completed, including the appropriate limitation on benefits and section 894 certifications.

**Sec. 4.04. Documentation for International Organizations.** WP may not treat a direct partner as an international organization entitled to an exemption from withholding under section 892 of the Code unless WP obtains a Form W-8EXP from the international organization and the name provided on the Form W-8EXP is the name of an entity designated as an international organization by executive order pursuant to 22 United States Code

288 through 288(f). If an international organization is not claiming benefits under section 892 of the Code but under another Code exception, the provisions of Section 4.02 of this Agreement apply rather than the provisions of this Section 4.04.

**Sec. 4.05. Documentation for Foreign Governments and Foreign Central Banks of Issue.**

(A) **Documentation For a Foreign Government or Foreign Central Bank of Issue Claiming an Exemption From Withholding Under Section 892 or Section 895.** WP may not treat a direct partner as a foreign government or foreign central bank of issue exempt from withholding under section 892 or 895 of the Code unless—

(1) WP receives from the direct partner a Form W-8EXP establishing that the direct partner is a foreign government or foreign central bank of issue;

(2) The income distributed to, or included in the distributive share of, the direct partner is the type of income that qualifies for an exemption from withholding under section 892 or 895; and

(3) WP does not know, or have reason to know, that the direct partner is a controlled commercial entity, that the income owned by the foreign government or foreign central bank of issue is being received from a controlled commercial entity, or that the income is from the disposition of an interest in a controlled commercial entity.

(B) **Treaty Exemption.** WP may not treat a direct partner as a foreign government or foreign central bank of issue entitled to a reduced rate of withholding under an income tax treaty unless it obtains a Form W-8BEN that, under Section 4.03 of this Agreement, is sufficient to obtain a reduced rate of withholding under a treaty.

(C) **Other Code Exception.** If a foreign government or foreign central bank of issue is not claiming benefits under section 892 or section 895 of the Code but under another Code exception (*e.g.*, the portfolio interest exception under sections 871(h) or 881(c) of the Code), the provisions of Section 4.02 of this Agreement apply rather than the provisions of this Section 4.05.

**Sec. 4.06. Documentation for Foreign Tax-Exempt Organizations.**

(A) **Reduced Rate of Withholding Under Section 501.** WP may not treat a

direct partner as a foreign organization described under section 501(c) of the Code, and therefore exempt from withholding (or, if the direct partner is a foreign private foundation, subject to withholding at a 4-percent rate under section 1443(b) of the Code) unless WP obtains a valid Form W-8EXP with Part III of the form properly completed.

(B) **Treaty Exemption.** WP may not treat a direct partner as a foreign organization that is tax exempt or entitled to a reduced rate of withholding under an income tax treaty unless WP obtains a Form W-8BEN that, under Section 4.03 of this Agreement, is sufficient to obtain a reduced rate of withholding under a treaty.

(C) **Other Exceptions.** If a tax-exempt entity is not claiming a reduced rate of withholding because it is an organization described under section 501(c) of the Code or under an income tax treaty, but is claiming a reduced rate of withholding under another Code exception, the provisions of Section 4.02 of this Agreement apply rather than the provisions of this Section 4.06.

**Sec. 4.07. Documentation for Passthrough Partners.** Except as provided in Section 10 of this Agreement, WP shall not act as a withholding foreign partnership with respect to an amount subject to withholding distributed to, or included in the distributive share of, a passthrough partner, as defined in Section 2.17 of this Agreement. WP must forward that passthrough partner's documentation (and associated withholding statement and documentation of indirect partners) to the withholding agent from whom WP receives the amount subject to withholding. WP may act as a withholding foreign partnership with respect to amounts subject to withholding distributed to, or included in the distributive share of, partners that are themselves withholding foreign partnerships or withholding foreign trusts.

**Sec. 4.08. Documentation for U.S. Exempt Recipients.** WP shall not treat a partner as a U.S. exempt recipient unless WP obtains a Form W-9 from the partner on which the partner writes "Exempt" in Part II of the form.

**Sec. 4.09. Documentation for U.S. Non-Exempt Recipients.** WP shall not

treat a partner as a U.S. non-exempt recipient unless WP obtains a Form W-9 from the partner.

**Sec. 4.10. Documentation Validity.** WP may not rely on Forms W-8 or W-9 if WP has actual knowledge or reason to know that the information or statements contained in the forms are unreliable or incorrect. Once WP knows, or has reason to know, that a Form W-8 or W-9 provided by a direct partner is unreliable or incorrect, WP must obtain a new Form W-8 or W-9 prior to the time withholding is required.

**Sec. 4.11. Documentation Validity Period.**

(A) **Form W-8.** WP may rely on a properly completed Form W-8 until its validity expires under Treas. Reg. § 1.1441-1(e)(4)(ii).

(B) **Form W-9.** WP may rely on a properly completed Form W-9 as long as it has not been informed by the IRS or another withholding agent that the form is unreliable.

**Sec. 4.12. Maintenance and Retention of Documentation.**

(A) **Maintaining Documentation.** WP shall maintain Forms W-8 and W-9 by retaining the original documentation, a certified copy, a photocopy or a microfiche, or by electronic storage or similar means of record retention.

(B) **Retention Period.** WP shall retain a direct partner's Form W-8 or W-9 obtained under this Section 4 for as long as it may be relevant to the determination of WP's tax liability under this Agreement.

**SECTION 5. WITHHOLDING FOREIGN PARTNERSHIP WITHHOLDING CERTIFICATE**

**Sec. 5.01. WP Withholding Certificate.** WP agrees to furnish a withholding foreign partnership withholding certificate to each withholding agent from which it receives amounts subject to NRA withholding as a withholding foreign partnership. The withholding foreign partnership withholding certificate is a Form W-8IMY (or acceptable substitute form) that certifies that WP is acting as a withholding foreign partnership, contains WP's WP-EIN, and provides all other information required by the form. WP is not required to disclose, as part of that Form W-8IMY or its



withholding statement, any information regarding the identity of a direct partner.

**Sec. 5.02. Withholding Statement.** WP agrees to provide to each withholding agent from which WP receives amounts subject to NRA withholding as a withholding foreign partnership a written statement (the "withholding statement") identifying the amounts for which WP acts as a withholding foreign partnership. The statement forms an integral part of the Form W-8IMY. The withholding statement may be provided in any manner, and in any form, to which WP and the withholding agent mutually agree.

**Sec. 5.03. Withholding Rate Pools.** When it is acting as a withholding foreign partnership, WP must assume withholding responsibility for amounts subject to withholding that are distributed to, or included in the distributive shares of, its direct partners. Accordingly, withholding rate pool information is not required as part of WP's withholding statement.

## SECTION 6. TAX RETURN OBLIGATIONS

### Sec. 6.01. Form 1042 Filing Requirement.

(A) **In General.** WP shall file a return on Form 1042, whether or not WP withheld any amounts under chapter 3 of the Code, on or before March 15 of the year following any calendar year in which WP acts as a withholding foreign partnership. In addition to the information specifically requested on Form 1042 and the accompanying instructions, WP shall attach a statement setting forth the amounts of any overwithholding or underwithholding adjustments made under Treas. Reg. § 1.1461-2 and Sections 7.01 and 7.03 of this Agreement, and an explanation of the circumstances that resulted in the over- or under-withholding.

(B) **Extensions for Filing Returns.** WP may request an extension of the time for filing Form 1042, or any of the information required to be attached to the form, by submitting Form 2758, *Application for Extension of Time to File Certain Excise, Income, Information, and Other Returns*, on or before the due date of the return. The application shall be in writing, properly signed by a duly authorized agent of WP, and shall clearly set forth the following:

(1) The calendar year for which the extension is requested; and

(2) A full explanation of the reason(s) for requesting the extension, to assist the IRS in determining the period of extension, if any, that will be granted.

**Sec. 6.02. Form 1042-S Reporting: General Rule.** Unless WP has made a pooled reporting (PR) election pursuant to Section 6.03 of this Agreement, WP is required to file separate Forms 1042-S for each direct partner to whom WP distributes, or in whose distributive share is included, an amount subject to NRA withholding. WP must file separate Forms 1042-S by income code, exemption code, recipient code, and withholding rate. WP must file its Forms 1042-S in the manner required by the regulations under chapter 3 of the Code and the instructions to the form, including any requirement to file the forms magnetically or electronically. Any Form 1042-S required by this section 6 shall be filed on or before March 15 following the calendar year in which withholding, if any, was required under Section 3.02 of this Agreement. WP may request an extension of time to file Forms 1042-S by submitting Form 8809, *Request for Extension of Time to File Information Returns*, by the due date of Forms 1042-S in the manner required by Form 8809.

**Sec. 6.03. Form 1042-S Reporting: Special Rule for PR Election.** If WP has made the PR election pursuant to this Section 6.03, WP is not required to file Forms 1042-S for amounts distributed to, or included in the distributive share of, each separate direct partner for whom such reporting would otherwise be required. Instead, WP shall 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. WP may use a single recipient code for all reporting pools except for amounts paid to foreign tax-exempt recipients, for which a separate recipient code must be used. For this purpose, a foreign tax-exempt recipient includes any organization that is not subject to NRA withholding and is not liable to tax in its country of residence because it is a charitable organization, a pension fund, or a foreign government. WP must make the

PR election at the time this Agreement is executed by signing the election statement on the signature page of this Agreement. Once made, the PR election remains in effect for the entire term of this Agreement beginning on the date the Agreement becomes effective and ending on the date of its expiration or termination under Section 9 of the Agreement. WP must make a new election for each renewal term of this Agreement. If WP makes the PR election, WP cannot revoke it prior to the end of the term for which WP has made the PR election. If WP did not make the PR election at the time this Agreement was executed, then WP may make a PR election only by terminating this Agreement pursuant to Section 9.03 and requesting to enter into a new withholding foreign partnership agreement.

**Sec. 6.04. Form 1065 Filing Requirement.** If WP is required to file Form 1065 and Schedules K-1 under Treas. Reg. § 1.6031(a)-1, then WP shall file Form 1065 and Schedules K-1 in accordance with the regulations and the instructions for the form.

**Sec. 6.05. Retention of Returns.** WP shall retain Forms 1065 and 1042 for the period of the applicable statute of limitations on assessments and collection under the Code.

## SECTION 7. ADJUSTMENTS FOR OVER- AND UNDER-WITHHOLDING; REFUNDS

**Sec. 7.01. Adjustments for NRA Overwithholding by WP.** WP may make an adjustment for amounts paid to its direct partners that it has overwithheld under chapter 3 of the Code by applying either the reimbursement or set-off procedures described in this section within the time period prescribed for those procedures.

(A) **Reimbursement Procedure.** WP may repay its partners for an amount overwithheld and reimburse itself by reducing, by the amount of tax actually repaid to the partners, the amount of any subsequent deposit of tax required to be made by WP under Section 3.04 of this Agreement. For purposes of this Section 7.01(A), an amount that is overwithheld shall be applied in order of time to each of WP's subsequent deposit periods in the same calendar year to the extent that the withholding

taxes required to be deposited for a subsequent deposit period exceed the amount actually deposited. An amount overwithheld in a calendar year may be applied to deposit periods in the calendar year following the calendar year of overwithholding only if—

(1) WP states on a Form 1042-S filed by March 15 of the calendar year following the calendar year of overwithholding, the amount of tax withheld and the amount of any actual repayments; and

(2) WP states on a Form 1042, filed by March 15 of the calendar year following the calendar year of overwithholding, that the filing of the Form 1042 constitutes a claim for credit in accordance with Treas. Reg. § 1.6414-1.

**(B) Set-Off Procedure.** WP may repay its partners by applying the amount overwithheld against any amount which otherwise would be required under chapter 3 of the Code to be withheld by WP before the earlier of March 15 of the calendar year following the calendar year of overwithholding or the date that the Form 1042-S is actually filed with the IRS. For purposes of making a return on Form 1042 or 1042-S for the calendar year of overwithholding, and for purposes of making a deposit of the amount withheld, the reduced amount shall be considered the amount required to be withheld from such income under chapter 3 of the Code.

**Sec. 7.02. Collective Credit or Refund Procedures for NRA Overwithholding.** If WP has made a PR election and it has overwithheld under chapter 3 of the Code on amounts subject to NRA withholding paid to WP's direct partners during a calendar year and the amount has not been recovered under the reimbursement or set-off procedures under Sections 7.01 of this Agreement, WP may request a credit or refund of the total amount overwithheld by following the procedures of this Section 7.02. WP shall follow the procedures set forth under sections 6402 and 6414 of the Code, and the regulations thereunder, to claim the credit or refund. No credit or refund will be allowed after the expiration of the statutory period of limitation for refunds under section 6511 of the Code. WP may use the collective refund procedures under this Section 7.02 only if the following conditions are met:

(A) WP must not have issued Forms 1042-S to the direct partners who were subject to overwithholding;

(B) WP must submit, together with its amended return on which it claims a credit or refund, a statement of the reason for the overwithholding;

(C) WP must submit, together with its amended return on which it claims a credit or refund, a statement that it has repaid the amount of overwithholding to the appropriate direct partners prior to filing the claim for credit or refund; and

(D) WP must retain a record showing that it repaid the direct partners the amount of the overwithholding.

**Sec. 7.03. Adjustments for NRA Underwithholding.** If WP knows that an amount should have been withheld under chapter 3 of the Code from a previous payment to a direct partner but was not withheld, WP may either withhold from future payments made to the same direct partner or satisfy the tax from the direct partner's proportionate share of assets over which it has control. The additional withholding or satisfaction of the tax owed may only be made before the due date of the Form 1042 (not including extensions) for the calendar year in which the underwithholding occurred.

**Sec. 7.04. NRA Underwithholding after Form 1042 Filed.** If, after a Form 1042 has been filed for a calendar year, WP, WP's external auditor, or the IRS determines that, due to WP's failure to carry out its obligations under this Agreement, WP has underwithheld tax for such year, WP shall file an amended Form 1042 to report and pay the underwithheld tax. WP shall pay the underwithheld tax, the interest due on the underwithheld tax, and any applicable penalties, at the time of filing the amended Form 1042. If WP fails to file an amended return, the IRS shall make such return under section 6020 of the Code.

**Sec. 7.05. Special Rule Regarding Failure to Deposit Penalties.** Solely for purposes of applying section 6656 of the Code (failure to make deposit of taxes), WP will not be considered to have made an underpayment of a deposit of NRA withholding taxes if the conditions of this paragraph are met. The conditions of this paragraph are that—

(A) WP makes its deposits within the time (deposit period) required by section 6302 of the Code;

(B) The deposit is not less than 90 percent of the aggregate amount of the tax required to be withheld under chapter 3 of the Code during the deposit period applicable to WP; and

(C) WP determines the difference between the total amount required to be deposited and the amount actually deposited as of the end of the 3rd, 6th, 9th, and 12th months of the calendar year and the difference is deposited no later than the 15th day of the second following month (*i.e.*, May 15, August 15, November 15, and February 15, respectively). In determining whether there has been an underpayment, reimbursements and set-offs shall be taken into account.

## SECTION 8. EXTERNAL AUDIT PROCEDURES

**Sec. 8.01. In General.** Unless WP requests an IRS audit in lieu of an external audit, the IRS agrees not to conduct an on-site audit of WP with respect to withholding and reporting obligations covered by this Agreement provided that an external auditor designated in Appendix A of this Agreement conducts an audit of WP in accordance with this Section 8. WP shall permit the external auditor to have access to all relevant records of WP for purposes of performing the external audit, including information regarding specific partners. WP shall permit the IRS to communicate directly with the external auditor and to review the audit procedures followed by the external auditor. WP represents that there are no legal prohibitions that prevent the external auditor from examining any information relevant to the external audit to be performed under this Section 8 and that there are no legal prohibitions that prevent the IRS from communicating directly with the auditor. WP shall permit the IRS to examine the external auditor's work papers and reports.

**Sec. 8.02. Designation of External Auditor.** WP's external auditor must be one of the auditors listed in Appendix A of this Agreement, unless WP and the IRS

agree, prior to the audit, to substitute another auditor. WP shall not propose an external auditor unless it has a reasonable belief that the auditor is subject to laws, regulations, or rules that impose sanctions for failure to exercise its independence and to perform the audit competently. The IRS has the right to reject a proposed external auditor, or to revoke its acceptance of an external auditor, if the IRS, in its sole discretion, reasonably believes that the auditor is not independent or cannot perform an effective audit under this Agreement.

**Sec. 8.03. Timing of External Audits: General Rule.** Unless WP has made a PR election, WP shall have the external auditor conduct an external audit only at such time and only for such calendar years as the IRS directs.

**Sec. 8.04. Timing of External Audits: Special Rule for PR Election.**

(A) If WP has made a PR election and the term of this Agreement is determined under Section 9.02(A), WP shall have the external auditor conduct an audit of the second full calendar year and the fifth full calendar year that this Agreement is in effect.

(B) If WP has made a PR election and the term of this Agreement is determined under Section 9.02(B), WP shall have the external auditor conduct an audit after the close of every other calendar year that this Agreement is in effect. The auditor shall examine the two previous calendar years. For example, the first audit will occur in the third calendar year that the Agreement is in effect and the external auditor will examine calendar years one and two.

**Sec. 8.05. Scope of External Audit.** The external auditor shall verify whether WP is in compliance with this Agreement by conducting an audit that meets the requirements of this Section 8.05. The report, described in Section 8.06 of this Agreement, must disclose that the external auditor has, at a minimum, performed the following checks listed in this Section 8.05, and set forth how each of those checks was performed and the results of the checks. WP's external auditor is encouraged to contact the IRS at the address set forth in Section 11.06 of this Agreement and submit an audit plan (which includes, if relevant, the extent to which the external auditor proposes to rely on WP's internal audit procedures) prior

to performing the audit so that the audit may be conducted in the most efficient and least costly manner possible.

(A) **Documentation.** The external auditor must review information contained in partner files to determine whether the documentation requirements of Section 4 of this Agreement are being met.

(B) **Withholding Responsibilities.** The external auditor must—

(1) Perform test checks of direct partners, to verify that WP is withholding the proper amounts.

(2) Verify that amounts withheld were timely deposited in accordance with Section 3.04 of this Agreement.

(C) **Return Filing and Information Reporting.** The external auditor must—

(1) Obtain copies of original and amended Forms 1042, and any schedules, statements, or attachments required to be filed with those forms, and determine whether the amounts of income, taxes, and other information reported on those forms are accurate by—

(i) Reviewing work papers;

(ii) Reviewing Forms W-8IMY, together with the associated withholding statements, that WP has provided to withholding agents;

(iii) Reviewing copies of Forms 1042-S received from withholding agents;

(iv) Reviewing account statements from withholding agents;

(v) Reviewing correspondence between WP and withholding agents; and

(vi) Interviewing personnel responsible for preparing the Form 1042 and the work papers used to prepare those forms.

(2) Obtain copies of original and amended Forms 1042-S and Schedules K-1 together with the work papers used to prepare those forms and determine whether the amounts reported on those forms are accurate by—

(i) Reviewing the Forms 1042-S received from withholding agents;

(ii) Reviewing the Form 1065, if required;

(iii) Reviewing a valid sample of earnings statements issued by WP to direct partners, if any.

(3) Thoroughly review the statements attached to amended Forms 1042 filed to claim a refund, ascertain their veracity, and

determine the causes of any overwithholding reported and ensure WP did not issue Forms 1042-S to persons whom it included as part of its collective credit or refund.

(4) Determine, in the case of collective credits or refunds, that WP repaid the appropriate partners prior to requesting a collective credit or refund.

(E) **Change in Circumstances.** The external auditor must verify that in the course of the audit it has not discovered any significant change in circumstances, as described in Section 9.05 (A) or (D) of this Agreement.

**Sec. 8.06. External Auditor's Report.**

Upon completion of the audit of WP, the external auditor shall issue a report, or reports, of audit findings directly to the IRS by sending the original report to the IRS at the address set forth in Section 11.06 of this Agreement. This report is due by December 31 following the calendar year being audited, or if that date falls on a Saturday or Sunday, the next U.S. business day. The IRS may, however, upon request by the external auditor, extend the due date of the audit report upon good cause. The report must be in writing, in English, and currency amounts must be stated in U.S. dollars. The report must fully describe the scope of the audit, the methodologies (including sampling techniques) used to determine whether WP is in compliance with the provisions of this Agreement, and the result of each such determination. The report must also specifically address each of the items in Section 8.05 of this Agreement.

**Sec. 8.07. Expanding Scope and Timing of External Audit.** Upon review of the external auditor's report, the IRS may request, and WP must permit, the external auditor to perform additional audit procedures.

## SECTION 9. EXPIRATION, TERMINATION AND DEFAULT

**Sec. 9.01. Term of Agreement: General Rule.** If WP has not made a PR election, this Agreement shall be in effect on \_\_\_\_\_ and shall continue in force until the earlier of the date WP terminates under its partnership agreement or the date WP is terminated under 9.03 or 9.04 of this Agreement.

**Sec. 9.02. Term of Agreement: Special Rule for PR Election.**

(A) If WP has made a PR election, unless WP elects the special term pursuant to Section 9.02(B), this Agreement shall be in effect on \_\_\_\_\_ and shall expire upon the earlier of the date WP terminates under its partnership agreement or December 31 of the fifth full calendar year after the year in which this Agreement first takes effect. This Agreement may be renewed for additional terms as provided in Section 9.08 of this Agreement.

(B) If WP has made a PR election, and WP elects the special term pursuant to this Section 9.02(B), this Agreement shall be in effect on \_\_\_\_\_ and shall expire upon the earlier of the date WP terminates under its partnership agreement or December 31 of the fourteenth full calendar year after the year in which this Agreement first takes effect. If WP elects the special term, this Agreement is not renewable. WP must make the special term election under this Section 9.02(B) at the time this Agreement is executed by signing the election statement on the signature page of this Agreement.

**Sec. 9.03. Termination of Agreement.** This Agreement may be terminated by either the IRS or WP prior to the end of its term by delivery of a notice of termination to the other party in accordance with Section 11.06 of this Agreement. The IRS, however, shall not terminate the Agreement unless there has been a significant change in circumstances, as defined in Section 9.05 of this Agreement, or an event of default has occurred, as defined in Section 9.06 of this Agreement, and the IRS determines, in its sole discretion, that the significant change in circumstances or the event of default warrants termination of this Agreement. In addition, the IRS shall not terminate this Agreement in the event of default if WP can establish to the satisfaction of the IRS that all events of default for which it has received notice have been cured within the time period agreed upon. The IRS shall notify WP, in accordance with Section 9.07 of this Agreement, that an event of default has occurred and that the IRS intends to terminate the Agreement unless WP cures the default. A notice of termination sent by either party shall take effect on the date specified in the notice.

**Sec 9.04. Automatic Termination of Agreement.**

(A) **Automatic Termination.** Notwithstanding Section 9.03 of this Agreement, this Agreement will terminate automatically in the event that the external auditor or the IRS on audit discovers that WP was not in possession of Forms W-8 or W-9, as applicable, for any direct partner at any time that withholding or reporting was required under Section 3.02 of this Agreement. The automatic termination will be effective as of December 31 of the year in which the external auditor or the IRS makes that discovery. The automatic termination rules of this Section 9.04(A) shall not apply in the case of indirect partners that are treated as direct partners of WP under Section 10 of this Agreement.

(B) **Cure and Reinstatement.** This Agreement will be reinstated, effective the same date it automatically terminated under Section 9.04(A) of this Agreement, if—

(1) WP obtains appropriate Forms W-8 or W-9 (that relate to the time withholding or reporting was required) for each such undocumented partner before March 15 of the year following the year in which the Agreement automatically terminated, or

(2) All such undocumented partners have ceased to be partners in WP before March 15 of the year following the year in which the Agreement automatically terminated.

(C) **Payment of Underwithholding and Reporting upon Termination.** In the event of automatic termination of this Agreement under this Section 9.04, WP must pay any underwithholding of tax, interest, and penalties that the IRS determines is attributable to each undocumented direct partner for the period during which the partner was undocumented, and, if WP has made a PR election, WP must file Forms 1099, or partner specific Forms 1042-S reporting the names and addresses and other required information, as appropriate, for every undocumented direct partner from the earliest time the Form W-8 or W-9 was required for that undocumented direct partner through the date of termination. WP may, however, continue to report on a pooled basis for documented foreign direct partners through this period.

(D) **Reinstatement after Termination.** After the date of automatic termination of

this Agreement, WP may not act as a withholding foreign partnership, and must so notify any persons to which WP has furnished a withholding foreign partnership certificate. After the date of automatic termination of this Agreement, the IRS may reinstate this Agreement (or the IRS may require WP to enter into a new withholding foreign partnership agreement) on such terms and conditions and with such modifications as the IRS may determine.

**Sec. 9.05. Significant Change in Circumstances.** For purposes of this Agreement, a significant change in circumstances includes, but is not limited to—

(A) any merger, consolidation or division of WP or any change in circumstances that would result in a termination of WP under section 708 of the Code;

(B) A change in U.S. federal law or policy, or applicable foreign law or policy, that affects the validity of any provision of this Agreement, materially affects the procedures contained in this Agreement, or affects WP's ability to perform its obligations under this Agreement;

(C) A ruling of any court that affects the validity of any provision of this Agreement; or

(D) A significant change in WP's business practices that affects WP's ability to meet its obligations under this Agreement.

**Sec. 9.06. Events of Default.** For purposes of this Agreement, an event of default occurs if WP fails to perform any material duty or obligation required under this Agreement, and includes, but is not limited to, the occurrence of any of the following:

(A) WP fails to implement adequate procedures, accounting systems, and internal controls to ensure compliance with this Agreement;

(B) WP underwithholds an amount that WP is required to withhold under chapter 3 of the Code and fails to correct the underwithholding or to file an amended Form 1042 reporting, and paying, the appropriate tax;

(C) WP makes excessive refund claims;

(D) WP fails to file Forms 1042, 1042-S, 1065 (if required), or Schedules K-1 (if required) by the due date specified on such forms or files forms that are materially incorrect or fraudulent;

(E) WP fails to have an external audit performed when required, WP's external auditor fails to provide its report directly to the IRS on a timely basis, WP fails to cooperate with the external auditor, or WP or its external auditor fails to cooperate with the IRS;

(F) WP fails to inform the IRS within 90 days of any significant change in its business practices to the extent that change affects WP's obligations under this Agreement;

(G) WP fails to cure a default identified by the IRS or by an external auditor;

(H) WP makes any fraudulent statement or a misrepresentation of material fact with regard to this Agreement to the IRS, a withholding agent, or WP's external auditor;

(I) The IRS determines that WP's external auditor is not sufficiently independent to adequately perform its audit function or the external auditor fails to provide an audit report that complies with Section 8 of this Agreement;

(J) WP is prohibited by any law from disclosing the identity of a partner or partner information to WP's external auditor;

(K) WP fails to make deposits in the time and manner required by Section 3.04 of this Agreement or fails to make adequate deposits, taking into account the procedures of 7.05 of this Agreement; or

(L) WP fails to permit the external auditor to perform additional audit procedures under the provisions of Section 8.07 of this Agreement.

**Sec. 9.07. Notice and Cure.** Upon the occurrence of an event of default, the IRS may deliver to WP a notice of default specifying the event of default that has occurred. WP shall respond to the notice of default within 60 days (60-day response) from the date of the notice of default. The 60-day response shall contain an offer to cure the event of default and the time period in which the cure will be accomplished or shall state the reasons why WP does not agree that an event of default has occurred. If WP does not provide a 60-day response, the IRS may deliver a notice of termination as provided in Section 9.03 of this Agreement. If WP provides a 60-day response, the IRS shall either accept or reject WP's statement that no default has occurred or accept or reject WP's proposal to cure an event of default.

If the IRS rejects WP's contention that no default has occurred or rejects WP's proposal to cure a default, the IRS will offer a counter-proposal to cure the event of default. Within 30 days of receiving the IRS's counter-proposal, WP shall notify the IRS (30-day response) whether it continues to maintain that no default has occurred or whether it rejects the IRS's counter-proposal to cure an event of default. If WP's 30-day response states that no default has occurred or it rejects the IRS's counter-proposal to cure, the parties shall seek to resolve their disagreement within 30 days of the IRS's receipt of WP's 30-day response. If a satisfactory resolution has not been achieved at the end of this latter 30-day period, or if WP fails to provide a 30-day response, the IRS may terminate this Agreement by providing a notice of termination in accordance with Section 9.03 of this Agreement. If WP receives a notice of termination from the IRS, it may appeal the determination within 30 days of the date of the notice of termination by sending a written notice to the address specified in Section 11.06 of this Agreement. If WP appeals the notice of termination, this Agreement shall not terminate until the appeal has been decided. If an event of default is discovered in the course of an external audit, the WP may cure the default, without following the procedures of this Section 9.07, if the external auditor's report describes the default and the actions that WP took to cure the default and the IRS determines that the cure procedures followed by WP were sufficient. If the IRS determines that WP's actions to cure the default were not sufficient, the IRS shall issue a notice of default and the procedures described in this Section 9.07 shall be followed.

**Sec. 9.08. Renewal.** If WP has made the PR election under Section 6.03 of this Agreement and intends to renew this Agreement for an additional term, it shall submit an application for renewal to the IRS no earlier than one year and no later than six months prior to the expiration of this Agreement. Any such application for renewal must contain an update of the information provided by WP to the IRS in connection with the application to enter into this Agreement, and any other information the IRS may request in connection with the renewal process. This Agreement shall be renewed only upon the signatures

of both WP and the IRS. Either the IRS or WP may seek to negotiate a new withholding foreign partnership agreement rather than renew this Agreement.

## **SECTION 10. CERTAIN PARTNERSHIPS AND TRUSTS**

**Sec. 10.01. Certain Smaller Partnerships and Trusts.** WP cannot apply the rules of this Section 10.01 unless it has made a PR election under Section 6.03 of this Agreement. WP may apply the rules of this Section 10.01 only to a partnership or trust that meets the following conditions: (i) the partnership or trust is a foreign partnership or foreign simple or grantor trust, (ii) the partnership or trust is a direct partner of WP, (iii) none of the partners, beneficiaries or owners of the partnership or trust is a U.S. person or a passthrough partner, beneficiary or owner, and (iv) the total reportable amounts distributed to, and included in the distributive share of, the partnership or trust for the calendar year do not exceed \$200,000. In applying this Section 10.01, WP must treat the partners of such a partnership or the beneficiaries or owners of such a trust as direct partners of WP under this Agreement. To apply this Section 10.01, WP and the partnership or trust must comply with all of the rules listed below.

(1) WP and the partnership or trust must agree in writing that the partnership or trust will make available to WP's auditor for purposes of WP's audit under Section 8 of this Agreement records that establish that the partnership or trust has provided WP with documentation for all of its partners, beneficiaries or owners.

(2) The partnership or trust must provide to WP a Form W-8IMY, together with Forms W-8 from each partner, beneficiary or owner, and a withholding statement, under Treas. Reg. § 1.1441-5(c)(3)(iv) or (e)(5)(iv), that provides information for all partners, beneficiaries or owners. The withholding statement, however, need not provide any allocation information.

(3) WP must treat amounts distributed to, or included in the distributive share of, the partnership or trust as allocated solely to any partner, beneficiary or owner that is subject to the highest rate of withholding and must withhold at that rate.

(4) WP may include amounts distributed to, or included in the distributive

share of, a partnership or trust under Section 10.01(3) in its Form 1042-S reporting pools for direct account holders under Section 6.03 of this Agreement.

(5) After WP has withheld in accordance with Section 10.01(3) above, it may file a separate Form 1042-S for any partner, beneficiary or owner who requests that it do so. WP may do so only if the partnership or trust provides a withholding statement that includes allocation information for the requesting partner, beneficiary or owner and only if the partnership or trust has agreed in writing under Section 10.01(1) to make available to WP's external auditor records that substantiate the allocation information included in its withholding statement.

(6) WP may not include any amounts distributed to, or included in the distributive share of, a partnership or trust to which WP is applying the rules of this Section 10.01 in any collective refund claim made under Section 7.02 of this Agreement.

(7) WP and a partnership or trust that apply this Section 10.01 to any calendar year are not required to apply this Section 10.01 to subsequent calendar years. WP and a partnership or trust that apply this Section 10.01 to any calendar year must apply these rules to the calendar year in its entirety.

(8) WP and the partnership or trust may not apply this Section 10.01 to any calendar year for which the partnership or trust has failed to make available to WP's auditor the records described in Section 10.01(1) within 90 days after these records are requested. If the partnership or trust has failed to make these records available within the 90-day period, or if WP and the partnership or trust fail to comply with any other requirement of this Section 10.01, WP must apply Treas. Reg. § 1.1441-1 and 1.1441-5 to the partnership or trust, correct its withholding, and must file corrected Forms 1042 and 1042-S.

**Sec. 10.02. Certain Related Partnerships and Trusts.** WP may not apply the rules of this Section 10.02 unless it has made a PR election under Section 6.03 of this Agreement. WP may apply the rules of this Section 10.02 only to a partnership or trust that meets the following conditions: (1) the partnership or trust is a foreign partnership or foreign simple or grantor trust; (2) the partnership or trust is either (i) a direct partner of WP or (ii) the

partnership or trust is an indirect partner of WP that is a partner, beneficiary or owner of a partnership or trust to which WP has also applied this Section 10.02; and (3) the WP is a general partner of the partnership or a trustee of the trust. WP may not apply this Section 10.02 to indirect partners, beneficiaries or owners of such partnerships or trusts, or to direct partners, beneficiaries or owners of such partnerships or trusts that are intermediaries, flow-through entities or U.S. nonexempt recipients. See 10.02(5) of this Agreement. To apply this Section 10.02, WP and the partnership or trust must comply with all of the rules listed below.

(1) WP and the partnership or trust must enter into a written agreement under which the partnership or trust agrees:

(a) To act as an agent of WP with respect to its partners, beneficiaries or owners, and, as WP's agent, to apply the provisions of the WP Agreement to its partners, beneficiaries or owners,

(b) To treat its direct partners, beneficiaries or owners as direct partners of WP under the WP Agreement and to treat its indirect partners, beneficiaries or owners as indirect partners of WP under the WP Agreement, and

(c) To make available, upon request, to WP's auditor for purposes of WP's audit under Section 8 of the WP Agreement, records that establish its compliance with all of the rules listed under this Section 10.02.

(2) By entering into an agreement with a partnership or trust under paragraph (1) of this section, WP is not assigning its liability for the performance of any of its obligations under this Agreement. WP and the partnership or trust to which WP applies the rules of this Section 10.02, are jointly and severally liable for any tax, penalties and interest that may result from the failure of the partnership or trust to meet any of the obligations imposed by its agreement with WP.

(3) The partnership or trust must provide to WP a Form W-8IMY together with a withholding statement, under Treas. Reg. § 1.1441-5(c)(3)(iv) or (e)(5)(iv), that includes all information necessary for WP to fulfill its withholding, reporting and filing obligations under this Agreement. The withholding statement may include pooled basis information regarding direct partners, beneficiaries or owners that are

not intermediaries, flow-through entities or U.S. non-exempt recipients. The partnership or trust need not provide to WP documentation for partners, beneficiaries or owners, except as provided under section 10.02(1)(c).

(4) WP must withhold on the date an amount is distributed to or included in the distributive share of a foreign partnership or trust based on the withholding statement provided by the partnership or trust. The amount allocated to each partner, beneficiary or owner in the withholding statement may be based on a reasonable estimate of the partner's, beneficiary's or owner's distributive share of income subject to withholding for the year. The partnership or trust must correct the estimated allocations to reflect the partner's, beneficiary's or owner's actual distributive share and must provide this corrected information to WP, on the earlier of the date that the statement required under section 6031(b) of the Code (schedule K-1) is mailed or otherwise provided to the partner or the due date for furnishing the statement (whether or not the partnership or trust is required to prepare and furnish the statement). If that date is after the due date for WP's Forms 1042 and 1042-S (without regard to extensions) for the calendar year, WP may withhold and report any adjustments required by the corrected information in the following calendar year.

(5) WP must file separate Forms 1042-S reflecting pooled basis information for each partnership or trust that has provided pooled basis information in its withholding statement. WP shall apply the provisions of Treas. Reg. § 1.1441-1 and 1.1441-5 to partners, beneficiaries or owners of such partnerships or trusts that are indirect partners, beneficiaries or owners, and to direct partners, beneficiaries or owners of such partnerships or trusts that are intermediaries, flow-through entities or U.S. nonexempt recipients.

(6) A partnership or trust to which WP applies this Section 10.02 may not assume primary NRA withholding responsibility, or primary Form 1099 reporting and backup withholding responsibility.

(7) WP and a partnership or trust that apply this Section 10.02 to any calendar year must apply these rules to the calendar year in its entirety. Generally, WP and a partnership or trust that apply this Section 10.02 to any calendar year are not required

to apply this Section 10.02 to subsequent calendar years. If, however, WP withholds and reports any adjustments required by corrected information in a subsequent calendar year under Section 10.02(4), WP must apply this Section 10.02 to that calendar year in its entirety.

(8) WP and a partnership or trust may not apply this Section 10.02 to any calendar year for which the partnership or trust has failed to make available to WP's auditor the records described in Section 10.02(1)(c) within 90 days after these records are requested. If, for any calendar year, the partnership or trust has failed to make these records available within the 90-day period, or if WP and the partnership or trust fail to comply with any other requirement of this Section 10.02, WP must apply Treas. Reg. § 1.1441-1 and 1.1441-5 to the partnership or trust, must correct its withholding, and must file corrected Forms 1042 and 1042-S for the calendar year.

## SECTION 11. MISCELLANEOUS PROVISIONS

**Sec. 11.01.** WP's application to become a withholding foreign partnership and the Appendix to this Agreement are hereby incorporated into and made an integral part of this Agreement. This Agreement, WP's application, and the Appendix to this Agreement constitute the complete agreement between the parties.

**Sec. 11.02.** This Agreement may be amended by the IRS if the IRS determines that such amendment is needed for the sound administration of the internal revenue laws or internal revenue regulations. The Agreement may also be modified by either WP or the IRS upon mutual agreement. Such amendments or modifications shall be in writing.

**Sec. 11.03.** Any waiver of a provision of this Agreement by the IRS is a waiver solely of that provision. The waiver does not obligate the IRS to waive other provisions of this Agreement or the same provision at a later date.

**Sec. 11.04.** This Agreement shall be governed by the laws of the United States. Any legal action brought under this Agreement shall be brought only in a U.S. court with jurisdiction to hear and resolve matters under the internal revenue laws of the

United States. For this purpose, WP agrees to submit to the jurisdiction of such U.S. court.

**Sec. 11.05.** WP's rights and responsibilities under this Agreement cannot be assigned to another person.

**Sec. 11.06.** Notices provided under this Agreement shall be mailed registered, first class airmail. Notice shall be directed as follows:

To the IRS

Internal Revenue Service  
LMSB:FS:QI  
290 Broadway  
New York, NY 10007-1867  
USA

All notices sent to the IRS must include the WP's WP-EIN

To WP:

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**Sec. 11.07.** WP, acting in its capacity as a withholding foreign partnership or in any other capacity, does not act as an agent of the IRS, nor does it have the authority to hold itself out as an agent of the IRS.

**IN WITNESS WHEREOF, the above parties have subscribed their names to these presents, in duplicate.**

Signed this      day of      ,

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(name and title of person signing for WP)

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(name and title of person signing for IRS)

**PR Election Statement – Six Year Term**

**By signing hereunder, WP makes the PR election with a term of six years or until WP terminates, whichever is earlier, under Sections 6.03 and 9.02 (A) of this Agreement.**

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(name and title of person signing for WP)

**PR Election Statement – Fifteen Year Term**

**By signing hereunder, WP makes the PR election with a term of 15 years or until WP terminates, whichever is earlier, under Sections 6.03 and 9.02 (B) of this Agreement.**

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(name and title of person signing for WP)

## Appendix A

WP and the IRS agree that any of the following auditors may be used by WP to perform the external audits required by Section 8 of this Agreement.

[Names, addresses, telephone and fax numbers of external auditors.]

## APPENDIX 2

### Withholding Foreign Trust Agreement

## SECTION 1. PURPOSE AND SCOPE

Sec. 1.01. General Obligations

Sec. 1.02. Parties to the Agreement

## SECTION 2. DEFINITIONS

Sec. 2.01. Agreement

Sec. 2.02. Amounts Subject to NRA Withholding

Sec. 2.03. Chapter 3 of the Code

Sec. 2.04. Chapter 61 of the Code

Sec. 2.05. Distributive Share

Sec. 2.06. External Auditor

Sec. 2.07. Flow -Through Entity

Sec. 2.08. Foreign Person

Sec. 2.09. Form W-8

- Sec. 2.10. Form W-9
- Sec. 2.11. Form 1042
- Sec. 2.12. Form 1042-S
- Sec. 2.13. Form 3520
- Sec. 2.14. Form 3520-A
- Sec. 2.15. Intermediary
- Sec. 2.16. Nonwithholding Foreign Trust
- Sec. 2.17. NRA Withholding
- Sec. 2.18. Overwithholding
- Sec. 2.19. Payment
- Sec. 2.20. Pooled Reporting (PR) Election
- Sec. 2.21. Reduced Rate of Withholding
- Sec. 2.22. Reportable Amount
- Sec. 2.23. Reporting Pool
- Sec. 2.24. TIN
- Sec. 2.25. Trust and Beneficiary or Owner; Direct, Indirect or Passthrough Beneficiary or Owner
- Sec. 2.26. Underwithholding
- Sec. 2.27. U.S. Person
- Sec. 2.28. Withholding Agent
- Sec. 2.29. Withholding Foreign Trust (or WT)
- Sec. 2.30. Withholding Foreign Trust (or WT) EIN
- Sec. 2.31. Withholding Statement
- Sec. 2.32. Other Terms

### **SECTION 3. WITHHOLDING RESPONSIBILITY**

- Sec. 3.01. NRA Withholding Responsibility
- Sec. 3.02. Timing of Withholding
- Sec. 3.03. Withholding on Distributions
- Sec. 3.04. Deposit Requirements

### **SECTION 4. DOCUMENTATION REQUIREMENTS**

- Sec. 4.01. Documentation Requirements
- Sec. 4.02. Documentation for Foreign Beneficiaries or Owners
- Sec. 4.03. Treaty Claims
- Sec. 4.04. Documentation for International Organizations
- Sec. 4.05. Documentation for Foreign Governments and Foreign Central Banks of Issue
- Sec. 4.06. Documentation for Foreign Tax-Exempt Organizations
- Sec. 4.07. Documentation From Passthrough Beneficiaries or Owners

- Sec. 4.08. Documentation for U.S. Exempt Recipients
- Sec. 4.09. Documentation for U.S. Non-Exempt Recipients
- Sec. 4.10. Documentation Validity
- Sec. 4.11. Documentation Validity Period
- Sec. 4.12. Maintenance and Retention of Documentation

### **SECTION 5. WITHHOLDING FOREIGN TRUST WITHHOLDING CERTIFICATE**

- Sec. 5.01. WT Withholding Certificate
- Sec. 5.02. Withholding Statement
- Sec. 5.03. Withholding Rate Pools

### **SECTION 6. TAX RETURN OBLIGATIONS**

- Sec. 6.01. Form 1042 Filing Requirement
- Sec. 6.02. Form 1042-S Reporting: General Rule
- Sec. 6.03. Form 1042-S Reporting: Special Rule for PR Election
- Sec. 6.04. Form 3520-A Filing Requirement
- Sec. 6.05. Retention of Returns

### **SECTION 7. ADJUSTMENTS FOR OVER- AND UNDER-WITHHOLDING; REFUNDS**

- Sec. 7.01. Adjustments for NRA Overwithholding by WT
- Sec. 7.02. Collective Credit or Refund Procedures for NRA Overwithholding
- Sec. 7.03. Adjustments for NRA Underwithholding
- Sec. 7.04. NRA Underwithholding after Form 1042 Filed
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### **SECTION 8. EXTERNAL AUDIT PROCEDURES**

- Sec. 8.01. In General
- Sec. 8.02. Designation of External Auditor
- Sec. 8.03. Timing of External Audits: General Rule
- Sec. 8.04. Timing of External Audits: Special Rule for PR Election
- Sec. 8.05. Scope of External Audit

- Sec. 8.06. External Auditor's Report
- Sec. 8.07. Expanding Scope and Timing of External Audit

### **SECTION 9. EXPIRATION, TERMINATION AND DEFAULT**

- Sec. 9.01. Term of Agreement: General Rule
- Sec. 9.02. Term of Agreement: Special Rule for PR Election
- Sec. 9.03. Termination of Agreement
- Sec. 9.04. Automatic Termination of Agreement
- Sec. 9.05. Significant Change in Circumstances
- Sec. 9.06. Events of Default
- Sec. 9.07. Notice and Cure
- Sec. 9.08. Renewal

### **SECTION 10. CERTAIN PARTNERSHIPS AND TRUSTS**

- Sec. 10.01. Certain Smaller Partnerships and Trusts
- Sec. 10.02. Certain Related Partnerships and Trusts

### **SECTION 11. MISCELLANEOUS PROVISIONS**

THIS AGREEMENT is made in duplicate under and in pursuance of section 1441 of the Internal Revenue Code of 1986, as amended, (the "Code") and Treasury Regulation § 1.1441-5(e)(5)(v) by and between \_\_\_\_\_, (referred to as "WT"), and the INTERNAL REVENUE SERVICE (the "IRS"):

**WHEREAS**, WT has submitted an application in accordance with Revenue Procedure 2003-64 to be a withholding foreign trust for purposes of Treas. Reg. § 1.1441-5(e)(5)(v);

**WHEREAS**, WT and the IRS desire to enter into an agreement to establish WT's rights and obligations regarding documentation, withholding, information reporting, tax return filing, deposits, and adjustment procedures under sections 1441, 1442, 1443, 1461, 6048, 6302, 6402, and 6414 of the Code with respect to certain types of payments;

**NOW, THEREFORE**, in consideration of the following terms, representations, and conditions, the parties agree as follows:



## SECTION 1. PURPOSE AND SCOPE

**Sec. 1.01. General Obligations.** Except as otherwise provided in this Agreement, WT's obligations with respect to income distributed to, or included in the distributive shares of, its beneficiaries or owners are governed by the Code and the regulations thereunder. Except as provided in Section 10 of this Agreement, WT may act in its capacity as a withholding foreign trust pursuant to this Agreement only for payments of amounts subject to NRA withholding that are distributed to, or included in the distributive shares of, its direct beneficiaries or owners. WT is required to act as a withholding foreign trust for all such amounts paid to WT, or included in WT's distributive share, by any withholding agent to which WT has provided a Form W-8IMY that represents that WT is acting as a withholding foreign trust with respect to such amounts. WT must act as a withholding foreign trust for any such amounts paid with respect to such a Form W-8IMY that are distributed to, or included in the distributive shares of, its direct foreign beneficiaries or owners. WT may act as a withholding foreign trust for such amounts that are distributed to, or included in the distributive shares of, its direct beneficiaries or owners that are U.S. persons. WT may also act as a withholding foreign trust and may treat itself as a direct foreign beneficiary if (i) WT is a trust the terms of which are described in section 651(a)(1) and (2) of the Code and (ii) in any taxable year, WT distributes amounts other than amounts of income described in section 651(a)(1). WT may not act as a withholding foreign trust, but must act as a nonwithholding foreign trust, for amounts subject to NRA withholding that are distributed to, or included in the distributive shares of, passthrough beneficiaries or owners or indirect beneficiaries or owners, except as provided under Section 10 of this Agreement.

**Sec. 1.02. Parties to the Agreement.** This Agreement applies to WT and the IRS.

## SECTION 2. DEFINITIONS

For purposes of this Agreement, the terms listed below are defined as follows:

**Sec. 2.01. Agreement.** "Agreement" means this Agreement between WT and

the IRS. All appendices to this Agreement and WT's application to become a withholding foreign trust are incorporated into this Agreement by reference.

**Sec. 2.02. Amounts Subject to NRA Withholding.** An "amount subject to NRA withholding" is an amount described in Treas. Reg. § 1.1441-2(a). An amount subject to NRA withholding shall not include interest paid as part of the purchase price of an obligation sold between interest payment dates or original issue discount paid as part of the purchase price of an obligation sold in a transaction other than the redemption of such obligation, unless the sale is part of a plan the principal purpose of which is to avoid tax and WT has actual knowledge or reason to know of such plan.

**Sec. 2.03. Chapter 3 of the Code.** Any reference to "chapter 3 of the Code" means sections 1441, 1442, 1443, 1461, 1463, and 1464 of the Code.

**Sec. 2.04. Chapter 61 of the Code.** Any reference to "chapter 61 of the Code" means sections 6041, 6042, 6045, 6048, 6049, and 6050N of the Code.

**Sec. 2.05. Distributive share.** "Distributive share" means an amount subject to withholding that is required to be distributed to the beneficiaries of a simple trust and an amount subject to withholding that is includible in the income of the owners of a grantor trust.

**Sec. 2.06. External Auditor.** An "external auditor" is any approved auditor listed in Appendix A of this Agreement that WT engages to perform the audits required by Section 8 of this Agreement.

**Sec. 2.07. Flow-Through Entity.** A flow-through entity is a foreign partnership described in Treas. Reg. § 301.7701-2 or 3 (other than a withholding foreign partnership), a foreign trust that is described in section 651(a) of the Code (other than a withholding foreign trust), or a foreign trust all or a portion of which is treated as owned by the grantor or other person under sections 671 through 679 of the Code (other than a withholding foreign trust). For an item of income for which a treaty benefit is claimed, an entity is also a flow-through entity to the extent it is treated as fiscally transparent under section 894 and the regulations thereunder.

**Sec. 2.08. Foreign Person.** A "foreign person" is any person that is not a "United

States person" and includes a "nonresident alien individual," a "foreign corporation," a "foreign partnership," a "foreign trust," and a "foreign estate," as those terms are defined in section 7701 of the Code.

**Sec. 2.09. Form W-8.** "Form W-8" means a valid IRS Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding*; IRS Form W-8ECI, *Certificate of Foreign Person's Claim for Exemption From Withholding on Income Effectively Connected With the Conduct of a Trade or Business in the United States*; IRS Form W-8EXP, *Certificate of Foreign Governments and Other Foreign Organizations for United States Tax Withholding*; and IRS Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Partnership, and Certain U.S. Branches for United States Tax Withholding*, as appropriate. It also includes any acceptable substitute form.

**Sec. 2.10. Form W-9.** "Form W-9" means a valid IRS Form W-9, *Request for Taxpayer Identification Number and Certification*, or any acceptable substitute.

**Sec. 2.11. Form 1042.** "Form 1042" means an IRS Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*.

**Sec. 2.12. Form 1042-S.** "Form 1042-S" means an IRS Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*.

**Sec. 2.13. Form 3520.** "Form 3520" means an IRS Form 3520, *Annual Return to Report Transaction with Foreign Trust and Receipt of Certain Foreign Gifts*.

**Sec. 2.14. Form 3520-A.** "Form 3520-A" means an IRS Form 3520-A, *Annual Information Return of Foreign Trust with a U.S. Owner*.

**Sec. 2.15. Intermediary.** An "intermediary" means any person that acts on behalf of another person, such as a custodian, broker, nominee, or other agent.

**Sec. 2.16. Nonwithholding Foreign Trust.** A "nonwithholding foreign trust" is any foreign trust that is not acting as a withholding foreign trust.

**Sec. 2.17. NRA Withholding.** For purposes of this Agreement, "nonresident alien (NRA) withholding" is any withholding required under chapter 3 of the Code (other than sections 1445 or 1446),

whether the payment subject to withholding is made to an individual or to an entity.

**Sec. 2.18. Overwithholding.** The term “overwithholding” means the excess of the amount actually withheld over the amount required to be withheld under chapter 3 of the Code.

**Sec. 2.19. Payment.** A “payment” is considered made to a person if that person realizes income whether or not such income results from an actual transfer of cash or other property. See Treas. Reg. § 1.1441-2(e).

**Sec. 2.20. Pooled Reporting (PR) Election.** A “pooled reporting (PR) election” is defined in Section 6.03. of this Agreement.

**Sec. 2.21. Reduced Rate of Withholding.** A “reduced rate of withholding” means a rate of withholding that is less than 30 percent, either as a result of a reduction in withholding under the Code or as a result of a reduction in withholding under an income tax treaty.

**Sec. 2.22. Reportable Amount.** A “reportable amount” means an amount subject to NRA withholding (as defined in Section 2.02 of this Agreement); U.S. source deposit interest; and U.S. source interest or original issue discount paid on the redemption of short-term obligations. The term does not include payments on deposits with banks and other financial institutions that remain on deposit for two weeks or less. It also does not include amounts of original issue discount arising from a sale and repurchase transaction completed within a period of two weeks or less, or amounts described in Treas. Reg. § 1.6049-5(b)(7), (10), or (11) (relating to certain foreign targeted registered obligations and certain obligations issued in bearer form).

**Sec. 2.23. Reporting Pool.** A reporting pool is defined in Section 6.03 of this Agreement.

**Sec. 2.24. TIN.** A “TIN” is a U.S. taxpayer identification number.

**Sec. 2.25. Trust, Beneficiary and Owner; Direct, Indirect or Passthrough Beneficiary or Owner.** The term “trust” is defined in Treas. Reg. § 301.7701-4. The term “beneficiary” is defined in section 643(c) of the Code and the regulations thereunder. An “owner” is a person treated as a grantor or owner under Subpart C of

Subchapter J of the Code. A direct beneficiary or owner is a beneficiary or owner, other than an intermediary or flow-through entity that is not itself a withholding foreign trust or withholding foreign partnership, for which WT acts as a withholding foreign trust. An indirect beneficiary or owner is a person that owns a trust interest in WT through one or more passthrough beneficiaries or owners. A passthrough beneficiary or owner is a direct or indirect beneficiary or owner in WT that is an intermediary or flow-through entity. As provided in Section 2.07 of this Agreement, a withholding foreign partnership or withholding foreign trust is not a flow-through entity and thus is not a passthrough beneficiary or owner.

**Sec. 2.26. Underwithholding.** “Underwithholding” means the excess of the amount required to be withheld under chapter 3 of the Code over the amount actually withheld.

**Sec. 2.27. U.S. Person.** A “United States (or U.S.) person” is a person described in section 7701(a)(30) of the Code, the U.S. government (including an agency or instrumentality thereof), a State of the United States (including an agency or instrumentality thereof), or the District of Columbia (including an agency or instrumentality thereof).

**Sec. 2.28. Withholding Agent.** A “withholding agent” has the same meaning as set forth in Treas. Reg. § 1.1441-7(a) and includes a payor. As used in this Agreement, the term generally refers to the person making a payment to a withholding foreign trust.

**Sec. 2.29. Withholding Foreign Trust (or WT).** A “withholding foreign trust” is a person, described in Treas. Reg. § 1.1441-5(e)(v), that has entered into a withholding agreement with the IRS to be treated as a withholding foreign trust and is acting in its capacity as a withholding foreign trust.

**Sec. 2.30. Withholding Foreign Trust (or WT) EIN.** A “withholding foreign trust EIN” or “WT-EIN” means the employer identification number assigned by the IRS to a withholding foreign trust. WT’s WT-EIN is only to be used when WT is acting as a withholding foreign trust. For example, WT must give a withholding agent its non-WT EIN, if any, rather than its WT-EIN, if it is not acting

as a withholding foreign trust and a taxpayer identification number is required.

**Sec. 2.31. Withholding Statement.** The term “withholding statement” is defined in Section 5.02 of this Agreement.

**Sec. 2.32. Other Terms.** Any term not defined in this section has the same meaning that it has under the Code, the income tax regulations under the Code, or any applicable income tax treaty.

## SECTION 3. WITHHOLDING RESPONSIBILITY

**Sec. 3.01. NRA Withholding Responsibility.** WT is subject to the withholding and reporting provisions applicable to withholding agents under chapter 3 of the Code. Under chapter 3, a withholding agent must withhold 30 percent of any payment of an amount subject to NRA withholding made to a beneficiary or owner that is a foreign person unless the withholding agent can reliably associate the payment with documentation upon which it can rely to treat the payment as made to a payee that is a U.S. person or as made to a beneficial owner that is a foreign person entitled to a reduced rate of withholding. When it is acting as a withholding foreign trust, WT must assume NRA withholding responsibility for amounts subject to NRA withholding that are distributed to, or included in the distributive share of, any direct beneficiary or owner, and WT must withhold the amount required to be withheld under chapter 3 of the Code. WT must provide a Form W-8IMY that certifies to a withholding agent that makes a payment of such amounts that WT is acting as a withholding foreign trust, and WT must identify such amounts on the withholding statement associated with that Form W-8IMY. WT is not required to withhold when it pays such amounts to another withholding foreign trust or withholding foreign partnership that has certified to WT on Form W-8IMY that it is acting as a withholding foreign trust or withholding foreign partnership with respect to such identified amounts. WT is not required to act as a withholding foreign trust for all amounts that it receives from a withholding agent. Except as provided in Section 10 of this Agreement, WT may not act as a withholding foreign trust for amounts distributed to, or included in the

distributive share of, passthrough beneficiaries or owners or indirect beneficiaries or owners. WT must act as a nonwithholding foreign trust for such amounts. When WT is not acting as a withholding foreign trust, WT must: 1) provide to the withholding agent a Form W-8IMY with Part VI completed; 2) identify such amounts on the withholding statement associated with that Form W-8IMY; and 3) provide the documentation and information required by Treas. Reg. § 1.1441-5(e)(5)(iii) and (iv).

**Sec. 3.02. Timing of Withholding.** WT must withhold on the date it makes a distribution to a direct foreign beneficiary or owner that includes an amount subject to NRA withholding. To the extent a direct foreign beneficiary's or owner's distributive share of income subject to withholding has not actually been distributed to the direct foreign beneficiary or owner, WT must withhold on the direct beneficiary's or owner's distributive share on the earlier of the date the statement required under section 6048 is mailed or otherwise provided to the beneficiary or owner or the due date for furnishing the statement (whether or not WT is required to prepare and furnish the statement).

**Sec. 3.03. Withholding on Distributions.** WT may determine the amount of withholding on a distribution based on a reasonable estimate of the beneficiary's or owner's distributive share of income subject to withholding for the year. WT must correct the estimated withholding to reflect the beneficiary's or owner's actual distributive share on the earlier of the date that the statement required under section 6048 is mailed or otherwise provided to the beneficiary or owner or the due date for furnishing the statement (whether or not WT is required to prepare and furnish the statement). If that date is after the due date for the WT's Forms 1042 and 1042-S (including extensions) for the calendar year, WT may withhold and report any adjustments required by the corrected information in the following calendar year.

**Sec. 3.04. Deposit Requirements.** WT must deposit amounts withheld under chapter 3 of the Code with a Federal Reserve bank or authorized financial institution at the time and in the manner provided under section 6302 of the Code (see Treas. Reg. § 1.6302-2(a) or § 31.6302-1(h)).

## SECTION 4. DOCUMENTATION REQUIREMENTS

**Sec. 4.01. Documentation Requirements.** WT agrees to obtain, review, and maintain Forms W-8 and W-9 in accordance with this Section 4. WT must obtain a Form W-8 or W-9 from every direct beneficiary or owner prior to the time that withholding is required. WT agrees to make documentation (together with any associated withholding statements and other documents or information) available upon request for inspection by WT's external auditor. WT represents that none of the laws to which it is subject prohibits disclosure of the identity of any beneficiary or owner or corresponding beneficiary or owner information to WT's external auditor. WT may rely on the Forms W-8 and W-9 it obtains under this Section 4 as the basis for determining its withholding and reporting obligations.

**Sec. 4.02. Documentation for Foreign Beneficiaries or Owners.** WT may treat a direct beneficiary or owner as a foreign beneficial owner if the direct beneficiary or owner provides a Form W-8 that supports such status. WT may treat a direct beneficiary or owner that has provided a Form W-8 as entitled to a reduced rate of NRA withholding if all the requirements for a reduced rate are met and the Form W-8 provided by the direct beneficiary or owner supports entitlement to a reduced rate. Sections 4.03 through 4.06 of this Agreement describe the specific documentation requirements necessary for obtaining a reduced rate of withholding in certain circumstances.

**Sec. 4.03. Treaty Claims.** WT may not reduce the rate of withholding based on a direct beneficiary's or owner's claim of treaty benefits unless WT obtains from the beneficiary or owner a Form W-8BEN with Part II of the form properly completed, including the appropriate limitation on benefits and section 894 certifications.

**Sec. 4.04. Documentation for International Organizations.** WT may not treat a direct beneficiary or owner as an international organization entitled to an exemption from withholding under section 892 of the Code unless WT obtains a Form W-8EXP from the international organization and the name provided on the Form W-8EXP is the name of an entity

designated as an international organization by executive order pursuant to 22 United States Code 288 through 288(f). If an international organization is not claiming benefits under section 892 of the Code but under another Code exception, the provisions of Section 4.02 of this Agreement apply rather than the provisions of this Section 4.04.

### Sec. 4.05. Documentation for Foreign Governments and Foreign Central Banks of Issue.

**(A) Documentation For a Foreign Government or Foreign Central Bank of Issue Claiming an Exemption From Withholding Under Section 892 or Section 895.** WT may not treat a direct beneficiary or owner as a foreign government or foreign central bank of issue exempt from withholding under section 892 or 895 of the Code unless—

(1) WT receives from the direct beneficiary or owner a Form W-8EXP establishing that the direct beneficiary or owner is a foreign government or foreign central bank of issue;

(2) The income distributed to, or included in the distributive share of, the direct beneficiary or owner is the type of income that qualifies for an exemption from withholding under section 892 or 895; and

(3) WT does not know, or have reason to know, that the direct beneficiary or owner is a controlled commercial entity, that the income owned by the foreign government or foreign central bank of issue is being received from a controlled commercial entity, or that the income is from the disposition of an interest in a controlled commercial entity.

**(B) Treaty Exemption.** WT may not treat a direct beneficiary or owner as a foreign government or foreign central bank of issue entitled to a reduced rate of withholding under an income tax treaty unless it obtains a Form W-8BEN that, under Section 4.03 of this Agreement, is sufficient to obtain a reduced rate of withholding under a treaty.

**(C) Other Code Exception.** If a foreign government or foreign central bank of issue is not claiming benefits under section 892 or 895 of the Code but under another Code exception (e.g., the portfolio interest exception under sections 871(h) or

881(c) of the Code), the provisions of Section 4.02 of this Agreement apply rather than the provisions of this Section 4.05.

#### **Sec. 4.06. Documentation for Foreign Tax-Exempt Organizations.**

**(A) Reduced Rate of Withholding Under Section 501.** WT may not treat a direct beneficiary or owner as a foreign organization described under section 501(c) of the Code, and therefore exempt from withholding (or, if the direct beneficiary or owner is a foreign private foundation, subject to withholding at a 4-percent rate under section 1443(b) of the Code) unless WT obtains a valid Form W-8EXP with Part III of the form properly completed.

**(B) Treaty Exemption.** WT may not treat a direct beneficiary or owner as a foreign organization that is tax exempt, or entitled to a reduced rate of withholding under an income tax treaty unless WT obtains a Form W-8BEN from the beneficiary or owner that, under Section 4.03 of this Agreement, is sufficient to obtain a reduced rate of withholding under a treaty.

**(C) Other Exceptions.** If a tax-exempt entity is not claiming a reduced rate of withholding because it is an organization described under section 501(c) of the Code or under an income tax treaty, but is claiming a reduced rate of withholding under another Code exception, the provisions of Section 4.02 of this Agreement apply rather than the provisions of this Section 4.06.

#### **Sec. 4.07. Documentation for Passthrough Beneficiaries or Owners.**

Except as provided in Section 10 of this Agreement, WT shall not act as a withholding foreign trust with respect to an amount subject to withholding distributed to, or included in the distributive share of, a passthrough beneficiary or owner, as defined in Section 2.25 of this Agreement. WT must forward that passthrough beneficiary's or owner's documentation (and associated withholding statement and documentation of indirect beneficiaries or owners) to the withholding agent from whom WT receives the amount subject to withholding. WT may act as a withholding foreign trust with respect to amounts subject to withholding distributed to, or included in the distributive share of, beneficiaries or owners that are themselves

withholding foreign trusts or withholding foreign partnerships.

**Sec. 4.08. Documentation for U.S. Exempt Recipients.** WT shall not treat a beneficiary or owner as a U.S. exempt recipient unless WT obtains from the beneficiary or owner a Form W-9 on which the beneficiary or owner writes "Exempt" in Part II of the form.

**Sec. 4.09. Documentation for U.S. Non-Exempt Recipients.** WT shall not treat a beneficiary or owner as a U.S. non-exempt recipient unless WT obtains a Form W-9 from the beneficiary or owner.

**Sec. 4.10. Documentation Validity.** WT may not rely on Forms W-8 or W-9 if WT has actual knowledge or reason to know that the information or statements contained in the forms are unreliable or incorrect. Once WT knows, or has reason to know, that a Form W-8 or W-9 provided by a direct beneficiary or owner is unreliable or incorrect, WT must obtain a new Form W-8 or W-9 prior to the time withholding is required

**(A) Form W-8.** WT may rely on a properly completed Form W-8 until its validity expires under Treas. Reg. § 1.1441-1(e)(4)(ii).

**(B) Form W-9.** WT may rely on a properly completed Form W-9 as long as it has not been informed by the IRS or another withholding agent that the form is unreliable.

#### **Sec. 4.12. Maintenance and Retention of Documentation.**

**(A) Maintaining Documentation.** WT shall maintain Forms W-8 and W-9 by retaining the original documentation, a certified copy, a photocopy or a microfiche, or by electronic storage or similar means of record retention.

**(B) Retention Period.** WT shall retain a direct beneficiary's or owner's Form W-8 or W-9 obtained under this Section 4 for as long as it may be relevant to the determination of WT's tax liability under this Agreement.

### **SECTION 5. WITHHOLDING FOREIGN TRUST WITHHOLDING CERTIFICATE**

**Sec. 5.01. WT Withholding Certificate.** WT agrees to furnish a withholding foreign trust withholding certificate to

each withholding agent from which it receives amounts subject to NRA withholding as a withholding foreign trust. The withholding foreign trust withholding certificate is a Form W-8IMY (or acceptable substitute form) that certifies that WT is acting as a withholding foreign trust, contains WT's WT-EIN, and provides all other information required by the form. WT is not required to disclose, as part of that Form W-8IMY or its withholding statement, any information regarding the identity of a direct beneficiary or owner.

**Sec. 5.02. Withholding Statement.** WT agrees to provide to each withholding agent from which WT receives amounts subject to NRA withholding as a withholding foreign trust a written statement (the "withholding statement") identifying the amounts for which WT acts as a withholding foreign trust. The statement forms an integral part of the Form W-8IMY. The withholding statement may be provided in any manner, and in any form, to which WT and the withholding agent mutually agree.

**Sec. 5.03. Withholding Rate Pools.** When it is acting as a withholding foreign trust, WT must assume withholding responsibility for amounts subject to withholding that are distributed to, or included in the distributive shares of, its direct beneficiaries or owners. Accordingly, withholding rate pool information is not required as part of WT's withholding statement.

### **SECTION 6. TAX RETURN OBLIGATIONS**

#### **Sec. 6.01. Form 1042 Filing Requirement.**

**(A) In General.** WT shall file a return on Form 1042, whether or not WT withheld any amounts under chapter 3 of the Code, on or before March 15 of the year following any calendar year in which WT acts as a withholding foreign trust. In addition to the information specifically requested on Form 1042 and the accompanying instructions, WT shall attach a statement setting forth the amounts of any overwithholding or underwithholding adjustments made under Treas. Reg. § 1.1461-2 and Sections 7.01 and 7.03 of this Agreement, and an explanation of the circumstances that resulted in the over- or underwithholding.

**(B) Extensions for Filing Returns.** WT may request an extension of the time for filing Form 1042, or any of the information required to be attached to the form, by submitting Form 2758, *Application for Extension of Time to File Certain Excise, Income, Information, and Other Returns*, on or before the due date of the return. The application shall be in writing, properly signed by a duly authorized agent of WT, and shall clearly set forth the following:

(1) The calendar year for which the extension is requested; and

(2) A full explanation of the reason(s) for requesting the extension, to assist the IRS in determining the period of extension, if any, that will be granted.

**Sec. 6.02. Form 1042-S Reporting: General Rule.** Unless WT has made a pooled reporting (PR) election pursuant to Section 6.03 of this Agreement, WT is required to file separate Forms 1042-S for each direct beneficiary or owner to whom WT distributes, or in whose distributive share is included, an amount subject to NRA withholding. WT must file separate Forms 1042-S by income code, exemption code, recipient code, and withholding rate. WT must file its Forms 1042-S in the manner required by the regulations under chapter 3 of the Code and the instructions to the form, including any requirement to file the forms magnetically or electronically. Any Form 1042-S required by this Section 6 shall be filed on or before March 15 following the calendar year in which withholding, if any, was required under Section 3.02 of this Agreement. WT may request an extension of time to file Forms 1042-S by submitting Form 8809, *Request for Extension of Time to File Information Returns*, by the due date of Forms 1042-S in the manner required by Form 8809.

**Sec. 6.03. Form 1042-S Reporting: Special Rule for PR Election.** If WT has made the PR election pursuant to this Section 6.03, WT is not required to file Forms 1042-S for amounts distributed to, or included in the distributive share of, each separate direct beneficiary or owner for whom such reporting would otherwise be required. Instead, WT shall 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. WT may use a single recipient code for all reporting pools except for amounts paid to foreign tax-exempt recipients, for which a separate recipient code must be used. For this purpose, a foreign tax-exempt recipient includes any organization that is not subject to NRA withholding and is not liable to tax in its country of residence because it is a charitable organization, a pension fund, or a foreign government. WT must make the PR election at the time this Agreement is executed by signing the election statement on the signature page of this Agreement. Once made, the PR election remains in effect for the entire term of this Agreement beginning on the date the Agreement becomes effective and ending on the date of its expiration or termination under Section 9 of this Agreement. WT must make a new election for each renewal term of this Agreement. If WT makes the PR election, WT cannot revoke it prior to the end of the term for which WT has made the PR election. If WT did not make the PR election at the time this Agreement was executed, then WT may make a PR election only by terminating this Agreement pursuant to Section 9.03 and requesting to enter into a new withholding foreign trust agreement.

**Sec. 6.04. Form 3520-A Filing Requirements.** If WT is required to file Form 3520-A under section 6048 of the Code, then WT shall file Form 3520-A and furnish any required statements to U.S. beneficiaries or owners in accordance with the instructions for the form.

**Sec. 6.05. Retention of Returns.** WT shall retain 1042 and Form 3520-A, if required, for the period of the applicable statute of limitations on assessments and collection under the Code.

## **SECTION 7. ADJUSTMENTS FOR OVER- AND UNDER-WITHHOLDING; REFUNDS**

**Sec. 7.01. Adjustments for NRA Overwithholding by WT.** WT may make an adjustment for amounts paid to its direct beneficiaries or owners that it has overwithheld under chapter 3 of the Code by applying either the reimbursement or set-off procedures described in this section

within the time period prescribed for those procedures.

**(A) Reimbursement Procedure.** WT may repay its beneficiaries or owners for an amount overwithheld and reimburse itself by reducing, by the amount of tax actually repaid to the beneficiaries or owners, the amount of any subsequent deposit of tax required to be made by WT under Section 3.04 of this Agreement. For purposes of this Section 7.01(A), an amount that is overwithheld shall be applied in order of time to each of WT's subsequent deposit periods in the same calendar year to the extent that the withholding taxes required to be deposited for a subsequent deposit period exceed the amount actually deposited. An amount overwithheld in a calendar year may be applied to deposit periods in the calendar year following the calendar year of overwithholding only if—

(1) WT states on a Form 1042-S, filed by March 15 of the calendar year following the calendar year of overwithholding, the amount of tax withheld and the amount of any actual repayments; and

(2) WT states on a Form 1042, filed by March 15 of the calendar year following the calendar year of overwithholding, that the filing of the Form 1042 constitutes a claim for credit in accordance with Treas. Reg. § 1.6414-1.

**(B) Set-Off Procedure.** WT may repay its beneficiaries or owners by applying the amount overwithheld against any amount which otherwise would be required under chapter 3 of the Code to be withheld by WT before the earlier of March 15 of the calendar year following the calendar year of overwithholding or the date that the Form 1042-S is actually filed with the IRS. For purposes of making a return on Form 1042 or 1042-S for the calendar year of overwithholding, and for purposes of making a deposit of the amount withheld, the reduced amount shall be considered the amount required to be withheld from such income under chapter 3 of the Code.

**Sec. 7.02. Collective Credit or Refund Procedures for NRA Overwithholding.** If WT has made a PR election and it has overwithheld under chapter 3 of the Code on amounts subject to NRA withholding paid to WT's direct beneficiaries or owners during a calendar year and the amount has not been recovered under the reimbursement or set-off procedures

under Section 7.01 of this Agreement, WT may request a credit or refund of the total amount overwithheld by following the procedures of this Section 7.02. WT shall follow the procedures set forth under sections 6402 and 6414 of the Code, and the regulations thereunder, to claim the credit or refund. No credit or refund will be allowed after the expiration of the statutory period of limitation for refunds under section 6511 of the Code. WT may use the collective refund procedures under this Section 7.02 only if the following conditions are met:

(A) WT must not have issued Forms 1042-S to the direct beneficiaries or owners who were subject to overwithholding;

(B) WT must submit, together with its amended return on which it claims a credit or refund, a statement of the reason for the overwithholding;

(C) WT must submit, together with its amended return on which it claims a credit or refund, a statement that it has repaid the amount of overwithholding to the appropriate direct beneficiaries or owners prior to filing the claim for credit or refund; and

(D) WT must retain a record showing that it repaid the direct beneficiaries or owners the amount of the overwithholding.

**Sec. 7.03. Adjustments for NRA Underwithholding.** If WT knows that an amount should have been withheld under chapter 3 of the Code from a previous payment to a direct beneficiary or owner but was not withheld, WT may either withhold from future payments made to the same direct beneficiary or owner or satisfy the tax from the direct beneficiary's or owner's proportionate share of assets over which it has control. The additional withholding or satisfaction of the tax owed may only be made before the due date of the Form 1042 (not including extensions) for the calendar year in which the underwithholding occurred.

**Sec. 7.04. NRA Underwithholding after Form 1042 Filed.** If, after a Form 1042 has been filed for a calendar year, WT, WT's external auditor, or the IRS determines that, due to WT's failure to carry out its obligations under this Agreement, WT has underwithheld tax for such year, WT shall file an amended Form 1042 to report and pay the underwithheld tax. WT shall pay the underwithheld tax, the interest due on the underwithheld tax, and

any applicable penalties, at the time of filing the amended Form 1042. If WT fails to file an amended return, the IRS shall make such return under section 6020 of the Code.

**Sec. 7.05. Special Rule Regarding Failure to Deposit Penalties.** Solely for purposes of applying section 6656 of the Code (failure to make deposit of taxes), WT will not be considered to have made an underpayment of a deposit of NRA withholding taxes if the conditions of this paragraph are met. The conditions of this paragraph are that—

(A) WT makes its deposits within the time (deposit period) required by section 6302 of the Code;

(B) The deposit is not less than 90 percent of the aggregate amount of the tax required to be withheld under chapter 3 of the Code during the deposit period applicable to WT; and

(C) WT determines the difference between the total amount required to be deposited and the amount actually deposited as of the end of the 3rd, 6th, 9th, and 12th months of the calendar year and the difference is deposited no later than the 15th day of the second following month (*i.e.*, May 15, August 15, November 15 and February 15, respectively). In determining whether there has been an underpayment, reimbursements and set-offs shall be taken into account.

## SECTION 8. EXTERNAL AUDIT PROCEDURES

**Sec. 8.01. In General.** Unless WT requests an IRS audit in lieu of an external audit, the IRS agrees not to conduct an on-site audit of WT with respect to withholding and reporting obligations covered by this Agreement provided that an external auditor designated in Appendix A of this Agreement conducts an audit of WT in accordance with this Section 8. WT shall permit the external auditor to have access to all relevant records of WT for purposes of performing the external audit, including information regarding specific beneficiaries or owners. WT shall permit the IRS to communicate directly with the external auditor and to review the audit procedures followed by the external auditor. WT represents that there are no legal prohibitions

that prevent the external auditor from examining any information relevant to the external audit to be performed under this Section 8 and that there are no legal prohibitions that prevent the IRS from communicating directly with the auditor. WT shall permit the IRS to examine the external auditor's work papers and reports.

**Sec. 8.02. Designation of External Auditor.** WT's external auditor must be one of the auditors listed in Appendix A of this Agreement, unless WT and the IRS agree, prior to the audit, to substitute another auditor. WT shall not propose an external auditor unless it has a reasonable belief that the auditor is subject to laws, regulations, or rules that impose sanctions for failure to exercise its independence and to perform the audit competently. The IRS has the right to reject a proposed external auditor, or to revoke its acceptance of an external auditor, if the IRS, in its sole discretion, reasonably believes that the auditor is not independent or cannot perform an effective audit under this Agreement.

**Sec. 8.03. Timing of External Audits: General Rule.** Unless WT has made a PR election, WT shall have the external auditor conduct an external audit only at such time and only for such calendar years as the IRS directs.

**Sec. 8.04. Timing of External Audits: Special Rule for PR Election.**

(A) If WT has made a PR election and the term of this Agreement is determined under Section 9.02(A), WT shall have the external auditor conduct an audit of the second full calendar year and the fifth full calendar year that this Agreement is in effect.

(B) If WT has made a PR election and the term of this Agreement is determined under Section 9.02(B), WT shall have the external auditor conduct an audit after the close of every other calendar year that this Agreement is in effect. The auditor shall examine the two previous calendar years. For example, the first audit will occur in the third calendar year that the Agreement is in effect and the external auditor will examine calendar years one and two.

**Sec. 8.05. Scope of External Audit.** The external auditor shall verify whether WT is in compliance with this Agreement by conducting an audit that meets the requirements of this Section 8.05. The report, described in Section

8.06 of this Agreement, must disclose that the external auditor has, at a minimum, performed the following checks listed in this Section 8.05, and set forth how each of those checks was performed and the results of the checks. WT's external auditor is encouraged to contact the IRS at the address set forth in Section 11.06 of this Agreement and submit an audit plan (which includes, if relevant, the extent to which the external auditor proposes to rely on WT's internal audit procedures) prior to performing the audit so that the audit may be conducted in the most efficient and least costly manner possible.

**(A) Documentation.** The external auditor must review information contained in beneficiary or owner files to determine whether the documentation requirements of Section 4 of this Agreement are being met.

**(B) Withholding Responsibilities.** The external auditor must—

(1) Perform test checks of direct beneficiaries or owners, to verify that WT is withholding the proper amounts.

(2) Verify that amounts withheld were timely deposited in accordance with Section 3.04 of this Agreement.

**(C) Return Filing and Information Reporting.** The external auditor must—

(1) Obtain copies of original and amended Forms 1042, and any schedules, statements, or attachments required to be filed with those forms, and determine whether the amounts of income, taxes, and other information reported on those forms are accurate by—

(i) Reviewing work papers;

(ii) Reviewing Forms W-8IMY, together with the associated withholding statements, that WT has provided to withholding agents;

(iii) Reviewing copies of Forms 1042-S received from withholding agents;

(iv) Reviewing account statements from withholding agents;

(v) Reviewing correspondence between WT and withholding agents; and

(vi) Interviewing personnel responsible for preparing the Form 1042 and the work papers used to prepare those forms.

(2) Obtain copies of original and amended Forms 1042-S and Forms 3520-A together with the work papers used to prepare those forms and determine

whether the amounts reported on those forms are accurate by—

(i) Reviewing the Forms 1042-S received from withholding agents;

(ii) Reviewing a valid sample of earnings statements issued by WT to direct beneficiaries or owners, if any.

(3) Thoroughly review the statements attached to amended Forms 1042 filed to claim a refund, ascertain their veracity, and determine the causes of any overwithholding reported and ensure WT did not issue Forms 1042-S to persons whom it included as part of its collective credit or refund.

(4) Determine, in the case of collective credits or refunds, that WT repaid the appropriate beneficiaries or owners prior to requesting a collective credit or refund.

**(E) Change in Circumstances.** The external auditor must verify that in the course of the audit it has not discovered any significant change in circumstances, as described in Section 9.05 (A) or (D) of this Agreement.

**Sec. 8.06. External Auditor's Report.**

Upon completion of the audit of WT, the external auditor shall issue a report, or reports, of audit findings directly to the IRS by sending the original report to the IRS at the address set forth in Section 11.06 of this Agreement. This report is due by December 31 following the calendar year being audited, or if that date falls on a Saturday or Sunday, the next U.S. business day. The IRS may, however, upon request by the external auditor, extend the due date of the audit report upon good cause. The report must be in writing, in English, and currency amounts must be stated in U.S. dollars. The report must fully describe the scope of the audit, the methodologies (including sampling techniques) used to determine whether WT is in compliance with the provisions of this Agreement, and the result of each such determination. The report must also specifically address each of the items in Section 8.05 of this Agreement.

**Sec. 8.07. Expanding Scope and Timing of External Audit.** Upon review of the external auditor's report, the IRS may request, and WT must permit, the external auditor to perform additional audit procedures.

**SECTION 9. EXPIRATION, TERMINATION AND DEFAULT**

**Sec. 9.01. Term of Agreement: General Rule.** If WT has not made a PR election, this Agreement shall be in effect on \_\_\_\_\_ and shall continue in force until the earlier of the date WT terminates under the trust instrument or the date WT is terminated under 9.03 or 9.04 of this Agreement.

**Sec. 9.02. Term of Agreement: Special Rule for PR Election.**

**(A)** If WT has made a PR election, unless WT elects the special term pursuant to Section 9.02(B), this Agreement shall be in effect on \_\_\_\_\_ and shall expire on the earlier of the date WT terminates under the trust instrument or December 31 of the fifth full calendar year after the year in which this Agreement first takes effect. This Agreement may be renewed for additional terms as provided in Section 9.08 of this Agreement.

**(B)** If WT has made a PR election, and WT elects the special term pursuant to this Section 9.02(B), this Agreement shall be in effect on \_\_\_\_\_ and shall expire on the earlier of the date WT terminates under the trust instrument or December 31 of the fourteenth full calendar year after the year in which this Agreement first takes effect. If WT elects the special term, this Agreement is not renewable. WT must make the special term election under this Section 9.02(B) at the time this Agreement is executed by signing the election statement on the signature page of this Agreement.

**Sec. 9.03. Termination of Agreement.** This Agreement may be terminated by either the IRS or WT prior to the end of its term by delivery of a notice of termination to the other party in accordance with Section 11.06 of this Agreement. The IRS, however, shall not terminate the Agreement unless there has been a significant change in circumstances, as defined in Section 9.05 of this Agreement, or an event of default has occurred, as defined in Section 9.06 of this Agreement, and the IRS determines, in its sole discretion, that the significant change in circumstances or the event of default warrants termination of this Agreement. In addition, the IRS shall not terminate this Agreement in the event

of default if WT can establish to the satisfaction of the IRS that all events of default for which it has received notice have been cured within the time period agreed upon. The IRS shall notify WT, in accordance with Section 9.07 of this Agreement, that an event of default has occurred and that the IRS intends to terminate the Agreement unless WT cures the default. A notice of termination sent by either party shall take effect on the date specified in the notice.

**(A) Automatic Termination.** Notwithstanding Section 9.03 of this Agreement, this Agreement will terminate automatically in the event that the external auditor or the IRS on audit discovers that WT was not in possession of Forms W-8 or W-9, as applicable, for any direct beneficiary or owner at any time that withholding or reporting was required under Section 3.02 of this Agreement. The automatic termination will be effective as of December 31 of the year in which the external auditor or the IRS makes that discovery. The automatic termination rules of this Section 9.04(A) shall not apply in the case of indirect beneficiaries or owners that are treated as direct beneficiaries or owners of WT under Section 10 of this Agreement.

**(B) Cure and Reinstatement.** This Agreement will be reinstated, effective the same date it automatically terminated under Section 9.04(A) of this Agreement, if—

(1) WT obtains appropriate Forms W-8 or W-9 (that relate to the time withholding or reporting was required) for each such undocumented beneficiary or owner before March 15 of the year following the year in which the Agreement automatically terminated, or

(2) All such undocumented beneficiaries or owners have ceased to be beneficiaries or owners in WT before March 15 of the year following the year in which the Agreement automatically terminated.

**(C) Payment of Underwithholding and Reporting upon Termination.** In the event of automatic termination of this Agreement under this Section 9.04, WT must pay any underwithholding of tax, interest, and penalties that the IRS determines is attributable to each undocumented direct beneficiary or owner for the period during which the beneficiary or owner was undocumented, and, if WT has

made a PR election, WT must file Forms 1099, or beneficiary or owner specific Forms 1042-S reporting the names and addresses and other required information, as appropriate, for every undocumented direct beneficiary or owner from the earliest time the Form W-8 or W-9 was required for that undocumented direct beneficiary or owner through the date of termination. WT may, however, continue to report on a pooled basis for documented foreign direct beneficiaries or owners through this period.

**(D) Reinstatement after Termination.** After the date of automatic termination of this Agreement, WT may not act as a withholding foreign trust, and must so notify any persons to which WT has furnished a withholding foreign trust certificate. After the date of automatic termination of this Agreement, the IRS may reinstate this Agreement (or the IRS may require WT to enter into a new withholding foreign trust agreement) on such terms and conditions and with such modifications as the IRS may determine.

**Sec. 9.05. Significant Change in Circumstances.** For purposes of this Agreement, a significant change in circumstances includes, but is not limited to—

(A) A change in U.S. federal law or policy, or applicable foreign law or policy, that affects the validity of any provision of this Agreement, materially affects the procedures contained in this Agreement, or affects WT's ability to perform its obligations under this Agreement;

(B) A ruling of any court that affects the validity of any provision of this Agreement; or

(C) A significant change in WT's business practices that affects WT's ability to meet its obligations under this Agreement.

**Sec. 9.06. Events of Default.** For purposes of this Agreement, an event of default occurs if WT fails to perform any material duty or obligation required under this Agreement, and includes, but is not limited to, the occurrence of any of the following:

(A) WT fails to implement adequate procedures, accounting systems, and internal controls to ensure compliance with this Agreement;

(B) WT underwithholds an amount that WT is required to withhold under chapter

3 of the Code and fails to correct the underwithholding or to file an amended Form 1042 reporting, and paying, the appropriate tax;

(C) WT makes excessive refund claims;

(D) WT fails to file Forms 1042, 1042-S, 3530-A (if required), 1041 (if required), and Schedules K-1 (if required) by the due date specified on such forms or files forms that are materially incorrect or fraudulent;

(E) WT fails to have an external audit performed when required, WT's external auditor fails to provide its report directly to the IRS on a timely basis, WT fails to cooperate with the external auditor, or WT or its external auditor fails to cooperate with the IRS;

(F) WT fails to inform the IRS within 90 days of any significant change in its business practices to the extent that change affects WT's obligations under this Agreement;

(G) WT fails to cure a default identified by the IRS or by an external auditor;

(H) WT makes any fraudulent statement or a misrepresentation of material fact with regard to this Agreement to the IRS, a withholding agent, or WT's external auditor;

(I) The IRS determines that WT's external auditor is not sufficiently independent to adequately perform its audit function or the external auditor fails to provide an audit report that complies with Section 8 of this Agreement;

(J) WT is prohibited by any law from disclosing the identity of a beneficiary or owner or beneficiary or owner information to WT's external auditor;

(K) WT fails to make deposits in the time and manner required by Section 3.04 of this Agreement or fails to make adequate deposits, taking into account the procedures of 7.05 of this Agreement; or

(L) WT fails to permit the external auditor to perform additional audit procedures under the provisions of Section 8.07 of this Agreement.

**Sec. 9.07. Notice and Cure.** Upon the occurrence of an event of default, the IRS may deliver to WT a notice of default specifying the event of default that has occurred. WT shall respond to the notice of default within 60 days (60-day response) from the date of the notice of default. The 60-day response shall contain



an offer to cure the event of default and the time period in which the cure will be accomplished or shall state the reasons why WT does not agree that an event of default has occurred. If WT does not provide a 60-day response, the IRS may deliver a notice of termination as provided in Section 9.03 of this Agreement. If WT provides a 60-day response, the IRS shall either accept or reject WT's statement that no default has occurred or accept or reject WT's proposal to cure an event of default. If the IRS rejects WT's contention that no default has occurred or rejects WT's proposal to cure a default, the IRS will offer a counter-proposal to cure the event of default. Within 30 days of receiving the IRS's counter-proposal, WT shall notify the IRS (30-day response) whether it continues to maintain that no default has occurred or whether it rejects the IRS's counter-proposal to cure an event of default. If WT's 30-day response states that no default has occurred or it rejects the IRS's counter-proposal to cure, the parties shall seek to resolve their disagreement within 30 days of the IRS's receipt of WT's 30-day response. If a satisfactory resolution has not been achieved at the end of this latter 30-day period, or if WT fails to provide a 30-day response, the IRS may terminate this Agreement by providing a notice of termination in accordance with Section 9.03 of this Agreement. If WT receives a notice of termination from the IRS, it may appeal the determination within 30 days of the date of the notice of termination by sending a written notice to the address specified in Section 11.06 of this Agreement. If WT appeals the notice of termination, this Agreement shall not terminate until the appeal has been decided. If an event of default is discovered in the course of an external audit, the WT may cure the default, without following the procedures of this Section 9.07, if the external auditor's report describes the default and the actions that WT took to cure the default and the IRS determines that the cure procedures followed by WT were sufficient. If the IRS determines that WT's actions to cure the default were not sufficient, the IRS shall issue a notice of default and the procedures described in this Section 9.07 shall be followed.

**Sec. 9.08. Renewal.** If WT has made the PR election under Section 6.03 of this Agreement and intends to renew this

Agreement for an additional term, it shall submit an application for renewal to the IRS no earlier than one year and no later than six months prior to the expiration of this Agreement. Any such application for renewal must contain an update of the information provided by WT to the IRS in connection with the application to enter into this Agreement, and any other information the IRS may request in connection with the renewal process. This Agreement shall be renewed only upon the signatures of both WT and the IRS. Either the IRS or WT may seek to negotiate a new withholding foreign trust agreement rather than renew this Agreement.

## **SECTION 10. CERTAIN PARTNERSHIPS AND TRUSTS**

**Sec. 10.01. Certain Smaller Partnerships and Trusts.** WT may not apply the rules of this Section 10.01 unless it has made a PR election under Section 6.03 of this Agreement. WT may apply the rules of this Section 10.01 only to a partnership or trust that meets the following conditions: (i) the partnership or trust is a foreign partnership or foreign simple or grantor trust, (ii) the partnership or trust is a direct partner, beneficiary or owner of WT, (iii) none of the partners, beneficiaries or owners of the partnership or trust is a U.S. person or a passthrough partner, beneficiary or owner, and (iv) the total reportable amounts distributed to, and included in the distributive share of, the partnership or trust for the calendar year do not exceed \$200,000. In applying this Section 10.01, WT must treat the partners of such a partnership or the beneficiaries or owners of such a trust as direct beneficiaries or owners of WT under this Agreement. To apply this Section 10.01, WT and the partnership or trust must comply with all of the rules listed below.

(1) WT and the partnership or trust must agree in writing that the partnership or trust will make available to WT's auditor for purposes of WT's audit under Section 8 of this Agreement records that establish that the partnership or trust has provided WT with documentation for all of its partners, beneficiaries or owners.

(2) The partnership or trust must provide to WT a Form W-8IMY, together with Forms W-8 from each partner, beneficiary or owner, and a withholding statement, under Treas. Reg. § 1.1441-5(c)(3)(iv) or (e)(5)(iv), that provides information for all partners, beneficiaries or owners. The withholding statement, however, need not provide any allocation information.

(3) WT must treat amounts distributed to, or included in the distributive share of, the partnership or trust as allocated solely to any partner, beneficiary or owner that is subject to the highest rate of withholding and must withhold at that rate.

(4) WT may include amounts distributed to, or included in the distributive share of, a partnership or trust under Section 10.01(3) in its Form 1042-S reporting pools for direct account holders under Section 6.03 of this Agreement.

(5) After WT has withheld in accordance with Section 10.01(3) above, it may file a separate Form 1042-S for any partner, beneficiary or owner who requests that it do so. WT may do so only if the partnership or trust provides a withholding statement that includes allocation information for the requesting partner, beneficiary or owner and only if the partnership or trust has agreed in writing under Section 10.01(1) to make available to WT's external auditor records that substantiate the allocation information included in its withholding statement.

(6) WT may not include any amounts distributed to, or included in the distributive share of, a partnership or trust to which the WT is applying the rules of this Section 10.01 in any collective refund claim made under Section 7.02 of this Agreement.

(7) WT and a partnership or trust that apply this Section 10.01 to any calendar year are not required to apply this Section 10.01 to subsequent calendar years. WT and a partnership or trust that apply this Section 10.01 to any calendar year must apply these rules to the calendar year in its entirety.

(8) WT and the partnership or trust may not apply this Section 10.01 to any calendar year for which the partnership or trust has failed to make available to WT's auditor the records described in Section 10.01(1) within 90 days after these records are requested. If the partnership or trust has failed to make these records available

within the 90-day period, or if WT and the partnership or trust fail to comply with any other requirement of this Section 10.01, WT must apply Treas. Reg. § 1.1441-1 and 1.1441-5 to the partnership or trust, must correct its withholding, and must file corrected Forms 1042 and 1042-S.

**Sec. 10.02. Certain Related Partnerships and Trusts.** WT may not apply the rules of this Section 10.02 unless it has made a PR election under Section 6.03 of this Agreement. WT may apply the rules of this Section 10.02 only to a partnership or trust that meets the following conditions: (1) the partnership or trust is a foreign partnership or foreign simple or grantor trust; (2) the partnership or trust is either (i) a direct beneficiary or owner of WT or (ii) an indirect beneficiary or owner of WT that is a partner, beneficiary or owner of a partnership or trust to which WT has also applied this Section 10.02; and (3) the WT is a general partner of the partnership or a trustee of the trust. WT may not apply this Section 10.02 to indirect partners, beneficiaries or owners of such partnerships or trusts, or to direct partners, beneficiaries or owners of such partnerships or trusts that are intermediaries, flow-through entities or U.S. nonexempt recipients. See Section 10.02(5) of this Agreement. To apply this Section 10.02, WT and the partnership or trust must comply with all of the rules listed below.

(1) WT and the partnership or trust must enter into a written agreement under which the partnership or trust agrees:

(a) To act as an agent of WT with respect to its partners, beneficiaries or owners, and, as WT's agent, to apply the provisions of the WT Agreement to its partners, beneficiaries or owners,

(b) To treat its direct partners, beneficiaries or owners as direct beneficiaries or owners of WT under the WT Agreement and to treat its indirect partners, beneficiaries or owners as indirect partners of WT under the WT Agreement, and

(c) To make available, upon request, to WT's auditor, for purposes of WT's audit under Section 8 of the WT Agreement, records that establish its compliance with all of the rules listed under this Section 10.02.

(2) By entering into an agreement with a partnership or trust under paragraph (1)

of this Section 10.02, WT is not assigning its liability for the performance of any of its obligations under this Agreement. WT and the partnership or trust to which WT applies the rules of this Section 10.02, are jointly and severally liable for any tax, penalties and interest that may result from the failure of the partnership or trust to meet any of the obligations imposed by its agreement with WT.

(3) The partnership or trust must provide to WT a Form W-8IMY together with a withholding statement, under Treas. Reg. § 1.1441-5(c)(3)(iv) or (e)(5)(iv), that includes all information necessary for WT to fulfill its withholding, reporting and filing obligations under this Agreement. The withholding statement may include pooled basis information regarding direct partners, beneficiaries or owners that are not intermediaries, flow-through entities or U.S. non-exempt recipients. The partnership or trust need not provide to WT documentation for partners, beneficiaries or owners, except as provided under Section 10.02(1)(c).

(4) WT must withhold on the date an amount is distributed to or included in the distributive share of a foreign partnership or trust based on the withholding statement provided by the partnership or trust. The amount allocated to each partner, beneficiary or owner in the withholding statement may be based on a reasonable estimate of the partner's, beneficiary's or owner's distributive share of income subject to withholding for the year. The partnership or trust must correct the estimated allocations to reflect the partner's, beneficiary's or owner's actual distributive share and must provide this corrected information to WT on the earlier of the date that the statement required under section 6031(b) of the Code (schedule K-1) is mailed or otherwise provided to the partner or the due date for furnishing the statement (whether or not the partnership or trust is required to prepare and furnish the statement). If that date is after the due date for WT's Forms 1042 and 1042-S (without regard to extensions) for the calendar year, WT may withhold and report any adjustments required by the corrected information in the following calendar year.

(5) WT must file separate Forms 1042-S reflecting pooled basis information for each partnership or trust that has provided pooled basis information in its

withholding statement. WT must apply the provisions of Treas. Reg. § 1.1441-1 and 1.1441-5 to partners, beneficiaries or owners of such partnerships or trusts that are indirect partners, beneficiaries or owners, and to direct partners, beneficiaries or owners of such partnerships or trusts that are intermediaries, flow-through entities or U.S. nonexempt recipients.

(6) A partnership or trust to which WT applies this Section 10.02 may not assume primary NRA withholding responsibility, or primary Form 1099 reporting and backup withholding responsibility.

(7) WT and a partnership or trust that apply this Section 10.02 to any calendar year must apply these rules to the calendar year in its entirety. Generally, WT and a partnership or trust that apply this Section 10.02 to any calendar year are not required to apply this Section 10.02 to subsequent calendar years. If, however, WT withholds and reports any adjustments required by corrected information in a subsequent calendar year under Section 10.02(4), WT must apply this Section 10.02 to that calendar year in its entirety.

(8) WT and a partnership or trust may not apply this Section 10.02 to any calendar year for which the partnership or trust has failed to make available to WT's auditor the records described in Section 10.02(1)(c) within 90 days after these records are requested. If, for any calendar year, the partnership or trust has failed to make these records available within the 90-day period, or if WT and the partnership or trust fail to comply with any other requirement of this Section 10.02, WT must apply Treas. Reg. § 1.1441-1 and 1.1441-5 to the partnership or trust, must correct its withholding, and must file corrected Forms 1042 and 1042-S for the calendar year.

## SECTION 11. MISCELLANEOUS PROVISIONS

**Sec. 11.01.** WT's application to become a withholding foreign trust and the Appendix to this Agreement are hereby incorporated into and made an integral part of this Agreement. This Agreement, WT's application, and the Appendix to this Agreement constitute the complete agreement between the parties.

**Sec. 11.02.** This Agreement may be amended by the IRS if the IRS determines

that such amendment is needed for the sound administration of the internal revenue laws or internal revenue regulations. The Agreement may also be modified by either WT or the IRS upon mutual agreement. Such amendments or modifications shall be in writing.

**Sec. 11.03.** Any waiver of a provision of this Agreement is a waiver solely of that provision. The waiver does not obligate the IRS to waive other provisions of this Agreement or the same provision at a later date.

**Sec. 11.04.** This Agreement shall be governed by the laws of the United States. Any legal action brought under this Agreement shall be brought only in a U.S. court with jurisdiction to hear and resolve matters under the internal revenue laws of the United States. For this purpose, WT agrees to submit to the jurisdiction of such U.S. court.

**Sec. 11.05.** WT's rights and responsibilities under this Agreement cannot be assigned to another person.

**Sec. 11.06.** Notices provided under this Agreement shall be mailed registered, first class airmail. Notice shall be directed as follows:

To the IRS  
  
Internal Revenue Service  
LMSB:FS:QI  
290 Broadway  
New York, NY 10007-1867  
USA

All notices sent to the IRS must include the WT's WT-EIN.

To WT:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Sec. 11.07.** WT, acting in its capacity as a withholding foreign trust or in any other capacity, does not act as an agent of the IRS, nor does it have the authority to hold itself out as an agent of the IRS.

**IN WITNESS WHEREOF, the above parties have subscribed their names to these presents, in duplicate.**

Signed this    day of    ,

\_\_\_\_\_  
(name and title of person signing for WT)

\_\_\_\_\_  
(name and title of person signing for IRS)

**PR Election Statement – Six Year Term**

**By signing hereunder, WT makes the PR election with a term of six years or until WT terminates, whichever is earlier, under Sections 6.03 and 9.02 (A) of this Agreement.**

\_\_\_\_\_  
(name and title of person signing for WT)

**PR Election Statement – Fifteen Year Term**

**By signing hereunder, WT makes the PR election with a term of 15 years or until WT terminates, whichever is earlier, under Sections 6.03 and 9.02 (B) of this Agreement.**

\_\_\_\_\_  
(name and title of person signing for WT)

**Appendix A**

WT and the IRS agree that any of the following auditors may be used by WT to perform the external audits required by Section 8 of this Agreement.

[Names, addresses, telephone and fax numbers of external auditors.]

**Amendment to Qualified Intermediary Withholding Agreement**

**SECTION 4A. CERTAIN PARTNERSHIPS AND TRUSTS**

**Sec. 4A.01.** *Certain Smaller Partnerships and Trusts.* QI may apply the rules of this Section 4A.01 to a partnership or trust only if (i) it is a foreign partnership or foreign simple or grantor trust, (ii) it is a direct account holder of QI, (iii) none of its partners, beneficiaries or owners is a U.S. person or a passthrough partner, beneficiary or owner, as defined in Section 2.17 of the WP agreement and Section 2.25 of the WT agreement, provided in Revenue Procedure 2003-64, and (iv) the total reportable amounts that QI has paid to accounts of the partnership or trust that are covered by the QI Agreement do not exceed \$200,000 for the calendar year. To apply this Section 4A.01, QI and the partnership or trust must comply with all of the rules listed below.

(1) QI and the partnership or trust must agree in writing that the partnership or trust, upon request, will make available to QI's auditor for purposes of QI's second and fifth year audits under Section 10 of the QI Agreement records that establish that the partnership or trust has provided QI with documentation all of its partners, beneficiaries or owners.

(2) The partnership or trust must provide to QI a Form W-8IMY, together with Forms W-8 or documentary evidence listed in the know-your-customer (KYC) attachment to the QI Agreement from each partner, beneficiary or owner, and a withholding statement, under Treas. Reg. § 1.1441-5(c)(3)(iv) or (e)(5)(iv), that provides information for all partners, beneficiaries or owners. The withholding statement, however, need not provide any allocation information.

(3) QI must treat payments to the partnership or trust as allocated solely to any partner, beneficiary or owner that is subject to the highest rate of withholding and must withhold at that rate.

(4) QI may include payments made to a partnership or trust under section 4A.01(3) in its Form 1042-S reporting pools for direct account holders under Section 8.03 of the QI Agreement.

(5) After QI has withheld in accordance with Section 4A.01(3) above, it may file a separate Form 1042-S for any partner, beneficiary or owner who requests that it do so. QI may do so only if the partnership or trust provides a withholding statement that includes allocation information for the requesting partner beneficiary or owner and only if the partnership or trust has agreed in writing under Section 4A.01(1) to make available to QI's external auditor records that substantiate that the allocation information included in its withholding statement.

(6) QI may not include any payments made to a partnership or trust to which QI is applying the rules of this Section 4A.01 in any collective refund claim made under section 9.04 of the QI Agreement.

(7) QI and a partnership or trust that apply this Section 4A.01 to any calendar year are not required to apply this Section 4A.01 to subsequent calendar years. QI and a partnership or trust that apply this Section 4A.01 to any calendar year must apply these rules to the calendar year in its entirety.

(8) QI and the partnership or trust may not apply this Section 4A.01 to any calendar year for which the partnership or trust has failed to make available to QI's auditor the records described in Section 4A.01(1) within 90 days after these records are requested. If the partnership or trust has failed to make these records available within the 90-day period, or if QI and the partnership or trust fail to comply with any other requirements of this Section 4A.01, QI must apply the provisions of Treas. Reg. § 1.1441-1 and 1.1441-5 to the partnership or trust, must correct its withholding, and must file corrected Forms 1042 and 1042-S.

**Sec. 4A.02. Certain Related Partnerships and Trusts.** QI may apply the rules of this Section 4A.02 only to a partnership or trust that is (1) a foreign partnership or foreign simple or grantor trust; (2) either (i) a direct account holder of QI or (ii) an indirect account holder of QI that is a direct partner, beneficiary or owner of a partnership or trust to which QI has also applied this Section 4A.02; and (3) the QI, or an affiliate of the QI, is a general partner of the partnership or a trustee of the trust. QI may not apply the rules of this Section 4A.02 to indirect partners, beneficiaries or owners of such a partnership

or trust, or to direct partners, beneficiaries or owners of such partnerships or trusts that are intermediaries, flow-through entities or U.S. nonexempt recipients. See Section 4A.02(5) of this Agreement. To apply this Section 4A.02, QI and the partnership or trust must comply with all of the rules listed below.

(1) QI and the partnership or trust must enter into a written agreement under which the partnership or trust agrees:

(a) To act as an agent of QI with respect to its partners, beneficiaries or owners, and, as QI's agent, to apply the provisions of the QI Agreement to the partners, beneficiaries or owners,

(b) To treat its direct partners, beneficiaries or owners as direct account holders of QI under the QI Agreement and to treat its indirect partners, beneficiaries or owners as indirect account holders of QI under the QI Agreement,

(c) To make available, upon request, to QI's auditor, for purposes of QI's audit under Section 10 of the QI Agreement, records that establish its compliance with all of the rules listed under this Section 4A.02.

(2) By entering into an agreement with a partnership or trust under paragraph (1) of this section, QI is not assigning its liability for the performance of any of its obligations under the QI Agreement. QI and the partnership or trust to which QI applies the rules of this Section 4A.02, are jointly and severally liable for any tax, penalties and interest that may result from the failure of the partnership or trust to meet any of the obligations imposed by its agreement with QI.

(3) The partnership or trust must provide to QI a Form W-8IMY together with a withholding statement, under Treas. Reg. § 1.1441-5(c)(3)(iv) or (e)(5)(iv), that includes all information necessary for QI to fulfill its withholding, reporting and filing obligations under the QI Agreement. The withholding statement may include pooled basis information regarding direct partners, beneficiaries or owners that are not intermediaries, flow-through entities or U.S. non-exempt recipients. The partnership or trust need not provide to QI documentation for partners, beneficiaries or owners, except as provided under paragraph (1)(c) of this section.

(4) QI must withhold on the date it makes a payment to a foreign partnership

or trust based on the withholding statement provided by the partnership or trust. The amount allocated to each partner, beneficiary or owner in the withholding statement may be based on a reasonable estimate of the partner's, beneficiary's or owner's distributive share of income subject to withholding for the year. The partnership or trust must correct the estimated allocations to reflect the partners', beneficiaries' or owners' actual distributive share, and must provide this corrected information to QI, on the earlier of the date that the statement required under section 6031(b) (schedule K-1) is mailed or otherwise provided to the partner or the due date for furnishing the statement (whether or not the partnership or trust is required to prepare and furnish the statement). If that date is after the due date for QI's Forms 1042 and 1042-S (without regard to extensions) for the calendar year, QI may withhold and report any adjustments required by the corrected information in the following calendar year.

(5) QI must file separate Forms 1042-S reflecting pooled basis information for each partnership or trust that has provided pooled basis information in its withholding statement. QI must file Forms 1042-S and 1099, as provided in the QI Agreement, for partners, beneficiaries or owners of such partnerships or trusts that are indirect partners, beneficiaries or owners, and for direct partners, beneficiaries or owners of such partnerships or trusts that are intermediaries, flow-through entities or U.S. nonexempt recipients.

(6) The partnership or trust may not assume primary NRA withholding responsibility, or primary Form 1099 reporting and backup withholding responsibility.

(7) QI and a partnership or trust that apply this Section 4A.02 to any calendar year must apply these rules to the calendar year in its entirety. Generally, QI and a partnership or trust that apply this Section 4A.02 to any calendar year are not required to apply this Section 4A.02 to subsequent calendar years. If, however, QI withholds and reports any adjustments required by corrected information in a subsequent calendar year under Section 4A.02(4), QI must apply this Section 4A.02 to that calendar year in its entirety.

(8) QI and a partnership or trust may not apply this Section 4A.02 to any calendar year for which the partnership or trust

has failed to make available to QI's auditor the records described in paragraph (1)(c) of this section within 90 days after these records are requested. If, for any calendar year, the partnership or trust has failed to make these records available within the 90-day period, or if QI and the partnership or trust fail to comply with any other requirement of this Section 4A.02, QI must apply Treas. Reg. § 1.1441-1 and 1.1441-5 to the partnership or trust, must correct its withholding, and must file corrected Forms 1042 and 1042-S for the calendar year.

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*26 CFR 601.201: Rulings and determination letters. (Also Part 1, §§ 856; 1.856-3, 1.856-5, and 301.7701-3.)*

## Rev. Proc. 2003-65

### SECTION 1. PURPOSE

This revenue procedure sets forth a safe harbor under which a loan from a real estate investment trust (REIT) secured by an interest in a partnership or by the sole membership interest in a disregarded entity will be treated as a real estate asset for purposes of §§ 856(c)(4)(A) and 856(c)(5)(B) of the Internal Revenue Code and the interest on the loan will be treated as interest on an obligation secured by a mortgage on real property or on an interest in real property for purposes of § 856(c)(3)(B).

### SECTION 2. BACKGROUND

.01 Many REITs invest in real estate by making loans that are secured by real property. In certain cases because of financing arrangements and restrictive loan covenants, REITs make loans to the owners of entities that hold real property instead of making loans that are secured directly by real property. These loans are secured by a pledge of the borrowers' ownership interests in the property-owning entities.

.02 Section 856(a) provides that an entity shall not be considered a REIT for any taxable year unless certain requirements are satisfied. One requirement is a test contained in § 856(c)(4)(A) that provides that at the close of each quarter of its taxable year, at least 75 percent of the value of a REIT's total assets must be represented by

real estate assets, cash and cash items (including receivables), and government securities.

.03 Section 856(c)(5)(B) provides that the term "real estate assets" means real property (including interests in real property and interests in mortgages on real property) and shares (or transferable certificates of beneficial interest) in other REITs that meet the requirements of §§ 856 through 859. Section 1.856-3(d) of the Income Tax Regulations provides that the term "real property" means land or improvements thereon, such as buildings and that the term "real property" includes interests in real property. Section 1.856-3(d) further provides that local law definitions will not be controlling for purposes of determining the meaning of the term "real property" as used in § 856 and the regulations thereunder.

.04 Section 856(c)(3)(B) provides that at least 75 percent of a REIT's gross income must be derived from certain items, including interest on obligations secured by mortgages on real property or on interests in real property.

.05 Section 1.856-5(c)(1) provides that if a mortgage covers both real property and other property, an apportionment of the interest income must be made for purposes of the 75-percent requirement of § 856(c)(3). Section 1.856-5(c)(1)(i) provides that if the loan value of the real property is equal to or exceeds the amount of the loan, the entire interest income shall be apportioned to the real property. Section 1.856-5(c)(2) provides that the loan value of the real property is the fair market value of the property, determined on the date the commitment by the trust to make the loan becomes binding on the trust.

.06 Under § 301.7701-3(b)(1)(ii) of the Procedure and Administration Regulations, certain entities (including limited liability companies) with a single member that do not elect to be treated as corporations will be disregarded as entities separate from their owners for federal tax purposes.

.07 Section 1.856-3(g) provides that in the case of a REIT that is a partner in a partnership, the REIT will be deemed to own its proportionate share of each of the assets of the partnership and will be deemed to be entitled to the income of the partnership attributable to such share. For purposes of § 856, the interest of a partner in

the partnership's assets will be determined in accordance with the partner's capital interest in the partnership. The character of the various assets in the hands of the partnership and items of gross income of the partnership retain the same character in the hands of the partners for all purposes of § 856. Thus, for example, if the REIT owns a 30-percent capital interest in a partnership that owns a shopping mall, the REIT will be treated as owning 30 percent of such property and as earning 30 percent of the rent derived from the property by the partnership.

.08 In Rev. Rul. 77-459, 1977-2 C.B. 239, a REIT makes a construction loan to a partnership, and as security for the loan the partnership assigns its interest in an Illinois land trust to the REIT. The partnership is the sole beneficiary of the land trust, and the sole asset of the land trust is real property. Although the beneficial interest in an Illinois land trust is personal property under Illinois law, so long as the real property remains the sole asset of the land trust, the beneficial interest has no value apart from the underlying real property. Accordingly, Rev. Rul. 77-459 concludes that the loan is a real estate asset for purposes of § 856(c) and that interest on the loan is interest on an obligation secured by a mortgage on real property or on an interest in real property for purposes of § 856(c)(3).

### SECTION 3. SCOPE

This revenue procedure applies to a loan made by an entity that makes an election to be taxed as a REIT under § 856(c) if the loan meets the requirements of this section.

.01 The borrower is either a partner in a partnership or the sole member of an eligible entity that has not elected to be treated as a corporation for federal tax purposes and is therefore disregarded as an entity separate from its owner under §§ 7701 and 301.7701-3(b)(1).

.02 The loan is nonrecourse, secured only by the partner's interest in the partnership, or the member's interest in the disregarded entity; thus, in the event of default, the sole recourse is against the pledged ownership interest.

.03 The lender is granted a first priority security interest in the pledged ownership interest. This security interest will place the lender's claim as lender ahead of the

claims of other creditors of the partner or LLC member. The pledged ownership interest cannot be further encumbered unless the security interest created is subordinate to the lender's security interest.

.04 Upon default and foreclosure on the secured loan, the lender will replace the borrower as a partner in the partnership or as the sole member of the disregarded entity. In the case of a loan secured by a partnership interest, the other partners in the partnership must have agreed that upon default and foreclosure they will not unreasonably oppose the admission of the lender as a partner.

.05 On the date the commitment by the lender to make the loan becomes binding on the lender, the partnership or disregarded entity holds real property within the meaning of § 1.856-3(d). If all or part of this real property is subsequently sold or otherwise transferred, the loan will become due and payable upon the sale or transfer of the real property.

.06 On each testing date, the value of the real property (within the meaning of § 1.856-3(d)) held by the partnership or disregarded entity is at least 85 percent of the value of all of the assets of the partnership or disregarded entity. For this purpose a testing date means the close of the first quarter of the lender's taxable year following the date on which the commitment by

the lender to make the loan becomes binding on the lender, and the close of each subsequent quarter in which the partnership or disregarded entity acquires any assets other than real estate assets, cash and cash items (including receivables), or government securities (within the meaning of § 856(c)(4)(A)), or reasonable quantities of equipment and materials customarily used for the maintenance and repair of real property. For this purpose, asset acquisitions by a partnership or disregarded entity include additional partnership or member contributions.

.07 The loan value of the real property owned by the partnership or disregarded entity equals or exceeds the amount of the loan as determined under § 1.856-5(c)(2). For this purpose, the loan value is reduced by any liens encumbering the real property, as well as by any other liabilities of the partnership or disregarded entity on the date the commitment by the lender to make the loan becomes binding on the lender. If the real property is owned by a partnership, only the proportionate share of the loan value (determined using the principles of § 1.856-3(g)) attributable to the interest that secures the lender's loan is taken into account.

.08 Interest on the loan meets the requirements of §§ 1.856-5(a) and (b); thus, the interest includes only an amount that

constitutes compensation for the use or forbearance of money, and, subject to the exception contained in § 1.856-5(d), the determination of the amount does not depend in whole or in part on the income or profits of any person.

#### SECTION 4. PROCEDURE

A loan made by a REIT that satisfies the requirements of Section 3 of this revenue procedure will be treated as a real estate asset for purposes of §§ 856(c)(4)(A) and 856(c)(5)(B), and the interest on the loan will be treated as interest on an obligation secured by a mortgage on real property or on an interest in real property for purposes of § 856(c)(3)(B).

#### SECTION 5. EFFECTIVE DATE

This revenue procedure is effective August 11, 2003.

#### DRAFTING INFORMATION

The principal author of this revenue procedure is Eric E. Boody of the Office of Associate Chief Counsel (Financial Institutions and Products). For further information regarding this revenue procedure, contact Mr. Boody at (202) 622-3960 (not a toll-free call).

# Part IV. Items of General Interest

## Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

### Transfers of Compensatory Options

REG-116914-03

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9067) relating to the sale or other disposition of compensatory nonstatutory stock options to related persons. The text of those regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by September 30, 2003.

ADDRESSES: Send submissions to: CC:PA:RU (REG-116914-03), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC, 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:RU (REG-116914-03), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., NW, Washington, DC. Alternatively, taxpayers may submit electronic comments directly to the IRS Internet site at [www.irs.gov/regs](http://www.irs.gov/regs).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Stephen Tackney (202) 622-6030; concerning submissions of comments and/or requests for a hearing, Guy Traynor, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

### Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin amend 26 CFR part 1. The

regulations provide that a sale or other disposition of a nonstatutory stock option to a related person will not be treated as a transaction that closes the application of section 83 with respect to the option. The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

### Special Analyses

It has been determined that these proposed regulations are not a significant regulatory action as defined in Executive order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 533(b) of the Administrative Procedures Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations are being submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

### Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. The IRS and Treasury Department specifically request comments on the clarity and efficacy of the proposed definition of a related person. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

### DRAFTING INFORMATION

The principal author of these proposed regulations is Stephen Tackney of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

\* \* \* \* \*

### Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### PART 1—INCOME TAXES

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

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

Par. 2. Section 1.83-7 is amended as follows:

1. Paragraph (a) is amended by adding a sentence at the end.
2. Paragraphs (a)(1) and (a)(2) are added.
3. Paragraph (d) is added.

The additions read as follows:

(a) [The text of proposed § 1.83-7(a) is the same as the text of § 1.83-7T(a) published elsewhere in this issue of the Bulletin].

\* \* \* \* \*

(d) *Effective dates.* This section is applicable to sales or other dispositions of options on or after the publication of final regulations in the **Federal Register**. For dates on or after July 2, 2003, see § 1.83-7T(d).

Robert E. Wenzel,  
*Deputy Commissioner of  
Internal Revenue.*

(Filed by the Office of the Federal Register on July 1, 2003, 8:45 a.m., and published in the issue of the Federal Register for July 2, 2003, 68 F.R. 39498)

## Changes in Annual Accounting Period

### Announcement 2003-49

#### PURPOSE

This announcement discusses some of the changes that the Internal Revenue Service and Treasury Department have made in finalizing Notice 2002-75, 2002-47 I.R.B. 884, which proposes procedures for individuals to obtain the automatic approval of the Commissioner to change their annual accounting period from a fiscal year to a calendar year. The final procedures are contained in Rev. Proc. 2003-62, page 299 of this Bulletin.

#### BACKGROUND

The Service published Notice 2002-75 on November 25, 2002, and requested public comments on the proposed procedures contained therein. No public comments were received. However, the Service and Treasury Department have made certain changes to Notice 2002-75 to further conform the rules for automatic accounting period changes by individuals to those provided in Rev. Proc. 2002-37, 2002-1 C.B. 1030 (providing procedures for automatic approval of annual accounting period changes by corporations) and Rev. Proc. 2002-39, 2002-1 C.B. 1046 (providing procedures for the prior approval of annual accounting period changes by taxpayers generally, including individuals).

Also, the Service and Treasury Department have made conforming changes to Notice 2002-75 as a result of Rev. Proc. 2003-34, 2003-18 I.R.B. 856, which modifies the term and condition of Rev. Proc. 2002-37 and Rev. Proc. 2002-39 regarding the carryback of losses incurred in the short period.

#### CHANGES

##### A. Interest in a Pass-through Entity

The Service and Treasury Department have determined that the \$10,000 *de minimis* exception for an individual's interest in a pass-through entity provided in section 4.02(2)(d) of Notice 2002-75 should be raised to \$500,000. This change is consistent with the \$500,000 *de minimis* exception to the "substantial distortion" rule provided in section 5.05(1)(ii) of Rev. Proc. 2002-39. The corresponding example in Notice 2002-75 is modified to reflect this change.

Section 4.02(2)(a) of Notice 2002-75 is modified to remove the reference to foreign personal holding companies (FPHCs), because FPHCs cannot make a one-month deferral election under § 898(c)(1)(B) of the Internal Revenue Code. Section 4.02(2)(a) of Rev. Proc. 2002-37 also contains this reference. The Service and Treasury Department intend to remove the reference to FPHCs in section 4.02(2)(a) of Rev. Proc. 2002-37. No inference should be drawn from that reference that FPHCs are eligible to

make a one month deferral election under § 898(c)(1)(B).

##### B. Net Operating Loss Term and Condition.

Section 6.05 of Notice 2002-75 provides that a net operating loss (NOL) generated in the short period is carried back or carried over if the loss is \$10,000 or less. The Service and Treasury Department have determined that the \$10,000 ceiling should be raised to \$50,000, consistent with the \$50,000 ceiling provided in section 5.04 of Rev. Proc. 2002-39. Also, the Service and Treasury Department have made other changes to this section consistent with Rev. Proc. 2003-34.

##### C. Other Changes

Additional conforming changes have been made to Notice 2002-75 to make the automatic approval procedures applicable to individuals consistent with those of Rev. Proc. 2002-37 and Rev. Proc. 2002-39. See, for example, section 6.07 of Rev. Proc. 2003-62.

#### FURTHER INFORMATION

For further information regarding this announcement, contact Roy A. Hirschhorn or Jeffrey S. Marshall of the Office of the Associate Chief Counsel (Income Tax and Accounting) at (202) 622-4960 (not a toll-free call).

## Announcement of Disciplinary Actions Involving Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries — Suspensions, Censures, Disbarments, and Resignations

### Announcement 2003-50

Under Title 31, Code of Federal Regulations, Part 10, attorneys, certified public accountants, enrolled agents, and enrolled actuaries may not accept assistance from, or assist, any person who is under disbarment or suspension from practice before the Internal Revenue Service if the assistance relates to a matter constituting practice before the Internal Revenue Service

and may not knowingly aid or abet another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

To enable attorneys, certified public accountants, enrolled agents, and enrolled actuaries to identify persons to whom

these restrictions apply, the Director, Office of Professional Responsibility will announce in the Internal Revenue Bulletin their names, their city and state, their professional designation, the effective date of disciplinary action, and the period of suspension. This announcement will appear in the weekly Bulletin at the earliest practicable date after such action and will



continue to appear in the weekly Bulletins for five successive weeks.

## Suspensions From Practice Before the Internal Revenue Service After Notice and an Opportunity for a Proceeding

Under Title 31, Code of Federal Regulations, Part 10, after notice and an opportunity for a proceeding before an administrative law judge, the following individuals have been placed under suspension from practice before the Internal Revenue Service:

Name	Address	Designation	Effective Date
Arnold, John	Clovis, CA	Enrolled Agent	February 13, 2003 to August 12, 2003

## Disbarments From Practice Before the Internal Revenue Service After Notice and an Opportunity for a Proceeding

Under Title 31, Code of Federal Regulations, Part 10, after notice and an opportunity for a proceeding before an administrative law judge, the following individuals have been disbarred from practice before the Internal Revenue Service:

Name	Address	Designation	Effective Date
Kalajian, Thomas	Laguna Hills, CA	CPA	October 2, 2002
Messman, Carla	Outing, MN	Enrolled Agent	January 9, 2003

## Consent Suspensions From Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, an attorney, certified public accountant, enrolled agent, or enrolled actuary, in order to avoid the institution or conclusion of a proceeding for his or her disbarment or suspension from practice before the Internal Revenue Service, may offer his or her consent to suspension from such practice. The Director, Office of Professional Responsibility, in his discretion, may suspend an attorney, certified public accountant, enrolled agent or enrolled actuary in accordance with the consent offered.

The following individuals have been placed under consent suspension from practice before the Internal Revenue Service:

Name	Address	Designation	Date of Suspension
Kemp, Bart	Sonoma, CA	Attorney	March 15, 2003 to November 15, 2003

Name	Address	Designation	Date of Suspension
Marks, Gary	Hewlett, NY	CPA	March 24, 2003 to March 23, 2004
Fehl, Kenneth	Palo Alto, CA	Attorney	April 1, 2003 to March 31, 2004
Cohen, Peter	Edison, NJ	CPA	April 3, 2003 to May 2, 2005
Kohn, Michael	St. Louis, MO	Attorney	Indefinite from April 30, 2003
Sogamoso, Carlos	Bellflower, CA	Enrolled Agent	Indefinite from May 1, 2003
Huston, James	Kingman, AZ	CPA	May 1, 2003 to April 30, 2006
Halleran, Edward	Carle Place, NY	Enrolled Agent	Indefinite from May 1, 2003
Marshall, E. Peter	Glens Falls, NY	CPA	May 1, 2003 to April 30, 2006
Bell, Rosanna	Irvington, NY	CPA	Indefinite from May 8, 2003
Kingsley, Steven	Weston, CT	CPA	Indefinite from May 15, 2003
Schawe, Rudolph	Brenham, TX	Enrolled Agent	May 22, 2003 to October 21, 2004
Scheve, Michael	Baltimore, MD	CPA	Indefinite from May 27, 2003
McKenzie, Dawna	Fort Smith, AR	Enrolled Agent	Indefinite from June 2, 2003
Suen, Ming	San Francisco, CA	Enrolled Agent	Indefinite from June 3, 2003
Reyes, Ruperto	Placentia, CA	Enrolled Agent	June 10, 2003 to December 9, 2005

Name	Address	Designation	Date of Suspension
Garmo, Georgis	W. Bloomfield, MI	CPA	Indefinite from June 10, 2003
Holmes, James L.	Burlington, NC	Enrolled Agent	Indefinite from June 18, 2003
Brooks, Sandra	San Diego, CA	Enrolled Agent	Indefinite from June 20, 2003
Malley, Wayne	Cupertino, CA	Enrolled Agent	Indefinite from June 27, 2003
Leininger, Barbara	Lutz, FL	Enrolled Agent	Indefinite from June 27, 2003

## Expedited Suspensions From Practice Before the Internal Revenue Service

Under Title 31, Code of Federal Regulations, Part 10, the Director, Office of Professional Responsibility, is authorized to immediately suspend from practice before the Internal Revenue Service any practitioner who, within five years from the date

the expedited proceeding is instituted (1) has had a license to practice as an attorney, certified public accountant, or actuary suspended or revoked for cause or (2) has been convicted of certain crimes.

The following individuals have been placed under suspension from practice before the Internal Revenue Service by virtue of the expedited proceeding provisions:

Name	Address	Designation	Date of Suspension
Radwick, Peter	Woodinville, WA	CPA	Indefinite from March 10, 2003
Jellinger, Richard	Anoka, MN	Attorney	Indefinite from March 10, 2003
Deen, Billy	Mansfield, TX	CPA	Indefinite from March 10, 2003
Dougherty Jr, William	Newport News, VA	Attorney	Indefinite from March 10, 2003
Abood, Norman	Oregon, OH	Attorney	Indefinite from March 10, 2003
Matis, Vendel	Redlands, CA	Attorney	Indefinite from March 31, 2003

Name	Address	Designation	Date of Suspension
Workman, Andrew	Panama City, FL	CPA	Indefinite from March 31, 2003
Bagwell, Jr., Noel	Cunningham, TN	Attorney	Indefinite from March 31, 2003
O'Brien, Brien	Sioux City, IA	Attorney	Indefinite from March 31, 2003
Boykoff, Franklin	Pleasantville, NY	Attorney	Indefinite from March 31, 2003
McKinnon, Marva	Statesville, NC	Attorney	Indefinite from March 31, 2003
Bailey, Scott K.	Eden Prairie, MN	Attorney	Indefinite from March 31, 2003
Kim, Kun	Atlanta, GA	CPA	Indefinite from March 31, 2003
Massari III, Domenic	Tampa, FL	Attorney	Indefinite from May 12, 2003
Haugabrook II, Tyrone	Valdosta, GA	Attorney	Indefinite from May 19, 2003
Wester, Joseph	Montgomery, AL	CPA	Indefinite from May 19, 2003
Smercina, David	Solon, OH	CPA	Indefinite from May 19, 2003
Pullings, Retna	Washington, DC	Attorney	Indefinite from May 19, 2003
Boyd, James	Mendota Heights, MN	Attorney	Indefinite from May 20, 2003
Spindler, Judith	Omaha, NE	Attorney	Indefinite from May 20, 2003
Wintroub, Edward	Omaha, NE	Attorney	Indefinite from May 20, 2003

Name	Address	Designation	Date of Suspension
Brinker, Peter	Omaha, NE	Attorney	Indefinite from May 21, 2003
Valdes, Alfredo	Old Greenwich, CT	CPA	Indefinite from May 21, 2003
Cruise, Michael	Lincoln, NE	Attorney	Indefinite from May 22, 2003
Schoppert, Thomas	Minot, ND	Attorney	Indefinite from June 2, 2003
White, Paul	Smithfield, NC	Enrolled Agent	Indefinite from June 2, 2003
Brier, Michael	Providence, RI	CPA	Indefinite from June 16, 2003

## Resignations of Enrolled Agents

Under Title 31, Code of Federal Regulations, Part 10, an enrolled agent, in order to avoid the institution or conclusion of a proceeding for his or her disbarment or suspension from practice before the Internal Revenue Service, may offer his or

her resignation as an enrolled agent. The Director, Office of Professional Responsibility, in his discretion, may accept the offered resignation.

The Director, Office of Professional Responsibility, has accepted offers of resignation as an enrolled agent from the following individuals:

Name	Address	Date of Designation
Evans, Caroline	Tiverton, RI	May 7, 2003

## Censure Issued by Consent

Under Title 31, Code of Federal Regulations, Part 10, in lieu of a proceeding being instituted or continued, an attorney,

certified public accountant, enrolled agent, or enrolled actuary, may offer his or her consent to the issuance of a censure. Censure is a public reprimand.

The following individuals have consented to the issuance of a Censure:

Name	Address	Designation	Date of Censure
Pargas, Carlos B.	Miami, FL	CPA	March 19, 2003
Malkasian, Gary	Sacramento, CA	CPA	March 27, 2003
Wilcox, Ronald E.	Mt. Carmel, IL	CPA	April 29, 2003
Wood, David T.	Shawneetown, IL	CPA	May 27, 2003

## **Deletions From Cumulative List of Organizations Contributions to Which are Deductible Under Section 170 of the Code**

### **Announcement 2003–52**

The name of an organization that no longer qualifies as an organization described in section 170(c)(2) of the Internal Revenue Code of 1986 is listed below.

Generally, the Service will not disallow deductions for contributions made to a listed organization on or before the date of announcement in the Internal Revenue Bulletin that an organization no longer qualifies. However, the Service is not precluded from disallowing a deduction for any contributions made after an organization ceases to qualify under section 170(c)(2) if the organization has not timely filed a suit for declaratory judgment under section 7428 and if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for or was aware of the activities or omissions of the organization that brought about this revocation.

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section

7428(c) would begin on March 18, 2002, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is \$1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

Hispanic Association of Lucent  
Technologies Employees, Inc.  
Napersville, IL

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### **Section 7428(c) Validation of Certain Contributions Made During Pendency of Declaratory Judgment Proceedings**

#### **Announcement 2003–53**

This announcement serves notice to potential donors that the organizations listed below have recently filed timely declaratory judgment suits under section 7428 of the Code, challenging revocation of their status as eligible donees under section 170(c)(2).

Protection under section 7428(c) of the Code begins on the date that the notice of revocation is published in the Internal

Revenue Bulletin and ends on the date on which a court first determines that an organization is not described in section 170(c)(2), as more particularly set forth in section 7428(c)(1). In the case of individual contributors, the maximum amount of contributions protected during this period is limited to \$1,000.00, with a husband and wife being treated as one contributor. This protection is not extended to any individual who was responsible, in whole or in part, for the acts or omissions of the organization that were the basis for the revocation. This protection also applies (but without limitation as to amount) to organizations described in section 170(c)(2) which are exempt from tax under section 501(a). If the organization ultimately prevails in its declaratory judgment suit, deductibility of contributions would be subject to the normal limitations set forth under section 170.

South Community Association  
Middletown, OH

South Park Remedial Association  
Dayton, OH

# Definition of Terms

*Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:*

*Amplified* describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

*Clarified* is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

*Distinguished* describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

*Modified* is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A

and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

*Obsoleted* describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

*Revoked* describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

*Superseded* describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance

of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

*Supplemented* is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

*Suspended* is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

# Abbreviations

*The following abbreviations in current use and formerly used will appear in material published in the Bulletin.*

A—Individual.  
Acq.—Acquiescence.  
B—Individual.  
BE—Beneficiary.  
BK—Bank.  
B.T.A.—Board of Tax Appeals.  
C—Individual.  
C.B.—Cumulative Bulletin.  
CFR—Code of Federal Regulations.  
CI—City.  
COOP—Cooperative.  
Ct.D.—Court Decision.  
CY—County.  
D—Decedent.  
DC—Dummy Corporation.  
DE—Donee.  
Del. Order—Delegation Order.  
DISC—Domestic International Sales Corporation.  
DR—Donor.  
E—Estate.  
EE—Employee.  
E.O.—Executive Order.

ER—Employer.  
ERISA—Employee Retirement Income Security Act.  
EX—Executor.  
F—Fiduciary.  
FC—Foreign Country.  
FICA—Federal Insurance Contributions Act.  
FISC—Foreign International Sales Company.  
FPH—Foreign Personal Holding Company.  
F.R.—Federal Register.  
FUTA—Federal Unemployment Tax Act.  
FX—Foreign corporation.  
G.C.M.—Chief Counsel's Memorandum.  
GE—Grantee.  
GP—General Partner.  
GR—Grantor.  
IC—Insurance Company.  
I.R.B.—Internal Revenue Bulletin.  
LE—Lessee.  
LP—Limited Partner.  
LR—Lessor.  
M—Minor.  
Nonacq.—Nonacquiescence.  
O—Organization.  
P—Parent Corporation.  
PHC—Personal Holding Company.  
PO—Possession of the U.S.

PR—Partner.  
PRS—Partnership.  
PTE—Prohibited Transaction Exemption.  
Pub. L.—Public Law.  
REIT—Real Estate Investment Trust.  
Rev. Proc.—Revenue Procedure.  
Rev. Rul.—Revenue Ruling.  
S—Subsidiary.  
S.P.R.—Statement of Procedural Rules.  
Stat.—Statutes at Large.  
T—Target Corporation.  
T.C.—Tax Court.  
T.D.—Treasury Decision.  
TFE—Transferee.  
TFR—Transferor.  
T.I.R.—Technical Information Release.  
TP—Taxpayer.  
TR—Trust.  
TT—Trustee.  
U.S.C.—United States Code.  
X—Corporation.  
Y—Corporation.  
Z—Corporation.

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<sup>1</sup> A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2003-1 through 2003-26 is in Internal Revenue Bulletin 2003-27, dated July 7, 2003.



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<sup>1</sup> A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2003-1 through 2003-26 is in Internal Revenue Bulletin 2003-27, dated July 7, 2003.