



Information Reporting Advisory Committee  
**PUBLIC REPORT**

October 2018



**Information Reporting Program Advisory Committee**

**2018 General Report**

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## 2018 Public Report Letter from the Chair

October 24, 2018

Dear Commissioner Rettig,

On behalf of the Information Reporting Program Advisory Committee (IRPAC), I am pleased to present you and your leadership team with the 2018 IRPAC annual report.

In this increasingly complex and changing tax environment, IRPAC represents a collaborative forum between the Internal Revenue Service (IRS) and tax professionals to establish open communication regarding information reporting issues that are present in our industry. It also provides a mutually beneficial opportunity that lets both the IRS and industry leverage such collaboration into clearer policies and guidance to ease operational burdens for both parties.

As detailed in the report, the recommendations and discussions between the IRS and the three subgroups within IRPAC represent a wide variety of topics.

In some cases, the recommendations presented by the subgroups have been accepted and implemented by the IRS for which we are greatly appreciative.

We are especially appreciative of the IRS's support now when the IRS is resource constrained given the overwhelming demands of U.S. tax reform. However, we would stress the importance of continuing our collaborative efforts in addressing information reporting issues as there are still more improvements to be made.

In addition to the specific issues addressed by our subgroups, there are also all-encompassing issues affecting all subgroups that we feel require general recommendations from the entirety of IRPAC. These issues are varied, but IRPAC feels these issues affect the entirety of the tax industry and thus warrant further discussion. These general recommendations are explained in more detail in the Executive Summary of Issues section, but here are the brief highlights of these issues:

- **Change of Business Master File Entity Addresses:**  
Confidential information of corporate filers is being disclosed to third parties as the addresses of these corporate filers are being changed within the IRS's Business Master File, without the filer's specific request. IRPAC recommends that the IRS implement procedures that require positive affirmation of a change of address from a filer before updating the IRS's Business Master File.
- **E-Signature for Form W-9:**  
While withholding agents may obtain an electronic signature on Forms W-8, such electronic signature option is not currently available for Form W-9. IRPAC

continues to recommend for 2018, as it did in the 2017 annual report, that the IRS extend electronic signature capability to the Form W-9.

- **Tax Cuts and Jobs Act:**  
IRPAC recognizes the historical and monumental significance of the Tax Cuts and Jobs Act (TCJA) to both taxpayers and the IRS. IRPAC recommends that the IRS allocate the necessary financial means, personnel and technological tools that it needs to effectively provide guidance to the industry regarding information reporting issues that arose prior to and post enactment of the TCJA.
- **Practitioner ID and Identity Theft:**  
Tax practitioners are required to verbally provide their Taxpayer Identification Number (TIN) or date of birth when speaking with the IRS on behalf of clients. Despite best efforts of the tax practitioner, this confidential information can be overheard, become compromised and used for identity theft purposes. IRPAC recommends alternatives so that the tax practitioner is not required to verbally provide this confidential information.
- **Cryptocurrency:**  
IRPAC recommends that the IRS issue further guidance on the information reporting and withholding implications of cryptocurrency transactions.

Lastly, on behalf of IRPAC, I'd like to thank your office, the entire NPL Team and all IRS personnel that have worked with us throughout the year. I'd also like to thank Acting Commissioner Kautter for his support of IRPAC, his generosity of time throughout the year speaking with us and his enthusiasm for our work and committee.

IRPAC is an amazing committee consisting of individuals of varying backgrounds, professional experience and interests. I'd like to extend my gratitude to my Vice-Chair, Joel Levenson, all Subgroup Chairs and each contributing member on IRPAC who have volunteered their time away from their professions and families to work diligently throughout the year on issues that they are passionate about to the greater benefit of the industry. Until I began my journey three years ago with IRPAC, I didn't realize what an extraordinary bridge it is between the industry and the IRS. It has been both my pleasure and my honor to serve as the Chair of IRPAC.

Sincerely,

Dana Flynn

2018 IRPAC Chair

## **2018 Executive Summary of Issues**

### **General IRPAC Recommendations**

The following are the all-encompassing IRPAC issues that have been discussed between IRPAC as an entire committee and the IRS.

#### **A. Change of Business Master File Entity Addresses**

As indicated in our 2017 annual report, IRPAC continues strongly to recommend that the IRS implement procedures that require positive affirmation of a change of address from a corporate filer before updating the IRS's Business Master File. Throughout 2018, IRPAC continued to be informed of scenarios where corporate filer addresses are being unilaterally changed by the IRS absent any type of request from the entity. The IRS is then using these incorrect addresses to communicate B-Notices, 972CG Penalty Notice and other such notices containing personal identification information of underlying clients of the corporate filer. Such disclosure by the IRS to third parties increases the risk of identity theft and information fraud.

We wish to highlight the fact that the IRS team responsible for the 972CG Penalty Notice process has taken prior 2017 IRPAC recommendations and substantially improved this process by improving acknowledgement of taxpayer communications as well as response time. The issue of incorrect addresses being used for IRS notices and the risk of identity theft affects the team responsible for the 972CG Penalty Notice by jeopardizing the strong improvements they have made this prior year.

Again, IRPAC recommends that the IRS immediately implement procedures that require positive affirmation of a change of address from a corporate filer. IRPAC recommends the receipt of a completed IRS Form 8822-B (Change of Address or Responsible Party – Business), before any action is taken to update a filer's address. The IRS should no longer rely on the address used on previously filed returns to update the filer's address, especially when that filer has no previous history of filing these types of returns.

#### **B. E-Signature for Form W-9**

As indicated in our 2017 annual report, IRPAC strongly continues to recommend for 2018 that the IRS extend electronic signature capability to the Form W-9. While IRPAC appreciates that the IRS has extended electronic signature capabilities to Forms W-8 for withholding agents, we request the same efficiency and effective tax administration for Form W-9. Worldwide, withholding agents apply rigorous AML/KYC standards to U.S. persons to determine identity. IRPAC believes that allowing the use of electronic signature on Form W-9 would not risk a U.S. person attempting to circumvent such standards. In addition, many withholding agents use the IRS TIN Matching System, which adds another level of security and helps ensure that the industry is

obtaining valid names and taxpayer identification numbers for information reporting purposes.

IRPAC strongly recommends that the IRS apply the resources necessary to examine this issue and determine the regulatory appropriateness of allowing electronic signature to be applied to the Form W-9.

### **C. Tax Cuts and Jobs Act**

With the enactment of the Tax Cuts and Job Act (TCJA) in December 2017, IRPAC recognizes the financial, technological and personnel challenges encountered by the IRS regarding its implementation. In addition, IRPAC recognizes that the IRS continues to experience similar restraints for issues pre-enactment of the TCJA that are not related to the TCJA.

IRPAC recommends that the IRS allocate the necessary financial means, personnel and technological tools that it needs to effectively provide guidance to the industry regarding information reporting issues that arose prior to and post enactment of the TCJA. In addition, IRPAC continues to support and collaborate with the IRS regarding effective guidance so that all industry-wide information reporting issues can be addressed to the satisfaction of the IRS and the industry.

### **D. Practitioner ID and Identity Theft**

Given security concerns, effective January 2018, the IRS began to require that tax practitioners who call the IRS must verbally provide personal TINs and Date of Birth (DOB) instead of Central Authorization File (CAF) numbers or Employer Identification Numbers (EINs) to speak with the IRS on behalf of clients.

While IRPAC understands that the change in procedure is due to valid security concerns, the requirement to verbally provide a practitioner's TIN or DOB exposes the practitioner to information security risk and identity fraud. By requiring verbal statement of the TIN or DOB, such information can be overheard by third parties or recorded by third parties despite the best efforts of the practitioner to prevent such information from being compromised.

IRPAC recommends that the IRS immediately withdraw the requirement of the practitioner to verbally provide his or her personal TIN and DOB.

IRPAC also recommends that in the interim, the prior procedure of requiring the use of CAF numbers and EINs is used until the IRS can implement a procedure that does not compromise personal information of the practitioner.

Finally, IRPAC recommends that the following alternative requirements be considered to address the IRS's security concerns with using CAF numbers and EINs:

- Create a PIN associated with the CAF number to enhance security,

- Request verbal statement of only the last 4 digits of the practitioner's TIN or first four digits of the practitioner's DOB,
- Create the ability for the practitioner to enter the last four digits of his or her TIN or first four digits of his or her DOB by using the telephone keypad or
- Create an online account for use by the tax practitioner in which he can communicate with the IRS through secured means.

#### **E. Cryptocurrency**

In the past few years, with the innovative rise of technology throughout the financial sector, there has also been a rise in the popularity of investment in cryptocurrency. However, with the popularity of cryptocurrency, there has also been an equal rise in questions as to the applicable tax consequences that apply to it. While we acknowledge and thank the IRS for publishing Notice 2014-21, which provides that virtual currency is treated as property for U.S. federal tax purposes, many industry and tax practitioners still question other tax consequences of cryptocurrency transactions. For example: Can cryptocurrency be considered a specified foreign financial asset? How is the basis determined for cryptocurrency that is sold? Does broker reporting apply to cryptocurrency transactions?

Therefore, IRPAC recommends that the IRS issue further guidance on the tax consequences of cryptocurrency transactions.

## **Employer Information Reporting and Burden Reduction Subgroup Executive Summary**

The following are the principal issues that have been discussed between the Employer Information Reporting and Burden Reduction Subgroup of IRPAC and the IRS.

### **A. Reporting by Insurance Companies and Applicable Large Employers under IRC §6055 and §6056**

IRPAC would like to thank the IRS for adopting several of our prior year recommendations dealing with §§ 6055 and 6056 during tax years 2017/2018 including the extension of good faith efforts penalty relief for reporting of incorrect or incomplete information reported on 2017 Forms 1095-B and Forms 1095-C filed in 2018.

IRPAC recommends good faith efforts penalty relief for reporting of incorrect or incomplete information reported on returns, as well as a 30-day delay for furnishing forms due January 31, 2019, is extended to the 2018 Forms 1095-B and Forms 1095-C filed in 2019.

In addition, IRPAC recommends that IRS issue guidance as soon as practical regarding changes, if any, to reporting requirements due to the reduction of the Individual Shared Responsibility Payments to \$0 for calendar year 2019.

Finally, as the compliance environment for ACA reporting becomes more mature, IRPAC recommends that the IRS adopt new procedures for submission of prior year corrections through the AIR system by which a new transmitter will be able to submit corrections that were previously transmitted by a filer's prior service provider.

### **B. Form W-4 2018 and 2019 versions**

IRPAC recommends that the IRS waive penalties for taxpayer under-withholding for tax year 2018.

IRPAC recommends the IRS further clarify the rules and procedures for federal income tax withholding in 2019 when employees do not change their current Form W-4.

IRPAC recommends the IRS provide guidance to employers that do not receive a 2019 W-4 for new employees hired on or after January 1, 2019, or for which the employer receives an invalid Form W-4.

IRAPC recommends that the IRS enhance taxpayer and employer education tools regarding the filing of 2019 Form W-4.

### **C. FIRE System Latency**

IRPAC recommends the IRS make significant efforts to improve the scalability of the FIRE System that is used for the submissions of Forms 1099.

**D. W-2 Box 12 DD Reporting**

IRPAC recommends that the reporting of the cost of employer-sponsored health coverage (Form W-2 Box 12 DD) be made voluntary.

**E. E-Levy and Electronic Payment of Levies**

IRPAC recommends that the IRS continue working with employers and financial institutions on the development and implementation of electronic methods to communicate tax levy information and to electronically remit levy payments.

**F. Expansion of IRS Direct Pay Program for Estimated Individual Income Tax Payments**

IRPAC recommends the IRS let individual income taxpayers pay their individual income tax estimates for multiple years through the Direct Pay program.

**G. Shrink the tax gap due to underreported cash income**

IRPAC recommends that IRS continue to increase awareness of the current trend of underreporting cash income by helping promote awareness education.

**H. Implementation of the New Backup Withholding Rate and Revised CP-2100/2100A**

IRPAC recommends that the IRS issue a revised Form W-9 to reflect the revision of the backup withholding rate from 28% to 24% as the rate change was effective for the 2018 tax year.

**I. Form 1099MISC Non-Employee Compensation**

IRPAC recommends the IRS consider reinstating Form 1099-NEC so that non-employee compensation can be reported on a form other than Form 1099-MISC, which reports other income items with a deadline that is different than the deadline applicable to non-employee compensation.

## **Emerging Compliance Issues Subgroup Executive Summary**

The following are the principal issues that have been discussed between the Emerging Compliance Issues Subgroup of IRPAC and the IRS.

### **A. Retirement Plan Levies**

IRPAC made the following recommendations:

- The IRS should review its processes to ensure that the correct series of Form 668-A is being used.
- The IRS should limit the most currently revised Form 668-A to one version to prevent inconsistency.
- The IRS should use Form 5500—which is filed publicly with the Department of Labor—to ensure that the Form 668-A is sent to the appropriate address and properly identifies the plan’s current administrator.
- Because attachments to retirement accounts are not as common, a separate version of the Form 668-A should be developed for this specific purpose.
- If the IRS begins to levy retirement accounts with greater frequency, then the industry and IRS should remain in close contact regarding the timing and volume of such levies. This will ensure the industry has sufficient resources available to handle additional manual processing and that there is good communication to resolve any issues that arise.
- The IRS should change verbiage on the form regarding account attachments to an affirmative, as opposed to a negative, statement. For example, instead of reading:
  - “This levy won’t attach retirement account funds unless the block to the right is signed” the Form 668 could instead read:
  - “If the block to the right is signed, this levy attaches retirement account funds.”
- The Form 668-A should implement the inclusion of a checkbox when applied to retirement funds.
- The Form 668-A should make bold the instruction that indicates this is being treated as flagrant behavior.

### **B. Section 529 Plans and the PATH Act**

The Protecting Americans from Tax Hikes Act of 2015 (the PATH Act) included many enhancements to section 529 plans. IRPAC would like to thank the IRS for addressing these issues in Notice 2018-58.

### C. IRC § 6050S and Form 1098-T Reporting

IRPAC continues to make the following recommendations concerning Internal Revenue Code §6050S, the related Treasury Regulations and their effect on IRS Form 1098-T reporting:

1. As noted in the 2016 and 2017 IRPAC Public Reports, the Committee continues to recommend the following amendments to the Proposed Regulations included in the Notice of Proposed Rulemaking (REG-131418-14):
  - a. Retain the exemption to reporting Form 1098-T, Tuition Statement, for students whom are non-resident aliens by reinstating Treasury Regulation § 1.6050S-1(a)(2)(i).
  - b. Remove the requirement to report the number of months a student was a full-time student by deleting Proposed Treasury Regulation §1.6050S-1(b)(2)(ii)(I).
  - c. Let institutions report on Form 1098-T how payments are actually applied to students' accounts by revising Proposed Regulation § 1.6050S-1(b)(2)(J)(v) to read, "Payments received for qualified tuition and related expenses determined. For purposes of determining the amount of payments received for qualified tuition and related expenses during a calendar year, institutions may choose to report payments applied to charges in a manner that reflects the payment application in the institution's student account system. Alternatively, institutions may use a safe harbor method and report payments received with respect to an individual during the calendar year from any source (except for any scholarship or grant that, by its terms, must be applied to expenses other than qualified tuition and related expenses, such as room and board) are treated first as payments of qualified tuition and related expenses up to the total amount billed by the institution for qualified tuition and related expenses for enrollment during the calendar year, and then as payments of expenses other than qualified tuition and related expenses for enrollment during the calendar year. Payments received with respect to an amount billed for enrollment during an academic period beginning in the first 3 months of the following calendar year are treated as payment of qualified tuition and related expenses in the calendar year during which the payment is received by the institution. For purposes of this section, a payment includes any positive account balance (such as any reimbursement or refund credited to an individual's account) that an institution applies toward current charges."

#### **D. Inclusion of Adjusted Gross Amount for Reporting on Form 1099-K**

IRPAC recommends that the IRS require payors to report the adjusted gross amount of payment/third-party network transactions. To support this additional reporting requirement, the IRS should also modify Form 1099-K to include a box to report the total adjusted gross amount and to use the existing Boxes 5a-5l to report adjusted gross amounts paid for each month of the calendar year. The IRS is encouraged to solicit information from interested stakeholders to identify adjustments that are most common and most likely to produce information reporting that is more reliable and more reflective of taxable income.

#### **E. Treatment of Liquidating Distributions Paid by Mutual Funds**

When a Regulated Investment Company (RIC) that is taxed under Subchapter M of the Code makes a complete liquidation in redemption of all holders' interest in the fund, the Form 1099 reporting requirements are unclear. IRPAC recommends that the IRS (i) clarify whether RIC liquidating distributions are subject to cost basis reporting and, (ii) if so, amend Forms 1099-B and 1099-DIV, and the accompanying instructions, to specify that liquidating distributions by RICs should be reported on Form 1099-B, so that brokers can properly report cost basis information for such distributions.

#### **F. Tax Identification Number Identity Theft Resulting in False Forms 1099**

With increased incidents of identity theft, IRPAC recommends that the IRS provide issuers of forms in the 1099 series and taxpayers with additional mechanisms to report suspected cases of identity theft.

#### **G. Combined Federal State Filing Program**

IRPAC continues to recommend the IRS make updates into the Combined Federal State Filing (CF/SF) Program by making information returns filed through the program available to the state(s) earlier in the year and on a more frequent, if not real-time basis.

#### **H. Certified Acceptance Agent Compliance Review Letters**

IRPAC recommends the ITIN Policy Section update their compliance review letters to inform a Certifying Acceptance Agent (CAA) of their ability to respond to or disagree with the findings listed in the letters.

## **International Reporting and Withholding Subgroup Executive Summary**

The following are the principal issues that have been discussed between the International Reporting and Withholding (IRW) Subgroup of IRPAC and the IRS. For convenience, the recommendations have been grouped according to topic.

### **A. Qualified Intermediary Agreement (Rev. Proc. 2017-15)**

#### **Recommendation A.1 - Validity Period of Documentary Evidence**

IRPAC continues to recommend that the IRS provide further details regarding its consideration of applying a three-year validity period to documentary evidence obtained by a Qualified Intermediary (QI) in support of an account holder's claim for treaty benefits to give industry time for further comment regarding appropriate recommendations.

#### **Recommendation A.2 – Electronic Provision of Documentation**

IRPAC recommends that the IRS review the various QI attachments to consider whether the requirement that documentary evidence provided remotely by an account holder be a certified copy is still necessary and to modify the QI attachments to incorporate the electronic delivery provisions included in the regulations.

#### **Recommendation A.3 – Joint Account Certifications**

IRPAC requests that the IRS accept a valid Form W-8IMY for purposes of a partnership or trust certifying to a QI that the partnership or trust maintained a permissible Chapter 4 status at all times during the certification period as this certification is a prerequisite for the QI to be able to apply the joint account provisions.

#### **Recommendation A.4 – Recipient-Specific Form 1042-S Reporting**

IRPAC recommends that the IRS establish a defined deadline for account holders to request payee specific Form 1042-S from QIs that file pooled Forms 1042-S reporting.

## **Recommendation A.5 - Section 871(m) Good Faith Efforts by QIs**

IRPAC recommends that the IRS clarify through an FAQ that QIs, as intermediaries, may request and benefit from good faith with regards to Section 871(m) compliance.

## **Recommendation A.6 - Consolidation of QDD Tax Liability**

IRPAC recommends that the IRS permit a QI acting as a QDD to report its QDD tax liability on a consolidated basis. IRPAC further requests the IRS to clarify why such a consolidation is not presently permitted per the QI agreement.

## **B. Foreign Account Tax Compliance Act including Section 871(m)**

### **Recommendation B.1 – Curing Hold Mail Addresses**

IRPAC recommends that the standard to *cure* instructions for a hold mail address used as an account holder's permanent residence address be satisfied by documentary evidence used to establish foreign status as opposed to documentary evidence establishing residence in the country in which the account holder claims to be a tax resident.

### **Recommendation B.2 – Gross Proceeds Withholding**

IRPAC requests delay in the requirement to deduct and withhold tax on gross proceeds and foreign pass-through payments for two years following the issuance of guidance defining the terms.

### **Recommendation B.3 – Professional Management**

IRPAC recommends that the IRS modify the FATCA regulations to let certain professionally managed investment entities be treated as a Passive Nonfinancial Foreign Entity (PNFFE) rather than a Foreign Financial Institution (FFI). IRPAC recommends that these entities be treated consistently as PNFFEs and that the financial institution's (FI) holding accounts for the PNFFEs perform the required reporting to the IRS with respect to the substantial U.S. owners or controlling U.S. persons of the PNFFE.

## **Recommendation B.4 – Further Guidance Regarding Section 871(m) Implementation for Non-Delta 1 Transactions**

IRPAC recommends that the IRS revise IRC §871(m) regulatory requirements to limit withholding to delta 1 transactions and those transactions captured by the anti-abuse rule in the regulations. Absent elimination of withholding on non-delta 1 transactions, IRPAC recommends that the IRS provide other relief in the regulations to make the application of Section §871(m) requirements less costly to implement and maintain on an ongoing basis.

## **Recommendation B.5 – Sponsored Entity Model 1 IGA Reporting**

IRPAC recommends that the IRS revise the proposed FATCA regulations on sponsored entities to let FFIs claiming a FATCA status of Sponsored Investment Entity (SIE) per the FATCA regulations report to their local tax authority as would normally be the case for FFIs located in a Model 1 IGA jurisdiction.

## **Recommendation B.6 – Standardized Field on Form W-8 for Reasonable Written Explanation for Lack of Foreign Taxpayer Identification Number**

IRPAC recommends that a standardized field be added to the Forms W-8BEN, W-8BEN-E, W-8ECI and W-8ECP to let an account holder provide a reasonable written explanation for the lack of a foreign Taxpayer Identification Number (FTIN) on the withholding certificate.

## **C. Pension and Individual Retirement Account Distributions**

### **Recommendation C.1 – Treaty Rates for Pension Distributions**

IRPAC recommends that the IRS provide guidance on specific countries with which the U.S. has an income tax treaty where pension payments are subject to a specialized treatment depending upon the type of payment. IRPAC recommends that Table 1 of the tax treaty tables, located at [irs.gov/individuals/international-taxpayers/tax-treaty-tables](https://www.irs.gov/individuals/international-taxpayers/tax-treaty-tables), which was previously contained in Publication 515 (Withholding of Tax on Nonresident Aliens and Foreign Entities), be updated to reflect this specialized treatment for the specific payment types by including footnotes highlighting that the rate of withholding may vary depending upon whether the pension payment is a periodic payment or a lump sum distribution.

## **D. Other Issues**

### **Recommendation D.1 – Cryptocurrency Initiatives**

IRPAC requests the IRS issue further guidance in respect to cryptocurrency activities.

### **Recommendation D.2 – Elimination of Form 8233**

IRPAC recommends that Form 8233 be eliminated from the library of IRS forms, and the associated process to achieve treaty benefits for personal services performed in the U.S. be streamlined. The purpose that Form 8233 currently serves can be blended into existing Forms W-8 with minimal effort thus resulting in more efficient processes and an increase in voluntary tax compliance.

### **Recommendation D.3 – Guidance on Character of Loan Syndication Fee Payments**

IRPAC requests the IRS issue written guidance on the source and character of cross-border fee payments, specifically those for loan syndication transactions.

### **Recommendation D.4 – Allowance for Collective Refund Claims by U.S. Withholding Agents**

IRPAC recommends the IRS give U.S. withholding agents the option of making use of a collective refund process similar to that available to QIs.

### **Recommendation D.5 – Liability Calculations for Form 1042 Audits**

IRPAC understands the IRS is currently in the process of reviewing its policies with respect to the disallowance of remediation efforts and application of *cure* documentation to extrapolated liability calculations as part of statistical samples in both QI audits as well as U.S. withholding agent audits. IRPAC further understands from public IRS comments that the IRS has considered both IRPAC and other industry group recommendations in formulating these new policies as items *cured* within a reasonable timeframe will not be used to extrapolate tax liability. IRPAC would urge the IRS to promptly finalize and publish these policies for the information reporting and withholding community to effectively manage tax obligations.

### **Recommendation D.6 – Retroactive Application of Section 305(c)**

IRPAC recommends that the IRS publicly announce that it will not impose withholding tax liability, penalties or interest on withholding agents for Section 305(c) events occurring in tax years before 2016.

### **Recommendation D.7 – Form 1099 Reporting for Deemed Dividends**

IRPAC continues to recommend, consistent with the prior year IRPAC report, that the regulations under IRC §6042 be amended to include coordination rules under which the timing and amount of an IRC §305(c) deemed dividend reported on Form 1099-DIV (Dividends and Distributions) would be governed by the issuer's reporting of the timing and amount of the IRC §305(c) deemed dividend on Form 8937 (Report of Organizational Actions Affecting Basis of Securities), as required by IRC §6045B.

Furthermore, IRPAC continues to recommend that the IRS defer Form 1099-DIV reporting for IRC §305(c) deemed dividends until regulations are issued and adequate time is provided to implement the new reporting requirements.

### **Recommendation D.8 – Section 1446 Publicly Traded Partnership Withholding**

In light of the complexities in determining dividend equivalent amounts (DEAs) with respect to derivatives referencing master limited partnerships (MLPs), IRPAC recommends that the IRS amend the appropriate regulations to extend the time allowed to perform withholding and reimbursement/setoff procedures with respect to these transactions to September 15 of the year following the year the DEA is determined (i.e., September 15, 2018, for 2017 DEAs) for all withholding agents, including QDDs. In addition, IRPAC recommends that the IRS ensure that interest or penalties will not be charged on any withholding payments made by September 15 going forward. IRPAC greatly appreciates the relief provided in FAQ 23 for the 2017 tax year, but for the reasons discussed below, IRPAC would encourage the IRS to extend this relief to future tax years.

### **Recommendation D.9 – MLP Interests Delivered to Satisfy Short Sales**

IRPAC requests that the tax treatment of an account holder whose MLP interests were removed from an account and delivered to a purchaser in a short sale, and the treatment of the short seller's position by the partnership, be clarified.

**Recommendation D.10 – Custodian Form 990-T Filing Responsibilities for IRA Accounts**

IRPAC requests the issuance of a series of FAQs related to the obligations and responsibilities of custodians when filing a Form 990-T on behalf of an IRA account.

**Information Reporting Program Advisory Committee**

**Employer Information Reporting  
and  
Burden Reduction Subgroup Report**

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## **Employer Information Reporting and Burden Reduction Subgroup Report**

### **A. Reporting by Insurance Companies and Applicable Large Employers under IRC §6055 and §6056**

IRPAC would like to thank the IRS for adopting several of our prior year recommendations dealing with §§ 6055 and 6056 during tax years 2017/2018, including the extension of good faith efforts penalty relief for reporting of incorrect or incomplete information reported on returns for 2017 Forms 1095-B and Forms 1095-C filed in 2018. While not specifically requested by IRPAC, we also welcomed the extension of the deadline for furnishing the forms to recipients for 30 days from January 31, 2018.

In addition, IRPAC would like to remind IRS that there are still two open recommendations from our 2016 recommendations that we would like addressed:

1. Guidance on reporting in situations in which an Applicable Large Employer group member undergoes a corporate transaction in a calendar year and
2. Guidance on which corrections to Form 1095-C might be considered inconsequential to the recipient as there are clearly elements on that form that only apply to the potential liability for employer-shared responsibility payments and have no bearing on the recipient's tax return.

### **Recommendations:**

IRPAC recommends that good faith efforts penalty relief for reporting of incorrect or incomplete information reported on returns as well as a 30-day delay for furnishing forms from January 31, 2019, be extended to 2018 Forms 1095-B and Forms 1095-C filed in 2019. In any event, it would be helpful to the filers of these forms to know as soon as practicable if there will be any such relief granted.

In addition, IRPAC recommends that IRS issue guidance as soon as practical regarding changes, if any, to reporting requirements due to the reduction of the Individual Shared Responsibility Payments to \$0 for calendar year 2019.

Finally, as the compliance environment for ACA reporting becomes more mature, we recommend that the IRS adopt new procedures for submission of prior year corrections through the AIR system by which a new transmitter will be able to submit corrections that were previously transmitted by a filer's prior service provider.

### **Discussion:**

1. Furnishing and filing relief (good faith).

IRS announced in Notice 2018-06 that it was providing an automatic extension of the due dates to comply with the Affordable Care Act (ACA) reporting requirements. The

due date to furnish individuals the 2017 Form 1095-B, Health Coverage, and the 2017 Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, was extended for 30 days from January 31, 2018, to March 2, 2018. In addition, this notice provided that that penalties would not be imposed on health insurers and employers that make a good faith effort to comply with the reporting requirements, provided statements were furnished to individuals and timely filings were made with the IRS. Penalties for future years are to be evaluated under a more rigorous reasonable cause standard, which is explained in Treas. Reg. §301.6724-1. The Notice was made public on December 22, 2017.

Previously, in our 2017 subgroup report, we detailed several reasons to support another year's extension. Without reiterating them herein, we believe that they continue to apply. In any event, in the absence of a complete good faith waiver, we continue to recommend that there be a good faith waiver extended to the most common error— TIN/name mismatches. There are several reasons for recommending that a similar extension and penalty relief be extended for the current year's filings. First, these ACA forms are fundamentally different than many information returns that report income to recipients and are required for completion of individual tax returns. These other income-reporting returns are providing information that taxpayers need to complete their Forms 1040. However, the ACA information returns report "status." As the IRS has observed many times in many forums, including FAQs on its website, most individuals will have knowledge and alternate documentation that will permit them to complete their tax returns without receipt of these ACA forms. The fact is that only a very small percentage of the employed population will need the information on a Form 1095-C to claim or certify eligibility for premium tax credits for coverage secured through the Marketplace. The individual should have knowledge of which months (if any) he or his dependents were enrolled in coverage to address the individual shared responsibility requirements of his Form 1040.

Moreover, due to the nature of the information, it is often burdensome to get the necessary data for the final months of the calendar year in time to populate a form due January 31. In fact, given the requirements around providing health care coverage, there can be information and elections in February that affect reporting for the prior December. Unlike the information reporting systems that have been built up over the years to support the timely filing of the income-reporting information returns, the information necessary to accurately complete the ACA forms are still not that advanced and are subject to the retroactivity already discussed that, for the most part, does not affect the income reporting to individuals who are cash-basis taxpayers. The requested furnishing delay will mean that the forms provided will be more accurate and reduce the number of corrections that issuers would otherwise need to provide.

In the absence of another universal extension to the furnishing deadline, the IRS should expect to be inundated with requests for extensions. This request will be in writing and require manual review by IRS. While the IRS may not feel that in the fourth year of reporting it would be inclined to grant very many of such requests, we would expect many filers, especially large employers, to request these extensions. Filing for these extensions by large corporate conglomerates will be especially burdensome to both filers and IRS because although the information is usually housed at the group level, each legal entity in the large group will need to file its own request. This will create burden for both the filers and IRS.

As to the request for penalty relief, IRPAC notes that, based on our anecdotal experience, the preponderance of errors being identified on these ACA forms continue to be in name/TIN mismatches. Some employers have experienced these errors for employees whose name/SSN combination is not being flagged for the same combination when submitted on Forms W-2 for the same calendar year.

Proposed regulations were published on August 2, 2016, which explained a newly designed process by which solicitations must be done to let filers demonstrate reasonable cause for missing or incorrect TINs. Due to the burdens on IRS to issue guidance under the Tax Cut and Jobs Act, it appears highly unlikely that these regulations will be finalized by the end of 2018.

Especially considering the number of these name/TIN errors and the problems highlighted in the Treasury Inspector General for Tax Administration report issued March 21, 2018<sup>1</sup>, filers are understandably nervous about the potential imposition of penalties. It is especially difficult to address these errors without TIN matching capability. For these reasons, we recommend that the good faith standard be extended until ACA-reporting-specific TIN solicitation rules are finalized and the IRS's TIN validation processes are significantly improved. We would recommend that such relief be extended to these specific TIN/name matching errors if broader relief is not forthcoming.

Finally, we would request that any such relief be announced as early as possible, before year end. While the announcement late in December 2017 for the 2017 reporting furnished and filed in 2018 was welcome, many filers struggled to meet the original January 31 deadline assuming that no announcement would be made. An earlier announcement would relieve the same struggles from occurring again.

2. Guidance on any changes triggered by TCJA as soon as possible.

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<sup>1</sup> Treasury Inspector General for Tax Administration, Affordable Care Act: Processes to Identify Employers Subject to the Employer Shared Responsibility Payment Need Improvement, March 21, 2018, highlighting needs to streamline TIN validations, p. 15-19.

With the effective repeal of the individual shared responsibility payments beginning in calendar year 2019, we recognize that there will be limited utility in the furnishing of the information contained on Forms 1095-B and 1094-C, Part III. This information is used primarily by taxpayers as evidence of enrollment in health coverage for purposes of satisfying the requirement to not owe an individual shared responsibility payment. We recognize that the IRS might use the information in its administration of taxpayer eligibility for premium tax credits under IRC §36B. For that reason, it is likely that there could be significant burden reduction for filers based on the change in the needs for tax administration. Understanding that, we recommend that any changes to reporting (or furnishing requirements) under IRC §6055 regarding the 2019 tax change be communicated as early as possible to give filers sufficient time to comply with new, albeit likely reduced, reporting requirements

3. Develop new process to permit new transmitter to transmit corrections.

As we are entering the fourth year of ACA reporting, several filers are reassessing and changing relationships with third-party vendors who provide help in furnishing and filing the required forms. As a filer moves to a new provider, the new provider often uncovers errors made by the previous provider. With the development of the IRS issuing notices of potential liability for employer-shared responsibility payments, many Applicable Large Employers are particularly concerned with revising errors found in prior years' filings. However, because the AIR system requires that the transmitter control code for the original filing be used in the transmission of any corrections, the new providers may be unable to transmit the desired corrections on behalf of their new clients. IRPAC recommends that IRS develop a process by which a new transmitter can transmit corrections to records transmitted by a previous transmitter.

**B. Form W-4 2018 and 2019 versions**  
**Recommendation**

IRPAC recommends that the Internal Revenue Service (IRS) waive penalties for taxpayer under-withholding for tax year 2019.

IRPAC recommends the Internal Revenue Service further clarify the rules and procedures for federal income tax withholding in 2020 when employees and former employees do not change their current Form W-4 or W-4P.

IRPAC recommends the Internal Revenue Service provide guidance to employers that do not receive a 2020 W-4 for new employees hired after January 1, 2020 or that receive an invalid Form W-4 or W-4P.

We would further recommend that the Internal Revenue Service enhance taxpayer and employer education tools regarding the filing of 2020 Form W-4 and W-4P.

## Discussion

Public Law No. 115-97, often referred to as the Tax Cuts and Jobs Act (TCJA), was enacted on December 22, 2017, with the bulk of the law taking effect for the 2018 tax year. Employees received the benefit of the law's reduced tax rates soon after 2018 withholding tables were issued on January 11. The 2018 Form W-4 was released on February 28. The form eliminated allowances for the employee's spouse and dependents because of the TCJA's reduction of the personal exemption amount to zero, but added allowances based on the increased child tax credit and new non-child dependent tax credit. Employees were not required to submit a 2018 Form W-4 to their employers, but were encouraged to do a "Paycheck Checkup" by using the IRS's revised withholding calculator. Because the TCJA nearly doubled the standard deduction, many people will now file their Form 1040 returns taking the standard deduction when in the past they itemized their deductions. This change will be exaggerated by the limitation of state and local tax (SALT) deductions to \$10,000, the limit on interest deductions for mortgages exceeding \$750,000, and the elimination of most miscellaneous deductions including non-reimbursed business expenses. This may cause a significant number of taxpayers to be under-withheld when they file their 2018 personal income tax returns. Despite the IRS's efforts to inform taxpayers to check their withholding and encourage the use of the "calculator" on the IRS website, usage of the "calculator" through completion has been minimal because of the complexity (per IRS comments). IRPAC feels that a onetime waiver of under-withholding penalties for taxpayers is warranted.

Allowing two significantly different versions of Forms W-4 or W-4P for an extended period is confusing to both employers and employees. The IRS is constantly trying to educate the public to check their withholding. When the 2020 income tax withholding tables are released, IRS has stated they will accommodate both 2020 and prior year versions Forms W-4 and W-4P. While there were no "exemptions" or "allowances" per se on the 2020 Form W-4 (other than the two or three allowances assigned to the employee based on filing status), allowing use of pre-2020 version Forms W-4 or W-4P implies that they still exist. Under the new system, an employee indicating "single" will receive two allowances and an employee indicating "married filing jointly" or "head of household" will receive three allowances. Employer systems will need to identify at the employee level which Form W-4 or W-4P method is being used – 2020 or pre-2020. Additionally, in 2020 if the employee finds they are under-withheld due to having income tax withheld based on a pre-2020 Form W-4 or W-4P, they will need to file a 2020 W-4.

To avoid the potential of under-withholding because many employees will not update their Form W-4 or W-4P status and to simplify reporting requirements, IRPAC recommends that the IRS review the decision to allow pre-2020 Forms W-4 or W-4P to

be used indefinitely and require employees to file a 2020 Form W-4 by a certain date (e.g., Oct. 1, 2020). This would be consistent with the timing for requiring new Forms W-4 and W-4P after enactment of the Tax Reform Act of 1986. This would also encourage employees to file a 2020 Form W-4 or W-4P sooner rather than later. IRPAC understands that this recommendation might require Congressional action, but believes it is in the best interest of taxpayers to use a Form W-4 and W-4P that is consistent with current law and is designed to reach a correct amount of income tax withholding.

Prior to January 1, 2020 employers that do not receive a Form W-4 or W-4P for new employees or receive an invalid Form W-4 or W-4P from an employee (and have no valid Form W-4 or W-4P on file for that employee) are instructed to withhold as if the employee claimed to be a single filer with zero withholding allowances. For 2020 this does not seem to be the correct result. It is IRPAC's belief that the proper withholding for the above situations would be based on a filing status of single with two allowances. IRPAC recommends that the IRS provide written guidance for these two specific situations.

Taxpayers remain confused about their federal income tax withholding. The withholding calculator that appears on the IRS website is using the old marital status and allowance routine. It also requires taxpayers to come prepared with their prior year tax return and a current paystub to properly use the calculator. In 2020 the calculator will have to be replaced by one based on the new Form W-4 and W-4P method of withholding, which is very different than what has been used for the last three decades plus. IRPAC believes that many employees will not complete and submit a new Form W-4 or W-4P to their employer due to the changes and the confusion the employee will have in completing the new form and using the calculator. In the past, employers and payroll professionals have been instructed not to assist employees with Form W-4 submission to avoid being put in the role of tax advisor. The complexities of the new Form W-4 will add additional pressure on employers to take a more active part in the taxpayer education process. It is IRPAC's recommendation that the IRS:

1. Update the withholding calculator to account for the 2020 Form W-4 and W-4P changes as soon as possible.
2. Consider having a "short form" calculator. This could be provided by using questions that would determine if the taxpayer could confidently skip the more detailed questions that do not apply.
3. Enhance the calculator to produce a Form W-4 that is ready for submission to the employer upon completion of the calculator.
4. Require employers to distribute the 2020 Instructions for Form W-4 to all employees or provide the link to the document's location on the IRS website to the employees.

### **C. FIRE System Latency Recommendation**

IRPAC recommends the IRS make significant efforts to improve the scalability of the FIRE System that is used for the submissions of Forms 1099. This recommendation is being made to not only improve the user's ability to comply with regulatory due dates, but more importantly to mitigate risk of system failure during peak processing periods similar to the Tax Day outage of tax year 2017.

#### **Discussion**

During peak 1099 processing periods such as January 31 and March 31, the FIRE site that is used to submit 10 series Forms slows to an unmanageable pace to meet compliance deadlines. Users of the FIRE system have reported a wait time of three to five minutes per click when trying to upload the properly formatted fixed length text files.

Additionally, the amount of time a user waits to receive acknowledgement from the FIRE site has been reported to be as high as 11 days during these peak processing times. In speaking with IT leadership, IRPAC has learned that additional storage is being added to the systems responsible for file responses. This additional storage is expected to greatly improve response times for tax year 2018 forward.

There is growing concern from taxpayers that with new regulations, such as those promulgated under the Path Act, and the removal of the automatic extension of time for non-employee compensation on Form 1099MISC that the FIRE system will prevent filers from submitting their forms to IRS by the required due dates and that they will be subjected to late filing penalties because of these system limitations.

In discussions with the IRS through 2018, IRPAC learned that in 2017 the FIRE site's January volume was more than 500% of what was previously estimated. Moreover, there is an active project to implement additional security protocols to the FIRE system that may have the potential to further slow performance.

In light of the volume increases, the continued addition of requirements that increase volumes during peak periods, and the reports of user latency, IRPAC recommends that research into and potential investment into the system's infrastructure is warranted to reduce latency and prevent an outage that would result in a filer's inability to comply.

## **D. W-2 Box 12 DD Reporting Recommendations**

IRPAC recommends that the reporting of the cost of employer-sponsored health coverage (W-2 Box 12 DD) be made voluntary. The introduction to Notice 2012-9 states that the reporting is “required... to provide useful and comparable consumer information to employees on the cost of their health care coverage.” In Q&A-2 of Notice 2012-9, the IRS elaborates,

“The purpose of the reporting is to provide useful and comparable consumer information to employees on the cost of their health care ‘coverage.’”

The reporting and the variability associated with such reporting means that it has failed to meet its goal of providing *useful and comparable consumer information*, but it is creating a burden on some employers.

### **Discussion**

IRS announced issued Notice 2011-28 that plan sponsors are required to report “aggregate reportable cost” of “; employee’s W-2 for informational purposes only pursuant to legislation enacted as a part of the ACA. Additional guidance was issued in Notice 2012-9 with Q&As.

The employer-sponsored health insurance premium or COBRA equivalent is a required element of the reporting. This reporting meets the purpose of the reporting and does provide useful consumer information on the cost of their employer-provided health care coverage.

The fact that other employer-provided health care coverage may or may not be required to be reported makes the value of the information in Box 12 DD not as useful as comparative consumer information. For example:

The cost of dental or vision benefits that qualify as *excepted benefits* under HIPAA are not reported. Generally, such benefits are excepted benefits for HIPAA purposes if they are (1) provided under a separate contract from other health coverage or (2) employees participation is elective with the payment of an additional premium. Otherwise, the cost of dental or visions benefits must be included in the Box 12 DD amount.

Also, excludable from reporting is the cost of coverage for a specified disease (e.g., cancer) or illness, hospital indemnity or other fixed indemnity insurance, unless the employer makes any contribution to this coverage or if the policy is purchased pre-tax through a cafeteria plan.

The cost of coverage for terminated employees may be reported under any reasonable method as long as used consistently by the employer for its employees in a plan. This creates variability in what is reported in Box 12 between employers who choose to report under a method that provides costs while actually employed and those that choose to include the costs of post-employment coverages (e.g., COBRA).

Salary reductions to a health Flexible Spending Account are excluded unless the employer contribution is more than the salary reduction; then it is reportable.

*Excess reimbursements* included in a highly compensated employee's income under Code Section 105(h) reduces the aggregate reportable cost of the employer-sponsored coverage.

Health Reimbursement Arrangements (HRAs) are excludable; however, the employer may voluntarily report.

An Employee Assistance Program (EAP), wellness program or on-site medical clinic are not reportable unless a COBRA premium is charged for these programs.

The variability in this reporting makes the final value reported in Box 12 DD of limited value to the employee. It is difficult to see how it meets the goal of providing "useful and *comparable* consumer information" when there is so much variability.

The reporting adds additional burden to employers as well. Depending on the W-2 reporting system/software used and expertise within an employer to set up the system and make the employer reporting decisions, the reporting could be highly inaccurate. While most large employers have adapted to the reporting by now, the added burden to small employers is still very prevalent as many need to rely upon manual tracking and data entry that results in added cost, added time and a reduced accuracy level.

The Box 12 DD reporting, for all the reasons listed above, is not meeting the mission to provide employees with useful and comparable consumer information and has added additional burden to employers. Making this reporting voluntary is recommended until more definitive and practical reporting rules can be circulated, which would serve the purposes of the reporting without providing an undue burden upon employers, especially small employers.

Making this reporting voluntary would not be unprecedented. The reporting of deferrals of nonqualified deferred compensation using Box 12 Code Y has been voluntary since it was added to the Internal Revenue Code with Code Section 409A in the American Jobs Creation Act of 2004.

## **E. E-Levy and Electronic Payment of Levies**

### **Recommendation**

IRPAC recommends that the IRS continue working with employers and financial institutions on developing and implementing electronic methods to communicate tax levy information and for payors to electronically remit levy payments.

### **Discussion**

For the past several years, the IRS has been partnering with business taxpayers and financial institutions on plans to develop an electronic method to communicate tax levy information to payors and to enable electronic remittance of levied funds to the IRS. IRS began a six-month pilot with eight partners in April 2018. The IRS is planning to expand the pilot to include more participants, increased transaction volume and, hopefully, to include reporting agents and other government agency payors.

IRPAC commends IRS for its efforts to respond to the employer need for an e-levy option to the current paper-based tax levy process and supports the IRS's collaboration with the business taxpayer community. Electronic communication of tax levies (i.e., e-levy) and electronic payment of levied funds will allow for reduced employer burden and improved compliance. E-levy and electronic remittance will yield reduced processing time, employer costs and processing errors.

IRPAC recommends development of flexible electronic payment options (e.g., through IRS Direct Pay and the IRS Electronic Federal Tax Payment System) to ensure wide access to electronic payment methods. IRPAC looks forward to IRS's future implementation of electronic levy and remittance options as these will be beneficial to IRS, employers and payroll service providers.

## **F. Expansion of IRS Direct Pay Program for Estimated Individual Income Tax Payments**

### **Recommendation**

IRPAC recommends the IRS let individual income taxpayers pay their individual income tax estimates for multiple years through the Direct Pay program.

### **Discussion**

The IRS has a website called Direct Pay that lets individual income taxpayers pay their individual income tax estimate payments online. The Direct Pay website is very user-friendly for individual income taxpayers and results in more timely payments of taxes by taxpayers.

The website does not let an individual taxpayer pay an individual estimated income tax payment (Form 1040-ES) after January 31 of the year the tax return is due until after the tax return has been filed and accepted by the IRS. For example, individual taxpayers can pay their individual income tax (1040-ES) estimate payments for the 2017 tax year until January 31, 2018, using the Direct Pay website. After that date, no further estimated payments for individual income taxes can be made for the 2017 tax year until the tax return is filed and accepted by the IRS. The result is that taxpayers are unable to make an online payment for several months (February 2018 until the tax return has been filed and accepted by the IRS). Many months can go by without any payments being made because the tax returns have not been filed and accepted by the IRS. Suspending payments by the taxpayer until the tax return is filed and accepted results in the taxpayer incurring additional penalties for late payment. By letting the taxpayers select the tax years for estimated income tax estimate payments on the Direct Pay website, the taxpayer can continue making estimated tax payments and reduce these penalties.

#### **G. Shrink the tax gap due to underreported cash income Recommendation**

IRPAC recommends that IRS continue to increase public awareness of the current trend of underreporting cash income by helping promote awareness education.

This can easily be done by reaching out to industry organizations such as the National Restaurant Association and the American Association of Cosmetology Schools, which have a constituency that reaches out to millions of cash-paid taxpayers.

The promotion of current IRS training videos online such as the Small Business Taxes: The Virtual Workshop should be used in the quest to build educational tax awareness. IRPAC still recommends that these video training programs be revised and updated. The *business income* segment was updated five years ago. IRPAC also continues to recommend adding a special segment *Reporting Cash Income* to be included in this component of online training videos. In addition to benefiting the IRS by potentially collecting additional revenue, we believe that the videos should stress the benefits of reporting cash-paid income to individual taxpayers, which could include the potential for increased Social Security benefits, qualifying for the Earned Income Tax Credit and increased access to credit.

## **Discussion**

IRPAC recommends the IRS relook at shrinking the tax gap due to our current cash economy and improperly underreported cash income amongst numerous key professions/individuals known for receiving cash income such as bail bonds, car washes, check-cashing establishments, coin-operated amusements, cosmetologists, hair salons, laundromats, massage salons, nail shops, scrap metal businesses, restaurants, taxicab services and waiters/waitresses.

During 2005-2007, IRPAC made a recommendation aimed at shrinking the tax gap due to the cash economy. As a result, reporting on Form 1099K Payment Card and Third Party Network Transactions was instituted. IRPAC is aware of the growing tax gap and recommends updating and revising the IRS's current online training Small Business Taxes: The Virtual Workshop. In 2017, IRPAC made a similar recommendation to shrink the tax gap due to the cash economy, which was recognized by multiple groups within the IRS.

IRPAC believes this Workshop to be a useful tool and a source of training available to small business owners and individuals getting paid predominantly in cash. The program needs to be brought up-to-date. Once the program has been updated, a simple outreach to the many industry organizations via an IRS NPL public announcement, along with directly targeted emails to key industry organizations that contain businesses and individuals who are typically paid in cash can be used to bring new awareness of their reporting obligations.

IRPAC believes that this will build communication with small businesses and individuals who receive much of their income in cash. Due to IRS budget constraints, updating this existing Workshop will allow for cost-effective, continued and much-needed education and training that could influence a reduction of non-reported cash income.

### **H. Implementation of the New Backup Withholding Rate and Revised CP-2100/2100A Recommendation**

IRPAC recommends that the IRS issue a revised Form W-9 to reflect the revision of the backup withholding rate from 28% to 24% as the rate change was effective for the 2018 tax year.

IRPAC recommended that IRS issue a communication to clarify that payors who computed tax year 2018 backup withholding at the 28% rate before IRS's revision of Form W-9 reflecting the correct 24% rate need not refund the payee for any over-withheld amounts. IRPAC acknowledges that the IRS is developing communications to

issuers of Forms 1099 that will include instructions on what to do if they over-withheld backup withholding taxes.

IRPAC recommended that the IRS issue a revised Notice Number CP-2100/2100A to reflect the revision of the backup withholding rate from 28% to 24% as the rate change was effective for the 2018 tax year and to incorporate other changes to make the document clearer and more readable. IRPAC commends the IRS for taking steps so that the September 2018 Notice to the recipients was changed to reflect the current backup withholding rate of 24%.

## **Discussion**

Public Law No. 115-97, often referred to as the Tax Cuts and Jobs Act (TCJA), was enacted on December 22, 2017, and provided a reduction in the backup withholding rate from 28% to 24% effective for the 2018 tax year. The tax rate change should be reflected on the Form W-9 for tax year 2018. Although the rate change was effective January 1, 2018, IRS targets the issuance of the revised Form W-9 for October 2018, as seen in a published draft of the Form W-9, due to the very high workload required by IRS to implement other provisions of the TCJA.

IRPAC does acknowledge that, while the Form W-9 has contained the outdated rate, IRS has taken numerous steps to communicate the change to the backup withholding rate to the payor and practitioner communities (e.g., updates to the [irs.gov](http://irs.gov) webpage, tax tips news releases, social media posts and updates at practitioner events and tax forums). However, in some instances, payors, especially those overseas or with less tax knowledge regarding the TCJA, may not have realized quickly enough the change in the backup withholding rate during the beginning of 2018.

IRPAC recommends that IRS issue a communication to clarify that payors who relied on the 28% backup withholding rate for tax year 2018 before IRS's correction of Form W-9 need not refund the payee for any over-withheld amounts. While payees should seek a refund of any over-withheld amounts when filing their 2018 tax return, payees may, nevertheless, demand refund from payors. IRPAC recommends that the IRS issue communication to confirm that payors need not refund such amounts. Such communication would reduce payor burden and help avoid confusion and controversy between payees and payors over the process for refunding any over-withheld taxes.

IRPAC commends the IRS for seeking input from the tax practitioner community regarding revisions to Notice Number CP-2100/2100A. Revisions included the change to the 2018 tax year backup withholding rate, which was implemented for the September 2018 mailings to taxpayers. IRPAC recommends that future revisions to the CP-2100/2100A Notice should include steps to make the CP-2100 more understandable, to clarify the steps that the payor needs to take regarding Form 1099

errors related to taxpayer identification number (TIN) and/or name and to specify the consequences should the payor receiving a CP-2100 fail to act. IRPAC acknowledges the heavy workload facing IRS due to TCJA changes and the programming efforts required to modify the CP-2100/2100A. IRPAC notes that while it is unfortunate that all of the recommended revisions to the CP-2100/2100A will not be in place until September 2019, we commend the IRS for making the withholding rate change this year.

## **I. 1099MISC Non-Employee Compensation Recommendation**

IRPAC recommends the IRS consider reinstating Form 1099-NEC so that non-employee compensation can be reported on a form other than Form 1099-MISC, which reports other income items with a deadline that is different than the deadline applicable to non-employee compensation.

### **Discussion**

Non-employee compensation has historically been reported in Box 7 of Form 1099MISC. The Path Act of 2015 accelerated the due date of non-employee compensation to January 31 while all other boxes on the form kept the filing deadline of March 31. This created several logistical challenges for both the IRS and the tax reporting industry as a whole.

Having one form with multiple due dates created data extract challenges for many large institutions that had a business need to segregate filings between non-employee compensation payments and all other payment types reported on Form 1099MISC. This significantly complicated the corrections filing process as it relates to the corrections penalty tiers that are increased 30 days after a forms due date.

Additional burden was placed on filers when the IRS issued notice 2017-51 on December 22, 2017, that stated if forms reporting non-employee compensation are filed with other 1099MISC payment amounts after January 31 that action could subject filers of such forms that are otherwise compliant into a penalty situation under Internal Revenue Code Section 6721.

Years ago, non-employee compensation was reported on a separate form, known as Form 1099-NEC. This form was then retired. IRPAC recommends that if the IRS has the available resources it considers resurrecting Form 1099-NEC with the intent to report non-employee compensation on a form different than the Form 1099-MISC. IRPAC recommends this development to resolve the problems outlined above.

The implementation of a new form type is something that requires significant investment by industry. It is critical that industry be given visibility into the development status of any new (or reissued) form to forecast the development investments that will

need to be made in the private sector to comply with the form. In addition, it is critical that filers be given enough time to revise programming to meet the requirements of any new form.

IRPAC recommends that the IRS remain engaged with the various advisory committees on addressing the issues faced by filers when using a single form that reports different types of income that have different furnishing and filing deadlines. IRPAC urges the IRS to keep filers aware of developments and seek input into any drafts it might develop so that any potential reporting challenges can be identified and resolved as efficiently as possible.

**Information Reporting Program Advisory Committee**

**Emerging Compliance Issues Subgroup Report**

**Tenesha Carter, Subgroup Chair**

**Deborah Fox**

**Sanford Kelsey**

**Mas Kuwana**

**Joel Levenson**

**Ryan Lovin**

## Emerging Compliance Issues Subgroup Report

The Emerging Compliance Issues (ECI) subgroup would like to thank the IRS for addressing several issues during the year. While some of these items were initiated by ECI, others were a result of feedback provided by the subgroup after solicitation from the IRS. To resolve these issues, the IRS:

- Implemented several suggestions provided by ECI and the Employer Information Reporting and Burden Reduction (EIRBR) subgroups regarding updates for Form 668A, Notice of Levy, when attaching to funds in Retirement Plans. See section A. below for more information on this.
- Issued Notice 2018-58 announcing their plan to issue regulations clarifying several matters including amounts recontributed to 529 plans. See section B. below for more information on this.
- Plans to update the box 9 information in the 2019 (and beyond) Instructions for Form 1099B to correct the tax year being referenced. Additionally, because the issue was present in the 2017 and 2018 Instructions, a Recent Development Article, dated June 21, 2018, was posted on the 1099B homepage to notify taxpayers of the update.
- Has agreed to update the Scholarships section of the Instructions for Form 1099-Misc to clarify that taxable scholarships or fellowship payments do not have to be reported by the issuer to the IRS on any form unless IRC §6050S applies.
- Accepted feedback regarding the correction of formatting and grammatical issues present on Form 1096, Annual Summary and Transmittal of U.S. Information Returns.

ECI would also like to thank the IRS for providing guidance on §6050W Returns Relating to Payments Made in Settlement of Payment Card and Third Party Network Transactions, especially for the provided definitions of key terms integral to the meaning of *third-party payment network*. The FAQs on this and related topics that were released between 2015 and July 2018 effectively addressed items that had been requested by IRPAC for the past several years.

In a year where tax reform was obviously the priority, the resolution and/or quick response to these items was greatly appreciated.

## A. Retirement Plan Levies

IRPAC was asked by the IRS Small Business and Self-Employed Division (SB/SE) to provide input regarding what issues need to be addressed regarding the levy of certain retirement plan account assets, which occur on Form 668-A.

As background, qualified retirement plans are not generally permitted to allow benefits to be assigned or alienated. However, there is an exception for federal tax levies and judgments. See Treas. Reg. 1.401(a)-13(b)(2). Further, when the IRS does levy assets in a retirement account, there is an exception from the tax on early distributions so that the 10% penalty does not apply. See IRC section 72(t)(2)(A)(vii). This exception only applies when the IRS directly levies the assets, not when the participant him or herself requests a plan loan or hardship distribution to pay the tax owed. Two IRS memoranda — Field Service Advice Memorandum 199930039 and Chief Counsel Advice memorandum 199936041 — provide additional background regarding the IRS's views on levying retirement assets. The Internal Revenue Manual (IRM) in section 5.11.6 Notice of Levy in Special Cases provides additional guidance regarding when the IRS will levy retirement account assets.

In response to SB/SE's request for feedback, IRPAC compiled the following issues and suggestions for consideration.

- **Receipt of incorrect forms** – The industry often receives forms where the box that specifically required to levy retirement account assets is not signed or an incorrect series of Form 668 is provided (such as Form 668-W for wages).
- **Inconsistent appearance of forms** – The form mentions the signature box to be used if the levy will include retirement accounts; however, some forms issued (examples were provided to the IRS) do not have a box despite having the same title and revision date as a version provided to IRPAC for review.
- **Issuance to correct parties** – Levies directed at retirement accounts should be directed to the retirement plan's current trustee. However, they are often misdirected to entities such as the retirement account record-keeper, a former trustee for the retirement plan or a non-existent entity. (i.e., the organization listed in the *To* field is not the name of the legal entity that acts as trustee of the accounts).
- **Infrequency of retirement related attachments** – Because it is a rare occurrence for many financial institutions to receive levies attaching retirement accounts, there is higher risk of the process being handled improperly or details being missed.
- **Insufficient Time and Resources** -
  - Levies are often sent to an incorrect address, which may cause delays in getting to the correct department or organization.
  - Levies are received and processed manually (including the need for a processor to investigate any of the previously mentioned issues); this requires significant time.

- Responsiveness issues have been reported when trying to resolve levy issues with the IRS.

## **Recommendations**

To address the above issues, IRPAC made the following recommendations:

- The IRS should review its processes to ensure that the correct series of Form 668-A is being used.
- The IRS should limit the most currently revised Form 668-A to one version to prevent inconsistency.
- The IRS should use Form 5500 — which is filed publicly with the Department of Labor — to ensure that the Form 668-A is sent to the appropriate address and properly identifies the plan’s current administrator.
- Because attachments to retirement accounts are not as common, a separate version of the Form 668-A should be developed for this specific purpose.
- If the IRS begins to levy retirement accounts with greater frequency, then the industry and IRS should remain in close contact regarding the timing and volume of such levies. This will ensure the industry has sufficient resources available to handle additional manual processing and that there is good communication to resolve any issues that arise.
- The IRS should change verbiage on the form regarding retirement account attachments to an affirmative, as opposed to a negative, statement. For example, instead of reading:
  - “This levy won’t attach retirement account funds unless the block to the right is signed” the Form 668 could instead read:
  - “If the block to the right is signed, this levy attaches retirement account funds.”
- The Form 668-A should implement the inclusion of a checkbox when applied to retirement funds.
- The Form 668-A should bold the instruction that indicates this is being treated as flagrant behavior.

## **Discussion**

At the April IRPAC meeting, the representatives from SB/SE and IRPAC had a very productive discussion regarding these issues. IRPAC provided the IRS with the above description of our concerns, issues and suggestions on the current process for levy attachment to retirement plans. In particular, the IRS indicated that they found the suggestions to be sensible and committed to look into how to implement them:

- The IRS committed to ensuring that collections agents use the correct forms. In particular, they liked the idea of a separate levy form for retirement accounts to reduce confusion.

- As the Tax Cut and Jobs Act resulted in updates to all the levy forms, the IRS committed to taking the opportunity to update the Form 668-A.
- The IRS acknowledged that multiple versions of the same levy form have been in use, and they are to simplify to one version of the form.
- The IRS committed to look into procedures to perfect the source of the information rather than looking only at 1099 information that may be stale. As IRPAC recommended, this may include procedures to look at Form 5500.

The IRS indicated that the next step for their team is to decide upon a course of action with respect to IRPAC's recommendations and to prepare an associated implementation plan. IRPAC was cautioned that a new form would take time to develop and publish, but that IRPAC will be given the opportunity to review a draft when it is available. IRPAC and its industry partners committed to monitoring, and to reporting back to the IRS through IRPAC, any changes to retirement account levies and Forms 668-A that we encounter. IRPAC looks forward to continuing this discussion with the IRS as the Form 668-A and retirement account levy program is refined.

## **B. Section 529 Plans and the PATH Act**

### **Recommendations**

The Protecting Americans from Tax Hikes Act of 2015 (the PATH Act) included many enhancements to section 529 plans.

First, IRPAC thanks the IRS for responding to the late-year enactment of the PATH Act by quickly providing much needed transition relief with respect to 2015 tax reporting in Notice 2016-13.

Second, the industry requested guidance on the new ability for section 529 plan account owners to recontribute refunded amounts. Before the PATH Act, an account owner who withdrew money from a 529 plan, paid for a qualified higher education expense and then received a refund for that expense (for example, if a student was forced to withdraw from school due to illness) would have had to treat the withdrawal as nonqualified, which would have resulted in income inclusion and penalties. The PATH Act added a new subsection, Code section 529(c)(3)(D), which lets a beneficiary recontribute a withdrawn amount to a 529 plan, up to the refunded amount, without incurring income inclusion or penalties, provided the amount is recontributed within 60 days of the date of the refund. The Code uses the term *recontribution*, but it does not directly address the characterization of the contribution.

The industry recommended that the IRS provide guidance on several issues related to recontributions:

1. The industry requested guidance regarding whether an amount that is recontributed to a 529 plan should be treated (i) as a new contribution or (ii)

divided into an earnings portion and a return of investment portion, based on the earnings ratio applied to the amount originally distributed.

2. If the IRS determined that a recontribution should be treated as being divided into an earnings portion and a return of investment portion, then certain additional questions would require guidance. In particular:
  - a. Should a recontribution that is directed into a different investment option than when it was distributed count as an investment change? Under Code section 529(b)(4), an account owner may not exchange amounts (any contributions and any earnings thereon) from the current investment option(s) to a different option(s) more than twice in any calendar year.
  - b. Should a new plan administrator that receives a recontribution from an account owner treat the entire recontribution as earnings in the absence of documentation from the account owner? An amount that is recontributed to a 529 plan with a different plan administrator from the plan from which the distribution was taken would require the new plan administrator to rely on the account owner to provide a statement issued by the distributing 529 program, showing the earnings portion of the distribution, so that the principal and earnings may be properly recorded. Absent such records, the plan administrator would not have the ability to determine the amount that is required to be treated as earnings.
  - c. What default ordering rule should be applied where a beneficiary has multiple 529 plan accounts and the beneficiary receives distributions from more than one 529 plan and then receives a refund of qualified education expenses relating to those distributions?

## **Discussion**

IRPAC would like to thank the IRS for addressing these issues in Notice 2018-58. Notice 2018-58 announces that the IRS plans to issue regulations clarifying matters relating to, among other things, the administration of amounts recontributed to section 529 plans. The Notice specifies that, until IRS issues proposed regulations, taxpayers, beneficiaries and administrators of 529 plans may rely on the rules described in the Notice. IRPAC and 529 plan industry participants look forward to reviewing the proposed regulations and, where necessary, to continuing to discuss these issues.

The intention of the IRS, as described in Notice 2018-58, is to issue regulations that will provide that the entire recontributed amount will be treated as principal, rather than requiring a portion to be treated as earnings, based on the amount that represented earnings when distributed. The Notice is clear that the IRS is implementing this rule of administrative convenience to eliminate the burdens associated with determining the earnings portion. Under this guidance, the recontributed amount will not

count against the contribution limit applicable to the beneficiary, because the amount will already have been taken into account when it was originally contributed to the 529 plan. Given that a beneficiary may have more than one 529 plan account, the Notice also clarifies that the re-contribution does not need to be made to the same account from which it was distributed. The re-contribution must, however, be made to an account for the same beneficiary who received the distribution.

Because the IRS intends to treat recontributions as principal, the additional questions raised above do not need to be addressed in guidance.

### **C. IRC § 6050S and Form 1098-T Reporting Recommendations**

IRPAC would like to thank the IRS for updating the Form 1098-T instructions to provide helpful guidance to educational institutions. The instructions were updated to clarify that institutions who change their reporting method to *Payments received* do not have to complete box 4 *Adjustments Made for a Prior Year* until the institution reimburses or refunds an amount that was previously reported as an amount paid.

IRPAC continues to make the following recommendations concerning Internal Revenue Code §6050S, the related Treasury Regulations and their effect on IRS Form 1098-T reporting:

3. As noted in the 2016 and 2017 IRPAC Public Reports, the Committee continues to recommend the following amendments to the Proposed Regulations included in the Notice of Proposed Rulemaking (REG-131418-14):
  - a. Retain the exemption to reporting Form 1098-T, Tuition Statement, for non-resident alien students by reinstating Treasury Regulation § 1.6050S-1(a)(2)(i).
  - b. Remove the requirement to report the number of months a student was a full-time student by deleting Proposed Treasury Regulation §1.6050S-1(b)(2)(ii)(I).
  - c. Let institutions report on Form 1098-T how payments are actually applied to students' accounts by revising Proposed Regulation § 1.6050S-1(b)(2)(J)(v) to read, "Payments received for qualified tuition and related expenses determined. For purposes of determining the amount of payments received for qualified tuition and related expenses during a calendar year, institutions may choose to report payments applied to charges in a manner that reflects the payment application in the institution's student account system. Alternatively, institutions may use a safe harbor method and report payments received with respect to an

individual during the calendar year from any source (except for any scholarship or grant that, by its terms, must be applied to expenses other than qualified tuition and related expenses, such as room and board) are treated first as payments of qualified tuition and related expenses up to the total amount billed by the institution for qualified tuition and related expenses for enrollment during the calendar year, and then as payments of expenses other than qualified tuition and related expenses for enrollment during the calendar year. Payments received with respect to an amount billed for enrollment during an academic period beginning in the first 3 months of the following calendar year are treated as payment of qualified tuition and related expenses in the calendar year during which the payment is received by the institution. For purposes of this section, a payment includes any positive account balance (such as any reimbursement or refund credited to an individual's account) that an institution applies toward current charges.”

## **Discussion**

IRC § 6050S and the related Treasury Regulations require the reporting of information to help taxpayers claim an education credit or deduction. This information is reported on IRS Form 1098-T. Qualified tuition and related expenses for Form 1098-T reporting purposes mirrors the definition found under the education credits of IRC §25A. Generally, qualified tuition and related expenses means tuition and fees required for the enrollment or attendance at an eligible educational institution for courses of instruction at such institution.

For transactions occurring during calendar year 2018, information required to be reported in 2019 and in subsequent years includes:

- The name, address and Taxpayer Identification Number (TIN) of any individual who is or has been enrolled at an eligible educational institution,
- The aggregate amount of payments received for qualified tuition and related expenses,
- The aggregate amount of grants or scholarships received by such individual for payments of costs of attendance that are administered and processed by the institution,
- The amount of any adjustments to the aggregate amounts of previously reported payments received for qualified tuition and related expenses or grants and

- The Employer Identification Number (EIN) of the eligible educational institution.

Before calendar year 2016, institutions had the option of reporting the aggregate amount billed for qualified tuition and related expenses or the aggregate amount of payments received for qualified tuition and related expenses. Protecting Americans from Tax Hikes of 2015, P.L. 114-113, removed the option for institutions to report the aggregate amount billed for qualified tuition and related expenses. The Higher Education Industry and IRPAC are grateful to the IRS for penalty relief granted under IRS Announcements 2016-17 and 2016-42 for institutions that continued to report on the amounts billed basis. Educational Institutions and IRPAC understand that the amounts billed reporting basis will no longer be an option for the 2018 calendar year to be reported in 2019.

Notice of Proposed Rulemaking (REG-131418-14) was published into the Federal Register on August 2, 2016. Included in this notice are multiple changes to Form 1098-T reporting. IRPAC's concerns with the proposed regulations are:

1. By removing the exception to reporting on Form 1098-T for non-resident aliens, there will be a large increase in Forms 1098-T to be produced, which will not yield a materially higher number of correctly claimed education credits. Institutions, taxpayers and the IRS will face increased costs with processing and interpreting these forms, where there is generally no benefit. Currently, a nonresident alien may require an institution to report a Form 1098-T by requesting one. It is important to note that non-resident aliens are only eligible for education credits when:

- The non-resident alien is married and chose to file a joint return with a U.S. citizen or resident spouse
- The non-resident alien is a dual-status alien, and chose to be treated as a U.S. resident for the entire year.

2. For many institutions, the office processing the information currently required on Form 1098-T operates as a billing/collections office. This office contains information on charge types, but does not have information on dates of semesters. By requiring the number of months that a particular student was a full-time student to be reported on Form 1098-T, institutions will be required to implement a manual process to report accurate information. Further, institutions will be required to update systems to ensure that accurate information is reported and shared between offices securely.

3. By implementing a *payment application assumption*, institutions may be forced to have dual-student account information reporting. For example, if an institution did not program their payment application system to meet the IRS standards included in the

notice of proposed rule-making, they would be forced to maintain one system for actual payment applications and one for tax reporting purposes. In this situation, if a student were to verify their Form 1098-T to the actual student account, there would be discrepancies between the sources of information.

#### **D. Inclusion of Adjusted Gross Amount for Reporting on Form 1099-K**

##### **Recommendation**

IRPAC recommends that the IRS require payors to report the adjusted gross amount of payment/third party network transactions. To support the additional reporting requirement, the IRS should also modify Form 1099-K to include a box to report the total adjusted gross amount and to use the existing Boxes 5a-5l to report adjusted gross amounts paid for each month of the calendar year. The IRS is encouraged to solicit information from interested stakeholders to identify adjustments that are most common and most likely to produce information reporting that is more reliable and more reflective of taxable income.

##### **Discussion**

Enacted in 2008, Internal Revenue Code Section 6050W requires payment settlement entities and electronic payment facilitators to report Forms 1099-K to payees unless the de minimis exception applies. Section 6050W requires the payor to report the gross amount, which Reg 1.6050W-1(a)(6) defines as a gross amount that is not adjusted for credits, fees, refunds or any other amounts. As a result, Form 1099-K reports gross unadjusted amounts that may or may not represent taxable income and provide the IRS and the taxpayer with little transparency into the amounts reported, including whether the amounts are taxable.

To promote transparency and maximize the value of tax information reporting, IRPAC encourages the IRS to require payors to report the adjusted gross amount of payment/third-party network transactions. Changing the tax reporting requirements to include adjusted gross amounts will produce information reporting that is more reliable and more likely to represent a clearer and more accurate representation of taxable income.

Through this change, IRPAC believes that the enhanced tax reporting will help the taxpayer calculate taxable income and will provide the IRS with additional transparency into the amounts paid to the taxpayer.

## **E. Treatment of Liquidating Distributions Paid by Mutual Funds**

### **Recommendations**

When a Regulated Investment Company (RIC) that is taxed under Subchapter M of the Code makes a complete liquidation in redemption of all holders' interest in the fund, the Form 1099 reporting requirements are unclear.

The mutual fund industry, through the Investment Company Institute, has long recommended that the IRS (i) clarify whether RIC liquidating distributions are subject to cost basis reporting and, (ii) if so, amend Forms 1099-B and 1099-DIV, and the accompanying instructions, to specify that liquidating distributions by RICs should be reported on Form 1099-B so that brokers can properly report cost basis information for such distributions.

### **Discussion**

The IRS and IRPAC had a preliminary discussion of these issues at the August 2018 meeting. To discuss the issue in the appropriate detail, IRPAC committed to providing the IRS with additional written materials for the IRS to review and discuss with IRPAC at a future meeting. IRPAC looks forward to working with the IRS on this issue to ensure (i) that RIC investors receive the cost basis reporting to appropriately meet their tax obligations and (ii) consistent industry practice.

## **F. Tax Identification Number Identity Theft Resulting in False Forms 1099**

### **Recommendation**

With increased incidents of identity theft, IRPAC recommends that the IRS provide issuers of forms in the 1099 series and taxpayers with additional mechanisms to report suspected cases of identity theft. Specifically, IRPAC makes the following recommendations:

- Update forms to include a checkbox or other indicator for the payor to report that the recipient may be the victim of identity theft and
- To reinforce the process for reporting that the taxpayer is a victim of identity theft, the IRS should modify the form instructions to refer the recipient to Form 14039 (Identity Theft Affidavit).

To the extent that the IRS updates forms to include a checkbox or other indicator to report that the income may be the result of identity theft, IRPAC also recommends that

the IRS promulgate rules that provide payors with penalty relief for filing corrected returns after the reporting deadlines.

## **Discussion**

An individual or entity that is required to file an information return with the IRS must generally have a tax identification number (TIN) for the recipient. The IRS publishes Form W-9, Request for Taxpayer Identification Number and Certification, for use by U.S. persons to provide a correct TIN. Form W-9 also requires certification under penalties of perjury that, among other things, the TIN is correct and belongs to the certifier. Failure to provide the correct TIN and certification could result in backup withholding, penalties and/or imprisonment. Even with these consequences, the IRS acknowledges in the Form W-9 Instructions that this may not deter an identity thief from using someone else's TIN, without permission, to commit fraud or other crimes. As such, the IRS instructs taxpayers to take practical steps to protect their TIN and to report suspected identity theft on Form 14039, Identity Theft Affidavit.

An information return issuer's regulatory obligation to file information returns does not account for instances when the information reported is subject to a claim from the recipient that such information was reported under a TIN subject to identity theft. Further, completing Form 14039 to mark an account to identify questionable activity does not alone relieve an individual or entity from its obligation to file a related information return. Meeting this filing obligation often results in the recipient and IRS expending time and resources rebutting information provided on such returns; notwithstanding TIN theft notification to the information return issuer and timely completing Form 14039 with the IRS.

In its 2018 Annual Report, the Information Sharing and Analysis Center (ISAC) encourages real-time sharing of threats and other fast-moving suspicious activities. In the report, ISAC provides that a key initiative for ISAC is to facilitate information-sharing about incidents, patterns, tactics and emerging schemes. IRPAC also recognizes the need to contemporaneously share and acknowledge TIN identity theft notifications that information return issuers receive. Accordingly, as part of its comprehensive efforts to combat tax identity theft, IRPAC recommends that the IRS also implement a process that lets an individual or entity required to file an information return alert the IRS when an information return required to be filed is subject to a TIN identity theft claim by the recipient.

These changes would let issuers of the forms continue to meet their information reporting obligations while at the same time acknowledging and providing documentation of the claim to form recipients. Concurrently, the new process and checkbox would prevent the IRS from spending time and resources investigating what should be identity theft claims as underreporter issues.

## **G. Combined Federal State Filing Program**

### **Recommendation**

IRPAC continues to recommend the IRS make updates into the Combined Federal State Filing (CF/SF) Program by making information returns filed through the program available to the state(s) earlier in the year and on a more frequent, if not real-time basis.

### **Discussion**

The CF/SF Program is an information-sharing service offered by the IRS to payors of Forms 1099-B, 1099-DIV, 1099-G, 1099-INT, 1099-K, 1099-MISC, 1099-OID, 1099-PATR, 1099-R and 5498. Participating states are automatically forwarded original and corrected information returns that are filed electronically with the IRS.

Several states have discontinued their participation in the CF/SF program. In the 2017 tax year, only 31 states participated, which was down from 33 in 2014. Of the 31 states still participating, 15 have instituted their own separate reporting requirements with more states following. The primary reasons given for non-participation or separate filing requirements is the delay in and infrequency of the passage of information from the IRS to the states.

Payors who are subject to separate reporting requirements by the states are experiencing increased burden in several ways:

- There are disparate processes between the IRS and states including formatting rules, due dates and electronic filing requirements.
- Many small and medium businesses rely on the IRS as their source of information, not having in-house tax or legal departments.
- Increasingly, states are requiring electronic-only filing of such informational returns regardless of the federal guideline of 250 forms.
- States do not automatically honor extended-filing due dates a payor may have obtained from the IRS

The PATH ACT, enacted by Congress in December 2015, advanced the due date for employers to report wage information on Forms W-2 to the IRS and the Social Security Administration (SSA) from the end of February (or March if filing electronically) to January 31. This change also applied to reporters of non-employee compensation (NEC) on Form 1099-MISC. Many states have followed suit and moved their dates forward to January 31 to coincide with federal guidelines.

Although the filing date for Forms W-2 and 1099-MISC reporting NEC is now January 31, the first remittance of a CF/SF file drop for the states does not occur until April, with five other remittances occurring later in the year. This delay in the forwarding of information is the major reason many of the states are requesting payors to file directly with the state taxing authorities.

In ECI's discussions with the IRS, the main reason for the delay in the first distribution of data and the infrequency of subsequent distributions is the lack of funding and resources. Though IRPAC appreciates the difficulties this creates for the IRS, we feel improving the process of information sharing with states to reduce the burden on employers and payors should remain a priority.

## **H. Certified Acceptance Agent Compliance Review Letters Recommendations**

IRPAC recommends the ITIN Policy Section update their compliance review letters to inform a Certifying Acceptance Agent (CAA) of their ability to respond to or disagree with the findings listed in the letters.

Further, IRPAC recommends the ITIN Policy Section give at least 45 days for a CAA to respond to a compliance review letter. The additional time will permit a CAA to review the letter and respond to the proposed findings.

### **Discussion**

The ITIN Policy Section and IRPAC discussed procedures in place for a CAA compliance review during our June meeting. IRPAC agreed to review the letters sent to CAAs at the end of a review and suggest any edits, if necessary. After reviewing the letters, IRPAC suggested the ITIN Policy Section give additional time for CAAs to adequately respond to the findings included in a compliance review letter. Additionally, IRPAC suggested some language to include in each of the letters that would better inform a CAA of their right to respond to the findings of the review.

**Information Reporting Program Advisory Committee**

**International Reporting and Withholding Subgroup Report**

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## **International Reporting and Withholding Subgroup**

The following are the principal issues that have been discussed between the International Reporting and Withholding (IRW) Subgroup of IRPAC and the IRS. For convenience, the recommendations have been grouped according to topic.

### **A. Qualified Intermediary Agreement (Rev. Proc. 2017-15)**

#### **Recommendation A.1 - Validity Period of Documentary Evidence**

IRPAC continues to recommend that the IRS provide further details regarding its consideration of applying a three-year validity period to documentary evidence obtained by a Qualified Intermediary (QI) in support of an account holder's claim for treaty benefits to give industry time for further comment regarding appropriate recommendations.

#### **Discussion**

Section 4.08 of the preamble to the QI Agreement provides as follows:

“The Treasury Department and the IRS are considering applying the same three-year validity period to documentary evidence obtained (by) QIs supporting an account holder's claim for treaty benefits to align with the validity period of the treaty statement.”

To support an account holder's claim for treaty benefits, a QI may obtain either documentary evidence detailed on the KYC jurisdiction attachment to the QI agreement or under Treas. Reg. §1.1441-6. Such documentary evidence includes passports or other governmental issued identification documents for individuals and formation documents for entities.

Certain forms of documentary evidence, such as certificates of incorporation, lack natural expiration dates, while other forms of documentary evidence, such as passports, have extended periods of validity. For example, a passport is generally valid for 10 years. Under the existing QI Agreement, the treaty statement is only valid for three years.

It is unclear as to the benefit the IRS would obtain by requiring the account holder to resubmit, every three years, new copies of the documentary evidence previously provided to the withholding agent in scenarios where such documentary evidence either does not have a prescribed expiration period or where such expiration

date has not been reached. In addition, under Treas. Reg. §1.1441-1(e)(4)(ii)(B), there are certain circumstances where documentary evidence will remain valid indefinitely. It would seem contradictory to apply an expiration period to documentary evidence within the QI agreement when the regulations specifically provide indefinite validity for those forms of documentary evidence lacking a natural expiration date. Subjecting otherwise valid documentation to expiration creates an undue burden on both the account holder and the withholding agent. As such, IRPAC continues to recommend that the IRS provide additional insight into its consideration of applying a three-year validity period to documentary evidence and further requests the opportunity for affected parties to make additional recommendations as applicable.

## **Recommendation A.2 – Electronic Provision of Documentation**

IRPAC recommends that the IRS review the various QI Attachments to consider whether the requirement that documentary evidence provided remotely by an account holder be a certified copy is still necessary and to modify the QI Attachments to incorporate the electronic delivery provisions included in the regulations.

### **Discussion**

Treas. Reg. §1.1441-1T(e)(4)(iv)(D) generally permits a withholding agent to rely on a Form W-8 and/or documentary evidence that is provided by facsimile or email. With respect to documentary evidence obtained from account holders by a QI, the rules associated with the receipt and reliance of such documentary evidence are governed by the applicable QI Attachment for the specific country in which the QI operates.

While each QI Attachment is country-specific, the various attachments generally contain similar requirements regarding collection and reliance on documentary evidence. For example, item 5(ii) of the QI Attachment for the United Kingdom reads as follows:

“QI may obtain a photocopy of the specific documentary evidence listed in item 4 by mail or otherwise remotely from the account holder or a person acting on behalf of the account holder, provided that the photo copy has been certified as a true and correct copy by a person whose authority to make such certification appears on the photocopy, and provided that the laws and regulations listed in item 1 permit QI to rely on the certified photocopy to identify the account holder.”

The phrase, *by mail or otherwise* may well be interpreted to permit electronic delivery in a manner consistent with the regulations, although it would be helpful to have greater clarity on this. Moreover, the requirement for a *certified copy* of the documentary evidence seems to go beyond the requirements of the regulations, and

thereby imposes a *greater* burden on a QI regarding the collection of documentary evidence than for other withholding agents. While IRPAC realizes that a modification of the provisions may be limited by local AML/KYC regulations, IRPAC's understanding is that there may have been modifications to local law and local practice since the time that the QI Attachments were originally issued and/or subsequently modified.

AML/KYC regulations, which are stringently required in the banking industry, do not require certified copies of documentation when banking clients are establishing new accounts. IRPAC believes it is universally agreed that the need, which AML/KYC primarily addresses, that being combatting money-laundering by terrorist or other criminal elements, is regarded as substantially of greater importance to the welfare of society than tax evasion. Accordingly, IRPAC asserts that the requirements for a QI to document a recipient of a withholdable payment should only be as stringent as those applied for purposes of AML/KYC, especially as the population to which the QI rules apply is never larger than those applicable for AML/KYC. Thus, governmental standards readily exist that could be easily adopted by the IRS and Treasury in meeting these needs.

Given this passage of time, IRPAC recommends that the IRS review the QI Attachments to consider whether the certified copy requirement is still necessary and to modify the QI Attachments to incorporate the electronic delivery provisions of the regulations.

### **Recommendation A.3 – Joint Account Certifications**

IRPAC requests that the IRS accept a valid Form W-8IMY for purposes of a partnership or trust certifying to a QI that the partnership or trust maintained a permissible Chapter 4 status at all times during the certification period as this certification is a prerequisite for the QI to be able to apply the joint account provisions.

### **Discussion**

IRPAC would like to thank the IRS for publishing FAQ #11<sup>2</sup> for Qualified Intermediaries/Withholding Foreign Partnerships/Withholding Foreign Trusts following various discussions.

Under section 4.05(A)(1) of the 2017 QI Agreement, a QI is required to obtain a certification from each partnership or trust subject to joint account treatment indicating that the partnership or trust has maintained a permissible Chapter 4 status at all times during the certification period. IRPAC strongly recommended that the IRS let a QI rely on a valid Form W-8IMY for purposes of this determination, as the Form W-8IMY

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<sup>2</sup> See FAQ 11 at the following link: <https://www.irs.gov/businesses/corporations/frequently-asked-questions-faqs-fatca-compliance-legal#CPRQ11>.

specifically includes a jurat signed under penalties of perjury, stating “I agree that I will submit a new form within 30 days if any certification made on this form becomes incorrect.” As such, the QI should be able to rely upon this certification that new documentation would be provided to the extent a status change has occurred. Again, IRPAC would like to thank the IRS for publishing FAQ 11 acknowledging that a valid Form W-8IMY would be sufficient for this purpose.

#### **Recommendation A.4 – Recipient-Specific Form 1042-S Reporting**

IRPAC recommends that the IRS establish a defined deadline for account holders to request payee-specific Form 1042-S from QIs that file pooled Forms 1042-S reporting.

#### **Discussion**

Under Section 8.01 of the QI Agreement, a QI is generally permitted, with certain exceptions, to file Forms 1042-S in Chapter 3 and Chapter 4 reporting pools. However, the QI Agreement permits an account holder to request a payee-specific Form 1042-S from a QI. If a QI has already filed its Forms 1042-S in a reporting pool, it must not only file the payee-specific Form 1042-S, but it must also amend a previously filed Form 1042-S to reduce the amount of the payment reported to reflect the amount allocated to the account holder. Depending when the payee-specific Form 1042-S is requested, the QI may also be required to file an amended Form 1042.

As a practical matter, this can be operationally cumbersome for a QI if it must continually recalculate reporting pools and amend Forms 1042-S that have been filed to accommodate account holder requests. In some instances, this requires the QI to perform this task manually as the systems are already programmed for a subsequent tax year. Also, as there is no time limit on an account holder to request a payee-specific Form 1042-S, an amended return may reopen a closed tax year or prevent a tax year from closing indefinitely.

IRPAC encourages the IRS to consider instituting a deadline for account holders to request a payee-specific Form 1042-S. IRPAC recommends the date be set as August 1 of the following calendar year for Forms 1042-S filed by March 15 (e.g., August 1, 2019, for TY2017 Forms 1042-S filed by March 15, 2018). If a QI does not file a Form 1042-S by March 15, the account holder will have a period of 18 months after the QI files the pooled Form 1042-S by which to make the request.

## **Recommendation A.5 - Section 871(m) Good Faith Efforts by QIs**

IRPAC recommends that the IRS clarify through an FAQ that QIs, as intermediaries, may request and benefit from good faith with regards to Section 871(m) compliance.

### **Discussion**

IRS Notice 2016-76 provides that the IRS will consider the good faith efforts made by a withholding agent regarding the Section 871(m) regulations for delta one transactions (tax year 2017) and non-delta one transactions (tax year 2018). IRS Notice 2017-42 further extended the period in which the IRS would consider the good faith efforts of a withholding agent for such delta one and non-delta one transactions (tax year 2018 and tax year 2019 respectively).

The QI Agreement (Rev. Proc. 2017-15) only specifies good faith in relation to a QI acting as a QDD. Because a QI is a withholding agent, it can be implied that IRS Notice 2016-76 and IRS Notice 2017-42 are applicable. However, because the QI agreement does not specifically address this point, IRPAC recommends clarification of applicability through a FAQ.

IRPAC would like to thank the IRS for publishing FAQ #13<sup>3</sup> on June 6, 2018, addressing such concern and specifying that QIs acting as intermediaries for Section 871(m) transactions may also request and benefit from good faith.

## **Recommendation A.6 - Consolidation of QDD Tax Liability**

IRPAC recommends that the IRS permit a QI acting as a QDD to report its QDD tax liability on a consolidated basis. IRPAC further requests the IRS to clarify why such a consolidation is not presently permitted per the QI agreement.

### **Discussion**

Within the QI Agreement (Rev. Proc. 2017-15), Section 7.01(C), a QI acting as a QDD: "...must report its QDD tax liability on the appropriate U.S. tax return (to be prescribed by the IRS), including separately identifying each part of the QDD tax liability described in section 3.09(A) through (C) of this Agreement separately for the home office and each branch that is acting as a QDD (if applicable)."

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<sup>3</sup> See FAQ#13 at the following link: <https://www.irs.gov/businesses/corporations/frequently-asked-questions-faqs-fatca-compliance-legal#CPRQ11>.

Because separate identification of the QDD tax liability is required for the home office and each branch acting as a QDD, consolidation of such QDD tax liability is not permitted as currently written in the QI Agreement. For purposes of easing operational processes, IRPAC recommends that QDDs be allowed to consolidate their QDD tax liability. In addition, IRPAC requests clarification as to why the QI Agreement does not currently permit a QDD to consolidate its QDD tax liability. IRPAC requests such clarification so that it can better understand the reasoning and possible complexities behind the IRS's requirement for separate reporting so that it may make further recommendations.

## **B. Foreign Account Tax Compliance Act including Section 871(m)**

### **Recommendation B.1 – Curing Hold Mail Addresses**

IRPAC recommends that the standard to cure instructions for a hold mail address used as an account holder's permanent residence address be satisfied by documentary evidence used to establish foreign status as opposed to documentary evidence establishing residence in the country in which the account holder claims to be a tax resident.

#### **Discussion**

Under the Chapter 3 and Chapter 4 regulations, an account holder's permanent residence address is the address in the country of which the person claims to be tax resident. Under Treas. Reg. §§1.1441-1T(c)(38)(ii) and 1.1471-1T(b)(99), a permanent residence address includes instructions for a hold mail address. However, if instructions for a hold mail address are used by the account holder, the withholding agent must be provided with documentary evidence establishing residence in the country in which the account holder claims to be a resident for tax purposes.

The standard for documentary evidence used to cure instructions for a hold mail address is higher than that for curing U.S. status, a U.S. address or a U.S. telephone number. For example, documentary evidence collected to establish foreign status includes government identification, documentation establishing that an entity was created or organized under the laws of a foreign country and certificates of residence, all of which should be sufficient to cure a hold mail address.

## **Recommendation B.2 – Gross Proceeds Withholding**

IRPAC requests delay in the requirement to deduct and withhold tax on gross proceeds and foreign pass-through payments for two years following the issuance of guidance defining the terms.

### **Discussion**

Treas. Reg. §1.1473-1(a)(1)(ii) provides that a withholdable payment includes “for any sales or other dispositions occurring after December 31, 2018, any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends that are U.S. source FDAP income.” Treas. Reg. §1.1471-4(b)(4) provides that “A participating FFI is not required to deduct and withhold tax on a foreign pass-through payment made by such participating FFI to an account held by a recalcitrant account holder or to a nonparticipating FFI before the later of January 1, 2019, or the date of publication in the Federal Register of final regulations defining the term foreign pass-through payment.”

Industry standard generally indicates that withholding systems require approximately two years to design, build, test and implement. Furthermore, given the widespread participation in FATCA with 113 Intergovernmental Agreements (IGAs), withholding agents would likely apply withholding on documentation failures, rather than real non-participating foreign financial institutions (NPFFIs). As such, this will lead to unnecessary withholding resulting in considerable refund claims, thereby placing an additional burden on withholding agents and the IRS. Given this short timeframe, IRPAC requests a minimum of two years following the issuance of guidance further defining the terms.

As part of defining these terms, IRPAC recommends that the IRS restrict withholding to assets otherwise subject to Form 1099-B reporting and to account holders for which there is actual knowledge the account holder is an NPFFI. IRPAC further recommends that actual knowledge be limited to those persons self-selecting NPFFI on the Form W-8. This would help in the implementation efforts, as withholding agents generally have existing systems to withhold on the assets that are currently subject to backup withholding.

## **Recommendation B.3 – Professional Management**

IRPAC recommends that the IRS modify the FATCA regulations to let certain professionally managed investment entities be treated as a Passive Nonfinancial

Foreign Entity (PNFFE), rather than a Foreign Financial Institution (FFI). IRPAC recommends that these entities be treated consistently as PNFFEs and that the Financial Institution's (FI's) holding accounts for the PNFFEs perform the required reporting to the IRS with respect to the substantial U.S. owners or controlling U.S. persons of the PNFFE.

The recommendation applies to situations where the following requirements are met by the entity: 1) the entity's equity is closely held by a family or limited number of individuals (if the entity is a trust without an FI trustee, the trust beneficiaries are a family or limited number of individuals), 2) the entity's equity or trust certificates are not offered to the public for investment and 3) the management of the entity's corporate/trustee activities (such as deciding where to open a bank account, ability to authorize a power of attorney or make decisions about distributions) are not managed by a FI, such as a FI trustee of a trust.

These requirements to maintain PNFFE status will also be met if the entity's equity is held by one or more commonly controlled entities that collectively meet all three requirements. The controlling entity must meet all three requirements and the controlled entities have to meet requirements 2 and 3. For example, this rule would be met if individuals' A and B collectively own 100% of controlling entity 1, which owns 100% of controlled entity 2 (which has the financial account at the FI) and both entity 1 and entity 2 meet requirements 2 and 3 above. Requirement 1 is met because individuals' A and B collectively own 100% of the commonly controlled entities.

## **Discussion**

Treasury Regulation §1.1471-5(e)(4) seems to define an Investment Entity as any PNFFE that has all or part of its assets managed by a professional money manager. FIs routinely sell investment products to personal investment company clients where the FI has discretionary authority to trade for the client's account after the client has picked the investment structure. These agreements are sometimes referred to as discretionary mandates (DM). Similar to mutual fund investments, clients can terminate the DM on very short notice. Thus, it is quite possible for an entity to flip-flop between being professionally managed and not being professionally managed dependent upon the client's management of the DMs. A legal entity's FATCA status should not hinge on whether the legal entity has entered or terminated a DM at a given point in time. The operational complexity of changing the reporting status of a legal entity based on transitory facts is very difficult to implement for FIs. In addition, these personal investment company entities typically do not have any employees or infrastructure to do reporting and register as an FFI, so this approach creates operational complexity as well.

Aside from the operational complexities, IRPAC believes the focus on professional management creates compliance risk. Personal investment companies are generally the very vehicles that created the need for FATCA given their ability to mask beneficial ownership. Allowing these entities themselves to decide what they need to report to the IRS and what amounts should be reported poses compliance challenges that do not exist when a third-party FI is doing the reporting.

Moreover, local governments are going to be challenged to enforce the reporting requirement(s) as they may not be aware that the entity is professionally managed and therefore accept a claimed PNFEE status. In fact, the entity may be giving different tax forms to the various FIs where it holds accounts, and FIs where the entity does not have a DM will not be able to challenge the client's claim of PNFEE status. For these reasons, IRPAC recommends that these entities be treated as PNFEEs with the FIs maintaining the accounts being required to complete the necessary FATCA reporting. IRPAC recognizes that PNFEE reporting will be on controlling persons for accounts held in IGA jurisdictions versus all debt and equity holders of an FFI. However, these entities, in accordance with the IRPAC recommendation, would be closely held so the risk of underreporting based on ownership threshold seems much lower than the risk of underreporting due to these entities being required to manage their own reporting.

#### **Recommendation B.4 – Further Guidance Regarding Section 871(m) Implementation for Non-Delta 1 Transactions**

IRPAC recommends that the IRS revise IRC §871(m) regulatory requirements to limit withholding to delta 1 transactions and those transactions captured by the anti-abuse rule in the regulations. Absent elimination of withholding on non-delta 1 transactions, IRPAC recommends that the IRS provide other relief in the regulations to make the application of Section §871(m) requirements less costly to implement and maintain on an ongoing basis.

#### **Discussion**

IRPAC would like to thank the IRS for responding to IRPAC's initial request for delay in the implementation of certain IRC §871(m) requirements by issuing Notice 2017-42, Extension of the Phase-in Period for the Enforcement and Administration of Section 871(m).

This Notice was extremely helpful in letting withholding agents spend 2017 focusing on implementing withholding on delta 1 transactions, which are expected to generate the majority of withholding tax due under the IRC §871(m) regulations. Even

though the majority of withholding will be collected on these transactions, withholding agents will need to spend significant resources both up front and ongoing to implement the delta 0.8 standard required by the regulations, primarily to be able to prove on audit that no withholding tax was due on the thousands of transactions entered into each year.

Given the cost to withholding agents is expected to exceed the benefit to the IRS, IRPAC recommends that the IRS eliminate the delta 0.8 standard.

If the IRS is unwilling to eliminate withholding on trades covered by the delta 0.8 standard, IRPAC recommends that the IRS provide other relief for withholding agents to make the application of the 0.8 standard less costly to implement and maintain on a go forward basis. Potential relief measures the IRS should consider include: a) elimination of the combination rule for listed transactions for withholding agents and maintenance of the current combination rule approach for over the counter transactions (for listed transactions, taxpayers should only have to combine trades done on the same day and with the same maturity); b) given withholding agents normally run risk systems at the end of the day, let withholding agents run end of the day processes with a delta 0.75 or other reasonable standard, and only review those trades above the lower delta threshold using real time data to test for substantial equivalence or delta 0.8 standard; and c) let withholding agents set upfront parameters for a product structure to conclude that transactions won't meet the substantial equivalence test or delta 0.8 standard and use this analysis as proof that no withholding is required.

Another relief item that applies to delta 1 and delta 0.8 standard transactions is withholding on cash equities held by a Qualified Derivatives Dealer (QDD). IRPAC recommends that QDD's continue to be able to avoid withholding on cash equities held in their dealer business provided the QDD can show that, in aggregate, the QDD withheld an equal or greater amount from client transactions. Thus, the QDD would determine the aggregate amount of withholding it would have been subject to on its cash equities positions and would only pay withholding to the extent that sum is greater than the sum of all IRC §871(m) withholding the QDD collected from clients and paid over to the IRS.

Lastly, IRPAC thanks the IRS for issuing Notice 2018-72, Extension of the Phase-in Period for the Enforcement and Administration of Section 871(m). Notice 2018-72 provides welcome relief regarding an additional delayed effective date for implementation of the delta 0.8 standard. IRPAC looks forward to working with the IRS on the recommendations mentioned above to ensure clear guidance going forward from when the delay in Notice 2018-72 expires.

## **Recommendation B.5 – Sponsored Entity Model 1 IGA Reporting**

IRPAC recommends that the IRS revise the proposed FATCA regulations on sponsored entities to let FFIs claiming a FATCA status of Sponsored Investment Entity (SIE) per the FATCA regulations report to their local tax authority as would normally be the case for FFIs located in a Model 1 IGA jurisdiction.

### **Discussion**

The preamble to the proposed FATCA regulations on sponsored entities includes the following statement: “Thus, a financial institution covered by a Model 1 or Model 2 IGA may choose to qualify as a SIE, controlled foreign corporation, or closely held investment vehicle pursuant to §1.1471-5(f) instead of Annex II of the Model 1 or Model 2 IGA. In such a case, the financial institution must satisfy all the requirements applicable to such an entity in the regulations, including the requirement for the sponsoring entity to report information directly to the IRS, even in the case of a financial institution covered by a Model 1 IGA.”<sup>4</sup>

This issue arises as some of the early IGAs (e.g., the UK and Ireland) do not have SIE provisions in their Annex II that outlines non-reporting local jurisdiction institutions and products. Consequently, SIEs from those countries can get that status only under the IRS FATCA regulation, §1.1471-5(f). This IRS requirement is causing confusion in the marketplace as the local governments think the SIEs should report directly to them. Moreover, there should not be a compliance concern for the IRS given reporting would be to the local government as with other Model 1 FFIs. Further, to have these sponsored entities report directly to the IRS fails to resolve the challenges posed by local law prohibitions on information sharing that the IGAs were initially designed to address. IRPAC recommends that the IRS eliminate this requirement in the proposed regulations such that these SIEs located in Model 1 jurisdictions can report directly to their local jurisdiction as opposed to the IRS.

## **Recommendation B.6 – Standardized Field on Form W-8 for Reasonable Written Explanation for Lack of Foreign Taxpayer Identification Number**

IRPAC recommends that a standardized field be added to the Forms W-8BEN, W-8BEN-E, W-8ECI and W-8ECP to let an account holder provide a reasonable written

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<sup>4</sup> See Preamble to Chapter 4 Regulations Relating to Verification and Certification Requirements for Certain Entities and Reporting by Foreign Financial Institutions, 82 FR 1629 (January 6, 2017).

explanation for the lack of a foreign Taxpayer Identification Number (FTIN) on the withholding certificate.

## Discussion

Under Treas. Reg. Section 1.1441-1T(e)(2)(ii)(B), withholding certificates associated with certain payments made on or after January 1, 2018, to document an account maintained at a U.S. branch or office of a financial institution that is a withholding agent must contain a foreign TIN subject to certain narrow exceptions. If a foreign TIN is not provided on the form, a reasonable written explanation for why the account holder was not issued a foreign TIN must be provided, otherwise the form will be treated as invalid. The narrow exceptions include:

- **Accounts held by residents in jurisdictions with which the U.S. does not have an agreement relating to exchange of tax information in force:** The IRS will publish a list of the countries with which it has an agreement in place. If the account holder is resident in a country not listed, the account holder would not be required to provide a foreign TIN
- **Accounts Held by Residents in Jurisdictions That Do Not Issue Foreign TINs (or Jurisdictions Which Have Otherwise Requested to be Included on This List):** Currently this includes Bermuda, the British Virgin Islands, the Cayman Islands and Australia and
- **Accounts Held by Certain Account Holders:** Accounts where a withholding agent has obtained valid documentation establishing that the account holder is a government, an international organization, a foreign central bank of issue or resident in a U.S. territory, will not be required to provide a foreign TIN.

Per the Instructions for the Requestor of Forms W-8BEN, W-8BEN-E, W-8ECI, W-8EXP and W-8IMY, a withholding agent may accept an explanation written in the line on the form for a foreign TIN, in the margins of the form or on a separate attached statement associated with the form. If the account holder writes the explanation on the line for foreign TINs or in the margins of the form, the account holder may shorten the explanation to “not legally required.” If the written explanation provided is an explanation other than “not legally required,” then the withholding agent must determine if the explanation is reasonable.

While the guidance in the instructions lets account holders write their explanation in the foreign TIN line or in the margins is helpful and ensures that the written explanation is associated with the form, it does not provide the account holder adequate space on the form to write the explanation. As space is limited in these areas of the form, the account holder may abbreviate language leaving the withholding agent to

decipher what the account holder meant, which may result in a withholding agent misunderstanding the explanation. Furthermore, account holders have been known to write in the margins of the page, otherwise encircle the page and in some cases, continue writing on the back of the form. As a result, existing business as usual scanning processes may fail to capture the complete explanation as included on the original form. Also, even if the account holder provides a separate page detailing the reasonable written explanation, this separate page must be associated with the form. This step may be cumbersome to withholding agents who may receive these written explanations after receiving the Form W-8 and must ensure that they are able to associate these separate pieces of paper to the Form W-8, particularly when an account holder may have multiple accounts being held at the institution.

To prevent these scenarios, IRPAC recommends that a dedicated line or section on the Form W-8 be specifically provided for an account holder to write their reasonable explanation with the possible addition of a checkbox for those account holders where the foreign TIN is not legally required. This will help to ensure that account holders whose explanations are other than “not legally required” have adequate space to provide their reasonable explanation, and the withholding agent is easily able to associate the reasonable explanation to the Form W-8.

### **C. Pension and Individual Retirement Account Distributions**

#### **Recommendation C.1 – Treaty Rates for Pension Distributions**

IRPAC recommends that the IRS provide guidance on specific countries with which the U.S. has an income tax treaty where pension payments are subject to a specialized treatment depending upon the type of payment. IRPAC recommends that Table 1 of the tax treaty tables, located at [irs.gov/individuals/international-taxpayers/tax-treaty-tables](https://www.irs.gov/individuals/international-taxpayers/tax-treaty-tables), which was previously contained in Publication 515 (Withholding of Tax on Nonresident Aliens and Foreign Entities), be updated to reflect this specialized treatment for the specific payment types by including footnotes highlighting that the rate of withholding may vary depending upon whether the pension payment is a periodic payment or a lump sum distribution.

#### **Discussion**

Withholding agents rely heavily upon the tax treaty tables associated with Publication 515 to develop internal withholding logic systems. The current version of Table 1 of the tax treaty tables associated with Publication 515 indicates a 0% or other reduced treaty withholding rate on pension payments without any footnote or caveat regarding whether the payment is a periodic payment or a lump-sum distribution. This

remains the case, even though the 2018 Publication 515 withholding guidance on *Pensions and annuities* added the following new warning language regarding treaty exemptions: “The exemption may not apply to lump-sum payments. See, for example, Article 17(2) of the United States-U.K. income tax treaty.”

However, the IRS examination teams are raising an issue on U.S. withholding agent Form 1042 audits that the liability to withhold on pension payments where a treaty exists, in some countries, such as the United Kingdom, the Netherlands and Italy, is based on whether the payment is a periodic payment or a lump-sum distribution, as defined by the applicable treaty. IRPAC recommends that the IRS provide written guidance on which specific countries have specialized treatment of withholding on pension payments depending upon the type of payment or distribution.

In notable cases, such as the United Kingdom, Netherlands and Italy, the Table 1 tax treaty table withholding rate indicated is 0%, when the actual treaty withholding rate on certain lump-sum distributions is 30%. The Table 1 tax treaty table is misleading and could result in U.S. withholding agents withholding at 0% or another rate when 30% withholding is required on lump-sum distributions. Footnotes should be added to the Table 1 tax treaty table to indicate when 0% or reduced treaty withholding rates do not apply to lump-sum distributions. Form 1042 audits have included substantial debate over treaty language and withholding agents have generally been unable to obtain confirmation from the IRS as to which countries do require specialized treatment. In the interest of effective, efficient and transparent tax administration, IRPAC recommends that the IRS provide written guidance in the Table 1 tax treaty table on the effective withholding rates. As such, IRPAC has provided the IRS with suggested language for the Table 1 treaty rate table in Appendix A.

## **D. Other Issues**

### **Recommendation D.1 – Cryptocurrency Initiatives**

IRPAC requests the IRS issue further guidance in respect to cryptocurrency activities.

#### **Discussion**

Blockchain digital technologies have become a very real phenomenon in the business and finance areas in the last few years. One outgrowth of the interest in the possibilities raised by these developments is the increase in the use of *cryptocurrencies*. *Virtual currency* is a type of “digital currency,” and is defined by the

European Banking Authority as “a digital representation of value that is neither used by a central bank or public authority nor necessarily attached to a fiat currency but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically.” In turn, *cryptocurrency* is a category of virtual currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds. The most commonly known unit of cryptocurrency is the bitcoin, although there are many other well-known examples.

A recent article highlighted the significance of the tax consequences of these transactions. On April 5, 2018, Fundstrat Global Advisers published a research note, which estimated cryptocurrency-related U.S. tax liabilities at \$25 billion. That is based on approximately \$92 billion of taxable gains for U.S. cryptocurrency investors, who, according to Fundstrat, comprise around 30 percent of cryptocurrency investors worldwide. Globally, the cryptocurrency market grew from about \$19 billion at the start of January 2017 to more than \$500 billion at the end of December 2017, according to data from CoinMarketCap.<sup>5</sup> Whether or not these estimates are accurate, they clearly underscore the need to gain more information on the operations of these protocols and to ensure that taxes that may be applicable to them are efficiently collected. Assuming a noncompliance rate equal to 50%, potentially unreported cryptocurrency tax liabilities represent approximately 2.5% of the estimated \$458 billion tax gap.

As noted in a recent IRS News Release, IR-2018-71, March 23, 2018, because transactions in virtual currencies can be difficult to trace and have an inherently pseudo-anonymous aspect, some taxpayers may be tempted to hide taxable income from the IRS.

Existing general tax principles applicable to property transactions apply to virtual currency transactions. Notice 2014-21 provides that virtual currency is treated as property for U.S. federal tax purposes. General tax principles that apply to property transactions apply to transactions using virtual currency. Among other things, this means that:

- A payment made using virtual currency is subject to information reporting to the same extent as any other payment made in property.
- Payments using virtual currency made to independent contractors and other service providers are taxable, and self-employment tax rules generally apply. Normally, payors must issue Form 1099-MISC.
- Wages paid to employees using virtual currency are taxable to the employee, must be reported by an employer on a Form W-2 and are subject to federal income tax withholding and payroll taxes.

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<sup>5</sup> Matthew DeSilva, U.S. Cryptocurrency Tax Liabilities Estimated at \$25 Billion After 2017 Mania, ETHNews, April 6, 2018.

- Certain third parties who settle payments made in virtual currency on behalf of merchants that accept virtual currency from their customers are required to report payments to those merchants on Form 1099-K, Payment Card and Third-Party Network Transactions.
- The character of gain or loss from the sale or exchange of virtual currency depends on whether the virtual currency is a capital asset in the hands of the taxpayer.

There remain significant open issues, however, that will need additional analysis and further guidance to refine the reporting of these *transactions*, e.g., whether virtual currency held for investment is a capital asset; whether the virtual currency ought to be treated as a *security*, subject or not subject to the wash sale rules, or affected by mark to market implications under Section 475;<sup>6</sup> whether a taxpayer may use LIFO or FIFO to determine the basis of virtual currency sold; basis tracking through activities in the blockchain; whether broker reporting is required under section 6045 of the Code for transactions using virtual currency; whether a taxpayer may contribute virtual currency to an IRA; and whether virtual currency is a commodity. The answers to these questions may implicate reporting as earnings from employment (subject to federal income tax withholding, FICA tax, FUTA tax and reported on Form W-2). See discussion in American Bar Association Section of Taxation, ABA Tax Section Offers Suggestions for Cryptocurrency Guidance (March 20, 2018); AICPA, AICPA Seeks Updated Guidance on Tax Treatment of Virtual Currency (May 30, 2018); Shakow, The Tao of the DAO: Taxing an Entity That Lives on a Blockchain, Tax Notes, August 13, 2018.

Also, while an initial reading would suggest that virtual currency would not be considered a financial account for FATCA purposes, various guidance notes issued by foreign jurisdictions for purposes of implementing the Common Reporting Standard (CRS) have indicated virtual currency does represent a financial account. This inconsistency between regimes that purportedly try to maintain a high level of consistency will be confusing to withholding agents and subject to inherent error.

Some activities are more clearly treated under existing rules. For example, when profits are distributed in the form of *fiat* currencies (e.g., United States dollars, or other governmentally issued currencies), the entities receiving them may be subject to existing withholding and reporting rules. Similarly, entities operating wallet applications (investors use these to store holdings) should be required to comply with existing anti-money laundering/know-your-customer checks and reporting when participants begin to use them and should know all their customers and keep records of them.

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<sup>6</sup> The U.S. Securities and Exchange Commission is also studying whether investments in certain Decentralized Autonomous Organizations may be considered a security for purposes of the Securities Acts – see SEC Release No. 81207 (July 25, 2017).

A good illustration of the difficulties of tax enforcement in this area may be found in a recent case. In *United States v. Coinbase Inc.*, No. 3:17-cv-01431 (N.D. Cal. 2017) on behalf of the IRS, the DOJ requested permission from the U.S. District Court for the Northern District of California to serve a John Doe summons on Coinbase, Inc. Coinbase is an exchange dealing in cryptocurrency that operates a bitcoin wallet and exchange business headquartered in San Francisco. During 2013 through 2015, Coinbase maintained over 4.9 million wallets in 190 countries with 3.2 million customers served and \$2.5 billion exchanged. The Coinbase summons initially sought “information regarding United States persons who, at any time during the period January 1, 2013, through December 31, 2015, conducted transactions in a convertible currency as defined in IRS Notice 2014-21.” That request was later narrowed to Coinbase users who “bought, sold, sent or received at least \$20,000” worth of cryptocurrency in a year. The court granted the request to issue the John Doe summons. Following Coinbase’s initial refusal to comply, the United States petitioned the Court to enforce the summons. On November 28, 2017, the Court granted the petition to enforce. Coinbase has since announced it will comply with the summons.

Many, if not most, taxpayers will report these activities correctly if they are able to determine the implications of their cryptocurrency activities. Some taxpayers will be tempted to do otherwise, however, because anonymity is inherent in the structure of the blockchain activities. In light of Coinbase, these taxpayers are likely to use exchanges outside the jurisdiction of the U.S. It is unclear at present whether the U.S. may obtain information from foreign exchange activities (the exact nature of residence of the virtual activities of an exchange is itself vexing under existing source and jurisdiction rules, and lead to issues of whether the activities are sourced to any jurisdiction or are *stateless income*). Several countries are now concerned and may be considering cooperation with others to deal with tax evasion and possible criminal activities.<sup>7</sup>

IRPAC would be very interested in helping develop information reporting and withholding guidance on these important issues.

## **Recommendation D.2 – Elimination of Form 8233**

IRPAC recommends that Form 8233 be eliminated from the library of IRS forms, and the associated process to achieve treaty benefits for personal services performed in the U.S. be streamlined. The purpose that Form 8233 currently serves can be blended into existing Forms W-8 with minimal effort thus resulting in more efficient processes and an increase in voluntary tax compliance.

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<sup>7</sup> See Irish Department of Finance, *Virtual Currencies and Blockchain Technology* (March 23, 2018).

## Discussion

Form 8233 – Exemption From Withholding on Compensation for Independent (and Certain Dependent) Personal Services of a Nonresident Alien Individual – was most recently updated in March 2009. As nearly all withholding-related forms have been updated, many substantially, within the past one to four years, Form 8233 is clearly an anomaly, as it has remained unchanged for nearly 10 years. Moreover, as Form 8233 is not technically part of the W-8 withholding tax form series, but arguably should be, given its purpose in the withholding and exemption arena for nonresident aliens; it is an outlier whose antiquated format and numbering causes unnecessary confusion to both taxpayers and withholding agents.

Form 8233 currently addresses three U.S. source income fact patterns: 1) independent personal services, 2) dependent personal services and 3) non-compensatory scholarship or fellowship income and personal services income (paid by the same withholding agent). IRPAC asserts that Form 8233 is essentially duplicative of existing forms that can be modified with minimal changes to streamline the exemption and withholding processes for these income types.

With respect to independent personal services income, to the extent a treaty applies, Form W-8BEN can be used to document such treaty claims. Given that treaty claims for other types of income are permitted when a foreign TIN (FTIN) is supplied, treaty claimants need not apply for and obtain an ITIN in such instances. Removing the hurdle of obtaining an ITIN will save taxpayers (treaty claimants), withholding agents, tax advisors and the IRS several hours in each instance. These types of treaty claims are common when a professional is delivering a speech in the United States and receiving an honorarium for their time. The exchange of ideas provided by these visits benefits the United States, although sometimes the associated paperwork discourages those who are invited, especially given the passport-related requirements, which may affect travel plans and incur tax advisor costs. The elimination of the ITIN requirement in favor of a foreign TIN would provide a time savings to all involved, in addition to the general advancement of the U.S. and global societies at large, with no loss of revenue to the U.S. Treasury. Moreover, such payors and recipients are generally regarded as highly compliant as a group, further supporting a reduction in administration to deliver a more efficient federal tax system.

The procedure whereby the IRS is provided a copy of the Form 8233 before payments being made free of withholding tax would be eliminated under this proposal. Accordingly, the standard procedures with respect to Form W-8BEN would apply, in which the withholding agent would review the completed form it received for completeness and reasonableness and would bear the risk of withholding to the extent

the form was not reasonably completed, based on the withholding agent's knowledge. Elimination of this review procedure would also result in a cost savings to the IRS and withholding agents. In the experience of IRPAC members as well as industry broadly, the review procedure does not appear to be carried out on a timely basis, with questions often being sent to withholding agents months later – well beyond the 10 days for which withholding agents are required to delay payment in case of questions from the IRS. Thus, there are questions as to the value of the review procedures currently in place, notwithstanding the question of the value of such reviews as officially conceived.

With respect to dependent personal services income, such income is taxable in the United States as effectively connected income. Accordingly, an expansion of the scope of Form W-8ECI to document such nonresident alien workers would be most logical. (To the extent such income is exempt under a treaty, Form W-8BEN would be used, as outlined above.) An ITIN would need to be obtained for an NRA to supply this form to the withholding agent, and therefore the form and instructions to Form W-8ECI would need to be revised accordingly, but this is anticipated to be relatively minor. Inclusion of dependent personal services compensation as being within the scope of Form W-8ECI is expected to streamline understanding of the compliance process for all types of ECI and produce efficiencies among all recipients and payors of ECI, in addition to such at the IRS. Stated differently, to the extent a payor or recipient of ECI understands the totality of payments subject to ECI taxation and reporting, the propensity to comply on the front end increases substantially. Otherwise, the user of a Form W-8ECI may interpret the exclusion of dependent personal services income as being outside the scope of such form and assume such income is not subject to tax; conversely, the same assumption might be made by those who predominantly deal with Form 8233. The elimination of personal exemptions as part of the Tax Cuts and Jobs Act of 2017 adds further weight to the argument that Form 8233 is no longer required, as that peculiarity was germane to Form 8233 as opposed to Form W-8ECI.

For those instances where an individual has non-compensatory scholarship or fellowship income and is making a treaty claim, Form W-8BEN would be used. If an individual received income for personal services from the same withholding agent, Form W-8BEN could also be used to the extent such income was within the scope of the applicable treaty. Conversely, for instances where such income is subject to U.S. taxation, Form W-8ECI would be used.

## **Recommendation D.3 – Guidance on Character of Loan Syndication Fee Payments**

IRPAC requests the IRS issue written guidance on the source and character of cross-border fee payments; specifically, those for loan syndication transactions.

### **Discussion**

The IRS and withholding agents have a unique partnership in which the IRS heavily relies on withholding agents to ensure proper tax collection and administration. As part of this partnership, withholding agents require clear guidelines to effectively administer withholding on outbound payments. Lack of clear guidance and ambiguity pose both audit risk and competitive disadvantage to a withholding agent as well as a loss of revenue to the Treasury.

To ensure compliance with IRS requirements, withholding agents have requested that the IRS issue guidance on fee payments for several years, specifically with respect to loan syndication transactions. However, the IRS has not provided such guidance, which has resulted in inconsistent treatment of similar transactions by both withholding agents and IRS examiners.

As these fees are becoming a focus on audit, the IRS must have a view on the treatment of these fees. Therefore, IRPAC requests written guidance and additional transparency on the proper treatment of these fees to enable withholding agents to continue to effectively support the IRS in the collection and administration of these taxes.

To help the IRS with such guidance and in coordination with industry representatives, IRPAC has included a fee chart as Appendix B. The fee chart provides a list of standard loan syndication fee categorizations (i.e., service), names, descriptions and classifications (i.e., non-FDAP). IRPAC requests the IRS review this chart, offer opinion on the conclusions and publish the conclusions, letting all withholding agents adapt these rules on a prospective basis. Furthermore, as indicated in prior IRPAC reports, given the existing ambiguity in this area, giving time for implementation and enforcement on a prospective basis is critical. Accordingly, IRPAC requests a minimum of six months following the IRS publication for withholding agents to implement any required changes in treatment.

## **Recommendation D.4 – Allowance for Collective Refund Claims by U.S. Withholding Agents**

IRPAC recommends the IRS give U.S. withholding agents the option of making use of a collective refund process similar to that available to QIs.

### **Discussion**

Section 9.04 of the QI Agreement provides for a collective refund claim process in which QIs can, but are not required to, make a refund claim on behalf of their account holders. Generally, QIs are able to use this process to make refund claims for all amounts subject to Chapter 3 U.S. non-resident withholding or Chapter 4 FATCA withholding.

Specific requirements for making these claims include:

- (1) QI must not have issued (and will not issue) Forms 1042-S to the account holders that received the payment that was subject to over withholding;
- (2) QI must submit together with its amended Form 1042 on which it provides a reconciliation of amounts withheld and claims a credit or refund, a copy of the Form 1042-S furnished to QI by its withholding agent reporting the taxes withheld to which the claim relates (if applicable) and a statement that includes the following information and representations —
  - (i) The reason(s) for the over withholding;
  - (ii) QI deposited the tax for which a refund is being sought under section 6302 or received a Form 1042-S from its withholding agent showing the amount of tax withheld, and neither QI nor its withholding agent has applied the reimbursement or set-off procedure of §§1.1461-2 and 1.1474-2 to adjust the tax withheld to which the claim relates;
  - (iii) QI has repaid or will repay the amount for which refund is sought to the appropriate account holders;
  - (iv) QI retains a record showing the total amount of tax withheld, credits from other withholding agents, tax assumed by QI, adjustments for under withholding and reimbursements for over withholding as it relates to each account holder and also showing the repayment (if applicable) to such account holders for tax for which a refund is being sought;
  - (v) QI retains valid documentation that meets the requirements of chapter 3 or 4 (as applicable) to substantiate the amount of over withholding with respect to each account holder for which the refund is being sought and
  - (vi) QI has not issued and will not issue a Form 1042-S (or such other form as the IRS may prescribe) to any account holder with respect to the payments for which the refund is being sought.

IRPAC recommends the IRS give U.S. withholding agents the option of making use of a similar collective refund claim process. It is important to note that IRPAC favors this as an option for withholding agents and not as a requirement.

Some changes to the QI process would be necessary to expand this program to U.S. withholding agents. It is critical, as demonstrated by requirement 1, that the QI not issue a Form 1042-S to the account holder for the amounts subject to the refund claim as this safeguards the IRS from the payee also seeking a refund. While this is easily accomplished by QIs given the availability of pooled Form 1042-S reporting, the IRS would need to update Forms 1042-S if extending this privilege to U.S. withholding agents. This could be done via a checkbox on the Form 1042-S, which the withholding agent would tick to indicate the amount covered by the Form 1042-S was subject to a collective refund claim and cannot be used by the payee to claim a refund.

In recent years, industry conferences, advisory group meetings and other sessions have all discussed the significant challenges the IRS faces with respect to refund fraud. As a result, the IRS has implemented significant procedural safeguards to protect against these very real threats; however, these safeguards have also resulted in foreign persons investing in the U.S. market facing significant delays in receiving refunds, and in some cases essentially having to abandon refund claims for amounts rightfully owed to these payees. Giving U.S. withholding agents the option of making a collective refund claim similar to that which QIs can make use of could free up IRS and industry resources and expedite legitimate refund claims of which there are many. For example, significant numbers of foreign persons are required to make refund claims for late income reclasses between dividends and capital gains, etc.

### **Recommendation D.5 – Liability Calculations for Form 1042 Audits**

IRPAC understands the IRS is currently in the process of reviewing its policies with respect to the disallowance of remediation efforts and application of cure documentation to extrapolated liability calculations as part of statistical samples in both QI audits as well as U.S. withholding agent audits. IRPAC further understands from public IRS comments that the IRS has considered both IRPAC and other industry group recommendations in formulating these new policies as items *cured* within a reasonable timeframe will not be used to extrapolate tax liability. IRPAC would urge the IRS to promptly finalize and publish these policies for the information reporting and withholding community to effectively manage tax obligations.

### **Discussion**

As part of both the 2016 and 2017 reports, IRPAC recommended that the IRS remove restrictions on extrapolating cures in both QI periodic reviews as well as U.S. withholding agent audits. From public comments at recent conferences, IRPAC understands that the IRS has completed an extensive review of its policies in this space

and has determined that withholding agents will be allowed to exclude timely *cured* items from any extrapolation of liability. IRPAC thanks the IRS for its extensive consideration of this matter and is appreciative of this conclusion that provides an effective means of balancing the need for prompt issue resolution with an equitable means of reflecting accurate under-withholding liabilities.

IRPAC would encourage the IRS to publish this guidance in the Internal Revenue Manual as promptly as possible to help with effective audit management and allow withholding agents to manage their tax obligations.

### **Recommendation D.6 – Retroactive Application of Section 305(c)**

IRPAC recommends that the IRS publicly announce that it will not impose withholding tax liability, penalties or interest on withholding agents for Section 305(c) events occurring in tax years before 2016.

### **Discussion**

As part of the October 2016 and 2017 IRPAC reports, IRPAC recommended that the IRS “publicly announce that it will not impose withholding tax liability, penalties, or interest on withholding agents for section 305(c) events occurring in tax years before 2016.” This recommendation was presented as proposed regulations were only released in April 2016. As such, it would be unfair to penalize withholding agents for events in years before the release of these proposed regulations by applying withholding tax liability, penalties or interest on a retroactive basis.

As indicated in the October 2016 and 2017 IRPAC reports, IRPAC appreciated the IRS’s efforts to clarify the applicable rules by issuing the 2016 proposed regulations. However, the proposed regulations serve as an acknowledgment by the IRS that additional guidance was needed to administer the Section 305(c) withholding obligations. Accordingly, we do not believe withholding agents can reasonably be expected to have put a withholding process in place in years before 2016. Therefore, IRPAC again requests public acknowledgement from the IRS that withholding agents will not be held liable with respect to Section 305(c) events occurring before 2016.

### **Recommendation D.7 – Form 1099 Reporting for Deemed Dividends**

IRPAC continues to recommend, consistent with the prior year IRPAC report, that the regulations under IRC §6042 be amended to include coordination rules under which the timing and amount of an IRC §305(c) deemed dividend reported on Form 1099-DIV (Dividends and Distributions) would be governed by the issuer’s reporting of the timing

and amount of the IRC §305(c) deemed dividend on Form 8937 (Report of Organizational Actions Affecting Basis of Securities), as required by IRC §6045B.

Furthermore, IRPAC continues to recommend that the IRS defer Form 1099-DIV reporting for IRC §305(c) deemed dividends until regulations are issued, and adequate time is provided to implement the new reporting requirements.

### **Discussion**

IRC §6042 generally requires Form 1099-DIV reporting when a dividend is paid. Currently, it does not appear that reporting on Form 1099-DIV would be required under IRC §6042 for deemed dividends under IRC §305(c); the reasoning, therefore, is because while a deemed dividend constitutes a *dividend* for this purpose, there is no *payment* of the dividend that triggers reporting. The preamble to the proposed regulations under IRC §305(c) requested comments on the implementation of Form 1099-DIV reporting of deemed dividends under IRC §305(c). Such proposed regulations indicate that *similar principles* for reporting deemed dividends under Treas. Reg. §1.6045B-1 with respect to reporting of deemed dividends that affect the basis of a security are to be applied in reporting IRC §305(c) deemed dividends on Form 1099-DIV under IRC §6042.

IRPAC recommends that the regulations under IRC §6042 be amended to include coordination rules under which the timing and amount of an IRC §305(c) deemed dividend reported on Form 1099-DIV would be governed by the issuer's reporting of the timing and amount of the IRC §305(c) deemed dividend on Form 8937 (Report of Organizational Actions Affecting Basis of Securities), as required by IRC §6045B.

In addition, IRPAC further recommends that the IRS defer Form 1099-DIV reporting for IRC §305(c) deemed dividends until regulations are issued and adequate time is provided to implement the new reporting requirements. Likewise, similar coordination would be required with respect to Form 1099-B reporting under Treas. Reg. §1.6045-1(d) regarding the required basis adjustment resulting from the deemed dividend.

### **Recommendation D.8 – Section 1446 Publicly Traded Partnership Withholding**

In light of the complexities in determining dividend equivalent amounts (DEAs) with respect to derivatives referencing master limited partnerships (MLPs), IRPAC recommends that the IRS amend the appropriate regulations to extend the time given to perform withholding and reimbursement/setoff procedures with respect to these

transactions to September 15 of the year following the year the DEA is determined (i.e., September 15, 2018, for 2017 DEAs) for all withholding agents, including QDDs. In addition, IRPAC recommends that the IRS ensure that interest or penalties will not be charged on any withholding payments made by September 15 going forward. IRPAC greatly appreciates the relief provided in FAQ 23 for the 2017 tax year, but for the reasons discussed below, IRPAC would encourage the IRS to extend this relief to future tax years.

## **Discussion**

Treas. Reg. §1.871-15(m) treats derivatives on covered partnerships as having a DEA on a look-through basis to the extent the covered partnership is holding investments that receive a payment of a dividend or a DEA. The most common derivatives linked to covered partnerships are derivatives referencing MLP units. Unfortunately, it will often not be possible for withholding agents to determine the proper DEA amount with respect to a derivative on an MLP by the March 15 withholding deadline in the current regulations.<sup>8</sup> Withholding agents are expecting to rely on MLP Form 1065, Schedule K-1 (K-1) data to make the DEA determination, and this data will not be received in time to do the necessary calculations required by March 15. IRPAC understands that K-1s are often not issued until March 15 or shortly beforehand, which is not enough time for withholding agents to complete the complex calculations required to determine the DEA amount for each MLP derivative transaction the withholding agent has entered into. The K-1 data is only the starting point of a very complex allocation process that must take place to allocate the K-1 result among the various trades the withholding agent had outstanding during the year.

Without the proper data, withholding agents simply cannot withhold the proper amount by the March 15 deadline. This results in either under-withholding or over-withholding on taxpayers, however unintentional. Consequently, IRPAC recommends extending the withholding and reimbursement/setoff deadline from March 15 to the extended Form 1042 filing deadline of September 15.

## **Recommendation D.9 – MLP Interests Delivered to Satisfy Short Sales**

IRPAC requests that the tax treatment of an account holder whose MLP interests were removed from an account and delivered to a purchaser in a short sale be clarified as well as the treatment of the short seller's position by the partnership.

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<sup>8</sup> See Treas. Reg. §1.1441-2(e)(7)(vii).

## Discussion

Since the issuance of TD 8225, which created the nominee to K-1 issuer reporting structure 30 years ago, questions have remained regarding the reporting of publicly traded MLP interests that are delivered to a third party to satisfy a short sale. The regulations issued under TD 8225, IRC §§1.6031(b)-1T and 1.6031(c)-1T remain temporary. The Background section of TD 8225 noted that the IRS was “actively studying issues related to the tax treatment of short sales of partnership interests.” IRPAC believes it is now appropriate to address the following short sale situation to remove a growing uncertainty in the marketplace.

U.S. securities regulations require a broker to deliver securities to a purchaser even if the securities were sold short. Such delivery in a short sale is effected by borrowing stock or using margined stock. IRC §1058 establishes rules for the treatment of securities pursuant to stock loan/borrow arrangements. However, this section is applicable to securities as defined under IRC §1236(c), which are shares of stock in a corporation and certain other instruments. It does not define an MLP interest as a security, so it is questionable whether IRC §1058 is applicable. Without the application of IRC §1058, the delivery of the shares from a margin or other third-party account would seem to constitute a disposition subject to gain or loss recognition. Additionally, the return of the MLP interests back into the lender’s account could be viewed as a new acquisition. If so, then the nominee should be informing the partnerships of such changes in ownership. This does not appear to be happening in practice. In part, this may be a result of the brokerage community’s application of IRC §1.6045-2, which establishes a means of allocating shares, which have been loaned out, for dividends in lieu payments and is applicable to MLP interests. This seems to contemplate the ability to freely borrow and lend MLP securities pursuant to IRC §1058, despite the definition of securities covered by that section.

An additional complication in the short selling scenario arises for the partnership when issuing K-1s to its partners. Is there an obligation to issue a *negative* K-1 to short sellers to offset the additional partnership interest that exists if the lending transaction is not deemed a sale? Without treating the lender as having disposed of the MLP position, the outstanding number of MLP participation interests will be inflated by the amount that has been sold short.

IRPAC requests clarification of these issues. Providing such guidance will give nominees much needed direction in fulfilling their reporting obligations under IRC §1.6031(c)-1T, provide taxpayers with a clear understanding of the tax implications of the use of their MLP securities for delivery in short sales and inform the partnership on its reporting obligations regarding short selling transactions.

## **Recommendation D.10 – Custodian Form 990-T Filing Responsibilities for IRA Accounts**

IRPAC requests the issuance of a series of FAQs related to the obligations and responsibilities of custodians when filing a Form 990-T on behalf of an IRA account.

### **Discussion**

Although an IRA is generally not subject to paying current tax on the income it generates, there is an exception for the unrelated business taxable income (UBTI) it may earn. This income is often derived from investing in publicly traded MLPs leading to a filing obligation under Treas. Reg. §1.6033-1(h)(3)(i). The return to be filed is Form 990-T. The filing obligation is set out in Treas. Reg. §1.6012-3(a)(5), which states:

“Every fiduciary for a trust described in section 511(b)(2) which is subject to the tax imposed on its unrelated business taxable income by section 511(b)(1) shall make a return on Form 990-T for each taxable year if the trust has gross income, included in computing unrelated business taxable income for such taxable year, of \$1,000 or more.”

In the IRA business realm, this typically places the obligation to file the Form 990-T with the broker/custodian of the account. IRC sections 511 – 514 are the general rules related to UBTI and incorporate paragraph (a)(5) of Treas. Reg. §1.6012-3 in establishing the custodian as the responsible party for filing Form 990-T on behalf of a customer's IRA.

Given the dynamics of the securities business and the portability of IRA accounts, the Form 990-T filing obligation creates certain situations for which guidance is needed. To demonstrate the potential magnitude of Form 990-T challenges and the extent to which a situation can be raise questionable IRA rule concerns, consider the following:

There has been a large increase in IRA UBTI liability in TY 2017 due to partnership's pass-through of cancellation of indebtedness income (CODI) resulting from bankruptcies in the energy sector. Custodian-trustees for these IRAs are obligated to submit Forms 990-T and remit payment of the tax liability to the IRS on behalf of the affected IRA clients. However, in the context of CODI passed through to IRAs as UBTI, this is *income* that creates a liability without an associated payment received. There are instances where cash and assets are not available in the IRA to cover the liability. These scenarios place the custodian in the challenging position of determining the appropriate treatment. One position would be to file Form 990-T reflecting the tax liability as tax due without submission of payment, letting the IRS pursue collection directly with the client, even where the client may have a) some value in the account to make a partial payment or b) other assets in non-IRA accounts under the custodians

control that could be used to satisfy the liability. There could possibly be a liquidation of the IRA and/or non-IRA to the extent funds are available to satisfy the UBTI liability. However, in liquidating a non-IRA account, one could take the position that such liquidation serves as a contribution into the IRA account exceeding allowable limits. There are valid concerns about potential exposure a custodian may have, to the IRS or customer, depending upon the course of action it takes.

IRPAC would encourage the IRS to provide guidance to this and other unclear situations a custodian faces when carrying an IRA account subject to UBTI tax and Form 990-T reporting. IRPAC requests that the IRS provide answers in the form of FAQs to the following situations/questions:

- What should a custodian do when accounts subject to UBTI transfer or deplete all the assets, leaving no funds available to make a 990-T tax payment?
- If a customer has assets available outside of an IRA account, can these funds be used to cover a Form 990-T liability without raising excess contribution issues?
- Would a custodian be violating its obligation to an IRA customer if it sells out other positions within an IRA account to meet 990-T liability?
- How can a broker who receives in an IRA-transferred account require the transferring broker to furnish historical accumulated UBTI loss data for use in offsetting future UBTI income? What documentation would satisfy the IRS?
- What obligation does a custodian have when receiving IRS notices for accounts that have transferred to another custodian, especially if tax is owed?
- Which custodian has the definitive obligation to file a Form 990-T when an account transfers before year end? After year end?
- How can a custodian, on behalf of an account holder, force a partnership to provide unrelated debt financed income information? While it is believed this information should be made available to partners under the tax law, it appears that it is only available from K-1 processing firms on behalf of K-1 issuers for a fee.
- The requirement to make estimated tax payments if the tax exceeds \$500 is problematic as the information to base a payment on is hard to come by until the K-1 is delivered in the subsequent year. Should the prior year tax obligation determine the estimate?

## Appendix A

### Table 1 Tax Treaty Table Recommendations

IRPAC recommends the following updates to the Table 1 tax treaty table that was previously contained in Publication 515 and as now included on IRS.gov:

1. Modification of the general footnote *d* for income code 15 Pensions and Annuities is necessary in Treaty Table 1. IRPAC suggests modifying the existing footnote *d* as follows - “In most cases, these rates refer to periodic payments on pensions not paid by a government. If making a lump-sum distribution on a non-government plan, you must review the actual text of the treaty to validate the rate applicable to lump sum distributions. See specific treaty rules for government pensions.”
  - a. IRPAC also suggests this footnote *d* be added to the income code 15 header on page 3 as well to confirm it is applicable to all countries.
2. Associate existing footnote *ii* with the Netherlands. Specifically, this existing footnote states “The exemption does not apply if (1) the recipient was a U.S. resident during the five-year period before the date of payment, (2) the amount was paid for employment performed in the United States and (3) the amount is not a periodic payment or is a lump-sum payment in lieu of a right to receive an annuity.”
  - a. IRPAC also recommends that footnote *p* that is currently associated with the Netherlands be deleted. The applicable language in the Netherlands treaty is the language in existing footnote *ii* and not the language in existing footnote *p*.
3. Add footnote for the United Kingdom. IRPAC would suggest the language: “The exemption does not apply to lump-sum distributions.”
4. Add footnote for Italy. IRPAC suggests the language: “The exemption does not apply to lump-sum or severance payments received if the applicable past employment was performed in the United States while such person was a resident of the United States.”

## Appendix B

### Loan Syndication Fee Chart

Overall Grouping	Fee Name	Fee Description	Classifications
Commitment/Consent	Amendment / Consent Fee	Fee charged by lender as consideration for waiver of default or agreeing to amend financing documentation (except where the fee is structured like interest).	non-FDAP
Commitment/Consent	Commitment /Unused Fee	Fee on the unused portion of the commitment amount. Fee is distributed to the lender group. Paid periodically.	non-FDAP
Commitment/Consent	Facility Fee	Periodic, fixed rate amount paid by borrower to lenders calculated on the total committed amount of a credit facility, whether drawn or undrawn; generally only applicable to investment grade credit facilities, where they typically serve as a surrogate for what would otherwise be (i) a commitment fee on undrawn amounts and (ii) additional interest on drawn amounts.	non-FDAP
Commitment/Consent	Upfront Fee	Fixed-rate, one-time fee paid to the initial lenders as compensation for committing to participate in the initial syndication of a credit facility. Fee is earned at closing, and is paid by borrower or arranger/underwriter.	non-FDAP
Commitment/Consent	Usage/Utilization Fee	Fee charged (accrued) on the used amount of a commitment. Sometimes referred to as a commitment fee - in a revolving credit agreement, the fee paid by the Borrower on the used/funded portion of the commitment.	FDAP
Commitment/Consent	Ticking Fee	An accruing fee charged to compensate when a deal does not close by a designated time. A fee is charged for the amount of time between the commitment allocation and the actual funding.  An additional description has been furnished indicating that this is used in the pre-closing context that is dealt with only in the commitment papers and is paid to syndicate members who have committed to the facility under circumstances where the closing ends up being delayed beyond the deadlines contemplated in the commitment papers.  The Borrower agrees to pay to the Administrative Agent for the account of each Lender ticking fee	non-FDAP
Commitment/Consent	Rollover Fee	If a bridge loan has not been replaced with notes after one year, the loan may be converted into a nine-month term loan, and a Rollover Fee would be due from borrower to the lenders for funding the new term loan. The fee is earned at the closing of the new loan.	Non-FDAP
Letters of Credit Guarantees	LC Facing	Fee to obtain an LC, paid to the issuer of the LC. Distinguished from LC Issuance by the fact that the fee is not allocated among several participating institutions.	FDAP

Overall Grouping	Fee Name	Fee Description	Classifications
Letters of Credit Guarantees	LC Fee	Also known as an LC participation fee. Periodic, fixed rate amount paid by borrower to lenders calculated on the total amount of issued letters of credit under a credit facility.	FDAP
Letters of Credit Guarantees	Fronting/Issuance Fee	Fee to obtain an LC guaranteeing credit or performance of the borrower. Also known as an LC Fronting Fee. One time or periodic, fixed rate amount paid by the borrower to the issuer of a letter of credit at issuance. Paid to a subset of the lenders at the time of issuance.	FDAP
Letters of Credit Guarantees	Risk Fee	Fee paid to another person to assume a portion of the risk of a default by a third party.	FDAP
Letters of Credit Guarantees	Standby LC	Fee charged to the Borrower, on the Standby LCs, which is distributed to the members of the syndication.(Fixed, earned when paid, fee charged by the Bank for the issuance of the LC.)	FDAP
Penalties	Deal Failure Fee	Fee paid to a lender who committed funds if the deal is not consummated.	non-FDAP
Penalties	Late Payment Fee	Fee charged for failure to make a payment on time	FDAP
Penalties	Breakage/Prepayment Penalty Fee	Prepayment Penalty Fee is the fee that a lender may assess when a borrower repays the loan before the scheduled maturity date. This fee is charged only when the pay-off fees is defined in the fee set of the loan	non-FDAP
Premium	Bankers acceptance fee	A banker's acceptance, or BA, is a promised future payment, or time draft, which is accepted and guaranteed by a bank and drawn on a deposit at the bank. The banker's acceptance specifies the amount of money, the date, and the person to whom the payment is due. This is a discounted product and staming fee is paid at issuance from borrower to the lenders.	non-FDAP
Services	Administrative Fees	Fee to perform an administrative or ministerial task, such as properly recording an amendment to the loan agreement or the assignment of a loan interest.	FDAP
Services	Amendment Fee	Fee paid by the Borrower to the Lenders for modifying or amending terms and conditions within the credit agreement.	FDAP
Services	Arrangement Fee	An Arrangement Fee is an administration charge made by lenders for arranging credit – usually for a mortgage or for a business loan and sometimes for car finance. One-time, fixed rate amount paid by borrower calculated on the underwriting commitment.	FDAP
Services	Assignment Fee	Fixed, one-time payment by lender to agent when debt is transferred from one lender to another.	FDAP
Services	Finder's Fee (LC commission)	Commission income refers to fees earned by brokers and agents in making a sale or closing a deal. It is the primary revenue account of real estate brokers, stock brokers, insurance agencies, etc. so the Fee here is a letter of credit commission fee	FDAP

Overall Grouping	Fee Name	Fee Description	Classifications
Structuring/Underwriting	Origination Fee	FASB fee (fixed, earned when paid) charged to borrower which is earned for the work performed in structuring and arranging, refinancing or restructuring the loan agreement. Typically a discretionary fee.	FDAP
Structuring/Underwriting	Structuring Fee (Service Component)	Fee for "lead" services -- finding other lenders, advising borrower, etc. Includes a commitment to provide a significant amount (e.g., 25-30%) of the borrowed funds. Paid at closing. Typically a discretionary fee.	FDAP
Structuring/Underwriting	Underwriting Fee (Service Component)	Similar to a structuring fee, but combined with a commitment to lend the full amount if other lenders are not found for the full amount. Paid at closing. Typically a discretionary fee.	FDAP

## INFORMATION REPORTING PROGRAM ADVISORY COMMITTEE (IRPAC)

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1111 Constitution Avenue, NW, Room 7563, Washington, DC 20224

October 24, 2018

### **IRPAC's Recent Accomplishments**

The Information Reporting Program Advisory Committee (IRPAC) appreciates the opportunity to highlight a few of the committee's accomplishments over the past few years. These accomplishments are the result of the joint efforts between the IRPAC and the IRS. The IRPAC looks forward to the continuous partnership with the IRS, the result of which benefits taxpayers, information reporters and the Service itself.

### **2018 Term Accomplishments**

- 972CG Penalty Notice Process
  - o Improved acknowledgement of taxpayer communications.
  - o Improved IRS response time.
- 2018 General Instructions for Certain Information Returns
  - o Helped the IRS update the Penalties section of the instructions to be current.
- Form 668A - Notice of Levy
  - o The IRS agreed to address multiple issues regarding qualified retirement plans and the levy process.
- Guidance on Section 529 plan transactions
  - o IRS Notice 2018-58 provided guidance on recontributions, rollovers and qualified higher education expenses under Section 529.
- 1099-MISC Instructions
  - o The IRS agreed to update the 1099-MISC instructions to clarify that under certain circumstances, scholarships and fellowships are reportable.
- 1098-T instructions
  - o The IRS updated the instructions to provide needed guidance on Box 4 reporting.
- FAQ Relating to Qualified Intermediaries (QI) on IRS.gov
  - o The IRS published Q11 to acknowledge that a QI could rely upon a Form W-8IMY for purposes of documenting Chapter 4 status of a partnership or trust subject to the joint account provisions.
  - o The IRS updated Q13 to acknowledge that a QI acting as intermediaries for Section 871(m) transactions may request and benefit from good faith under Notices 2016-76 and 2017-42.

- The IRS published Q4 providing guidance re due diligence and reporting requirements for certain tax-free savings accounts formed as trust arrangements under applicable non-U.S. law.
- Further Delay of Phase in of Section 871(m) Rules
  - IRS published Notice 2018-72 providing an additional two-year delay on application of Section 871(m) rules to non-delta one contracts as well as extending the simplified combination rule for two years.
  - Extension of Qualified Securities Lender (QSL) regime through 2020.
- Publication 1281 – Backup Withholding for Missing and Incorrect Name/TIN(s)
  - Helped the IRS update the publication to be current.
- §6050W Guidance
  - The IRS provided guidance to define key terms integral to the meaning of third party payment network.
  - General guidance related to payments made in settlement of payment card and third-party network transactions was also included.
- §3405 Guidance
  - Release of Revenue Ruling 2018-17 provided guidance on withholding and reporting with respect to payments from IRAs to state unclaimed property funds.
- Interactive Tax Assistant Online Tool
  - Helped the IRS identify an error in the Whom May I Claim as a Dependent? section of the Interactive Tax Assistant tool on IRS.gov.

## 2017 Term Accomplishments

- 1095-B and 1095-C Penalty Relief
  - IRS Notice 2018-06 extended good faith efforts penalty relief to filers who reported incorrect or incomplete information on 2017 forms filed in 2018.
- Delay in implementation of certain §871(m) requirements by issuing 2017-42.
- Two-year extension of Qualified Securities Lender (QSL) regime.
- Form 1098-T Guidance
  - The IRS updated Publication 1220 to provide guidance on the TIN solicitation checkbox.
- Guidance re extrapolation of liability for *cured* items on U.S. withholding agent audits.
  - IRS publicly announced that U.S. withholding agents who were able to *cure* items within a reasonable amount of time would not be required to include those *cured* items within the extrapolation of under withholding liability.
- Relief re Foreign Taxpayer Identification Number (FTIN) requirements
  - IRS allowed for phase in of FTIN requirement on Forms W-8.
  - IRS included *white list* of jurisdictions that do not issue FTINs and/or jurisdictions that have requested to be included on such a list for which an FTIN or reasonable explanation is not required.

- IRS limited application of withholding to those scenarios where there would otherwise be a withholding requirement – e.g., requirement to backup withhold will not apply to either foreign source income or gross proceeds.
- Extension of time for the 2017 calendar year, stating that a withholding agent will not be subject to interest, penalties, or additions to tax with respect to a dividend equivalent payment made with respect to a derivative referencing a partnership provided that the withholding agent withholds and reports on Form 1042 and Form 1042-S with respect to the payment by September 17, 2018.”
  - IRS provided extension of time for withholding agents to navigate these requirements.

## **2016 Term Accomplishments**

- Hard-to-Value Assets
  - The IRS updated the instructions to Forms 5498 and 1099-R to provide guidance on reporting hard-to-value assets.
- Form 1098 Mortgage Interest Reporting
  - The IRS provided guidance on reporting which address should be used on Form 1098 in instances where multiple properties secure a mortgage loan.
  - The IRS provided guidance on reporting beginning of the year mortgage principal balances in instances where the service provider either originated or did not hold the loan at the beginning of the year.
- Changes to Proposed 2017 QI Agreement incorporated into final 2017 QI Agreement
  - Clarification of application of QDD rules to branches.
  - Clarification on withholding timing and deposit rules for QDD tax liability.
  - Extension of periodic review deadline to December 31 for those QIs electing to use the third year of the certification period as the periodic review year.
  - Clarification of independence standard for periodic reviewers.
  - Changes to under withholding liability calculation and extrapolation process.
- Implementation of *alternative* withholding statement format.
- Changes in sunset period for Forms W-8.
  - The IRS updated the sunset provisions to provide that previous versions of Forms W-8 remain valid for the longer of six months or the end of the calendar year once a new version of a Form W-8 is issued.
- Clarification on the acceptance of Forms W-8 with electronic signatures.
  - IRS published guidance providing that withholding agents may accept a Form W-8 with an electronic signature that was not executed on the withholding agent’s electronic systems.
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## **2018 Information Reporting Program Advisory Committee Members**

### **Lisa Allen**

IRPAC, Member

#### **Employee Information Reporting/Burden Reduction Subgroup, Member**

Ms. Allen is the VP of Regulatory Affairs, Relph Benefit Advisors an Alera Group Company, in Fairport, NY. Ms. Allen has 25+ Years of Employee Benefit experience. Ms. Allen is VP of Regulatory Affairs for Relph Benefit Advisors and is a Certified Healthcare Reform Specialist. Ms. Allen manages regulatory updates and provides clients with counsel regarding ACA, ERISA and Section 125. Ms. Allen supervised the processing of over 40,000 1095-Cs in Q1 2016 and Relph's ACA penalty subject matter expert and assists employers on 226J responses. Ms. Allen is the 2018 Chairman of Compliance Committee of the Benefit Advisors Network (BAN) and a conference committee member of the Employer Council on Flexible Compensation (ECFC). Ms. Allen is a member of International Society of Certified Employee Benefit Specialist and speaks at their annual symposium, and also a member of SHRM and NAHU.

### **Martin Bentsen**

IRPAC, Member

#### **International Reporting & Withholding Subgroup, Member**

Mr. Bentsen is an attorney and director of product development, FIS Wall Street Concepts (WSC), in New York, N.Y. He interacts with hundreds of financial firm clients on tax reporting matters. WSC's client base is comprised of self-clearing brokerage firms, hundreds of trust companies, some of the largest online brokers and international banking institutions and firms in the asset management advisory business. Mr. Bentsen is the lead for WSC's "Tax Community" outreach to clients, which provides a forum for clients to express their views and positions on tax-reporting matters. He is a member of the New York State Bar Association and a certified regulatory and compliance professional.

### **Laura Lynn Burke**

IRPAC, Member

#### **Employee Information Reporting/Burden Reduction Subgroup, Member**

Ms. Burke has been a Tax Professional for over seventeen years. She is an Enrolled Agent, provides tax resolution solutions and prepares tax returns for Individual, Corporate, Partnership, LLC Series, Estate and Not-for-profit. She has managed a VITA Tax Site and is a lead instructor. Ms. Burke is a member of the Illinois CPA Society,

Past Treasurer of Women in Insurance & Finance, and a member of APICS. She has a BA in Business and Psychology, Master of Science, Management Information Systems and an MBA in Tax, Marketing & Leadership.

**Tenesha Carter**

IRPAC, Member

**Emerging Compliance Issues Subgroup, Chair**

Ms. Carter is the Senior Vice President of Tax Preparation Services for the State Employees Credit Union in Raleigh, NC. Ms. Carter supervises and coordinates the tax preparation program for the credit union's 260 branches. She previously supervised daily operations of IRA services to ensure proper handling and reporting for the credit union. Ms. Carter is an Enrolled Agent and holds a Bachelor of Arts from the University of North Carolina, Chapel Hill.

**Randall Cathell**

IRPAC, Member

**International Reporting & Withholding Subgroup, Member**

Mr. Cathell is a Tax Director for Cherry Bekaert and heads the firm's international section in the State of Florida. He has more than 20 years of experience in federal, international and state tax matters. Mr. Cathell focuses on subchapter C corporations and partnerships in both the private and public sectors, in addition to foreign nationals with U.S. investments. He specializes in companies with international operations, from both a planning and compliance perspective. Mr. Cathell is a member of both the American Institute of Certified Public Accountants and Florida Institute of Certified Public Accountants. Mr. Cathell earned his Bachelor's degrees in Accounting and General Business & Management from the University of Maryland, and his Master's degree in Taxation from Texas Tech University.

**Alexandra Cruz**

IRPAC, Member

**International Reporting & Withholding Subgroup, Member**

Ms. Cruz is a Senior Manager in the Information, Reporting & Withholding practice of Ernst & Young's Financial Services Office in New York. She is primarily focused on advising and assisting clients in the Asset Management industry with the implementation of FATCA and CRS across organizations inclusive of investor relations, compliance and tax, along with reporting and other compliance matters under FATCA and CRS. She has extensive experience working with large asset management and banking organizations with both domestic reporting and withholding issues (i.e., Forms 1099 and backup withholding) and nonresident alien reporting and withholding issues (i.e., Forms 1042-S and section 1441 withholding). She is an attorney and is admitted to the bar in New York.

**Terry W. Edwards**

IRPAC, Member

**International Reporting & Withholding Subgroup, Member**

Mr. Edwards has worked in banking for over 28 years in the Corporate Tax Department of Wells Fargo Bank (and predecessor Wachovia Bank). He is the Director of Information Reporting Consulting where he leads a team of tax professionals that provide consulting to multiple and diverse business units on information reporting and withholding requirements. He has been a member of the American Bankers Association's Information Reporting Committee since 2009 and chair of the committee in 2015 and 2016. He served on the Clearing House's Tax Reporting Committee from 2002-2013 and as chair in 2011. Mr. Edwards is also a founding member of the Information Reporting Roundtable Committee (comprised of numerous U.S. Banks). Prior to joining Wells Fargo, he was employed as a tax consultant at Deloitte. He is a CPA with a Masters in Accounting, concentrating in tax, from Virginia Tech and a BS in Business Administration from the University of Virginia's college at Wise.

**Alan Ellenby**

IRPAC, Member

**Employee Information Reporting/Burden Reduction, Chair**

Mr. Ellenby is an executive director and an attorney serving as national tax technical advisory leader for Ernst & Young's practice providing ACA compliance and reporting services to large employers. In addition, he has worked with qualified and non-qualified retirement plans, other types of compensation and employee benefit issues, assisting multinational corporations with the U.S. taxation of employees participating in foreign pensions. He is a member of the American Bar Association and was a member of the AICPA Tax Division's Employee Benefit Technical Resource Panel. Mr. Ellenby received a degree in actuarial science from the University of Illinois and a JD from the University of Chicago.

**Dana Flynn**

IRPAC, Chair

**International Reporting & Withholding Subgroup, Member**

Ms. Flynn is a Director in the Corporate Tax Department at BNP Paribas and Global Head of U.S. Information Reporting & Withholding, FATCA, and QI Advisory. As U.S. tax advisory, she works with various local and global divisions of BNP Paribas relating to their policy planning, implementation and compliance issues regarding various areas of U.S. domestic and non-resident withholding tax and information reporting, including the Foreign Account Tax Compliance Act (FATCA) and Section 871(m) of the Internal Revenue Code. In addition, as the Global Head of QI advisory, she works closely with the BNP Paribas' Qualified Intermediary entities developing and implementing global

policy, procedure, training and risk controls. Previously, she was a Director within Group Tax at UBS where she was the Americas regional expert for FATCA. Prior to UBS, Ms. Flynn also worked at Bank of New York Mellon and PriceWaterhouseCoopers advising local and global stakeholders with regards to U.S. information reporting and withholding tax.

Ms. Flynn has been a guest speaker and chairperson at various tax information reporting and withholding conferences within the industry and is the 2018 Chair of IRPAC (Information Reporting Program Advisory Committee to the IRS). She received her BA from Boston College and JD from Suffolk University Law School.

**Deborah Fox**

IRPAC, Member

**Emerging Compliance Issues Subgroup, Member**

Ms. Fox is a Certified Scrum Product Owner with experience in a broad spectrum of verticals. As the Director of Marketing she is responsible for developing future strategy for tax solutions portfolio. She has a broad background in all aspects of product management including business case development, project management, partner management, development, operations, client services, systems analysis, sales and quality assurance. Ms. Fox is a self-starter with team building and leadership skills, and a strategic thinker with market analysis skills.

**Masaki Kuwana**

IRPAC, Member

**Emerging Compliance Issues Subgroup, Member**

Mr. Kuwana is a U.S. tax advisor for Amazon.com in Seattle, Wash. He is a senior tax advisor providing tax technical and operational support related to information reporting/withholding. Mr. Kuwana was previously an Executive Director at JPMorgan Chase & Co, where he managed US tax operations supporting multiple lines of business.

**Sanford Kelsey**

IRPAC, Member

**Emerging Compliance Issues Subgroup, Member**

Mr. Kelsey is the senior tax counsel, FedEx Corporation, in Memphis, Tenn. Mr. Kelsey holds a Juris Doctor and Legum Magister degree. He is also a CPA and has experience in government and private law practice. His responsibilities at FedEx include advising stakeholders of various subsidiaries on federal, state, local and international tax matters. He has also worked on administrative and legislative initiatives while in government. In addition, his tax experience includes structuring transactions and providing representation during tax contests. He is a member of the ABA Tax Lawyer Editorial Board and a past member of IRSAC.

**Joel Levenson**

IRPAC, Vice Chair

**Emerging Compliance Issues Subgroup, Member**

Mr. Levenson, as associate director of tax compliance at the University of Central Florida, considers information reporting a significant part of his role, working with taxpayers who receive information returns submitted by the university. He works with multiple departments to ensure accurate reporting including: student accounts for 1098-T; accounts payable for 1099-MISC; international studies for 1042-S; human resources for W-2; and the UCF card services for 1099-K. Mr. Levenson is a member of the Tax Council of the National Association of College & University Business Officers (NACUBO), the Inter-Institutional Committee on Finance & Accounting Officers (ICOFA), Tax Sub-Committee; and the University Tax Peer Group. He received his BS and Master of Science, Taxation from the University of Central Florida.

**Emily Lindsay**

IRPAC, Member

**Employee Information Reporting/Burden Reduction Subgroup, Member**

Ms. Lindsay is a former executive of Marriott International, Inc. Vice President, Corporate Accounting Services. Lead and directed a diverse team of over 50 accounting, tax, systems, and business services experts responsible for a wide variety of payroll, business support services, business systems analyses and development, payroll tax services, payroll accounting, and related banking services functions for Marriott, a company with \$12 billion in annual system-wide sales. Ms. Lindsay is a Certified Public Accountant (active license since 1984), Chartered Global Management Accountant (CGMA). CGMA is a professional management accounting designation and a joint venture of the AICPA and the London-based Chartered Institute of Management Accountants (CIMA). Professional Memberships: American Institute of Certified Public Accountants (AICPA); Association of Certified Fraud Examiners (ACFE); American Payroll Association (APA). American University Teaching and Service Awards: Kogod Faculty Award for Outstanding Service: September 2016; Sept. 2015; Sept. 2014; Sept. 2013.

**Ryan Lovin**

IRPAC, Member

**Emerging Compliance Issues Subgroup, Member**

Mr. Lovin is Associate Counsel for product tax on the Global Tax Advisors team at Vanguard. He has over 10 years of experience in the tax industry and previously worked for the Investment Company Institute in Washington, D.C. Mr. Lovin leads working groups to develop consensus-based solutions to industry issues, and presents those solutions to government stakeholders, including the IRS and the Dept. of the

Treasury. He also has experience with the Foreign Account Tax Compliance Act. Mr. Lovin has a Masters in Accounting from the University of North Carolina, Chapel Hill and a Juris Doctorate from Georgetown University.

**Fred Murray**

IRPAC, Member

**Emerging Compliance Issues Subgroup, Member**

Mr. Murray is the Director of the Graduate Tax Program and Professor of Taxation Practice, University of Florida Frederic G. Levin College of Law. His experience includes public law and accounting practice, government service as Deputy Assistant Attorney General in the Tax Division at the Department of Justice and as a Special Counsel to the Chief Counsel for the Internal Revenue Service. He is a former Chair of the US Internal Revenue Service Advisory Council (formerly Commissioner's Advisory Group); former Advisor to the International Tax Working Group of the United States Senate Finance Committee; and a former member, Commissioner's Advisory Council, Department of Taxation and Finance, State of New York. He is Vice Chair for CLE, and a former Council Director, governing Council of the American Bar Association Section of Taxation, as well as former chair of several of its committees. He has twice served as Chair of the Federal Bar Association Section of Taxation. He is a Fellow of the American College of Tax Counsel, and a Life Elected Member of the American Law Institute, a member of the International Bar Association, a member of the International Fiscal Association, and a member of the Bloomberg BNA International and Transfer Pricing Tax Advisory Board.

**James Paille**

IRPAC, Member

**Employee Information Reporting/Burden Reduction Subgroup, Member**

Mr. Paille has been an executive manager in the payroll service industry for over 30 years, specializing in managing multi-location offices. He has extensive experience in operations, customer service, mergers and acquisitions, payroll system conversions, operational startups and turnarounds, product development, call center design and implementation, and financial and large IS installations and conversions. He has designed and implemented standard branch management practices that resulted in dramatic customer service and client retention improvements, and has also designed a comprehensive due diligence checklist that is used in acquisitions.

In his current position at Thomson Reuters, a worldwide organization, Mr. Paille is responsible for compliance, regulatory licensing with the federal government and many states, periodic examinations, FINCIN reporting and AML programs. Previously Mr. Paille was responsible for payroll delivery and tax operations as well as assisting with product development, third party integration, strategic growth and acquisitions. Mr. Paille also writes The Payroll Report a monthly blog on current payroll issues.

Previously, Mr. Paille served as Senior Vice President of PaySystems, Vice President of Time Plus Payroll Services, Inc., and Vice President of Operations for SmallBizPros, Inc. He has also served as Vice President of Branch Operations for Advantage Business Services, Vice President and General Manager of Employee Solutions, Inc., a publicly traded PEO; and Director of Operations and Regional Controller for ADP.

Mr. Paille is a member of the American Payroll Association's Board of Directors and Past President, sits on the Finance Committee and National Speakers Bureau and chairs the CPP Certification Review Panel. He has authored numerous publications on the subject of payroll and payroll taxation. Mr. Paille is also a member of the Detroit Chapter of the American Payroll Association where he served as President and was a past Michigan Payroll Professional of the Year. Additionally, Mr. Paille is a member of IRPAC, RAF (IRS committees), IPPA, NACHA, NACTP and serves on a number of APA committees.

Mr. Paille holds a B.S. in Accounting from St. John Fisher College in Rochester, NY and is a Certified Payroll Professional.

**Thomas Prevost**

IRPAC, Member

**International Reporting & Withholding Subgroup, Member**

Mr. Prevost was a Managing Director at Credit Suisse and the FATCA Responsibility Officer for all Credit Suisse Group entities. He was responsible for FATCA Advisory and the Compliance Framework, including IRS certifications for Credit Suisse globally. Prior to March 1, 2015, Mr. Prevost was the American Head of Tax for 13 years where he was responsible for all taxation issues for the Americas region, including U.S. information reporting issues. He served 10 years as the International Swaps and Derivatives Association North American Tax Chair and is a Securities Industry and Finance Markets Association Tax Compliance Group member. Mr. Prevost holds a Juris Doctorate from the University of Houston and a Bachelor of Science in Accounting from the University of Louisiana-Lafayette.

**Clark Sells**

IRPAC Member

**Employee Information Reporting/Burden Reduction Subgroup, Chair**

Mr. Sells leads the Dayforce Payroll Tax Product team at Ceridian. In this role Sells is responsible for leading the product development life cycle responsible the payroll tax calculation and the got to market strategy for the Ceridian platforms. Mr. Sells has experience in building, implementing, and maintaining tax software for filers of all volumes. In addition to payroll Mr. Sells has product strategy experience in a multiple of

tax regimes including: 1099, FATCA, CRS, and ACA. He is a subject matter expert in the area of tax payer identification number matching, non-wage, and state reporting. Mr. Sells has over 10-year experience serving as liaison to various public and private industry groups that aim to reduce the burdens of tax information reporting. Previously in his career he held a Principal role at Sovos Compliance and worked in various Global Treasury Services roles within Bank of America and Ameriprise Financial.

**Kevin V. Sullivan**

IRPAC, Member

**International Reporting & Withholding Subgroup, Member**

Mr. Sullivan currently serves on the IRS Information Reporting Program Advisory Committee (IRPAC) as a member of the Information Reporting and Withholding Subgroup. Mr. Sullivan is Managing Director and Tax Executive at Bank of America where he is the Head of U.S. Information Reporting Advisory in the Global Tax Policy group. In this capacity, he manages a team of tax advisors responsible for U.S. withholding and information reporting advisory throughout Bank of America Merrill Lynch. Prior to Bank of America, Mr. Sullivan held various positions at BNP Paribas including Head of U.S. Information Withholding & Reporting, FATCA, and QI Advisory, Head of North American Tax Operations, and Head of North American FATCA. Mr. Sullivan also worked at Deloitte Tax as a Senior Manager in the Global Information Reporting group where he advised foreign and domestic financial institutions as well as multinational corporations in properly addressing U.S. and NRA tax withholding and reporting obligations.

**Mary Jo Werner**

IRPAC, Member

**Employee Information Reporting/Burden Reduction Subgroup, Member**

Ms. Werner is a partner in Wipfli's tax services and valuation, forensics, and litigation services groups. She uses her tax and accounting expertise to assist her clients in reducing their income and estate tax exposure and becoming more profitable. Mary Jo also specializes in litigation support for law firms and assists in fraud and forensic investigations. She prides herself on establishing long-term, solid relationships with her clients and works very hard to help them achieve their goals. Professional Memberships and Activities: American Institute of Certified Public Accountants (AICPA), American Bar Association (ABA), Gundersen Medical Foundation, Inc. – Executive Committee board member and Professional Friends Committee member, and IRS Taxpayer Advocacy Panel - Past member.

**Kelli Wooten**

IRPAC, Member

**International Reporting and Withholding Subgroup, Chair**

Ms. Wooten is a Managing Director with KPMG LLP. She advises both multinational corporations and financial institutions on their compliance with information reporting and withholding rules such as the Foreign Account Tax Account Compliance Act (FATCA) and the Common Reporting Standard (CRS). Prior to joining KPMG, Ms. Wooten was Global Commercial Head of Tax Services for CTI Tax Solutions of IHS Markit and Of Counsel with Burt, Staples & Maner, LLP. She also had an extensive career at Procter & Gamble where she served in many capacities, including domestic and international tax compliance, audit and litigation, and indirect tax. Ms. Wooten was previously a member of the IRS Electronic Tax Administration Advisory Committee (“ETAAC”) where she was the 2015 – 2016 Vice-Chair. Ms. Wooten earned a B.S. in Accounting from The University of Tennessee, and a Juris Doctorate from the University of Cincinnati College of Law.