

# INTERNAL REVENUE BULLETIN



## HIGHLIGHTS OF THIS ISSUE

**Bulletin No. 2015–19**  
**May 11, 2015**

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.

## INCOME TAX

### **Notice 2015–37, page 947.**

Eligibility for Minimum Essential Coverage for Purposes of the Premium Tax Credit. This notice provides guidance on whether or when, for purposes of the premium tax credit under § 36B of the Code, an individual is eligible for minimum essential coverage under a “Children’s Health Insurance buy-in program” that has been designated as minimum essential coverage.

## EXCISE TAX

### **REG–103281–11, page 948.**

Section 301 of James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111–347 (124 Stat. 3623) (the “Act”) added section 5000C to the Internal Revenue Code that imposes a 2 percent tax on payments made by the U.S. government to foreign persons pursuant to certain contracts. These proposed regulations provide guidance to U.S. government acquiring agencies and foreign persons to determine what goods or services are subject to the section 5000C; and how to remit the 2 percent tax by U.S. government acquiring agencies or foreign persons, if the section 5000C tax is applicable.

# The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the 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.

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 last 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 last Bulletin of each semiannual period.

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## Part III. Administrative, Procedural, and Miscellaneous

### Eligibility for Minimum Essential Coverage for Purposes of the Premium Tax Credit

#### Notice 2015–37

This notice provides guidance on eligibility for minimum essential coverage under § 36B of the Internal Revenue Code for individuals who may enroll in coverage under “Children’s Health Insurance (CHIP) buy-in programs” that the Department of Health and Human Services (HHS) designates as minimum essential coverage.

#### BACKGROUND

Beginning in 2014, certain individuals covered under a qualified health plan through the Health Insurance Marketplace, also called the Affordable Insurance Exchange, are allowed a premium tax credit under § 36B. Under § 36B and § 1.36B–2 of the Income Tax Regulations, coverage of an individual (who may be the taxpayer claiming the premium tax credit or a member of the taxpayer’s family) may be subsidized by the premium tax credit only for months the individual is not eligible for other minimum essential coverage, except coverage in the individual market. Minimum essential coverage is defined in § 5000A(f) and includes coverage under certain government-sponsored programs, including CHIP coverage under title XXI of

the Social Security Act, and coverage HHS designates as minimum essential coverage.

In general, an individual is treated as eligible for minimum essential coverage under a government-sponsored program if the individual meets the eligibility criteria for coverage under the program. However, the Commissioner may define eligibility for minimum essential coverage under specific government-sponsored programs in additional published guidance. Section 1.36B–2(c)(2)(i). The regulations under § 36B provide that, for purposes of the premium tax credit, an individual is eligible for minimum essential coverage under a health care program under chapter 17 or 18 of Title 38, U.S.C. (programs administered by the Department of Veterans Affairs) only if the individual is enrolled in the program. Section 1.36B–2(c)(2)(iii). Under Notice 2014–71, 2014–49 I.R.B. 912, and Notice 2013–41, 2013–29 I.R.B. 60, for purposes of the premium tax credit, individuals are eligible for minimum essential coverage under certain other government-sponsored programs and certain programs HHS has designated as minimum essential coverage only if they are enrolled in the program.

In certain states, certain individuals in households with income exceeding eligibility levels for CHIP may enroll in coverage resembling coverage under the state’s CHIP program. These programs, commonly called “CHIP buy-in programs”, generally require the payment of premiums with little or no government subsidy. The programs are not authorized

or funded under title XXI of the Social Security Act and therefore are not government-sponsored minimum essential coverage under § 5000A(f)(1)(A). Additionally, a segment of the population who otherwise would be eligible for subsidized qualified health plan coverage could enroll in coverage through a CHIP buy-in program only at high cost. HHS will consider recognizing CHIP buy-in programs as minimum essential coverage when an application is filed under 45 CFR § 156.604 on behalf of a program.

#### GUIDANCE

An individual who may enroll in a CHIP buy-in program that HHS has designated as minimum essential coverage is eligible for minimum essential coverage under the program for purposes of the premium tax credit only for the period the individual is enrolled.

#### EFFECTIVE DATE

This notice is effective for coverage on or after January 1, 2015.

#### DRAFTING INFORMATION

The principal author of this notice is Arvind Ravichandran of the Office of the Associate Chief Counsel (Income Tax and Accounting). For further information regarding this notice, contact Mr. Ravichandran at (202) 317-4718 (not a toll-free number).

# Part IV. Items of General Interest

## Notice of Proposed Rulemaking Tax on Certain Foreign Procurement

**REG-103281-11**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 5000C of the Internal Revenue Code relating to the 2 percent tax on payments made by the U.S. government to foreign persons pursuant to certain contracts. The proposed regulations affect U.S. government acquiring agencies and foreign persons providing certain goods or services to the U.S. government pursuant to a contract. This document also contains proposed regulations under section 6114, with respect to foreign persons claiming an exemption from the tax under an income tax treaty.

DATES: Written or electronic comments and requests for a public hearing must be received by July 21, 2015.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-103281-11), Internal Revenue Service, Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-103281-11), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224; or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (REG-103281-11).

### FOR FURTHER INFORMATION

CONTACT: Concerning the proposed regulations, Kate Hwa at (202) 317-6934, or for questions related to tax treaties, Rosy Lor at (202) 317-6933; concerning submissions of comments, Oluwafunmilayo Taylor, (202) 317-5179, (not toll-free numbers).

### SUPPLEMENTARY INFORMATION:

#### Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by June 22, 2015. Comments are specifically requested concerning:

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

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

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

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

The collection of information in the proposed regulations is contained in a number of provisions including §§ 1.5000C-2, 1.5000C-3, and 1.5000C-4. Responses to these collections of information are required to verify the status of foreign persons to whom specified Federal procurement payments subject to the section 5000C tax are made; to obtain a benefit (to claim an exemption to, or a reduction in, withholding); and to facilitate tax compliance (to

verify entitlement to an exemption). The IRS intends that these information collection requirements will be satisfied primarily on existing chapter 3 withholding forms by U.S. government acquiring agencies, along with Form 1120-F, "U.S. Income Tax Return of a Foreign Corporation," and Form 1040NR, "U.S. Nonresident Alien Income Tax Return." However, in certain circumstances, foreign persons must collect certain information in order to demonstrate to an acquiring agency the appropriate amount to withhold, if any, on a Section 5000C Certificate. This reporting burden will be reflected in a new Form W-14, "Certificate of Party Receiving Federal Procurement Payment," or the Section 5000C Certificate.

The likely respondents are the U.S. government and foreign persons that enter into contracts with the U.S. government.

Estimated total annual reporting or recordkeeping burden: 11,840 hours.

Estimated average annual burden hours per respondent or recordkeeper varies from .5 hours to 40 hours, depending on individual circumstances, with an estimated average of 5 hours, 55 minutes.

Estimated number of respondents or recordkeepers: 2,000.

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

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

### Background

This document contains proposed amendments to 26 CFR part 1 under section 5000C of the Internal Revenue Code (Code). On January 2, 2011, section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111-347 (the Act), 124 Stat. 3623, added section 5000C to the Code. Section 5000C imposes on any foreign person a 2 percent tax on certain payments received from the

Government of the United States (U.S. government) for goods and services. Section 301(a)(3) of the Act provides that section 5000C applies to payments received pursuant to contracts entered into on and after January 2, 2011. Additionally, section 301(b)(1) of the Act stipulates that no funds are to be disbursed to any foreign contractor in order to reimburse the tax imposed under section 5000C. The Federal Acquisition Regulation (FAR) is the body of rules that generally governs acquisitions and contracting procedures for federal agencies. See 48 CFR Chapter 1. To comply with section 301(b)(1) of the Act, the Federal Acquisition Regulation Council has amended the FAR to reflect that the 2 percent tax imposed under section 5000C is disallowed as a contract cost, excluded from the contract price, and not reimbursed under the contract. See 48 CFR 31.205–41(b), 52.229–3(b)(2), 52.229–4(b)(2), 52.229–6(c)(2), and 52.229–7(b)(2).

Section 301(c) of the Act provides that section 5000C shall be applied in a manner consistent with United States obligations under international agreements.

This document also contains amendments to 26 CFR part 301 under section 6114 of the Code. Section 6114(a) generally requires reporting when a taxpayer takes the position that a treaty of the United States overrules (or otherwise modifies) an internal revenue law. Section 6114(b) provides that the Secretary may waive the reporting requirement under section 6114(a) with respect to classes of cases for which the Secretary determines that the waiver will not impede the assessment and collection of tax.

### Explanation of Provisions

The proposed regulations provide rules relating to the imposition of, and exemption from, the tax under section 5000C. They also contain rules relating to the obligation of the U.S. government to withhold, deposit, and report amounts to the IRS under section 5000C. Further, they provide guidance to foreign persons who must report and pay the tax under section 5000C in certain circumstances. If the U.S. government fails to withhold an amount equal to the tax due under section 5000C, the foreign person must file a U.S. return and pay the tax due. In addition, the

proposed regulations provide guidance as to when the imposition of tax would be inconsistent with U.S. treaty obligations. Proposed regulations under section 6114(b) generally waive the reporting requirements under section 6114(a) when a taxpayer takes the position that a nondiscrimination provision of an income tax treaty exempts a payment from tax under section 5000C, provided that certain other requirements are satisfied.

### I. Payments Subject to Section 5000C Tax

Section 5000C(a) applies to foreign persons that are party to certain contracts with the U.S. government entered into on and after January 2, 2011. In particular, section 5000C imposes on the foreign person a tax equal to 2 percent of the amount of a specified Federal procurement payment in certain circumstances. Section 5000C(b) defines the term *specified Federal procurement payment* as any payment made pursuant to a contract with the U.S. government for goods or services if the goods are manufactured or produced in or the services are provided in any country that is not a party to an international procurement agreement with the United States.

### II. Definitions

Proposed § 1.5000C–1(c) sets forth definitions that apply solely for purposes of section 5000C and the proposed regulations, several of which are described as follows.

#### A. Contracting party, foreign contracting party

Under the proposed regulations, the term *contracting party* means any person that is a party to a contract with the U.S. government entered into on and after January 2, 2011. The term *foreign contracting party* means a contracting party that is not a U.S. person.

#### B. U.S. government

For purposes of section 5000C, the proposed regulations define the term *Government of the United States* or *U.S. gov-*

*ernment* as the executive departments specified in 5 U.S.C. 101 (such as the Department of Agriculture and the Department of Transportation), the military departments specified in 5 U.S.C. 102 (which includes the Department of the Army, the Department of the Navy, and the Department of the Air Force), the independent establishments specified in 5 U.S.C. 104(1), and wholly owned Government corporations specified in 31 U.S.C. 9101(3) (such as the Export-Import Bank of the United States and the Pension Benefit Guaranty Corporation). Unless otherwise specified in 5 U.S.C. 101, 102, or 104(1), or 31 U.S.C. 9101(3), the term U.S. government does not include any quasi-governmental entities or instrumentalities of the U.S. government. The proposed regulations refer to U.S. government departments or agencies that are party to a contract as acquiring agencies. Moreover, to the extent that a U.S. government department or agency other than the acquiring agency is making the payments pursuant to the contract, that department or agency is also treated as the acquiring agency for purposes of the proposed regulations.

#### C. International procurement agreement

The proposed regulations define the term *international procurement agreement* as the World Trade Organization Government Procurement Agreement within the meaning of 48 CFR 25.400(a)(1) and any Free Trade Agreement to which the United States is a party that includes government procurement obligations that provide appropriate competitive government procurement opportunities to U.S. goods, services, and suppliers. For purposes of this definition, a party to an agreement is a signatory to the agreement and does not include a country that is merely an observer with respect to the agreement.

#### D. Contract

The proposed regulations provide that the term *contract* has the same meaning as provided in § 2.101 of the FAR. Under the FAR, a contract does not include a grant agreement or cooperative agreement within the meaning of 31 U.S.C. 6304 and 6305, respectively. A grant agreement is

an agreement between the U.S. government and a recipient when: (1) the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the U.S. government; and (2) substantial involvement is not expected between the executive agency and the recipient when carrying out the activity contemplated in the agreement. See 31 U.S.C. 6304. A cooperative agreement is similar to a grant agreement except that substantial involvement is expected between the U.S. government and the recipient when carrying out the activity contemplated in the agreement. See 31 U.S.C. 6305. Thus, consistent with the FAR, the proposed regulations provide that the tax imposed under section 5000C does not apply to grant or cooperative agreements with the U.S. government.

### III. Exemptions from Section 5000C Tax

The proposed regulations provide five exemptions from the tax imposed under section 5000C. The first exemption excludes payments for purchases under the simplified acquisitions procedures that do not exceed the simplified acquisitions threshold (as described in the FAR). The second exemption excludes payments pursuant to contracts for certain emergency acquisitions (as defined in the FAR). The third exemption excludes payments if the imposition of the tax would be inconsistent with any international agreement with the United States, including for example, when a foreign contracting party is entitled to the benefit of a nondiscrimination provision of an international agreement with the United States, such as a qualified income tax treaty. The fourth exemption applies if the goods are manufactured or produced, or services are provided, in the United States. The final exemption is for goods manufactured or produced or services provided in a country that is a party to an international procurement agreement with the United States. Sections III.A–C of this preamble discuss several of the exemptions.

#### A. Payments for simplified acquisitions

The IRS and the Department of the Treasury (Treasury Department) recognize that withholding under section 5000C on contracts in certain circumstances may be administratively burdensome and, in some cases, more costly than the tax actually collected. Accordingly, the proposed regulations provide that the tax imposed under section 5000C will not apply to payments for purchases under the simplified acquisition procedures described in the FAR that do not exceed the simplified acquisition threshold. See 48 CFR 2.101. In general, simplified acquisition procedures apply when the U.S. government makes purchases of supplies or services of \$150,000 or less.

#### B. Emergency acquisitions

From time to time, the U.S. government makes purchases in emergency situations. The IRS and Treasury Department recognize that in those emergency situations it may not be practicable to impose tax on payments otherwise subject to section 5000C because it may impede the ability of the U.S. government to make certain acquisitions that are necessary to prevent serious injury, financial or other, to the U.S. government. Therefore, § 1.5000C–1(d)(2) exempts payments pursuant to contracts (1) awarded under the “unusual and compelling urgency” authority of 48 CFR 6.302–2, and (2) entered into under the emergency acquisition flexibilities as defined in 48 CFR Part 18. Acquisitions pursuant to the unusual and compelling urgency authority of 48 CFR 6.302–2 are subject to special rules and procedures when the need for supplies or services is of such an urgency that serious injury, financial or other, could result for the U.S. government if the special procedures did not apply. Certain written justifications and approvals described in 48 CFR 6.303 and 6.304 are required for acquisitions in these circumstances. Acquisitions entered into under the emergency acquisition flexibilities of 48 CFR Part 18 refer to acquisitions of supplies or services by the U.S. government that, as determined by the head of an executive agency, may be used (1) in support of a contingency operation (as

defined in 48 CFR 2.101), (2) to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, or (3) when the President issues an emergency declaration, or a major disaster declaration.

#### C. Certain international agreements

Section 301(c) of the Act requires that section 5000C be applied in a manner consistent with United States obligations under international agreements. The reference to “international agreements” includes income tax treaties to which the United States is a party. The General Explanation of Tax Legislation prepared by the Joint Committee on Taxation accompanying section 5000C explains that treaties generally provide that neither country may subject nationals of the other country to taxation more burdensome than the tax it imposes on its own nationals. This explanation by the Joint Committee on Taxation refers to the nondiscrimination provisions of tax treaties. See Staff of the Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 111<sup>th</sup> Congress, at 693–4.

The United States currently has 58 comprehensive income tax treaties in force that cover 66 countries. Virtually all nondiscrimination articles in these treaties contain provisions that prohibit the imposition of tax on a foreign national that is more burdensome than the taxation to which a U.S. national under similar circumstances may be subjected. A national is generally defined in tax treaties to include both individuals possessing citizenship and legal persons whose status is derived from the laws of that country. Some of these income tax treaties only prohibit discrimination against foreign nationals who are individuals, and a few provide protection only for foreign nationals who are also U.S. residents. The majority of nondiscrimination articles contain provisions that prohibit discrimination against all foreign nationals of the treaty country, regardless of whether the national is a resident of the treaty country.

Many of these income tax treaties have a nondiscrimination article that applies to “taxes of every kind and description,”

whether or not an income tax, and are broad enough to apply to the tax imposed under section 5000C. Consistent with section 301(c) of the Act, any foreign contracting party that is entitled to the benefits of such a nondiscrimination article is not subject to tax under section 5000C. The proposed regulations refer to a treaty with such an article as a qualified income tax treaty. The term is defined as a U.S. income tax treaty in force that contains a nondiscrimination provision that applies to the tax imposed under section 5000C and prohibits taxation that is more burdensome on a foreign national than a U.S. national (or in the case of some income tax treaties, taxation that is more burdensome on a foreign citizen than a U.S. citizen), regardless of residence. Notice 2015–35, 2015–18 IRB, identifies income tax treaties in force, as of the date the proposed regulations are issued, that are qualified income tax treaties (available on [www.irs.gov](http://www.irs.gov)). This Notice may be updated or amended in subsequent IRS Forms, Instructions, Publications, or other media (including electronic media).

#### *IV. Rules for Determining Where Goods Are Manufactured or Produced, and Where Services Are Performed*

Section 5000C(b) applies when payments are made pursuant to a contract for goods or services if the goods are manufactured or produced in or the services are provided in a country that is not a party to an international procurement agreement with the United States. Solely for purposes of section 5000C, the proposed regulations provide rules for determining where goods are manufactured or produced, and where services are performed. In particular, the proposed regulations provide that goods are manufactured or produced in the country (or countries) where property has been substantially transformed into the goods that are procured, or alternatively, where there has been assembly or conversion of component parts into the final product. Further, the proposed regulations provide that services will be considered to be provided in the country where the individuals performing the services are physically located when they perform their duties pursuant to the contract.

If, pursuant to a single contract, goods are manufactured or produced or services are provided in multiple countries, the proposed regulations provide that a foreign contracting party may use a reasonable allocation method to determine how the goods or services must be allocated to each country for purposes of applying the relevant exemptions for payments pursuant to that contract. A reasonable allocation method would include taking into account the proportionate costs (including the cost of labor and raw materials) incurred to manufacture or produce the goods in each country, or taking into account the proportionate costs incurred to provide the services in each country.

#### *V. Withholding by the U.S. Government on Specified Federal Procurement Payments*

##### *A. Increase amount deducted and withheld under chapter 3*

Section 5000C(d)(1) provides that the amount deducted and withheld under chapter 3 shall be increased by the amount of tax imposed under section 5000C. Accordingly, the proposed regulations generally follow the procedural requirements in the Code and Treasury regulations for situations in which withholding is required under chapter 3 on fixed or determinable annual or periodical income (FDAP). For example, similar to withholding agents under chapter 3, acquiring agencies with an obligation to withhold under section 5000C must file Form 1042, “Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,” and Form 1042–S, “Foreign Person’s U.S. Source Income Subject to Withholding,” to report amounts withheld. However, the proposed regulations differ from the withholding and reporting rules under chapter 3 to take into account the differences between the tax imposed under section 5000C and the tax imposed under subtitle A to which chapter 3 applies. Thus, a foreign contracting party is not required to submit a Form W–8BEN, “Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding,” or Form W–8BEN–E, “Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities),” to

an acquiring agency under the proposed regulations to certify its foreign status or claim a reduction in withholding under an applicable income tax treaty.

The proposed regulations require instead that a foreign contracting party must submit a “Section 5000C Certificate,” signed under penalties of perjury, that provides all of the information required by the proposed regulations to claim an exemption from section 5000C. The term “Section 5000C Certificate” also includes any form that the IRS may prescribe as a substitute for the certificate. Under the proposed regulations, an acquiring agency may generally rely on a claim made in a Section 5000C Certificate if the foreign contracting party provides complete information in the time and manner required by the regulations. However, an acquiring agency may not rely on the information provided by the foreign contracting party if it has reason to know that the information is incorrect or unreliable. An acquiring agency has reason to know that the information is incorrect or unreliable if it has knowledge of relevant facts or statements contained in the submitted information such that a reasonably prudent person in the position of the acquiring agency would know that the information provided is incorrect or unreliable.

For the convenience of both acquiring agencies and foreign contracting parties, a model Section 5000C Certificate is included as part of the proposed regulations. A foreign contracting party may choose not to use the format of the model certificate, but in all cases it must submit all the necessary information required by the proposed regulations accompanied by a signed penalties of perjury statement. Each Section 5000C Certificate applies to a single contract, and thus a foreign contracting party with multiple contracts with the U.S. government must complete a new certificate for each contract, if necessary.

##### *B. Steps for acquiring agencies*

The proposed regulations provide steps that an acquiring agency must follow to comply with its withholding obligations under section 5000C. Applying these steps will identify the payments that are subject to withholding under section 5000C and eliminate those that are not.

The steps are organized so that if an acquiring agency already possesses information that establishes that the payment is not subject to the tax imposed under section 5000C (because, for example, the payment is made to a U.S. person), the acquiring agency may conclude based on that particular information that the payment is not subject to withholding and will not have to continue to evaluate the other steps.

The first of these steps instructs an acquiring agency to determine whether the payment is made pursuant to a contract for goods or services. If the U.S. government is making a payment for any other purpose, there will not be an obligation to withhold under section 5000C on the payment. Thus, this step will eliminate from withholding payments made pursuant to grant or cooperative agreements, and payments made pursuant to contracts that are not for goods or services, such as a contract for the purchase or lease of land or an interest in land.

Under the second step, an acquiring agency must determine whether the payment is made to a U.S. person. This step takes into account that only foreign persons are subject to tax under section 5000C and § 1.5000C-1(b). Under this step, if the acquiring agency determines that the contracting party is a U.S. person based on its TIN as reflected in a U.S. government information system, such as the System for Award Management (or because there is a completed Form W-9, "Request for Taxpayer Identification Number (TIN) and Certification," on file), payments made pursuant to this contract are not subject to withholding under section 5000C.

Under the third step, an acquiring agency determines whether the payment is for purchases under the simplified acquisition procedures as described in the FAR. If it is, the acquiring agency does not have an obligation to withhold under section 5000C on the payment. This step takes into account the exemption from tax for simplified acquisitions in § 1.5000C-1(d)(1).

Under the fourth step, the acquiring agency determines whether the payment is made for certain emergency acquisitions. If it is, the acquiring agency does not have an obligation to withhold under section 5000C on the payment. This step takes into account the exemption from tax for emergency acquisitions as described in § 1.5000C-1(d)(2).

Under the fifth and sixth steps, the acquiring agency determines whether the payment is subject to withholding (in whole or in part) based on the information contained in a Section 5000C Certificate, if one has been provided by the foreign contracting party. Under the fifth step, if the acquiring agency determines that the foreign contracting party is exempt from the tax under section 5000C by reason of an international agreement with the United States, as represented on a completed Section 5000C Certificate, the acquiring agency does not have an obligation to withhold. For example, under this step, the acquiring agency does not have an obligation to withhold if a foreign contracting party provides a completed Section 5000C Certificate that accurately identifies the nondiscrimination article of a qualified income tax treaty on which it is relying to claim an exemption and the basis for that reliance.

Under the sixth step, the acquiring agency must determine from the Section 5000C Certificate if the payments are (in whole or part) made pursuant to a contract for goods manufactured or produced or services provided in the United States, or in a foreign country that is a party to an international procurement agreement and therefore exempt (to that extent) from withholding under Section 5000C.

Under the seventh step, if the acquiring agency determines that it has an obligation to withhold, the acquiring agency computes the amount of withholding based on the information contained in the Section 5000C Certificate, including a claim for a partial exemption from withholding, and withholds that amount from the payment.

Under the final step, the acquiring agency must deposit and report any amounts withheld.

#### *VI. Procedure for the Foreign Contracting Party to Request Offset for Underwithholding or Overwithholding*

Under certain circumstances, the proposed regulations provide that the foreign contracting party may request that the acquiring agency increase or decrease the amount of withholding on future payments for which withholding is required under section 5000C. The IRS and Treas-

ury Department intend for this procedure to provide flexibility for foreign contracting parties that discover that the previous amounts withheld did not satisfy, or exceeded, their tax liability under section 5000C and the proposed regulations. These requests must be in writing, and provide an explanation, signed under penalties of perjury. Any increase or decrease in amounts withheld under this procedure may occur only if the payments to which it applies are made on or before the date on which the acquiring agency must file Form 1042 for the year with respect to the payment for which the overwithholding or underwithholding occurred.

#### *VII. Administrative Provisions Relating to Withholding by U.S. Government*

Under § 1.6302-2 of the Income Tax Regulations, the amount of tax under chapter 3 that U.S. withholding agents are required to withhold determines the frequency of their deposits: monthly, quarterly, or annual. Section 5000C(d)(1) instructs acquiring agencies to increase amounts deducted and withheld under chapter 3 by amounts withheld under section 5000C. Therefore, for purposes of determining the frequency of their deposits, the proposed regulations require acquiring agencies that have chapter 3 deposit obligations for a period to add amounts withheld under section 5000C to the amounts withheld under chapter 3. This rule applies regardless of whether the chapter 3 deposit obligation is with respect to the contracting party or any other person. However, to reduce the burden on acquiring agencies that have no chapter 3 withholding obligations, the proposed regulations require these acquiring agencies to make deposits monthly, regardless of the amount of tax withheld. Acquiring agencies must deposit all withheld amounts by electronic funds transfer, as that term is defined in § 31.6302-1(h)(4)(i).

#### *VIII. Special Arrangement for Certain Contracts and Classified Contracts*

The IRS and Treasury Department have determined that, in limited circumstances, it may be in the interest of sound tax administration to allow flexibility in some of the rules provided in the proposed regulations. Thus, the proposed regula-

tions authorize the IRS to consent to alternative means for depositing the tax due under section 5000C when agreed to by the acquiring agency and the foreign contracting party subject to tax under section 5000C. In these situations, the IRS may also modify any reporting or return requirements of the acquiring agency or the foreign contracting party. Similarly, § 1.5000C-3 provides that an acquiring agency is not required to report information on Form 1042-S for payments made pursuant to classified contracts, as described in section 6050M(e)(3), unless the acquiring agency determines that the information reported on the Form 1042-S does not compromise the safeguarding of classified information or national security.

#### *IX. Requirement for Foreign Contracting Party to File a Return and Pay Tax, and Procedures for Contracting Party to Seek a Refund*

Section 5000C(d)(2) provides that for purposes of subtitle F of the Code (relating to procedure and administration), the tax imposed under section 5000C on foreign contracting parties is treated as a tax imposed under subtitle A (rather than as an excise tax under subtitle D). As such, and because section 5000C(d)(1) provides only that the amount deducted and withheld under chapter 3 shall be increased by the amount of tax imposed under section 5000C, the proposed regulations treat the tax imposed on foreign contracting parties under section 5000C as administered in a manner similar to gross basis income taxes. Thus, if a payment is subject to the tax imposed under section 5000C and the foreign contracting party remains liable for the tax because, for example, it was not fully satisfied by withholding by the acquiring agency, the foreign contracting party must make an income tax return (for example, Form 1120-F, “U.S. Income Tax Return of a Foreign Corporation”) and remit payment by the due date of that income tax return. See sections 6012 and 6072 and the regulations thereunder. Penalties may apply for the foreign contracting party’s failure to comply, including those in sections 6651 and 6662.

If the acquiring agency has overwithheld under section 5000C and has made a deposit of the amount withheld, the con-

tracting party may claim a refund of the amount overwithheld pursuant to the procedures described in chapter 65. See section 6402 and the regulations thereunder for refund procedures. See section 6511 and the regulations thereunder for the statute of limitations on refund claims.

#### *X. Anti-Abuse Rule*

The proposed regulations contain an anti-abuse rule to prevent circumvention of the tax under section 5000C. Under this rule, if a foreign person engages in a transaction (or series of transactions) with a principal purpose of avoiding the tax imposed under section 5000C, the transaction (or series of transactions) may be disregarded or the arrangement may be recharacterized in accordance with its substance.

#### *XI. Section 6114 Reporting*

Ordinarily any foreign person claiming that a nondiscrimination provision of an income tax or any other treaty obligation precludes the application of an otherwise applicable Code provision is required to report that position under § 301.6114-1(b)(1). Proposed § 301.6114-1(c)(1)(ix) provides that this reporting obligation is waived when a foreign person is claiming that a qualified income tax treaty precludes the application of section 5000C, but only if the foreign person has provided a Section 5000C Certificate (or such other form as may be prescribed by the Commissioner pursuant to section 5000C) in accordance with section 5000C and the regulations thereunder. Accordingly, if a foreign person relying on a qualified income tax treaty has not provided the certificate or is relying on a treaty obligation other than an income tax treaty to claim an exemption from the tax, reporting is not waived.

#### **Proposed Effective/Applicability Date**

Section 5000C applies to specified Federal procurement payments received pursuant to contracts entered into on and after January 2, 2011. Proposed §§ 1.5000C-1 through 1.5000C-7 and proposed § 301.6114-1(c)(1)(ix) will apply on and after the date that is 90 days after the date they are published as final regulations in the **Federal Register**.

Contracting parties and acquiring agencies may generally rely upon the rules in the proposed regulations until the date they become effective/applicable as final regulations. To the extent that a foreign contracting party is eligible for an exemption under the proposed regulations that would eliminate the tax imposed under section 5000C for any specified Federal procurement payments received on or before April 22, 2015, no further action is required, and the requirement to provide a Section 5000C Certificate is waived. Further, prior to the date these rules become effective/applicable as final regulations, the requirement to file a Form 8833, “Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b),” under section 6114 and the regulations thereunder (with respect to relief pursuant to the nondiscrimination provision of a qualified income tax treaty) is waived for positions related to the tax imposed under section 5000C (and thus no information reporting penalties will be imposed under section 6712).

If a foreign contracting party has a tax liability under section 5000C for any specified Federal procurement payment received before the date these rules become effective/applicable as final regulations (taking into account any exemptions in the proposed regulations as finalized) that has not been satisfied by withholding, the foreign contracting party should file a tax return and pay the tax in accordance with applicable IRS forms, such as Form 1120-F. If a foreign contracting party fully satisfies its tax and filing obligations under section 5000C with respect to any payments received before the date these rules become effective/applicable as final regulations, penalties will not be asserted with respect to those payments. However, with respect to tax due under section 5000C, a foreign contracting party is subject to applicable interest on the underpayments (as described in Subchapter A of Chapter 67 of the Code).

#### **Special Analyses**

It has been determined that this proposed regulation is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Proce-

Act (5 U.S.C. chapter 5) does not apply to the proposed regulations. The collection of information requirement in the proposed regulations will not have a significant economic impact on a substantial number of small entities because a limited number of foreign contracting parties that are small entities will be subject to the tax. Pursuant to section 7805(f) of the Code, the proposed regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### Comments and Public Hearing

Before the proposed regulations are adopted as final regulations, consideration will be given to any written (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 all aspects of the proposed rules, including comments on the clarity of the proposed rules and how they may be made easier with which to comply. All comments will be available for public inspection and copying at [www.regulations.gov](http://www.regulations.gov) or upon request.

### Drafting Information

The principal authors of the proposed regulations are Kate Hwa, Brad McCormack, and Rosy Lor, Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

\* \* \* \* \*

### Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1, 301, and 602 are proposed to be amended as follows:

#### PART I—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. An undesignated center heading is revised immediately following § 1.5000A-5 to read as follows:

Tax on Certain Foreign Procurement

Par. 3. Section 1.5000C-0 is added to read as follows:

#### § 1.5000C-0 Table of contents.

This section lists the table of contents for §§ 1.5000C-1 through 1.5000C-7.

#### § 1.5000C-1 Tax on specified Federal procurement payments.

- (a) Overview.
- (b) Imposition of tax.
- (c) Definitions.
- (d) Exemptions.
  - (1) Simplified acquisitions.
  - (2) Emergency acquisitions.
  - (3) Certain international agreements.
  - (4) Goods manufactured or produced or services provided in the United States.
  - (5) Goods manufactured or produced or services provided in a country that is a party to an international procurement agreement.
- (e) Country in which goods are manufactured or produced or services provided.
  - (1) Goods manufactured or produced.
  - (2) Provision of services.
  - (3) Allocation of total contract price to determine the nonexempt amount.
  - (4) Reduction or elimination of withholding by an acquiring agency.

#### § 1.5000C-2 Withholding on specified Federal procurement payments.

- (a) In general.
- (b) Steps in determining the obligation to withhold under section 5000C.
  - (1) Determine whether the payment is pursuant to a contract for goods or services.
  - (2) Determine whether the payment is made pursuant to a contract with a U.S. person.
  - (3) Determine whether the payment is for purchases under the simplified acquisition procedures.
  - (4) Determine whether the payment is for emergency acquisitions.
  - (5) Determine whether the foreign contracting party is entitled to relief pursuant to an international agreement.
  - (6) Determine whether the contract is for goods manufactured or produced or services provided in the United States or in a foreign country that is a party to an international procurement agreement.
  - (7) Compute amounts to withhold.

(8) Deposit and report amounts withheld.

(c) Determining whether the contracting party is a U.S. person.

- (1) In general.
- (2) Determination based on Taxpayer Identification Number (TIN).
- (3) Determination based on the Form W-9.
- (4) Contracting party treated as a foreign contracting party.

(d) Withholding when a foreign contracting party submits a Section 5000C Certificate.

- (1) In general.
- (2) Exemption for a foreign contracting party entitled to the benefit of relief pursuant to certain international agreements.
- (3) Exemption when goods are manufactured or produced or services provided in the United States, or in a foreign country that is a party to an international procurement agreement.
- (4) Information required for Section 5000C Certificate.
- (5) Validity period of Section 5000C Certificate.
- (6) Change in circumstances.
- (7) Model Section 5000C Certificate.
- (8) Time for submitting Section 5000C Certificate or Form W-9, "Request for Taxpayer Identification Number and Certification".

(e) Offset for underwithholding or overwithholding.

- (1) In general.
- (2) Underwithholding.
- (3) Overwithholding.

#### § 1.5000C-3 Payment and returns of tax withheld by the acquiring agency.

- (a) In general.
- (b) Deposit rules.
  - (1) Acquiring agency with a chapter 3 deposit requirement treats amounts withheld as under chapter 3.
  - (2) Acquiring agency with no chapter 3 filing obligation deposits withheld amounts monthly.
  - (c) Return requirements.
    - (1) In general.
    - (2) Classified contracts.
    - (d) Special arrangement for certain contracts.

*§ 1.5000C-4 Requirement for the foreign contracting party to file a return and pay tax, and procedures for the contracting party to seek a refund.*

(a) In general.

(b) Tax obligation of foreign contracting party independent of withholding.

(c) Return of tax by the foreign contracting party.

(d) Time and manner of paying tax.

(e) Refund requests when amount withheld exceeds tax liability.

*§ 1.5000C-5 Anti-abuse rule.*

*§ 1.5000C-6 Examples.*

*§ 1.5000C-7 Effective/applicability date.*

(a) In general.

(b) Reliance on proposed regulations.

(c) Obligation to file a return and pay tax.

(d) Waiver of penalties under certain circumstances.

Par. 4. Sections 1.5000C-1 through 1.5000C-7 are added to read as follows:

*§ 1.5000C-1 Tax on specified Federal procurement payments.*

(a) *Overview.* This section provides definitions and general rules relating to the imposition of, and exemption from, the tax on specified Federal procurement payments under section 5000C. Section 1.5000C-2 provides rules concerning withholding under section 5000C(d)(1), including the steps that must be taken to determine the obligation to withhold and whether an exemption from withholding applies. Section 1.5000C-3 provides the time and manner for depositing the amounts withheld under section 5000C and the related reporting requirements. Section 1.5000C-4 contains the rules for a foreign contracting party that must pay and report the tax under section 5000C when the tax obligation under section 5000C is not fully satisfied by withholding, as well as procedures by which a contracting party may seek a refund when the amount withheld exceeds its tax liability under section 5000C. Section 1.5000C-5 contains an anti-abuse rule. Section 1.5000C-6 contains examples illustrating the principles of §§ 1.5000C-1

through 1.5000C-7. Finally, § 1.5000C-7 contains the effective/applicability date for §§ 1.5000C-1 through 1.5000C-7.

(b) *Imposition of tax.* Except as otherwise provided, section 5000C imposes on any foreign contracting party a tax equal to 2 percent of the amount of a specified Federal procurement payment. In general, the tax imposed under section 5000C applies to specified Federal procurement payments received pursuant to contracts entered into on and after January 2, 2011. Specified Federal procurement payments received by a nominee or agent on behalf of a contracting party are considered to be received by that contracting party. The tax imposed under section 5000C is to be applied in a manner consistent with U.S. obligations under international agreements. Payments for the purchase or lease of land or an interest in land are not subject to the tax imposed under section 5000C.

(c) *Definitions.* Solely for purposes of section 5000C and §§ 1.5000C-1 through 1.5000C-7, the following definitions apply:

(1) The term *acquiring agency* means the U.S. government department, agency, independent establishment, or corporation described in paragraph (c)(7) of this section that is a party to the contract. To the extent that a U.S. government department or agency, other than the acquiring agency, is making the payments pursuant to the contract, that department or agency is also considered to be the acquiring agency.

(2) The term *contract* has the same meaning as provided in 48 CFR 2.101, and thus does not include a grant agreement or a cooperative agreement within the meaning of 31 U.S.C. 6304 and 6305, respectively.

(3) The term *contract ratio* refers to the nonexempt amount over the total contract price.

(4) The term *contracting party* means any person that is a party to a contract with the U.S. government that is entered into on or after January 2, 2011.

(5) The term *foreign contracting party* means a contracting party that is a foreign person.

(6) The term *foreign person* means any person other than a United States person (as defined in section 7701(a)(30)).

(7) The term *Government of the United States* or *U.S. government* means the executive departments specified in 5 U.S.C. 101, the military departments specified in 5 U.S.C. 102, the independent establishments specified in 5 U.S.C. 104(1), and wholly owned government corporations specified in 31 U.S.C. 9101(3). Unless otherwise specified in 5 U.S.C. 101, 102, or 104(1), or 31 U.S.C. 9101(3), the term *Government of the United States* or *U.S. government* does not include any quasi-governmental entities or instrumentalities of the U.S. government.

(8) The term *international procurement agreement* means the World Trade Organization Government Procurement Agreement within the meaning of 48 CFR 25.400(a)(1) and any Free Trade Agreement to which the United States is a party that includes government procurement obligations that provide appropriate competitive government procurement opportunities to U.S. goods, services, and suppliers. A party to an international procurement agreement is a signatory to the agreement and does not include a country that is merely an observer with respect to the agreement.

(9) The term *nonexempt amount* means the portion of the contract price allocated to nonexempt goods and nonexempt services.

(10) The term *nonexempt goods* means goods manufactured or produced in a foreign country that is not a party to an international procurement agreement with the United States.

(11) The term *nonexempt services* means services provided in a foreign country that is not a party to an international procurement agreement with the United States.

(12) The term *outlying areas* has the same meaning as set forth in 48 CFR 2.101(b), which includes Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the Virgin Islands, Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Atoll.

(13) The term *qualified income tax treaty* means a U.S. income tax treaty in force that contains a nondiscrimination provision that applies to the tax imposed under section 5000C and prohibits taxa-

tion that is more burdensome on a foreign national than a U.S. national (or in the case of certain income tax treaties, taxation that is more burdensome on a foreign citizen than a U.S. citizen), regardless of its residence.

(14) The term *Section 5000C Certificate* means a written statement that includes the information described in § 1.5000C-2(d) that the foreign contracting party submits to an acquiring agency for the purposes of demonstrating that the foreign contracting party is eligible for certain exemptions from withholding (in whole or in part) under section 5000C with respect to a contract. The term also includes any form that the Internal Revenue Service may prescribe as a substitute for the Section 5000C Certificate.

(15) The term *specified Federal procurement payment* means any payment made pursuant to a contract with a foreign contracting party that is for goods manufactured or produced or services provided in a foreign country that is not a party to an international procurement agreement with the United States. For purposes of the prior sentence, a foreign country does not include an outlying area.

(16) The term *Taxpayer Identification Number* or *TIN* means the identifying number assigned to a person under section 6109, as defined in section 7701(a)(41).

(17) The term *total contract price* means the total cost to the U.S. Government of the goods and services procured under a contract and paid to the contracting party.

(d) *Exemptions.* The tax imposed under paragraph (b) of this section does not apply to the payments made in the following situations. For the exemptions in paragraphs (d)(3), (4) and (5) of this section, see § 1.5000C-2(d) for the procedures to eliminate withholding by an acquiring agency.

(1) *Simplified acquisitions.* Payments for purchases under the simplified acquisition procedures that do not exceed the simplified acquisition threshold as described in 48 CFR 2.101.

(2) *Emergency acquisitions.* A payment made pursuant to a contract if the contract is—

(i) Awarded under the “unusual and compelling urgency” authority of 48 CFR 6.302-2, or

(ii) Entered into under the emergency acquisition flexibilities as defined in 48 CFR Part 18.

(3) *Certain international agreements.* A payment made by the U.S. government pursuant to a contract with a foreign contracting party when the payment is entitled to relief from the tax imposed under section 5000C pursuant to an international agreement with the United States, including relief pursuant to a nondiscrimination provision of a qualified income tax treaty, because the foreign contracting party is entitled to the benefit of that provision.

(4) *Goods manufactured or produced or services provided in the United States.* A payment made pursuant to a contract to the extent that the payment is for goods manufactured or produced or services provided in the United States.

(5) *Goods manufactured or produced or services provided in a country that is a party to an international procurement agreement.* A payment made pursuant to a contract to the extent the payment is for goods manufactured or produced or services provided in a country that is a party to an international procurement agreement, as defined in paragraph (c)(8) of this section.

(e) *Country in which goods are manufactured or produced or services provided—*(1) *Goods manufactured or produced.* Solely for purposes of section 5000C, goods are manufactured or produced in the country (or countries)—

(i) Where property has been substantially transformed into the goods that are procured pursuant to a contract; or

(ii) Where there has been assembly or conversion of component parts (involving activities that are substantial in nature and generally considered to constitute the manufacture or production of property) into the final product that constitutes the goods procured pursuant to a contract.

(2) *Provision of services.* Solely for purposes of section 5000C, services are considered to be provided in the country where the individuals performing the services are physically located when they perform their duties pursuant to the contract.

(3) *Allocation of total contract price to determine the nonexempt amount.* If, pursuant to a contract, goods are manufactured or produced, or services are provided, in multiple countries and only a

portion of the goods manufactured or produced or the services provided pursuant to the contract are nonexempt goods or nonexempt services, a foreign contracting party may use a reasonable allocation method to determine the nonexempt amount. A reasonable allocation method would include taking into account the proportionate costs (including the cost of labor and raw materials) incurred to manufacture or produce the goods in each country, or taking into account the proportionate costs incurred to provide the services in each country.

(4) *Reduction or elimination of withholding by an acquiring agency.* For procedures to reduce or eliminate withholding by an acquiring agency based on where goods are manufactured or produced or where services are provided, including as a result of an allocation under this paragraph (e), see § 1.5000C-2(d).

#### *§ 1.5000C-2 Withholding on specified Federal procurement payments.*

(a) *In general.* Except as otherwise provided in this section, every acquiring agency making a specified Federal procurement payment on which tax is imposed under section 5000C and §§ 1.5000C-1 through 1.5000C-7 must deduct and withhold an amount equal to 2 percent of the payment. For rules relating to the liability of a foreign contracting party with respect to specified Federal procurement payments not fully withheld upon at source, see § 1.5000C-4. An acquiring agency may rely upon any information furnished by a contracting party under this section unless the acquiring agency has reason to know that the information is incorrect or unreliable. An acquiring agency has reason to know that the information is incorrect or unreliable if it has knowledge of relevant facts or statements contained in the submitted information such that a reasonably prudent person in the position of the acquiring agency would know that the information provided is incorrect or unreliable.

(b) *Steps in determining the obligation to withhold under section 5000C.* An acquiring agency generally determines its obligation to withhold under section 5000C according to the steps described in this paragraph (b). See, however, para-

graph (e) of this section for situations in which withholding may be increased in the case of underwithholding, or may be decreased in the case of overwithholding.

(1) *Determine whether the payment is pursuant to a contract for goods or services.* The acquiring agency determines whether it is making a payment pursuant to a contract for goods or services. If the acquiring agency is making a payment for any other purpose, it does not have an obligation to withhold under section 5000C on the payment.

(2) *Determine whether the payment is made pursuant to a contract with a U.S. person.* The acquiring agency determines whether the payment is made pursuant to a contract with a person considered to be a United States person (U.S. person) in accordance with paragraph (c) of this section. If the contracting party is a U.S. person, the acquiring agency does not have an obligation to withhold under section 5000C on the payment.

(3) *Determine whether the payment is for purchases under the simplified acquisition procedures.* The acquiring agency determines whether the payment is for purchases under the simplified acquisitions procedures that do not exceed the simplified acquisition threshold as described in 48 CFR 2.101. If it is, the acquiring agency does not have an obligation to withhold under section 5000C on the payment.

(4) *Determine whether the payment is for emergency acquisitions.* The acquiring agency determines whether the payment is made for certain emergency acquisitions within the meaning of § 1.5000C-1(d)(2). If it is, the acquiring agency does not have an obligation to withhold under section 5000C on the payment.

(5) *Determine whether the foreign contracting party is entitled to relief pursuant to an international agreement.* If the foreign contracting party submits a Section 5000C Certificate in accordance with paragraph (d) of this section representing that the foreign contracting party is entitled to relief from the tax imposed under section 5000C pursuant to an international agreement with the United States (such as relief pursuant to the nondiscrimination provision of a qualified income tax treaty), the acquiring agency does not have an obligation to withhold under section 5000C on the payment.

(6) *Determine whether the contract is for goods manufactured or produced or services provided in the United States or in a foreign country that is a party to an international procurement agreement.* If the foreign contracting party submits a Section 5000C Certificate in accordance with paragraph (d) of this section that represents that the contract is for goods manufactured or produced or services provided in the United States, or in a foreign country that is a party to an international procurement agreement, the acquiring agency does not have an obligation to withhold. If the Section 5000C Certificate provides that payments under the contract are only partially exempt from withholding under section 5000C, the acquiring agency must withhold to the extent described in paragraph (b)(7).

(7) *Compute amounts to withhold.* If, after evaluating each step described in this paragraph (b), the acquiring agency determines that it has an obligation to withhold, the acquiring agency computes the amount of withholding by multiplying the amount of the payment by 2 percent, unless the foreign contracting party has provided a Section 5000C Certificate. In cases in which the Section 5000C Certificate demonstrates that the exemption in Step 6 applies, the acquiring agency generally computes the amount of withholding by multiplying the amount of the payment by the contract ratio provided on the most recent Section 5000C Certificate, the product of which is multiplied by 2 percent. However, in cases in which the exemption in Step 6 applies and the requirements of paragraph (d)(4)(iii)(B)(2) of this section are met, the acquiring agency computes the amount of withholding based on the payment for the specifically identified items, which may be identified by the contract line item number, or CLIN. The acquiring agency withholds the computed amount from the payment.

(8) *Deposit and report amounts withheld.* The acquiring agency deposits and reports the amounts determined in the prior step in accordance with § 1.5000C-3.

(c) *Determining whether the contracting party is a U.S. person—(1) In general.* An acquiring agency must rely on the provisions of this paragraph (c) to determine the status of the contracting party as

a U.S. person for purposes of withholding under section 5000C.

(2) *Determination based on Taxpayer Identification Number (TIN).* An acquiring agency must treat a contracting party as a U.S. person if the U.S. government information system (such as the System for Award Management (SAM)) indicates that the contracting party is a corporation (for example, because the name listed in SAM contains the term “Corporation,” “Inc,” or “Corp”) and that it has a TIN that begins with two digits other than “98” (a limited liability company or LLC is not treated as a corporation for purposes of this paragraph (c)(2)). Further, an acquiring agency must treat a contracting party as a U.S. person if the acquiring agency has access to a U.S. government information system that indicates that the contracting party is an individual with a TIN that begins with a digit other than “9”.

(3) *Determination based on the Form W-9.* An acquiring agency must treat a contracting party as a U.S. person if the person has submitted to it a valid Form W-9, “Request for Taxpayer Identification Number (TIN) and Certificate” (or valid substitute form described in § 31.3406(h)-3(c)(2) of this chapter), signed under penalties of perjury.

(4) *Contracting party treated as a foreign contracting party.* If an acquiring agency cannot determine that a contracting party is a U.S. person based on application of paragraph (c)(2) or (3) of this section, then the contracting party is treated as a foreign contracting party for purposes of this section.

(d) *Withholding when a foreign contracting party submits a Section 5000C Certificate—(1) In general.* Unless the acquiring agency has reason to know that the information is incorrect or unreliable, the acquiring agency may rely on a claim that a foreign contracting party is entitled to an exemption (in whole or in part) from withholding on payments pursuant to a contract if the foreign contracting party provides a Section 5000C Certificate to the acquiring agency as prescribed in this paragraph (d). When a Section 5000C Certificate is furnished, the acquiring agency is not required to withhold, or must reduce the amount of withholding, on payments made to a foreign person if the certificate establishes that the foreign person is wholly or partially exempt

from withholding. An acquiring agency may establish a system for a foreign contracting party to electronically furnish a Section 5000C Certificate.

(2) *Exemption for a foreign contracting party entitled to the benefit of relief pursuant to certain international agreements.* An acquiring agency is not required to withhold on payments pursuant to a contract with a foreign contracting party when the payment is entitled to relief from the tax imposed under section 5000C pursuant to an international agreement, including relief pursuant to a nondiscrimination provision of a qualified income tax treaty, because the foreign contracting party is entitled to the benefit of that agreement and the foreign contracting party has submitted a Section 5000C Certificate that includes all of the information described in paragraphs (d)(4)(i) and (ii) of this section.

(3) *Exemption when goods are manufactured or produced or services provided in the United States, or in a foreign country that is a party to an international procurement agreement.* An acquiring agency is not required to withhold on payments pursuant to a contract with a foreign contracting party to the extent that the payments are for goods manufactured or produced or services provided in the United States or in a foreign country that is a party to an international procurement agreement with the United States, provided that the foreign contracting party has submitted a Section 5000C Certificate that includes all of the information described in paragraphs (d)(4)(i) and (iii) of this section. If the Section 5000C Certificate provides that the payment is only partially exempt from withholding under section 5000C, the acquiring agency must withhold to the extent that the payment is not exempt.

(4) *Information required for Section 5000C Certificate—(i) In general.* The Section 5000C Certificate, entitled “Section 5000C Certificate,” must be signed under penalties of perjury by the foreign contracting party, and contain—

(A) The name of the foreign contracting party, country of organization (if applicable), and permanent residence address of the foreign contracting party;

(B) The mailing address of the foreign contracting party (if different than the permanent residence address);

(C) The TIN assigned to the foreign contracting party (if any);

(D) The identifying or reference number on the contract (if known);

(E) The name and address of the acquiring agency;

(F) A statement that the person signing the Section 5000C Certificate is the foreign contracting party listed in paragraph (d)(4)(i)(A) of this section (or is authorized to sign on behalf of the foreign contracting party);

(G) A statement that the foreign contracting party is not acting as an agent or nominee for another foreign person with respect to the goods manufactured or produced or services provided under the contract;

(H) A statement that the foreign contracting party agrees to pay an amount equal to any tax (including any applicable penalties and interest) due under section 5000C that the acquiring agency does not withhold under section 5000C;

(I) A statement that the foreign contracting party acknowledges and understands the rules in § 1.5000C-4 relating to procedural obligations related to section 5000C; and

(J) A statement that the foreign contracting party has not engaged in a transaction (or series of transactions) with a principal purpose of avoiding the tax imposed under section 5000C as defined in § 1.5000C-5.

(ii) *Additional information required for claiming an exemption based on the certain international agreements with the United States.* In addition to the information required by paragraph (d)(4)(i) of this section, a foreign contracting party claiming an exemption from withholding in reliance on a provision of an international agreement with the United States, including a qualified income tax treaty, must provide—

(A) The name of the international agreement under which the foreign contracting party is claiming benefits;

(B) The specific provision of the international agreement relied upon (for example, the nondiscrimination article of a qualified income tax treaty); and

(C) The basis on which it is entitled to the benefits of that provision (for example, because the foreign contracting party is a corporation organized in a foreign country

that has in force a qualified income tax treaty with the United States that covers all nationals, regardless of their residence).

(iii) *Additional required information for claiming exemption based on country where goods are manufactured or services provided.* (A) *In general.* In addition to the information required by paragraph (d)(4)(i) of this section, a foreign contracting party claiming an exemption from withholding (in whole or in part) because payments will be pursuant to a contract for goods manufactured or produced or services provided in the United States or a foreign country that is party to an international procurement agreement, the information submitted on the Section 5000C Certificate must describe the relevant goods or services and the country (or countries) in which they are manufactured or produced or are provided and include the name of the international procurement agreement or agreements (if relevant).

(B) *Information on allocation to exempt and nonexempt amounts.* (1) *In general.* In situations in which a foreign contracting party claims the exemption in paragraph (d)(3) of this section with respect to only a portion of the payments received under the contract, the Section 5000C Certificate must include an explanation of the method used by the foreign contracting party to allocate the total contract price among the countries, as described in § 1.5000C-1(e)(3), if applicable. In general, the Section 5000C Certificate also must include the total contract price and the nonexempt amount; however, when necessary, an estimate of the total contract price or the nonexempt amount may be used. For example, total contract price may be estimated when a Section 5000C Certificate is being completed with respect to payments to be made pursuant to a cost-reimbursement contract that is paid on the basis of actual incurred costs and the total amount of such costs is not known at the time the certificate is provided.

(2) *Specific identification of exempt items.* If agreed to by the acquiring agency, the Section 5000C Certificate may identify specific exempt and nonexempt amounts. For example, specific contract line items (such as a contract line

item number or CLIN) identified in the contract may be listed on the Section 5000C Certificate as exempt and nonexempt amounts (in whole or in part), as applicable. When this paragraph applies, and whether or not the contract identifies exempt and nonexempt amounts, a foreign contracting party must provide the information required by paragraphs (d)(4)(iii)(A) and (d)(4)(iii)(B)(1) of this section, on the Section 5000C Certificate to explain why the contract line items are eligible for an exemption; however, the foreign contracting party is not required to include information about the total contract price under this paragraph. In these circumstances, only one Section 5000C Certificate is required to be provided identifying the exempt and nonexempt contract line items that relate to the contract (for example, a spreadsheet

may be attached to the Section 5000C Certificate that identifies the contract line items with an explanation for the treatment as exempt or nonexempt).

(5) *Validity period of Section 5000C Certificate.* Except as otherwise provided in paragraph (d)(6) of this section, the Section 5000C Certificate is valid for the term of the contract.

(6) *Change in circumstances.* A foreign contracting party must submit a revised Section 5000C Certificate within 30 days of a change in circumstances that causes the information in a Section 5000C Certificate held by the acquiring agency to be incorrect with respect to the acquiring agency's determination of whether to withhold or the amount of withholding under Section 5000C. An acquiring agency must request a new Section 5000C

Certificate from a contracting party in circumstances in which it knows (or has reason to know) that a previously submitted Section 5000C Certificate becomes incorrect or unreliable. An acquiring agency may request an updated Section 5000C Certificate at any time, including when other documentation is required under the contract, such as the annual representations and certifications required in 48 CFR 4.1201.

(7) *Model Section 5000C Certificate.* The following is a sample of a Section 5000C Certificate. A foreign contracting party that chooses to use this model as a template for the Section 5000C Certificate must include all the necessary information required by this paragraph (d) on the completed model Section 5000C Certificate it submits to the acquiring agency.

<b>Section 5000C Certificate</b>	
<b>Part I. Identification of Foreign Contracting Party</b>	
<b>1</b> Name of foreign contracting party	<b>2</b> Country of organization if applicable (do not abbreviate)
<b>3</b> Permanent residence address (street, apt. no. or rural route). Do not use P.O. Box or in-care-of address	
City or town, state or province (include postal code, if applicable)	Country (do not abbreviate)
<b>4</b> Mailing address (if different from above)	
City or town, state or province (include postal code, if applicable)	Country (do not abbreviate)
<b>5</b> U.S. TIN, if any	<b>6</b> Contract/reference number (if known)
<b>7</b> Name and address of the acquiring agency	
City or town, state or province (including the postal code, if applicable)	Country (do not abbreviate)
<b>Part II. Exemption Based on an International Agreement (If Applicable)</b>	
<b>8</b> <input type="checkbox"/> Check this box if claiming relief from the tax under section 5000C pursuant to an international agreement with the United States (such as a qualified income tax treaty), and complete Part IV.	
<b>Part III. Exemption Based on an International Procurement Agreement or because Goods/Services Produced/Performed in the U.S.</b>	
<b>9</b> <input type="checkbox"/> Check this box if identifying specific exempt and nonexempt amounts (for example, by CLIN) and skip Lines 10 through 14 and complete Part IV, Line 15.	<b>10</b> Total Contract Price or Estimated Total Contract Price
<b>11</b> Nonexempt Amount or Estimated Nonexempt Amount	<b>12</b> Contract Ratio (Line 11 over Line 10)

**Part IV. Explanation (Complete if Part II or Part III Is Applicable)**

**13** If you checked the box in Part II, state the name of the agreement and specific provision relied upon (for example, the nondiscrimination article of a qualified income tax treaty); and the basis on which you are entitled to the benefits of that provision (for example, because you are a corporation organized in a foreign country with which the United States has a qualified income tax treaty that covers all nationals). (Use additional sheets as necessary.)

**14** If you completed Part III, but did not check the box on Line 9, state the relevant countries where the goods are manufactured or produced or services provided and the international procurement agreements relied upon, if relevant. If applicable, explain the method relied upon to allocate the total contract price between exempt and nonexempt amounts. (Use additional sheets as necessary.)

**15** If you checked the box on Line 9, provide an explanation for each item by stating the relevant countries where the goods are manufactured or produced or services provided and the international procurement agreements relied upon, if relevant. If applicable, explain the method relied upon to allocate the total contract price between exempt and nonexempt amounts. For example, you may attach a spreadsheet listing the various contract line items with an explanation for the treatment of each line item as exempt or nonexempt. If the contract includes details necessary to complete this section (such as exempt or nonexempt amounts by contract line item), you may incorporate by reference the relevant information in the explanation. (Use additional sheets as necessary.)

**Part V. Certificate**

Under penalties of perjury, I declare that I have examined the information on this certificate (and in the contract, if relevant) and to the best of my knowledge and belief it is true, correct, and complete. I further certify under penalties of perjury that:

- 1** I am the foreign person (or am authorized to sign on behalf of the foreign person) identified in Line 1 above,
- 2** I am not acting as an agent or nominee for another foreign person,
- 3** I agree to pay an amount equal to any tax due under section 5000C that the acquiring agency does not withhold under section 5000C and pay any applicable penalties and interest,
- 4** I acknowledge and understand the rules in § 1.5000C-4 relating to procedural obligations under section
- 5** I have not engaged in any transaction (or series of transactions) with a principal purpose of avoiding the tax imposed under section 5000C as defined in § 1.5000C-5.

**Sign Here** ▶

----- / / -----  
Signature of Foreign Person (or Authorized Representative)    Date    Capacity to Act

(8) *Time for submitting Section 5000C Certificate or Form W-9, "Request for Taxpayer Identification Number and Certification."* A contracting party must submit the Section 5000C Certificate or Form W-9 (as applicable) as early as practicable (for example, when the offer for the contract is submitted to the U.S. government). In all cases, however, the Section 5000C Certificate or Form W-9 must be submitted to the acquiring agency no later than the date of execution of the contract.

(e) *Offset for underwithholding or overwithholding—(1) In general.* If the

foreign contracting party discovers that amounts withheld on prior payments either were insufficient or in excess of the amount required to satisfy its tax liability under section 5000C, the foreign contracting party may request the acquiring agency to increase or decrease the amount of withholding on future payments for which withholding is required under section 5000C. The request must be in writing, signed under penalties of perjury, contain the amount by which the foreign contracting party requests to increase or decrease future amounts withheld under

section 5000C, and explain the reason for the request. The request may be submitted in conjunction with an original or updated Section 5000C Certificate.

(2) *Underwithholding.* Upon receipt of a request described in paragraph (e)(1) of this section, acquiring agencies may increase the amount of withholding under this paragraph to correct underwithholding only if the payment for which the increase is applied is otherwise subject to withholding under section 5000C and made before the date that Form 1042, "Annual Withholding Tax Return for U.S.

Source Income of Foreign Persons,” is required to be filed (not including extensions) with respect to the payment for which the underwithholding occurred. Amounts withheld under this paragraph must be deposited and reported in the time and manner as prescribed by § 1.5000C-3. See § 1.5000C-4 for procedures for a foreign contracting party that must pay tax due when its tax liability under section 5000C was not fully satisfied by withholding by an acquiring agency.

(3) *Overwithholding.* Upon receipt of a request described in paragraph (e)(1) of this section, acquiring agencies may decrease the amount of withholding on subsequent payments made to the foreign contracting party that are otherwise subject to withholding under section 5000C provided that the payment for which the decrease is applied is made on or before the date on which Form 1042, “Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,” is required to be filed (not including extensions) with respect to the payment for which the overwithholding occurred. See § 1.5000C-4(e) for procedures for foreign contracting parties to file a claim for refund for the overwithheld amount under section 5000C.

#### *§ 1.5000C-3 Payment and returns of tax withheld by the acquiring agency.*

(a) *In general.* This section provides administrative procedures that acquiring agencies must follow to satisfy their obligations to deposit and report amounts withheld under § 1.5000C-2. An acquiring agency with a section 5000C withholding obligation must increase the amount it deducts and withholds under chapter 3 for fixed or determinable annual or periodical income (FDAP income) by the amount it must withhold under § 1.5000C-2. Accordingly, this section generally applies the administrative provisions of chapter 3 for FDAP income relating to the deposit, payment, and reporting for amounts withheld under § 1.5000C-2, and contains some variation from those provisions to take into account the nature of the tax imposed under section 5000C.

(b) *Deposit rules—(1) Acquiring agency with a chapter 3 deposit requirement treats amounts withheld as under chapter 3.* If an acquiring agency has a

chapter 3 deposit obligation for a period, it must treat any amount withheld under § 1.5000C-2 as an additional amount of tax withheld under chapter 3 for purposes of the deposit rules of § 1.6302-2. Thus, depending on the combined amount withheld under chapter 3 and § 1.5000C-2, an acquiring agency subject to this paragraph (b)(1) must make monthly deposits, quarter-monthly deposits, or annual deposits under the rules in § 1.6302-2. To the extent provided in forms, instructions, or publications prescribed by the Internal Revenue Service (IRS), acquiring agencies must deposit all withheld amounts by *electronic funds transfer*, as that term is defined in § 31.6302-1(h)(4)(i) of this chapter.

(2) *Acquiring agency with no chapter 3 filing obligation deposits withheld amounts monthly.* If an acquiring agency has no chapter 3 deposit obligation to which the deposit rules of § 1.6302-2 apply for a calendar month, it must make monthly deposits of the amounts withheld under the rules in this paragraph (b)(2). Thus, an acquiring agency with no chapter 3 deposit obligations and that has withheld any amount under § 1.5000C-2 during any calendar month must deposit that amount by the 15th day of the month following the payment. To the extent provided in forms, instructions, or publications prescribed by the Internal Revenue Service (IRS), acquiring agencies must deposit all withheld amounts by *electronic funds transfer*, as that term is defined in § 31.6302-1(h)(4)(i) of this chapter.

(c) *Return requirements.* (1) *In general.* Except as provided in paragraph (c)(2) of this section, an acquiring agency that withholds an amount pursuant to section 5000C generally must file Form 1042-S, “Foreign Person’s U.S. Source Income Subject to Withholding,” and Form 1042, “Annual Withholding Tax Return for U.S. Source Income of Foreign Persons,” each year, or other such forms as the IRS may prescribe, to report information related to amounts withheld under section 5000C. The acquiring agency must prepare a Form 1042-S for each contracting party reporting the amount withheld under section 5000C for the preceding calendar year. The Form 1042 must show the aggregate amounts withheld under section 5000C that were re-

quired to be reported on Forms 1042-S (including those amounts withheld under section 5000C for which a Form 1042-S is not required to be filed pursuant to paragraph (c)(2) of this section). The Form 1042 must also include the information required by the form and accompanying instructions. Further, any forms required under this paragraph (c) are due at the same time, at the same place, and eligible for the same extended due dates and may be amended in the same manner as Form 1042 and Form 1042-S (or such other forms as the IRS may prescribe related to chapter 3). The acquiring agency must furnish a copy of the Form 1042-S (or such other form as the IRS may prescribe for the same purpose) to the contracting party for whom the form is prepared on or before March 15 of the calendar year following the year in which the amount subject to reporting under section 5000C was paid. It must be filed with a transmittal form as provided in instructions to the Form 1042-S and to the transmittal form. Section 5000C Certificates or other statements or information as prescribed by § 1.5000C-2 that are provided to the acquiring agency are not required to be attached to the Form 1042 filed with the IRS. However, an acquiring agency that is required to file Form 1042 must retain a copy of Form 1042, Form 1042-S, the Section 5000C Certificates, or other statements or information prescribed by § 1.5000C-2 for at least three years from the original due date of Form 1042 or the date it was filed, whichever is later. An acquiring agency that is not required to file Form 1042 must retain any Section 5000C Certificates or other statements or information as prescribed by § 1.5000C-2 for at least three years from the date the Form 1042 would have been due had the acquiring agency had an obligation to file.

(2) *Classified contracts.* An acquiring agency is not required to report information otherwise required by this section on Form 1042-S for payments made pursuant to classified contracts (as described in section 6050M(e)(3)), unless the acquiring agency determines that the information reported on the Form 1042-S does not compromise the safeguarding of classified information or national security.

(d) *Special arrangement for certain contracts.* In limited circumstances, the IRS may authorize the amount otherwise required to be withheld under section 5000C to be deposited in the time and manner mutually agreed upon by the acquiring agency and the foreign contracting party. In these circumstances, the IRS may in its sole discretion also modify any reporting or return requirements of the acquiring agency or the foreign contracting party.

*§ 1.5000C-4 Requirement for the foreign contracting party to file a return and pay tax, and procedures for the contracting party to seek a refund.*

(a) *In general.* For purposes of subtitle F of the Internal Revenue Code (“Procedure and Administration”), the tax imposed under section 5000C on foreign persons is treated as a tax imposed under subtitle A. Except as provided elsewhere in the regulations under section 5000C, forms, or accompanying instructions, the tax imposed on foreign contracting parties under section 5000C is administered in a manner similar to gross basis income taxes. This section provides procedures that a foreign contracting party must follow to satisfy its obligations to report and deposit tax due under § 1.5000C-1 as well as procedures for contracting parties to seek a refund of amounts overwithheld.

(b) *Tax obligation of foreign contracting party independent of withholding.* A foreign contracting party subject to tax under section 5000C and §§ 1.5000C-1 through 1.5000C-7 remains liable for the tax unless its tax obligation was fully satisfied by withholding by an acquiring agency in accordance with §§ 1.5000C-2 and 1.5000C-3.

(c) *Return of tax by the foreign contracting party.* If the tax liability under § 1.5000C-1 relating to a payment is not fully satisfied by withholding in accordance with §§ 1.5000C-2 and 1.5000C-3 (including as a result of the use of an estimated nonexempt amount or estimated total contract price in computing the contract ratio), a foreign contracting party subject to tax under § 1.5000C-1 during a calendar year must make a return of tax on, for example, Form 1120-F, “U.S. Income Tax Return of a Foreign Corpora-

tion,” or such other form as the Internal Revenue Service (IRS) may prescribe to report the amount of tax due under section 5000C (required return). A foreign contracting party with no other U.S. tax filing obligation other than with respect to its liability for the tax imposed under section 5000C must file its required return on or before the fifteenth day of the sixth month following the close of its taxable year. The required return must include the information required by the form and accompanying instructions. The required return must be filed at the place and time (including any extension of time to file) provided by the form and accompanying instructions. Penalties for failure to file contained in Subtitle F can apply to foreign contracting parties who fail to file the required return. A foreign contracting party must attach copies of all Forms 1042-S, “Foreign Person’s U.S. Source Income Subject to Withholding,” received from acquiring agencies (if any) to the required return.

(d) *Time and manner of paying tax.* A foreign contracting party must pay the tax imposed under section 5000C in the manner provided and in the time prescribed in the required return and accompanying instructions. In general, the foreign contracting party must pay the tax at the time that the required return is due, excluding extensions. To the extent provided in forms, instructions, or publications prescribed by the IRS, each foreign contracting party must deposit tax due under section 5000C by electronic funds transfer, as that term is defined in § 31.6302-1(h)(4)(i) of this chapter. A foreign contracting party that fails to pay tax in the time and manner prescribed in this section (or under forms, instructions, or publications prescribed by the IRS under this section) may be subject to penalties and interest under Subtitle F.

(e) *Refund requests when amount withheld exceeds tax liability.* After taking into account any offsets pursuant to § 1.5000C-2(e)(3), if the acquiring agency has overwithheld amounts under section 5000C and has made a deposit of the amounts under § 1.5000C-3(b), the contracting party may claim a refund of the amount overwithheld pursuant to the procedures described in chapter 65. The contracting party’s claim for refund must meet the requirements of section 6402 and the reg-

ulations thereunder, as applicable, and must be filed before the expiration of the period of limitations on refund in section 6511 and the regulations thereunder. In general, the contracting party making a refund claim must file the required return to claim a refund, stating the grounds upon which the claim is based. A Section 5000C Certificate and a copy of the Form 1042-S received from the acquiring agency must be attached to the required return. For purposes of this section, an amount is overwithheld if the amount withheld from the payment pursuant to section 5000C and §§ 1.5000C-1 through 1.5000C-7 exceeds the contracting party’s tax liability under § 1.5000C-1, regardless of whether the overwithholding was in error or appeared correct when it occurred. A U.S. person may seek a refund under this paragraph (e) even if it was treated as a foreign person under the rules in § 1.5000C-2 (for example, because it neither had a taxpayer identification number on file in the System for Award Management nor submitted Form W-9, “Request for Taxpayer Identification Number (TIN) and Certification,” to the acquiring agency).

*§ 1.5000C-5 Anti-abuse rule.*

If a foreign person engages in a transaction (or series of transactions) with a principal purpose of avoiding the tax imposed under section 5000C, the transaction (or series of transactions) may be disregarded or the arrangement may be recharacterized (including disregarding an intermediate entity), in accordance with its substance. If this section applies, the foreign person remains liable for any tax (including any tax obligation unsatisfied as a result of underwithholding) and the Internal Revenue Service retains all other rights and remedies under any applicable law available to collect any tax imposed on the foreign contracting party by section 5000C.

*§ 1.5000C-6 Examples.*

The rules of §§ 1.5000C-1 through 1.5000C-4 are illustrated by the following examples. For purposes of the examples: all contracts are executed with acquiring agencies on or after January 2,

2011, and are for the provision of either goods or services; none of the contracts are for emergency acquisitions described in § 1.5000C-1(d)(2); the acquiring agencies have no other withholding obligations under chapter 3 of the Code and have no other contracts subject to section 5000C; the foreign contracting parties do not have any U.S. source income or a U.S. tax return filing obligation other than a tax return filing obligation that arises based on the facts described in the particular example; and none of the contracts are classified contracts as described in section 6050M(e)(3).

*Example 1. U.S. person not subject to tax; no withholding.* (i) *Facts.* Company A Inc., a U.S. corporation and the contracting party, enters into a contract with Agency L, the acquiring agency. Before making its first payment under the contract (for example, on the date of execution of the contract), pursuant to the first step in § 1.5000C-2(b) Agency L determines that the contract will be for services. Under the second step, Agency L reviews Company A Inc.'s record in the System for Award Management (SAM) and determines that Company A is a corporation and is considered to be a U.S. person because Agency L's records demonstrate that Company A Inc. is a business entity treated as a corporation for tax purposes that has a TIN that does not begin with "98."

(ii) *Analysis.* Company A Inc. is a U.S. person and thus is not subject to the tax under section 5000C. Moreover, because Company A Inc. is a corporation for tax purposes that has a TIN that does not begin with "98," Agency L is able to determine that it has no obligation to withhold any amounts under section 5000C on the payment made to Company A Inc. For purposes of section 5000C, Company A Inc. could also establish that it is a U.S. person by providing a Form W-9, "Request for Taxpayer Identification Number (TIN) and Certification," to Agency L. Company A Inc. does not need to file a Section 5000C Certificate to demonstrate its eligibility for an exemption from withholding.

*Example 2. Foreign national entitled to the benefit of a nondiscrimination provision of a treaty; no withholding.* (i) *Facts.* Company B, a foreign contracting party and a national of Country T, provides goods to Agency M, the acquiring agency. Company B determines that it is exempt from tax under section 5000C because it is entitled to the benefit of the nondiscrimination article of a qualified income tax treaty between the United States and Country T. Company B submits a Section 5000C Certificate to Agency M when the contract is executed. Company B uses the model Section 5000C Certificate and properly fills out Sections II and IV stating the name of the treaty, the specific article relied upon, and the basis on which it is entitled to the benefits of that article. Following the steps in § 1.5000C-2, Agency M determines that the nondiscrimination provision of the Country T-United States income tax treaty applies to exempt Company B from the tax imposed

under section 5000C. Agency M makes one lump sum payment of \$50 million to Company B pursuant to the contract.

(ii) *Analysis.* Company B has no liability for tax under section 5000C because it is entitled to the benefit of a nondiscrimination article of a qualified income tax treaty. Because Company B submitted a Section 5000C Certificate meeting the requirements in § 1.5000C-2 and Agency M does not have reason to know that the submitted information is incorrect or unreliable, Agency M is not required to withhold under section 5000C. Agency M must retain the Section 5000C Certificate for at least three years pursuant to § 1.5000C-3(c)(1).

*Example 3. Foreign treaty beneficiary does not submit Section 5000C Certificate; withholding required.* (i) *Facts.* The facts are the same as in Example 2, except that Company B does not submit a Section 5000C Certificate to Agency M before Agency M makes the \$50 million payment.

(ii) *Analysis.* Company B is not subject to tax under section 5000C, but Agency M must nevertheless withhold on the payment made to Company B because Agency M did not receive a Section 5000C Certificate from Company B in the time and manner required pursuant to § 1.5000C-2(d). Agency M must withhold \$1 million (2 percent of \$50 million) on the payment, and deposit that amount under the rules in § 1.5000C-3 no later than the 15th day of the month following the month in which the payment was made. Agency M must also complete Forms 1042, "Annual Withholding Tax Return for U.S. Source Income of Foreign Persons," and 1042-S, "Foreign Person's U.S. Source Income Subject to Withholding," on or before the date specified on those forms and the accompanying instructions. Agency M must furnish copies of Form 1042-S to Company B. Agency M must retain a copy of the Form 1042 and the Form 1042-S for 3 years from the due date for the Form 1042 pursuant to § 1.5000C-3(c)(1). As Company B is not liable for the tax, it may later file a claim for refund pursuant to the procedures described in chapter 65.

*Example 4. Foreign contracting party partially exempt from tax under section 5000C when goods are manufactured in different countries.* (i) *Facts.* Company C, a foreign contracting party, provides goods to Agency N in 2015. The terms of the contract require that payment be made to Company C by Agency N in two \$5 million installments in 2015. Company C has a TIN that begins with "98" and is not entitled to relief pursuant to an international agreement with the United States, such as relief pursuant to a nondiscrimination provision of a qualified income tax treaty. Some of the goods are manufactured in Country R, which is a party to an international procurement agreement with the United States, with the remainder being manufactured in Country S, a country that is not a party to an international procurement agreement with the United States. Company C uses a reasonable allocation method based on the information available to it at the time in accordance with § 1.5000C-1(e)(3) to estimate that \$3 million is the nonexempt amount produced in Country S. Company C submits a valid and complete Section 5000C Certificate to Agency N in the time and manner required by §§ 1.5000C-1 through 1.5000C-7 that provides that the nonexempt

amount is \$3 million. In 2015, Agency N pays Company C in two installments pursuant to the terms of the contract.

(ii) *Analysis.* Using a reasonable allocation method to determine the estimated nonexempt amount, Company C determines that pursuant to section 5000C and §§ 1.5000C-1 through 1.5000C-7, tax of \$30,000 (2 percent of the \$5 million payment, multiplied by a fraction (the numerator of which is the estimated nonexempt amount, \$3 million, and the denominator of which is the estimated total contract price, or \$10 million)) is imposed on each payment made to Company C. Because Company C has timely submitted a Section 5000C Certificate explaining the basis for this allocation, Agency N withholds \$30,000 on each payment made to Company C. Agency N must deposit each \$30,000 withholding tax no later than the 15<sup>th</sup> day of the month following the month in which each payment is made. Agency N must also complete Forms 1042 and 1042-S and furnish copies of Form 1042-S to Company C. Provided that Agency N properly withholds on the nonexempt portion as required under section 5000C and §§ 1.5000C-1 through 1.5000C-7 and that Company C's estimate of the nonexempt amount is the actual nonexempt amount, Company C does not have an additional tax liability or a U.S. tax return filing obligation as a result of receiving the payment.

*Example 5. Foreign contracting party liable for additional tax under Section 5000C not fully withheld upon due to errors on the Section 5000C Certificate.* (i) *Facts.* The facts are the same as in Example 4, except that the Section 5000C Certificate submitted to Agency N by Company C erroneously provides that the estimated nonexempt amount is \$1.5 million instead of \$3 million. As a result, Agency N only withholds \$15,000 (2 percent of the \$5 million payment multiplied by a fraction (the numerator of which is the estimated nonexempt amount stated on the Section 5000C Certificate, \$1.5 million, and the denominator of which is the estimated total contract price, or \$10 million)) on each payment made to Company C. Agency N neither discovered nor had reason to know that the information on the Section 5000C Certificate was incorrect or unreliable. After both payments have been made and after the filing due date for Form 1042 for 2015, Company C determines that the estimated nonexempt amount should have been stated as \$3 million on the Section 5000C Certificate.

(ii) *Analysis.* The tax imposed under section 5000C on Company C as a result of the receipt of specified Federal procurement payments is \$60,000 and this amount has not been fully satisfied by withholding by Agency N. Accordingly, Company C must remit additional tax of \$30,000 (\$60,000 tax liability less \$30,000 amounts already withheld by Agency N) and file its required return, a Form 1120-F, "U.S. Income Tax Return of a Foreign Corporation," for 2015 to report this tax liability, as required by § 1.5000C-4. Company C must explain its corrected allocation method in its Form 1120-F. Company C must also attach a copy of the Form 1042-S it received from Agency N to Form 1120-F.

§ 1.5000C-7 Effective/applicability date.

Section 5000C applies to specified Federal procurement payments received pursuant to contracts entered into on and after January 2, 2011. Sections 1.5000C-1 through 1.5000C-7 apply on and after the date that is 90 days after the date they are published as final regulations in the **Federal Register**.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 5. The authority citation for part 301 continues to read in part as follows:

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

Par. 6. Section 301.6114-1 is amended by adding paragraph (c)(1)(ix) and revising paragraph (e) to read as follows:

§ 301.6114-1 Treaty-based return positions.

\* \* \* \* \*  
(c) \* \* \*  
(1) \* \* \*

(ix) Notwithstanding paragraph (b)(1) of this section, that a nondiscrimination provision of an income tax treaty exempts a payment from tax under section 5000C, but only if the foreign person claiming such relief has provided a Section 5000C Certificate (or such other form as may be prescribed by the Commissioner pursuant to section 5000C) in accordance with section 5000C and the regulations thereunder.

\* \* \* \* \*

(e) *Effective/applicability date*—(1) *In general*. This section is effective for tax-

able years of the taxpayer for which the due date for filing returns (without extensions) occurs after December 31, 1988. However, if—

(i) A taxpayer has filed a return for such a taxable year, without complying with the reporting requirement of this section, before November 13, 1989, or

(ii) A taxpayer is not otherwise than by paragraph (a) of this section required to file a return for a taxable year before November 13, 1989, Such taxpayer must file (apart from any earlier filed return) the statement required by paragraph (d) of this section before June 12, 1990, by mailing the required statement to the Internal Revenue Service, P.O. Box 21086, Philadelphia, PA 19114. Any such statement filed apart from a return must be dated, signed and sworn to by the taxpayer under the penalties of perjury. In addition, with respect to any return due (without extensions) on or before March 10, 1990, the reporting required by paragraph (a) of this section must be made no later than June 12, 1990. If a taxpayer files or has filed a return on or before November 13, 1989, that provides substantially the same information required by paragraph (d) of this section, no additional submission will be required. Foreign insurers and reinsurers subject to reporting described in paragraph (c)(7)(ii) of this section must so report for calendar years 1988 and 1989 no later than August 15, 1990.

(2) *Section 5000C*. Paragraph (c)(1)(ix) of this section is effective on the date that is 90 days after the date these regulations are published as final regulations in the **Federal Register**. However,

a foreign contracting party may rely on §§ 1.5000C-1 through 1.5000C-7 before that date.

\* \* \* \* \*

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 7. The authority citation for part 602 continues to read in part as follows:

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

Par. 8. In § 602.101, paragraph (b) is amended by adding entries in numerical order to the table to read as follows:

§ 602.101 OMB Control numbers.

\* \* \* \* \*  
(b) \* \* \*

CFR part or section where identified and described	Current OMB control no.
* * * * *	
1.5000C-2.....	1545-xxxx
1.5000C-3.....	1545-xxxx
1.5000C-4.....	1545-xxxx
* * * * *	

John M. Dalrymple,  
*Deputy Commissioner  
for Services and Enforcement.*

(Filed by the Office of the Federal Register on April 20, 2015, 4:15 p.m., and published in the issue of the Federal Register for April 22, 2015, 80 F.R. 22449)

# 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 sub-

stance 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 2014–27 through 2014–52 is in Internal Revenue Bulletin 2014–52, dated December 28, 2014.

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<sup>1</sup>A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2014–27 through 2014–52 is in Internal Revenue Bulletin 2014–52, dated December 28, 2014.

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## **Washington, DC 20224**

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The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at *www.irs.gov/irb/*.

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