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## 2016 IRPAC Public Report Letter from the Chair

October 26, 2016

Dear Commissioner Koskinen:

On behalf of the Information Reporting Program Advisory Committee (IRPAC), I am pleased to present you and your leadership team with our 2016 annual report. Under the IRPAC Charter our duty is to identify, and make specific recommendations for, areas of the information reporting program which can be improved by a change in operations, clarification of policy, or communication with the public. Well-designed information reporting rules help both taxpayers to comply with the law and the IRS to enforce it. If the information reporting process does not function properly, taxpayers may not receive the information they need to voluntarily comply with their tax obligations and the IRS may be unable to collect all of the revenue the government is entitled to receive. We believe that, as part of our joint pursuit of a high-functioning information reporting system, the IRS must try to minimize the burden of information reporting, especially when the information reported is unnecessary or could be accomplished more simply.

Unfortunately, there are barriers preventing the information reporting process from working as simply and effectively as it should. IRPAC recognizes and understands that the significant and chronic mismatch between the generally declining funding level of the IRS and its growing mandate is the most important challenge to improving information reporting. In many instances, we have been told that the IRS cannot pursue our recommendations because the IRS lacks the resources to open additional projects. As a result, both taxpayers and the IRS suffer.

An ongoing wave of new information reports shifts new and substantial burdens to payors and financial intermediaries. In just the last 6 years, Congress has added information reporting for cost basis on securities sales, reporting of financial payments under the Foreign Account Tax Compliance Act (FATCA), and health care coverage and enrollment under the Affordable Care Act.

For example, the Financial Institute Forum (FIF) estimated the cost to brokers and other financial intermediaries to implement cost basis reporting would exceed \$0.5 billion for the initial reporting period of 2011-2013.<sup>1</sup> Implementation costs associated with FATCA are likely to be even higher. SIFMA conducted an internal member survey and learned that the combined implementation costs of 17 respondents alone exceeded \$1 billion in 2013-2014.<sup>2</sup>

Today, I want to highlight three ways in which our 2016 report provides meaningful recommendations the IRS can implement to improve and simplify the information reporting process. Through our interactions with existing and draft versions

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<sup>1</sup> FIF cost basis working group, "Cost Basis Survey III, Final Report," at 23 (May 25, 2011).

<sup>2</sup> SIFMA Calls for Targeted Relief on FATCA. (n.d.). Retrieved February 16, 2016, from [http://www.sifma.org/newsroom/2014/sifma\\_calls\\_for\\_targeted\\_relief\\_on\\_fatca/](http://www.sifma.org/newsroom/2014/sifma_calls_for_targeted_relief_on_fatca/)

## 2016 IRPAC Public Report Letter from the Chair

of IRS forms and collaboration with IRS personnel, we identify issues we can bucket into three general categories: (1) small, specific changes that can be quickly addressed, (2) larger barriers that prevent a specific component of the information reporting process from operating effectively, and (3) still larger foundational issues that may require more substantial IRS resources to address. As you read through the report, it should become apparent that we have identified numerous items that fall into each of these categories.

One such barrier identified in the report that I would like to discuss in our meeting today centers on the 972CG proposed civil penalty and the process the IRS uses to evaluate reasonable cause waivers made by payors. A 972CG proposed civil penalty is commonly issued to payors when the IRS finds information returns submitted with name/TIN errors and/or that were filed late. Payors may seek abatement of the penalty if they can show they acted in a reasonable manner and the errors were not caused due to willful neglect. Our report details the pain that payors experience in obtaining this waiver and recommends that the IRS take appropriate steps to rectify the issue. This is a case where the IRS can take meaningful action to address a serious issue that we believe will lead to a reduced burden on payors and IRS personnel alike and allow valuable resources to be better allocated. This is especially important given the addition of millions of new ACA related information returns that will flow through this process.

I would like to thank members of the 2016 IRPAC for their amazing level of engagement on this and the many other issues contained in our report, their commitment to improving the information process, and their efforts to bring this report together. Likewise, I continue to be impressed with the IRS personnel we partner with throughout the year. They equal our passion when it comes to improving the information reporting process and the work we do could not be accomplished without their hard work and preparation. Our NPL team deserves a mountain of credit for their efforts in making this program and report a success. Candice, John, Mike and company do an outstanding job of ensuring we have the tools we need to succeed and provide unique insights into the IRS that enable us to do our job effectively.

Lastly, I would like to thank you Commissioner Koskinen. During my three years serving on the IRPAC, I have observed that you have a deep interest in our report and the recommendations that it contains. Your commitment to following up on our recommendations and holding your staff accountable to provide the IRPAC with updates on progress is laudable.

Best regards,



Michael Gangwer

2016 IRPAC Chairperson

## **Executive Summary of Issues**

### **General IRPAC Recommendations**

#### **A. 972CG Penalty Abatement Process**

To minimize the burden on taxpayers and the IRS, IRPAC recommends that the IRS take suitable action to rectify systemic issues that prevent 972CG penalty abatement requests from being judged properly and addressed timely. In addition, until such action can be implemented, IRPAC recommends that the IRS temporarily suspend the assessment of further 972CG proposed penalties for information returns showing mismatched name and TINs and for which pre-submission TIN/name matching ("TIN Matching") is not permitted.

#### **B. Form W-9**

IRPAC views Form W-9 as one of the building blocks of the information reporting process and recommends continued improvements that both simplify and bring clarity to the form. Specifically, IRPAC recommends that the fourth certification of Form W-9, Part II (regarding the FATCA code) be removed. If this recommendation is not adopted, IRPAC recommends the IRS issue guidance specifying that, for accounts maintained in the United States, a substitute version of Form W-9 is not required to include the fourth certification. In addition, IRPAC recommends the Instructions for the Requester of Form W-9 be modified to clarify that the exempt payee code and the exemption from FATCA reporting code are not required fields, and do not affect the validity of the form for purposes of withholding.

#### **C. Improving Frequently Asked Questions**

IRPAC recommends that the IRS implement a process to archive past FAQs so that payors who rely on an FAQ in filing information returns can later demonstrate the basis for the position taken. In addition, where practical, IRPAC recommends that the IRS enunciate the reasons supporting any changes to or deletions of prior FAQs to enhance transparency.

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

New recommendations this year would be to allow employers to establish electronic delivery of Forms W-2 and 1095-C as the default option, while allowing employees to retain the right to 'opt-out' of the default and request paper Forms W-2 and or 1095-C. Due to the decrease in satisfactory customer service provided to employers, service providers and tax practitioners as a result of the IRS budget cuts, IRPAC also recommends reactivation of the Electronic Account Resolution online tool that provided authorized practitioners the ability to efficiently and securely communicate with IRS to resolve a variety of tax issues. With the first full year of Affordable Care Act (ACA) reporting completed, IRPAC applauds IRS for implementing several of our prior year recommendations.

## **Executive Summary of Issues**

IRPAC also appreciates IRS' outreach and education efforts through webinars and the IRS' ACA team participating in meetings with the tax practitioner community. IRPAC also had additional recommendations for the Tax Tips, and continuing education regarding error messages, and on guidance for the responses to inconsequential errors. IRPAC continues to be concerned with Business Identity Theft and recommended measures that may help combat this type of theft. IRPAC continued to work with IRS on recommendations made in 2015 regarding improvements to Form W4-P and Form 1120-S k-1, as well as recommendations made in 2014 and 2015 regarding qualified plan payments to nonresident alien plan participants and guidance on gaps in withholding when IRA assets are escheated to State Governments.

### **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 IRC §§ 6055 and 6056 in 2016. With a full year of reporting under these new requirements, IRPAC has several recommendations which will help filers to further understand the reporting requirements which, in turn, will improve the accuracy and reliability of the reporting that IRS receives. Specifically, IRPAC recommends continued education on first year problems with the AIR system with new webinars addressing detailed information focused on the most common errors so that actions can be taken by filers to reduce errors. In order to reduce confusion by recipients, IRPAC recommends adding a Tax Tip to instructions advising taxpayers to not request correction of Form 1095-B or Form 1095-C with properly truncated SSNs or date of birth reporting properly missing. IRPAC recommends that "good faith efforts" penalty relief for reporting of incorrect or incomplete information reported on returns be extended at least to 2016 Forms 1095-B and Forms 1095-C filed in 2017. IRPAC further recommends that IRS provides specific guidance to Applicable Large Employers who undergo corporate transactions as that is an area that is particularly confusing and unclear. Finally, IRPAC recommends that the IRS consider guidance specific to what constitutes "inconsequential" errors with respect to reporting under IRC §§ 6055 and 6056.

### **B. Electronic Furnishing of Forms W-2 and 1095-C**

IRPAC recommends that Treasury Regulations be amended to allow an employer to electronically deliver Forms W-2 and 1095-C to all employees, and, if an employee prefers paper delivery, the employee may request such and the employer will deliver the W-2 or 1095-C on paper to that employee. This recommendation would allow an employer to establish electronic delivery as the default, the employees would then retain the option to 'opt-out' and get a paper Form W-2 and or Form 1095-C.

## **Executive Summary of Issues**

### **C. Theft of Business Taxpayer's Identity**

IRPAC applauds the IRS and the Security Summit in their expanding efforts to combat business identity theft, in addition to personal data breaches. However, the business community continues to be overwhelmingly concerned with all the confidential information that is shared with the IRS. To help combat Business Identity Theft, IRPAC recommends Federal Employer Identification Number truncation on payee information returns, and a revision of the procedures relative to address changes reported on Form 8822-B and the information stored in the Business Master File.

### **D. Reactivation of the online Electronic Account Resolution Tool**

IRPAC recommends that the Electronic Account Resolution online tool be reactivated, or a substitute tool or system be made available to employers, tax practitioners and service providers to provide an efficient and secure method of communicating and resolving tax issues with the IRS. This recommendation would provide the IRS and the Tax Practitioners a short term solution to the burdens created by the IRS budget cuts.

### **E. Information Reporting for IRA Assets Escheated to State Governments and 60-Day Rollover Relief**

IRPAC recommends that the IRS provide specific rollover relief by adding "The distribution was escheated to a state agency" to the list of self-certification reasons for missing the 60-day rollover in Revenue Procedure 2016-47. This recommendation would provide essential relief to taxpayers whose IRA assets were distributed without their knowledge and sent to state abandoned property divisions.

## **Emerging Compliance Issues**

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

IRPAC recommends the Proposed Regulations included in Notice of Proposed Rulemaking (REG-131418-14) be amended to allow educational institutions subject to 1098-T reporting to remain exempt from Form 1098-T reporting for students who are either non-resident aliens or for whom qualified tuition and related expenses are paid entirely with scholarships or formal billing arrangements.

Additionally, the NPRM should be updated to remove the requirement to report the number of months a student was a full-time student, allow institutions to report on Form 1098-T how payments are actually applied to students' accounts, and allow institutions to report on Form 1098-T how reimbursements or refunds are actually applied to students' accounts.

## **Executive Summary of Issues**

### **B. Hard to Value Assets**

IRPAC recommends that the IRS should update the 2016 Form 5498 and Form 1099-R instructions to clarify for the industry how or whether to report hard to value assets on the 1/31 account statements to participants and recommends that if reporting is required on the 1/31 statement trustees do not need to issue a separate 5498 if there have been no contributions to the account. In addition, IRPAC would like to know what codes, if any, should be used to report distributions of hard to value assets from Roth accounts. It is imperative that this clarification is made quickly as we are fast approaching year end.

### **C. 529 Accounts**

IRPAC has recommended that the IRS provide guidance clarifying how the industry can implement a new PATH Act reporting rule that eliminated the aggregation of distribution from multiple 529 accounts belonging to the same owner and beneficiary.

### **D. Form 1098 Mortgage Interest Reporting**

IRPAC recommends in the case where multiple properties secure a mortgage loan, the lender should be able to designate at their discretion one of the properties as the principal property securing the loan and use the address of that property for reporting purposes to complete Boxes 7, 8 and/or 9, as applicable. In the case where a lender originated the mortgage loan during the year or the lender or servicer of a mortgage loan did not hold the loan as of the beginning of the year, the outstanding mortgage principal as of the beginning of the year should not be required to be reported.

### **E. IRS Publication 1179 Substitute 1099-B Specifications**

IRPAC recommends that the IRS update Publication 1179 to specify how to report transactions that have the ordinary checkbox marked in Box 2 of the 1099-B on a substitute form. The current instructions only specify how to report transactions with short-term gains or losses and long-term gains and losses but don't provide direction on reporting transactions with ordinary income.

### **F. 2016 Form 8949 Instructions**

IRPAC recommends that the IRS provide instruction for taxpayers on where to report transactions that only have the ordinary checkbox marked in Box 2 of the 1099-B as it may be confusing to them on where to report transactions that do not fall into either the short-term or long-term gains and losses category.

### **G. IRC §6050W and Form 1099-K Reporting**

## Executive Summary of Issues

Guidance under section 6050W has been on the Treasury Priority Guidance Plan for the last several years and IRPAC was pleased to see that this project has remained on that Plan for 2016-2017. Notwithstanding this prioritization, however, the IRS declined to discuss this issue with IRPAC during 2016. IRPAC hopes that progress on this very important guidance project at the IRS has not stalled and remains committed to working with the IRS on these issues.

At a very minimum, the IRS should address the definitional issues associated with which entities qualify as Third Party Settlement Organizations eligible to avail themselves of the de minimis rules which *eliminate* reporting on otherwise reportable amounts if either the amount paid within a year doesn't exceed \$20,000 or the aggregate number of such transactions does not exceed 200. Because these de minimis rules can completely eliminate the obligation to issue Forms 1099-K to payees, IRPAC believes that guidance is urgently needed regarding the rules for determining which payors can qualify for TPSO status.

### H. Complex Debt Reporting Requirements

IRPAC partnered with the IRS on several initiatives related to the 1099-B for Tax Year 2016. As a result of our discussions the IRS published an amendment to the 2016 Instructions for Form 1099-B on August 16, 2016, clarifying the use of the ordinary check box. IRPAC thanks those involved with providing the industry with needed guidance quickly.

### International Reporting and Withholding

IRPAC made 31 recommendations on international reporting and withholding matters, including the following:

- A. IRS publicly acknowledge that withholding agents will not be held liable with respect to section 305(c) events occurring prior to 2016.
- B. Several changes to the qualified securities dealer rules, including a delay of the effective date of such rules to January 1, 2018.
- C. Several changes to the proposed qualified intermediary (QI) agreement, including a delay of the effective date of the new QI agreement to January 1, 2018.
- D. Streamline withholding statements that accompany Forms W-8IMY.
- E. Expand usage of Form W-9 as FATCA documentation for certain disregarded entities.

## Executive Summary of Issues

- F. Changes to the IRS FATCA Timeline.
- G. Changes to the partnership lag-method of reporting.
- H. Issue guidance on the escrow procedures.
- I. Delay the date on which the April 2016 version of Form W-8BEN-E becomes mandatory until January 1, 2017.
- J. Issue transitional relief regarding the new limitation on benefits boxes on Form W-8BEN-E.
- K. Numerous changes to the February 2016 draft Form W-8BEN-E and its instructions.
- L. Issue clarifying guidance regarding when a U.S. TIN is required on a Form W-8BEN-E submitted by a foreign 501(c) organization.
- M. Create a flowchart depicting the placement of GIINs on Forms W-8.
- N. Modify the Instructions for Form W-8ECI to clarify that a business address in the U.S. need not be included on a Form W-8ECI if form provider does not have a business address in the U.S.
- O. Issue clarifying guidance allowing withholding agents to accept a Form W-8 with an electronic signature that was not executed on the withholding agent's electronic systems.
- P. Resurrect substitute Form 1042-S payee statements under certain conditions.
- Q. Modify the Instructions for Form 1042-S to clarify that truncated TINs are permitted for all substitute Form 1042-S payee statements.
- R. Modify the Instructions for Form 8966 to provide more detail regarding a withholding agent's Form 8966 reporting obligations with respect to passive NFFEs with substantial U.S. owners, where the passive NFFE is an indirect payee of the withholding agent.
- S. Provide guidance on the Form 8966 and/or Form 1099 reporting requirements for a foreign branch of a U.S. financial institution in a Model 2 IGA country regarding account holders which are specified U.S. persons for Form 8966 reporting purposes and U.S. exempt recipients for Form 1099 reporting purposes.

## **Executive Summary of Issues**

- T. Issue guidance highlighting under what circumstances a Form 8655, "Reporting Agent Authorization," must be filed.
- U. Add a new sentence to the end of the instructions for line 64 of Form 1040 to clarify that such line should include federal income tax withheld and reported on a Form 1042-S.

## **Executive Summary of Issues**

# **INFORMATION REPORTING PROGRAM ADVISORY COMMITTEE**

## **GENERAL REPORT**

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## IRPAC General Report

### A. 972CG Proposed Penalty Assessments

#### Recommendation

IRPAC recommends that the IRS take suitable action to rectify the systemic issues in the existing IRS penalty abatement process that prevent 972CG penalty abatement requests from being judged properly and addressed timely. In addition, until such action can be implemented, IRPAC recommends that the IRS temporarily suspend the assessment of further 972CG proposed penalties for information returns showing mismatched name and TINs and for which pre-submission TIN/name matching ("TIN Matching") is not permitted.

#### Discussion

##### Systemic issues with the penalty abatement process

It is widely recognized by payors and information return preparers that obtaining a 972CG proposed penalty abatement is an extraordinarily long and frustrating affair, during which they have come to expect denials and appeals. This is particularly true for penalties issued with respect to TIN/name mismatches, which typically are beyond the control of the payor as they result from payees and employees providing incorrect information. Compounding the problem, information reporters do not have the ability to use the TIN Matching system in advance of submitting information returns that are not subject to backup withholding. In order to get the penalty abated, payors and information return preparers must spend an extraordinary amount of time and effort working within the abatement administrative process to achieve that result. IRPAC believes that this is not an efficient use of time for neither the IRS nor payors.

Payors indicate that the IRS response to penalty abatement letters takes too long, sometimes up to nine months. Adding to the frustration, initial penalty abatement requests are frequently denied, meaning that payors must enter the appeal process in order to receive an abatement. In contrast, payors have just 45 days to review a 972CG notice, investigate potentially thousands of impacted customer accounts, and respond to the proposed penalty letter or the penalty is deemed to be assessed. Collection notices are sent out before any response to the penalty abatement request is received. The IRS contact information on the collection notices does not reach a team that has access to the civil penalty information. Unabated penalties are applied to other information return liabilities like Form 945 and 1042. Denial letters often arrive just prior to the next tax year's 972CG proposed penalty notices being released, meaning payors must often manage multiple 972CG penalty abatements and appeals simultaneously. It is common for these firms to manage multiple legal entities, further complicating the process.

Another item of concern for IRPAC is that when denial letters are received, payors have noted that the reasons cited by the IRS for the denial of the abatement request are not consistent with the reasonable cause arguments made by the payor.

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Based on the experiences of IRPAC members and others we've spoken to across a variety of industries, IRPAC is concerned that IRS personnel tasked with reviewing 972CG penalty abatement requests may not be adequately equipped to address the highly technical issues discussed in the penalty abatement letters submitted by payors. IRPAC requested IRS Office of Servicewide Penalties to provide more detailed insight into current IRS practices and procedures for reviewing and granting/denying penalty abatement requests, however made little progress in our 2016 working sessions.

It is IRPAC's belief that the current process for obtaining a reasonable cause waiver to abate these penalties is unreasonable and unsustainable. IRPAC, therefore, recommends that the IRS take suitable action to address these issues with the abatement process. Until such action can be implemented, IRPAC further recommends that the IRS temporarily suspend the assessment of further 972CG proposed penalties for information returns showing mismatched name and TINs. Moreover, because the impact of these problems with the abatement process goes beyond information returns filed with name and TIN mismatches (and in fact extends to all information reporting errors included on the 972CG proposed penalty), IRPAC further recommends that the IRS take the steps needed to address the issue as it relates to all abatement requests based on a reasonable cause defense.

### Information Returns for the ACA

With increased per form penalty amounts and caps now in place and with the addition of many millions of ACA related information returns, the penalty abatement process problems will expand exponentially. Millions of new information returns will enter into the 972CG penalty process for the first time in 2016. Given the already burdened and in the eyes of IRPAC, flawed penalty review process, IRPAC does not believe that the current process is ready to handle this increased volume. IRPAC believes that a large number of the new 972CG proposed penalty notices from ACA reporting will be generated as a result of name and TIN mismatches on Forms 1095. The TIN matching service is only available to information reporters who report income that is subject to backup withholding and is not available to employers and insurance companies who must file Forms 1095. Thus, employers and insurance companies will not be able to address and correct any mismatches discovered until after their information returns have been submitted to the IRS electronically. In the end, employers and insurance companies will be left to sort out these errors – which typically covered by reasonable cause, through the already overburdened and inefficient 972CG penalty process. In sum, IRPAC recommends that the IRS temporarily suspend the assessment of further 972CG proposed penalties for ACA related information returns.

### **B. Form W-9, Request for Taxpayer Identification Number and Certification, Revision.**

Two IRPAC recommendations made in the 2014 Burden Reduction subcommittee (Item C. 8 a. and 13) were not implemented into the Form W-9 (Rev.

## IRPAC General Report

December 2014). IRPAC renews its request to incorporate the feedback contained in the 2014 report and requests additional updates to the next Form W-9:

1. Page 29, 8 a. – add “The information must match your government-issued identification information.” Add “or IRS confirmation” to clarify the documentation associated with an EIN. This information would be helpful given that the name on the Social Security card or IRS confirmation is what is used to match against the TIN provided by the customer.
2. The IRS posted to its website the “Clarification for Form W-9, Request for Taxpayer Identification Number and Certification (Rev. December 2014) on 10-APR-2015. It contained additional information related to the instructions for Lines 3, 4 and 5. The document is not presented with the Form W-9 so it is difficult for a taxpayer to access or know it exists. The language recommendations should be incorporated into the next Form W-9.
3. It would be helpful if the team responsible for updates to the Form W-9 worked with IRPAC to make additional updates so the information is clear to the taxpayer completing the form. Specific language recommendations have been provided to the team responsible for updates to the Form W-9.

### **Form W-9: FATCA Jurat, Exempt Payee Code, and Exemption from FATCA Reporting Code**

Two IRPAC recommendations in the 2014 International Reporting and Withholding subgroup report (Item O., 1 and 2) have not been implemented. IRPAC renews its request to incorporate the feedback contained in the 2014 report and summarized below.

IRPAC recommends the fourth certification of Form W-9, Part II (regarding the FATCA code) be removed. If this recommendation is not adopted, IRPAC recommends the IRS issue guidance specifying for accounts opened and maintained in the United States, the fourth certification may be omitted from a substitute W-9 incorporated into other business forms. In addition, IRPAC recommends the Instructions for the Requester of Form W-9 be modified to clarify that the exempt payee code and the exemption from FATCA reporting code are not required fields, and do not affect the validity of the form for purposes of withholding.

### **Recommendation**

IRPAC recommends that the fourth certification of Form W-9, Part II (regarding the FATCA code) be removed. If this recommendation is not adopted, IRPAC recommends the IRS issue guidance specifying that, for accounts maintained in the United States, a substitute version of Form W-9 is not required to include the fourth certification. In addition, IRPAC recommends the Instructions for the Requester of Form W-9 be modified to clarify that the exempt payee code and the exemption from FATCA reporting code are not required fields, and do not affect the validity of the form for purposes of withholding.

## **IRPAC General Report**

### **Discussion**

The fourth certification of Part II of Form W-9 was added pursuant to FATCA. IRPAC recommends that this certification be eliminated, as we see neither regulatory authority for it (see Treas. Reg. §§31.3406(h)-3(a)(1)-(2) regarding the statements that must be made under penalties of perjury on Form W-9), nor a need for a penalties of perjury statement with respect to a field that, according to our understanding, merely affects information reporting. If the recommendation in the preceding sentence is not adopted, IRPAC recommends guidance be issued by the IRS that the fourth certification in Part II of Form W-9 need not be included on a substitute version of Form W-9 for accounts opened and maintained in the United States. The certification is a source of confusion to customers since it was added to the Form W-9 (Rev. Dec 2014).

IRPAC believes the exempt payee code and the exemption from FATCA reporting code solely affect whether a payee or account holder may be subject to information reporting. It does not impact any requirement to withhold. The absence of an exempt payee code is not a reason to invalidate the form for backup withholding purposes, as this code is not a requirement for a valid Form W-9 (see Treas. Reg. §31.3406(h)-3(a)(2)). Since our 2014 report recommendation, certain payors continue to reject Forms W-9 and backup withhold when an exempt payee code is not provided. The absence of an exempt payee code could require a payor to treat such a payee as a U.S. nonexempt recipient and issue information reporting. The exemption from FATCA reporting code, in some cases, leads to unnecessary rejections of Forms W-9 and FATCA withholding. Both codes are only relevant for information reporting. IRPAC recommends the Instructions for the Requester of Form W-9 be modified to clarify that the absence of these codes does not require backup or FATCA withholding.

### **C. Suggestions for Improvements to the IRS Use of FAQs**

#### **Recommendation**

IRPAC recommends that the IRS implement a process to archive past FAQs so that payors who rely on an FAQ in filing information returns can later demonstrate the basis for the position taken. In addition, where practical, IRPAC recommends that the IRS enunciate the reasons supporting any changes to or deletions of prior FAQs to enhance transparency.

#### **Discussion**

In matters relating to information reporting, the IRS often posts on its website informal frequently asked questions with answers ("FAQs") to provide real time assistance for the information reporting community. FAQs are extremely helpful to the information reporting community as they typically answer procedural questions in the absence of formal guidance. In this regard, FAQs are akin to form instructions and publications, but can be issued more quickly so that the information reporting community can utilize the FAQs in preparing and filing timely information returns.

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Although IRPAC finds FAQs to be a very helpful tool for the information reporting community, there can be a problem with this tool when the IRS modifies or deletes FAQs from the website. Typically, these modifications/deletions are not highlighted in the newly posted FAQs (date stamped with a later date) nor is the rationale for these modifications/deletions provided. Unexplained FAQ modifications/deletions give rise to uncertainty in the information reporting community because even if the modifications/deletions are noticed, the community is often left without an understanding as to what, if any, action should be taken with respect to past reports issued following the recommendations provided by the prior FAQ.

IRPAC recommends that the IRS implement a process to archive (and preferably make searchable) past FAQs – or at a minimum save modified FAQs after replacing FAQ and deleted FAQs in one centralized location – so that payors who rely on an FAQ in filing information returns can later demonstrate the basis for the position taken. Currently many payors are forced to print hard copies of the website with date stamps to support any position taken in reliance on an FAQ should the content of the FAQ later change or be deleted. Where practical, the IRS should also enunciate the reasons supporting its changes/deletions made to prior FAQs to enhance transparency.

# IRPAC General Report

**INFORMATION REPORTING PROGRAM  
ADVISORY COMMITTEE**

**EMPLOYER INFORMATION REPORTING  
AND BURDEN REDUCTION  
SUBGROUP REPORT**

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## Employer Information Reporting and Burden Reduction

### 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 IRC §§ 6055 and 6056 during 2016 which include:

- The cross reference of electronic instructions for line 61 of Form 1040 to another document on the IRS website entitled Questions and Answers about Reporting Social Security Numbers to Your Health Insurance Company was completed in January 2016. (See pages 65 and 48 of the 2014 and 2015 Public Reports.)
- Proposed Treasury Regulations were published Aug. 2, 2016, for Information Reporting of Catastrophic Health Coverage and Other Issued Under IRC § 6055. Footnote 2 in the preamble to Proposed Regulations explains that “A filer of the information required under §1.6055-1 may receive an error message from the IRS indicating that a TIN and name provided on the return do not match IRS records. An error message is neither a 972CG, Notice of Proposed Penalty, nor a requirement that the filer must solicit a TIN in response to the error message.” (See page 50 of the 2015 IRPAC Public Report.)
- These same Proposed Regulations refined the solicitation requirements for proving that reasonable cause exists for missing TINs under Treas. Reg. § 301.6724-1. (See page 65 of the 2014 IRPAC Public Report.)
- A new webinar focused on correction of Forms 1095-B and Forms 1095-C was made available in May 2016. (See page 51 of the 2015 IRPAC Public Report.)

With a full year of reporting under these new requirements, IRPAC recommends the following:

#### Recommendations

1. Education about first year problems with the new ACA Information Returns (AIR) system should continue with active filer involvement designed to improve future years processing by identification of exact errors found by IRS on Forms 1095-B and Forms 1095-C. IRPAC recommends that IRS develop new webinars which share new and detailed information focused on the most common errors so that actions can be taken by filers to reduce errors in advance of filings for the 2016 tax year.
2. Taxpayers experienced high levels of confusion about aspects of the new Form 1095-B and Forms 1095-C when forms were distributed and often requested corrections when no correction was needed. Taxpayers were particularly confused about Social Security Numbers (SSNs) which had been truncated and date of birth reporting. IRPAC recommends that IRS add a Tax

## Employer Information Reporting and Burden Reduction

Tip to instructions advising taxpayers to not request correction of Form 1095-B and Form 1095-C with properly truncated SSNs or date of birth reporting properly missing.

3. IRPAC recommends that “good faith efforts” penalty relief for reporting of incorrect or incomplete information reported on returns be extended at least to 2016 Forms 1095-B and Forms 1095-C filed in 2017.
4. IRPAC recommends that an Applicable Large Employer (ALE) group member that undergoes a corporate transaction in a calendar year should be permitted to provide separate reporting to employees based on a change in group membership during the year. Alternatively, if the IRS will not provide a special exception to the current reporting rules requiring a single Form 1095-C be provided in this circumstance, it should provide clear guidance to large employers that such reporting is unacceptable via specific guidance in the instructions to Forms 1094-C and 1095-C as there is currently confusion among filers about this requirement.
5. IRPAC recommends that the IRS consider guidance specific to what constitutes “inconsequential” errors with respect to reporting under IRC §§ 6055 and 6056.

### Discussion

#### 1. More Education Needed About the New AIR System:

First year AIR reports with AIRTN500 errors only reported that a form contained an error. The error report did not identify the exact error which made it difficult for filers to locate and fix the exact problem. IRPAC commends the IRS for development of a new system designed to identify problems early in processing. Development of reports for the next processing year could be improved by active coordination with large filers who use the AIR reports to improve processing. IRPAC should also be actively involved in the review of error reports prior to actual use.

IRS developed new publications and over 20 webinars which discuss issues associated with this first year processing. Practitioners found the information and webinars very helpful but commented on the need to focus on new and timely concerns rather than repeating information covered numerous times before. For example, there were many references to the Application for TCC and other very basic and repetitive topics. Practitioners reported to IRPAC members that there was often little time available for IRS personnel to answer questions which were submitted during webinars.

The 2015 IRPAC Public Report recommended that webinars be developed “focused on the correction process and common errors noted in 2015 statements filed.” Discussions during 2016 stressed the need to share information about common errors

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

so that filers and software companies would have sufficient lead time to make 2016 information filed in 2017 more reliable to IRS. Notice 2016-4 delayed the time for providing recipients until March 31, 2016 and delayed filing electronic information on Forms 1095-B and Forms 1095-C with the IRS until June 30, 2016. This delay was much needed and appreciated by software developers and filers. The delayed filing date had the impact of also delaying the time frame available to IRS for gathering statistics and sharing information with the public common errors in advance of the 2016 filing season. IRPAC continues to encourage added webinars on common errors be developed as soon as possible so that filers have sufficient lead time to take advantage of lessons learned with 2015 filings. Advance vetting of these future webinars on common errors with IRPAC is highly encouraged to make the webinars most productive.

### **2. Add a Tax Tip to instructions regarding Truncated TINs and Incomplete Date of Birth:**

Filers were allowed to truncate the SSNs of responsible individuals and covered individuals reported on Forms 1095-B and Forms 1095-C. First year experience of filers found letters and calls often asking that the full SSN be printed or the date of birth added. Filers reported these requests despite the fact that form instructions state that SSNs could be truncated and date of birth reporting was only required where SSN information is missing. Filers who provided a cover letter with Form 1095-B and Form 1095-C discussing anticipated frequently asked questions about the new forms or made anticipated frequently asked question information available on websites also reported high call volumes around these two issues.

### **3. Extend “good faith efforts” penalty relief for 2016 Forms 1095-B and Forms 1095-C filed in 2017:**

IRS announced in Treasury Decision 9660 that penalties for the 2015 year filings which contained incorrect or incomplete information would be evaluated under a “good faith efforts” standard. Penalties for future years are to be evaluated under a more rigorous “reasonable cause” standard which is explained in Treas. Reg. §301.6724-1. New proposed regulations were published on Aug. 2, 2016, which explain a newly designed process by which solicitations must be done in order to allow filers to demonstrate reasonable cause for missing or incorrect TINs. Comments on these proposed regulations are due 60 days after publication in the Federal Register. The time frame for these regulations to move from the proposed to final stage makes it unlikely that final regulations will be issued in 2016.

This IRPAC Public Report identified problems with AIR reports from processing year 2015 which make it very difficult for filers to identify and correct additional errors in time to take full advantage of the strengths of the AIR reports. Problems with the 2015 AIR reports support the need for expansion of the good faith standard to 2016 reporting on Forms 1095-B and Forms 1095-C. In light of the numerous TIN mismatch errors received by most filers in 2016 with respect to the 2015 Forms, the need for this

## Employer Information Reporting and Burden Reduction

additional good faith year will be highly mitigated if the IRS adopts the suggestion elsewhere in this report regarding the suspension of the penalties related to Notice 972CG for TIN mismatches.

#### **4. Clarify the rules for ALE group members who undergo certain corporate transactions:**

Draft instructions to Forms 1094-C and 1095-C were published in late July of 2016 with final instructions due in September. Given the changes introduced into some of the areas of reporting, in particular the ever changing guidance and specificity relating to COBRA and post-employment reporting on Forms 1095-C, the IRS should recognize that the timing will not permit many programmers to adjust the logic in their software to accurately incorporate this new reporting guidance in time for furnishing forms to employees by the January 31, 2017, deadline.

The instructions to Forms 1094-C and 1095-C make it clear that the reporting obligation under IRC §6056 resides with ALE group member and not at the group level. IRPAC would like to thank the IRS for adding more clarity and specific examples to the [draft] 2016 instructions. Specifically, the instructions make it clear that each Group Member is responsible for filing the single authoritative 1094-C for the calendar year, that there is no filing at the Group level and that each employee is to receive only a single Form 1095-C from any ALE member.

However, this requirement is inconsistent with the typical way ALE groups currently administer their health benefit plans. Large employers often administer their plans at the group level. In particular, we believe that there is confusion over the proper reporting in the case of a corporate transaction involving the sale of stock from one controlled group to another group. To ease the administrative burden on the entities undergoing this type of transaction, we would recommend an exception to the filing rules quoted above to permit, although not require, the employing entity to provide two Forms 1095-C to each employee, one for each period in the calendar year in which the Member was in a different Group.

We understand that it might take the IRS time to update its forms, instructions and the AIR system to handle such a change. In the absence of an updated process incorporating the exception recommended in the prior paragraph, IRPAC recommends that the IRS put forth an example in the form instructions, a FAQ on IRS.gov or otherwise specify that, even in the event of a corporate transaction in which a member changes groups, that member must only provide a single Form 1095-C to each employee. Such guidance will help large employers who engage in such transactions to be on notice of the requirements for properly reporting under such circumstances.

We think it may be useful to provide a specific example to illustrate the problem:

*Example.* ALE Group Member, SubCo (FEIN XX-XXXX099) is a 100% owned subsidiary of Parent Corporation (FEIN XX-XXXX001) on January

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1, 2016 through April 30, 2016. On May 1, 2016, Parent Corporation sells all of the stock of SubCo (XX-XXXX099) to an unrelated corporation, Conglomerate (FEIN XX-XXXX002). Thus, SubCo was an ALE Group Member in the Parent Corporation group for the first four months of the year and a part of the Conglomerate group for the last eight months of the year.

For the sake of this example, assume the employees of SubCo are offered coverage and enrolled under the Parent Corporation Group Health Plan through April 30, 2016 and are offered coverage under the Conglomerate Group Welfare Plan starting May 1, 2016 through the end of 2016.

Under these facts, it is very likely that the data for completing the required reporting requirements for the January through April period will be contained in the information systems of Parent Corporation (and its third party vendors) and the data for the last eight months will reside with Conglomerate.

Today, without clear guidance, Parent and Conglomerate may be unaware that the impact of the rules in the instructions – one Form 1095-C per employing entity and one authoritative 1094-C per employing entity – may be that SubCo is responsible for consolidating all 12 months of data from its two parents. As the contracting with outside vendors for providing the forms is usually consolidated at the group level, Parent and Conglomerate might unwittingly agree to report on behalf of SubCo for the portion of the year that the SubCo employees participated in their respective plans.

We would recommend that ALE Group Members that experience such a transaction where it changes groups in the year be permitted to file on a bifurcated basis by indicating on the Forms 1094-C and 1095-C that such a transaction occurred and that more than a single form will be provided for the calendar year.

Absent that, we would strongly urge the IRS to issue guidance specific to this fact pattern to put employers on notice that the ALE Group Member that was the subject of the change in groups will be responsible for reporting the full year. That will at least put the acquiring group on notice that it will need to secure the appropriate data from the selling group to permit the ALE Group Member to comply with its reporting obligation for the calendar year.

### **5. Clarify and provide guidance regarding the definition of “inconsequential” errors under IRC §§ 6055 and 6056:**

IRC §§ 6721 and 6722 apply accuracy related penalties to the information reporting required under the ACA (IRC §§ 6055 and 6056.) The regulations promulgated under those sections provide, “An inconsequential error or omission is not considered a failure to include correct information.” See IRC §§ 301.6721-1(c)(1) and 301.6722-1(b)(1). As was recently acknowledged in the preamble to proposed

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regulations under IRC § 6055, these regulations were designed primarily for financial reporting; they are difficult to apply to IRC §§ 6055 and 6056 reporting.

In that regard it would be useful to provide specific guidance as to what constitutes an inconsequential error or omission in this context. This may be especially important with respect to the Form 1095-C which are used for purposes of assessing the employer shared responsibility payments under IRC § 4980H, the applicability of the individual shared responsibility payments under IRC § 5000A and an individual's eligibility for a premium tax credit under IRC § 36B. There could be errors on a Form 1095-C that has no bearing on the individual's eligibility for a premium tax credit or shared responsibility payment, but only relates to the employer's obligation for an employer shared responsibility payment. For purposes of the accuracy related penalties on the furnishing of a form to a "payee," an error related solely to a § 4980H Safe Harbor and Other Relief code (i.e., Line 16 of Form 1095-C) should be viewed as an inconsequential error as it relates to the employee-recipient. We believe that similar to the considerations given to specialized TIN solicitation rules which are included in the regulations under IRC § 6055 published on August 2, 2016, IRS could provide guidance under the provisions cited above that specifically recognizes and takes into account "the differences between information reporting under IRC § 6055 and information reporting under other provisions of the Code."

In that same regard, it would appear that the list of errors that require Form correction and reissuance to recipients in the instructions for Forms 1094-B and 1095-B and 1094-C and 1095-C are overly broad. The regulations cited above provide "the term 'inconsequential error or omission' means any failure that does not prevent or hinder the IRS from processing the return, from correlating the information required to be shown on the return with the information shown on the payee's tax return, or from otherwise putting the return to its intended use." We believe that a number of items on lists of "required" corrections in the Form instructions would be inconsequential when those standards are applied in the context of changes on these forms.

Given the nature of the information on these forms this is substantially different than that provided in financial reporting; we recommend additional guidance on what is inconsequential in this setting and a modification of the corrections process. This may mean that a revision to a furnished form need not be furnished to an employee if the correction is only relevant to the assessment of liability for an employer shared responsibility payment. Especially in light of the requirement that printing the forms on paper and mailing them to the recipients are required in lieu of an affirmative election to receive these forms electronically, there is a significant expense associated with supplying revisions especially where they add no value for the recipient and may merely serve as a source of confusion.

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### B. Electronic Furnishing of Forms W-2 and 1095-C

#### Recommendation

IRPAC recommends that Treasury Regulations § 31.6052-1(j) be amended to allow an employer to electronically deliver Forms W-2 to all employees, unless an employee “opts-out” of electronic delivery, in which case, the employer shall deliver the Form W-2 on paper to that employee. We also recommend similar amendments to Treasury Regulations § 301.6056.2 and 1.6055-2 with respect to employers furnishing of Forms 1095-C to employees.

#### Discussion

Currently, employers offering electronic delivery must have each employee affirmatively “opt-in” in order for the employer to be relieved of printing and delivering a paper W-2 to that employee. Treasury Regulations § 31.6051-1(j)2(i) states: “In general. The recipient must have affirmatively consented to receive the Form W-2 in an electronic manner.” See also, Treasury Regulations §§ 301.6056-2(a)(2)(i) and 1.6055-2(a)(2)(i). This has been taken to mean that a recipient must have affirmatively consented to receive Form W-2 in an electronic manner in place of paper delivery. Employers are free to post the Forms W-2 of all employees to a secure website, including the Forms W-2 of employees that never provided their consent. This is supported by a statement in the preamble to the final regulations: “Whether the furnisher stores (on a website) all statements or only those for which consents are received is a business decision for the furnisher.”

The IRPAC recommendation would allow an employer to establish electronic delivery as the default, and an employee would have the option to “opt-out” and receive a paper Form W-2 and or 1095-C.

Many State entities, such as the Unemployment Insurance entities offer the e-Services for Form W-2 access, unless a paper copy is requested. All states allow employers to electronically deliver pay statements as long as certain conditions are met, most having to do with security in order to protect confidential information and offering employee access to view and print at the employer’s premises.

There are many advantages of electronic delivery:

a. Decreased taxpayer burden:

Businesses would save time, money, and staff resources that would be spent in printing and mailing the W-2s that require envelopes and postage, and replacing lost or misplaced forms that also adds cost to the employer. Instead, employees can access their forms on a secure website any time that is convenient for them.

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b. Increased accuracy and electronic filing of personal income tax returns:

Many employers and service providers post the W-2 on a website in two formats: (1) a printable document that looks like the W-2 that would have been sent in the mail, and (2) as an electronic file that can be imported into tax-preparation software which then automatically populates the fields on the personal income tax return with the correct data. Automatic population of the proper fields reduces taxpayer errors, and, with an importable file can encourage the taxpayer to electronically prepare and file their personal income tax return thus increasing the number of electronically filed tax returns.

c. Decreased identity theft, increased security of sensitive personal information:

Over 240 million Form W-2s are issued each year that contain sensitive personal information, such as name, address, social security number, as well as personal financial data on forms that are mailed to employees. Mail can easily be stolen during the W-2 mailing period leading to identity theft and tax fraud. W-2s for those employees that have not informed the employer of a change of address will be returned to the employer or delivered to the correct address but received by an incorrect individual. Paper W-2s that are returned to the employer must be kept for at least 4 years, adding to the employer burden of securely storing these returned forms.

d. Increased tax compliance:

Studies have shown that that when income is reported on an information return, it is much more likely that it will be reported on a tax return and that the associated taxes will be paid. Employees that have moved do not always keep their employer informed of changes to physical addresses. W-2s that are posted to an always accessible secure website will make it easier for the taxpayer to receive their W-2s regardless of whether their physical address has changed.

The advantages outlined in a., b., and c., above would equally apply to the Forms 1095-C.

IRPAC wants to stress that the digital landscape has significantly changed and the digital divide has narrowed but more importantly the issue of identity theft, both of individuals and corporations, has become significantly more prevalent and the IRS is currently proactively attempting to curb the identity and tax theft problem. Thus, by limiting the change in regulations to Forms W-2 and 1095-C the digital divide becomes

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a non-issue, as employers can offer a secure means by electronic access to their employees to retrieve a copy of their W-2 and 1095-C.

### **C. Theft of Business Taxpayer's Identity**

The IRS continues to heavily focus on combating and protecting taxpayers from ID theft however still leaving businesses vulnerable because certain items that IRPAC has recommended geared toward business have not yet been implemented. Today's hackers are sophisticated criminals who continually find more avenues to online ID theft and fraud. IRS's addition of a multi-factor authentication process is an efficient start to this process. As part of an effort to protect taxpayers' data and tax preparers, IRPAC recommends further discussion regarding previously suggested safeguards. Also, there are new recommendations included in this report to further and accelerate efforts to defend against unauthorized security access.

IRPAC recognizes the progress that the Commissioner's Security Summit has gained in the fight against identity theft against individuals and anticipates that the Commissioner will continue to consider the IRPAC comments expressed herein in anticipation of fighting business identity theft.

#### **1. Recommendation for Identity Theft Deterrence**

- a. IRPAC reiterates its recommendation to allow the truncation of the issuer's Employer Identification Number (EIN) on payee information return statements as a means of preventing business identity theft. IRPAC believes that limiting additional EINs from being circulated untruncated would reduce the opportunity for these numbers to be obtained by unknown and ill-intentioned third parties in the future.
- b. The IRS has implemented a pilot program that adds verification codes to the W-2s. IRPAC recommends that the IRS further expand and implement the pilot programs to protect all businesses. The verification code will be used by tax preparers to authenticate and verify the information provided at the time of filing. In our discussion with the IRS, IRPAC was informed that they have implemented this program for W-2s electronically filed and intend to expand the program that would deter business ID theft of numerous other information reporting forms issued by all businesses.

#### **Discussion for Identity Theft Deterrence**

Further truncating of EINs needs to be expanded to protect sensitive information from data mining thieves. IRPAC previously recommended truncating the issuer's EIN on recipient copies of information returns to allow companies that issue 1099s and other information returns to have less exposure to false information returns being filed using their EIN and legal name. It should be mandated that the FEIN should be truncated to eliminate criminals from phishing and obtaining business ID's. Numerous forms

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containing sensitive data are sent out every year. By truncating the FEIN, we could reduce a large percentage of fraudulent activity.

With the added ACA reporting forms, 1095-B and 1095-C, the legal name and EIN of both the issuer (the insurance company) and the business that employs the insured individual, is revealed, exposing all of these businesses to identity theft. Thus, IRPAC recommends truncation of the employer's EIN be permitted on Forms 1095-B and 1095-C.

### 2. Recommendation for Business Master File and Form 8822-B

- a. IRPAC recommends IRS revise Revenue Procedure 2010-16 to state that an address change related to an EIN will occur **ONLY** after receipt of IRS Form 8822-B (Change of Address – Business). In the current year, taxpayers continue to receive duplicate change of address notices which are mailed simultaneously to the current and former address of the business.
- b. IRPAC recommends revisiting the discussion of the process of issuing a change of address notification letter mailed to the last address when a mailing address on the Business Master File (BMF) is updated based on the requirements in Revenue Procedure 2010-16.

### Discussion of Business Master File and Form 8822-B

It has been reported that several large businesses have experienced business and customer privacy breaches because the large business address has been updated in the BMF in error. Tax returns not normally filed by the large business such as Form 1041 and 990-T are being filed by taxpayers unconnected with the large business. The tax return contains the TIN of the large business but the business name on the filing is often not the large business taxpayer name. The large business address is being updated during the tax return processing without the proper authority from the large business, specifically a properly completed and filed Form 8822-B, which to date, is still not a mandatory requirement.

#### Business Master File

As previously noted, pursuant to Reg. §301.6212-2(a) that states a “taxpayer’s last known address is the address that appears on the taxpayer’s most recently filed and properly processed Federal tax return,” the IRS has issued revenue procedures to determine which returns will result in the IRS changing the address based on the address included on the most recently filed return, as well as which notices must be mailed to that “last known address” (per guidance provided in Revenue Procedure 2010-16 (2010-19 IRB 664, dated 04/16/2010)).

We encourage our recommendations to be considered to prevent identity theft, and furthermore allow companies to be forewarned if their withholding agent is not

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

making payroll deposits, permit businesses to have specific tax correspondence directed to the appropriate group or person, and increase efficiencies by having the IRS receive timely responses to its inquiries and notices without repeated mailings.

The IRS issues a notice of confirmation of an address change to both the former and new address of the business. It appears logical that the IRS send to both addresses to possibly alert the recipient that there has been an attempt to steal the business identity with an unauthorized change in address. A concern has been raised by IRPAC that numerous unnecessary notices are repeatedly being sent to taxpayers at the old address, thus providing confidential data to the wrong individual. Perhaps the IRS will consider removing the taxpayer identification numbers from these duplicated mailings.

### **Form 8822 – B**

We reiterate our concerns relating to the required information for the old representative of the business. Many companies, especially the ones that have been in operation for a number of years, do not know which entity or individual's name was put on the original Form SS-4 upon applying for the EIN. Often, the lawyers or accountants engaged in helping owners set up companies put their names and their address on the form, thus it is not that of the actual owners of the entity. Or, perhaps, they cannot locate the form as it may not be one that any business refers to on a regular basis. There is no reason to either have the old information if the purpose is to gather current information or treat the form as incomplete because the business cannot provide the old representative's name.

### **D. Reactivation of the on-line Electronic Account Resolution Tool (EAR)**

#### **Recommendations**

IRPAC recommends that the Electronic Account Resolution, (EAR), on-line tool be reactivated, or a substitute tool or system be made available to employers, tax practitioners and service providers to provide an efficient and secure method of communicating and resolving tax issues with the IRS.

#### **Discussion**

The EAR tool, which was deactivated on 9/2/2013, provided authorized practitioners the ability to:

- Request holds on accounts, which prevented the mailing of subsequent notices and provided time to respond to notices before being escalated into Collections. Hold responses were sent via e-mail.
- Address Levies electronically.
- Move an erroneous payment from one tax module to the correct module.
- Transmit pertinent information for consideration in determining whether penalty relief was merited.

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EAR could be enhanced to provide transcripts on the Business Master File to verify all wages in addition to taxes to help in resolving civil penalty notices and responding to Combined Annual Wage Report mismatch notices and preparing Form 941Xs.

Call times during the time period that EAR was activated averaged between 30 to 60 minutes and most EAR responses were issued within 72 hours of the request and in writing so as to provide the authorized practitioners a written verification to send to their taxpayer clients. The wait time during the 2015 fiscal year was up to 1 ½ to 2 hours for the Practitioner Priority Service lines. The Commissioner's public remarks at several forums anticipated that the average person who tries to call the IRS will get through approximately 50% of the time as opposed to 64% of the time in fiscal year 2014, indeed the percentage of calls that are getting through was down to 40% for 2015.

This recommendation is being proposed with the intention of providing the IRS, employers, tax practitioners and service providers a short term solution to the burdens created by the IRS budget cuts. This recommendation would free up customer service resources at the IRS and provide practitioners a secure and streamlined method in meeting their customers' needs.

### **E. Information Reporting for IRA Assets Escheated to State Governments and 60-Day Rollover Relief**

#### **Recommendation**

IRPAC recommends that the IRS provide specific rollover relief by adding "The distribution was escheated to a state agency" to the list of self-certification reasons for missing the 60-day rollover in Revenue Procedure 2016-47. Our 2015 recommendation that the IRS add a new Distribution Code to Box 7 on Form 1099-R to clarify that Individual Retirement Account (IRA) assets escheated to state government agencies are IRA distributions includable in gross income and subject to information reporting still stands.

#### **Discussion**

In August of 2016, the IRS released Revenue Procedure 2016-47 which permits taxpayers to self-certify that events beyond their control prevented them from completing a timely 60 day rollover to their IRA. We believe that this is a great initial step in addressing the longstanding issues associated with correcting common and unintended IRA rollover errors. IRA assets escheated to state agencies represent yet another common example of why this revenue procedure is so important and we recommend that the IRS incorporate this into the procedure as soon as practicable. As further support for our recommendation, we point to PLR 201611028 that highlights the same information reporting and rollover related issues surrounding escheated IRA assets that concerns IRPAC and provides the specific taxpayer with an extra 60 days to complete their rollover after the IRA assets were recovered from the state. IRPAC

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believes that this same relief should be available for all IRA owners that recover their IRA assets that were escheated to states.

IRPAC previously shared a concern that IRA trustees do not have sufficient guidance to properly withhold taxes and/or report IRA assets escheated to state governments. Please see the 2015 IRPAC report for additional details and IRPAC's recommendation for additional guidance via Form 1099-R enhancements.

## Employer Information Reporting and Burden Reduction

**INFORMATION REPORTING PROGRAM  
ADVISORY COMMITTEE**

**EMERGING COMPLIANCE ISSUES  
SUBGROUP REPORT**

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## Emerging Compliance Issues Subgroup Report

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

#### Recommendations

IRPAC recommends the Proposed Regulations included in Notice of Proposed Rulemaking (REG-131418-14) be amended as follows:

1. 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).
2. Retain the exemption to reporting Form 1098-T for students whom qualified tuition and related expenses are paid entirely with scholarships or formal billing arrangements by reinstating Treasury Regulations § 1.6050S-1(a)(2)(iii) & (iv).
3. 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).
4. Allow institutions to 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 utilize 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 in which the payment is made 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."
5. Allow institutions to report on Form 1098-T how reimbursements or refunds are actually applied to students' accounts by revising Proposed Regulation § 1.6050S-1(b)(2)(J)(vi) to read, "Reimbursements or refunds of payments for qualified tuition and related expenses determined. For purposes of determining the amount of reimbursements or refunds made of payments received for qualified tuition and related expenses, institutions may choose to report reimbursements or refunds of payments applied to charges in a manner that reflects the reimbursement or refund application in the institution's student

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account system. Alternatively, institutions may utilize a safe harbor method and report any reimbursement or refund made with respect to an individual during a calendar year (except for any refund of a scholarship or grant that, by its terms, was required to be applied to expenses other than qualified tuition and related expenses, such as room and board) is treated as a reimbursement or refund of payments for qualified tuition and related expenses up to the amount of any reduction in charges for qualified tuition and related expenses. For purposes of this section, a reimbursement or refund includes amounts that an institution credits to an individual's account, as well as amounts disbursed to, or on behalf of, the individual.”

### Discussion

IRC § 6050S and the related Treasury Regulations require the reporting of information to assist taxpayers in claiming 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 2016, information required to be reported in 2017 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 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.

Prior to 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.

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. The changes of concern are:

1. Removal of the exemption to reporting Form 1098-T for students whom are non-resident aliens.

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2. Removal of the exemption to reporting Form 1098-T for students whom qualified tuition and related expenses are paid entirely with scholarships or paid under a formal billing arrangement.
3. A new requirement to report the number of months a student was a full-time student during a calendar year.
4. Implementation of a, “payment application assumption” whereby for Form 1098-T reporting purposes, payments received during a calendar year are treated first as payments of qualified tuition and related expenses, unless the payment is a scholarship or grant which by its terms must be applied to non-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. Then payments are to be assumed to be applied to expenses other than qualified tuition and related expenses for enrollment during the calendar year. A similar rule applies in the case of payments received during the calendar year with respect to enrollment in an academic period beginning during the first three months of the next calendar year.
5. Implementation of a, “reimbursement / refund application assumption” whereby for Form 1098-T reporting purposes, reimbursements or refunds paid during a calendar year are treated first as qualified tuition and related expenses, unless the refund is a scholarship or grant which by its terms must be applied to non-qualified tuition and related expenses.

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 non-resident alien may require an institution to report a Form 1098-T by requesting one. Non-resident aliens are only eligible for education credits when:
  - a. The non-resident alien is married and chose to file a joint return with a U.S. citizen or resident spouse.
  - b. The non-resident alien is a dual-status alien, and chose to be treated as a U.S. resident for the entire year.
2. By removing the exception to reporting on Form 1098-T for students whose scholarships are in excess of their qualified tuition and related expenses or paid under a formal billing arrangement, 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 little to no benefit. Generally, a student whose qualified tuition and related expenses are paid entirely with scholarships or is paid through a formal billing arrangement is

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not eligible for an education credit, thus a Form 1098-T would add no value to the taxpayer or the IRS.

3. 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.
4. 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.
5. By implementing a “reimbursement / refund application assumption,” institutions may be forced to have dual-student account information reporting. For example, if an institution did not program their reimbursement / refund 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 reimbursement / refund 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.

### **B. Hard to Value Assets**

#### **Recommendation**

IRPAC recommends that the IRS should promptly update the 2016 Form 5498, IRA Contribution Information, and Form 1099-R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., instructions to clarify for the industry, the below hard to value assets reporting questions that are currently a major concern to trustees:

1. What needs to be reported on year end statements to participants for Hard to Value Assets?
  - a. Does Form 5498, Box 15a (“Fair Market Value (FMV) of certain specified assets”) have to be completed for Hard to Value assets on the 1/31 reporting on the statement to participants?
  - b. If trustees fill it in on the 1/31 statement, do they need to provide the participant a separate Form 5498 statement by 5/31 if there have been no contributions? IRPAC recommends that if the 1/31 reporting is required to

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include the FMV of Hard to Value assets for Box 15a, then a separate Form 5498 should not be required to be filed with the participant by 5/31 if there have been no contributions.

- c. What codes, if any, should be used to report distributions on Form 1099-R of Hard to Value assets from Roth accounts because the “Guide to Distribution Codes” does not provide for any specific Codes?

### Discussion

IRPAC truly appreciated the IRS providing a response to these questions this past June. However until the instructions are formally updated and posted to the IRS website, the industry does not have the appropriate guidance to modify their systems to comply with their 2016 Form 1099-R/5498 reporting requirement. In addition, for customers for whom there are no contributions made for the tax year, firms are able to provide a Fair Market Value (FMV) statement to participants by 1/31, in lieu of a Form 5498. Therefore, it is imperative that the industry immediately receive clarification, so that they can build and test their systems to meet the January 31<sup>st</sup> mailing deadline.

### C. 529 Accounts

#### Recommendation

IRPAC has recommended that the IRS provide guidance clarifying how the industry can implement a new PATH Act reporting rule that eliminated the aggregation of distributions from multiple 529 accounts belonging to the same owner and beneficiary.

#### Discussion

The new PATH Act required distributions from 529 accounts to be tracked and maintained as coming only from the account from which it was distributed. The industry in prior years followed guidance that provided distributions from multiple accounts belonging to the same owner and beneficiary should be allocated among each of the accounts. Therefore, most firms had built systems to maintain the basis information allocable to each account and for each distribution that proportionally reduced the basis for each account held by the same beneficiary and owner. Given the new rules, the basis information contained in these systems can no longer be used and the industry is forced to develop a process that can be used as the account basis to properly report going forward. This creates an issue, since without clear guidance from the IRS, firms may be taking different approaches to arrive at an account basis. This may not be a problem if these accounts remain at their respective firms until they are eventually closed. But if they do transfer to another firm, there could be issues given the variances in the inconsistent logic used to arrive at a basis at each firm, which may ultimately impact our customers.

### D. Form 1098 Mortgage Interest Reporting

#### Recommendation

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IRPAC recommends:

1. In the case where multiple properties secure a mortgage loan, the lender should be able to designate at their discretion one of the properties as the principal property securing the loan and use the address of that property for reporting purposes to complete Boxes 7, 8 and/or 9, as applicable.
2. In the case where a lender originated the mortgage loan during the year or the lender or servicer of a mortgage loan did not hold the loan as of the beginning of the year, the outstanding mortgage principal as of the beginning of the year should not be required to be reported.

### Discussion

As a result of the new law, The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, there are new reporting requirements for the recipients of mortgage interest. Accordingly, the IRS has made modifications to the 2016 Form 1098, Mortgage Interest Statement.

New Boxes 7, 8 and 9 require reporting of information on the address of the property securing the mortgage loan. It is not uncommon for multiple properties to secure a mortgage loan. In the case where a mortgage loan is secured by multiple properties, the lender should be able to designate at their discretion one of the properties as the principal property securing the loan and use the address of that property for reporting purposes to complete Boxes 7, 8 and/or 9, as applicable. This approach is similar to the approach where there are multiple borrowers on the loan and the lender must designate one of the borrowers as the principal borrower for reporting purposes.

As a result of IRPAC's recommendation and discussions with the IRS, the IRS added supplemental instructions on June 17, 2016 under "Recent Developments" at "[www.irs.gov/form1098](http://www.irs.gov/form1098)" to clarify the 2016 Form 1098 reporting requirement as follows:

- "If more than one property secures the mortgage, you may report the address of any one of the properties using boxes 7-9 and disregard the other address(es)."

New Box 2 requires reporting of the "Outstanding mortgage principal as of 1/1/2016" (i.e. principal at beginning of year). Many loans are originated during the year after January 1<sup>st</sup>. Further, it is common for mortgage loans to be sold with a new servicer acquiring the loan servicing during the year and reporting the mortgage interest for the remainder of the year. The original lender or prior servicer will report the mortgage interest received for the first portion of the year prior to the sale of the loan and would report the outstanding principal amount as of the beginning of the year in Box 2. In many cases, the new servicer of the loan does not acquire the data regarding the outstanding principal balance on January 1<sup>st</sup> from the original lender or prior servicer of the loan when acquiring the loan servicing. As a result, where a lender originated the mortgage loan during the year or the lender or servicer of a mortgage loan did not hold the loan as of the beginning of the year, the outstanding mortgage principal as of the beginning of the year should not be required to be reported in Box 2.

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As a result of IRPAC's recommendation and discussions with the IRS, the IRS added supplemental instructions on June 17, 2016 under "Recent Developments" at "[www.irs.gov/form1098](http://www.irs.gov/form1098)" to clarify the 2016 Form 1098 reporting requirement as follows:

- "The reporting instructions for Box 2, Form 1098, Mortgage Interest Statement, are amended to add the following: If the mortgage originated in 2016 or you acquired the mortgage during 2016, leave this box blank."

IRPAC would like to thank those involved from the IRS for quickly providing the recommended clarifying supplemental instructions to the 2016 Form 1098 reporting requirements to give the industry much needed guidance. IRPAC would request that these supplemental 2016 instructions be made part of the permanent Form 1098 instructions for reporting for tax years 2017 and the future.

### **E. IRS Publication 1179 Substitute 1099-B Specifications**

#### **Recommendation**

IRPAC recommends that the IRS specify how to report transactions that have the ordinary checkbox marked in Box 2 of the Form 1099-B, Proceeds From Broker and Barter Exchange Transactions, on a substitute form.

#### **Discussion**

The instructions within the 2016 Publication 1179, General Rules and Specifications for Substitute Forms 1096, 1098, 1099, 5498, and Certain Other Information Returns, does not provide brokers information on whether a transaction that has the ordinary box in Box 2 can be included on the substitute form. IRPAC recommends that the IRS specify that transactions with the ordinary box checked may be included on a substitute form and brokers should report them based on the holding period of the security and whether basis is being provided to the IRS.

### **F. 2016 Form 8949 Instructions**

#### **Recommendation**

IRPAC recommends that the IRS provide instruction for taxpayers on where to report transactions that only have the ordinary checkbox marked in Box 2 of the Form 1099-B, Proceeds From Broker and Barter Exchange Transactions.

#### **Discussion**

IRPAC is requesting guidance for taxpayers on how to report transactions that have the ordinary checkbox marked in box 2 of the 1099-B on the form. The 8949 is divided into two parts, short-term and long-term transactions. Brokers anticipate that taxpayers who see the ordinary box may be confused about how to report the transaction. It would be helpful to taxpayers if information was included under the Specific Instructions if that they should report the transaction in Part I or Part II based one their holding period for the security.

### **G. IRC §6050W and Form 1099-K Reporting**

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### Recommendations

IRPAC continues to recommend that guidance is needed related to IRC § 6050W "Returns Relating to Payments Made in Settlement of Payment Card and Third Party Network Transactions." While past IRPAC reports highlight several areas of needed guidance, most importantly, IRPAC recommends that the key terms integral to the meaning of "third party payment network" be defined because entities making payments with respect to third party payment network transactions (called third party settlement organizations or TPSOs) are not subject to reporting under IRC § 6050W unless the payments made to any given recipient exceed a very broad de minimis threshold. Because of the broad definition of TPSO, this enables different interpretations of the de minimis rule and can impact the usefulness of the reporting data because of the potential underreporting, IRPAC urges the IRS to prioritize this project.

### Discussion

Guidance under section 6050W has been on the Treasury Priority Guidance Plan for the last several years and IRPAC was pleased to see that this project has remained on that Plan for 2016-2017. Notwithstanding this prioritization, however, the IRS declined to discuss this issue with IRPAC during 2016. IRPAC hopes that progress on this very important guidance project at the IRS has not stalled and remains committed to working with the IRS on these issues.

While IRPAC understands that the IRS has had serious budget constraints placed on the organization, IRPAC believes that further prioritizing the IRC § 6050W guidance project would not only help the tax reporting community, but also would help the IRS tax collection efforts. At a very minimum, the IRS should address the definitional issues associated with which entities qualify as TPSOs eligible to avail themselves of the de minimis rules which *eliminates* reporting on otherwise reportable amounts if either the amount paid within a year does not exceed \$20,000 or the aggregate number of such transactions does not exceed 200. Because these de minimis rules can completely eliminate the obligation to issue Forms 1099-K, Payment Card and Third Party Network Transactions, to payees, IRPAC believes that guidance is urgently needed regarding the rules for determining which payors can qualify for TPSO status.

### H. Complex Debt Reporting Requirements

IRPAC partnered with the IRS on several initiatives related to the Form 1099-B, Proceeds From Broker and Barter Exchange Transactions, for Tax Year 2016. As a result of our discussions the IRS published an amendment to the 2016 Instructions for Form 1099-B on August 16, 2016 clarifying the use of the Ordinary check box. IRPAC thanks those involved with providing the industry with needed guidance quickly.

**INFORMATION REPORTING PROGRAM  
ADVISORY COMMITTEE**

**INTERNATIONAL REPORTING AND  
WITHHOLDING  
SUBGROUP REPORT**

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## **International Reporting and Withholding Subgroup Report**

The following are the principal issues that have been discussed between the International Reporting and Withholding (IRW) Subgroup of IRPAC and the IRS. Section I contains recommendations on the regulations and other non-form guidance. Section II contains recommendations on IRS forms and their instructions.

### **SECTION I – RECOMMENDATIONS ON THE REGULATIONS AND OTHER NON-FORM GUIDANCE**

#### **A. Section 305(c)**

##### **Recommendation**

IRPAC recommends that the IRS publically announce that it will not impose withholding tax liability, penalties, or interest on withholding agents for section 305(c) events occurring in tax years prior to 2016. In an effort to direct withholding agents on how to treat such events, proposed regulations were released in April 2016 (the “2016 Proposed Regulations”). As such, it would be unfair to penalize withholding agents for events in years prior to the release of these proposed regulations by applying withholding tax liability, penalties, or interest on a retroactive basis.

##### **Discussion**

It was not until an earlier (2014) set of proposed regulations under section 871(m) were published, which regulations included a brief coordinating rule with section 305(c), that withholding agents began to struggle with understanding a potential obligation to withhold tax on section 305(c) deemed dividends notwithstanding the absence of cash payments. To date, the withholding tax regime has been based upon cash payments and an understanding of the facts and circumstances of the income giving rise to such payments. Prior to the 2016 Proposed Regulations, there was no clear guidance on how to identify section 305(c) events, how to calculate the income arising from such events, and the withholding tax obligations in light of cashless payments.

Since 2014, withholding agents have been forthcoming and cooperatively working with the IRS to address many of the open questions and complications relating to the withholding tax issues resulting from a conversion rate adjustment on convertible bonds and other securities. While the 2016 Proposed Regulations address many of the open questions and clarify many points of issue prospectively, uncertainty regarding previous years remains, which is causing, among other things, uncertainty amongst withholding agents as to whether to collect taxes for prior years in the limited cases where collection might still be possible.

While IRPAC lauds IRS efforts to clarify the applicable rules by issuing the 2016 Proposed Regulations, these proposed regulations serve as an acknowledgment by the IRS that additional guidance was needed in order to administer the section 305(c) withholding obligations. As such, withholding agents cannot reasonably be expected to

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have put a withholding process in place in years prior to 2016. In sum, to minimize an ever-growing burden placed on withholding agents and to allow them to focus on the development of procedures and processes for withholding tax on section 305(c) events for tax year 2016 and beyond, IRPAC requests public acknowledgement from the IRS that withholding agents will not be held liable with respect to section 305(c) events occurring prior to 2016.

### **B. Qualified Derivatives Dealer (QDD)**

#### **Recommendation B.1 – QDD, Implementation Timeline and Requirements**

IRPAC recommends that the IRS defer the effective date for the QDD rules to January 1, 2018, in order to give QDDs sufficient time to implement the tax documentation, withholding and reporting requirements prior to the effective date.<sup>1</sup> Alternatively, IRPAC recommends that the IRS consider foregoing the periodic review and certifications with respect to the QDD provisions for the initial certification period and/or provide other relief (including penalty relief) that will effectively treat 2017 as a transition year.

IRPAC also recommends that the IRS consider paring back the extensive QDD reporting requirements in the proposed Qualified Intermediary (QI) agreement, such that the IRS will still obtain the necessary information that it needs, but in a manner that will be less burdensome for a QDD to comply.

### **Discussion**

Notice 2016-42 sets forth the proposed QI agreement, which includes new provisions that allow eligible entities to act as a QDD, whereby a QDD acting as a principal is permitted to receive payments with respect to potential §871(m) transactions and payments with respect to underlying securities, free of withholding tax. The QDD provisions in the QI agreement become effective as early as January 1, 2017.

Under the proposed agreement, a QDD is required to undertake significant tax withholding and reporting obligations, and the QDD is also required to calculate and pay its QDD tax liability. In addition, the QDD's responsible officer will be required to implement a compliance and review program, to make periodic compliance certifications in regard to the QDD's internal controls, and provide certain factual information to the IRS.

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<sup>1</sup> Presumably, a deferral in the effective date of the QDD provisions would also require a deferral of the effective date for §871(m).

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In terms of timing of the periodic review, a QI that is a QDD is required to use calendar year 2017 for the periodic review for the initial certification period (which ends on December 31, 2017) because QDD status is not applicable to calendar years 2015 or 2016; and to make the certification for the initial certification period by July 1, 2018. Thus, a QDD is expected to decipher and implement the QDD tax documentation, withholding and reporting requirements between the time the final QI agreement is issued and January 1, 2017, apply those requirements to its accounts for which it acts as a QDD during calendar 2017, conduct a review of its compliance with the newly implemented requirements and certify to having effective internal controls around the process by July 1, 2018.

It would seem unlikely that there would be enough time for a QDD to implement the requirements as currently constituted in the proposed QI agreement prior to January 1, 2017. More likely, the QDD would make every effort to implement as much as it can prior to January 1, 2017 and implement the remainder of the requirements as quickly as it can during 2017. Given the high probability that a QDD will have to phase in implementation of the QDD requirements throughout 2017, it doesn't seem practical to have the QDD conduct a review of, and to certify to, its compliance in 2017 when it would appear to be a *fait accompli* that the QDD will have compliance gaps for 2017.

Therefore, IRPAC recommends that the effective date of the QDD rules be extended for one year to January 1, 2018 in order to provide sufficient time to implement the new QDD requirements. If the IRS is unwilling to defer the effective date of the QDD provisions, it should consider foregoing the periodic review and certifications with respect to the QDD provisions for the initial certification period and/or provide other relief (including penalty relief) that will effectively treat 2017 as a transition year.

IRPAC also recommends that the IRS consider paring back the extensive QDD reporting requirements in the proposed QI agreement, such that it will still obtain the necessary information that it needs, but in a manner that will be less burdensome for a QDD to comply. IRPAC would be happy to work with the IRS to identify specific ways to streamline these reporting requirements.

### **Recommendation B.2 – QDD, Agency Securities Lending**

IRPAC recommends maintaining a modified version of the current QSL regime for entities engaging in securities lending and sale repurchase (“repo”) transactions as agents.<sup>2</sup>

### **Discussion**

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<sup>2</sup> IRPAC acknowledges that there may be other instances not described in the report where QSL status should be preserved, including for *principal* securities lending or repo transactions.

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The proposed QI agreement in Notice 2016-42 states that a QI cannot act as a QDD when acting in an intermediary capacity. This appears to indicate that entities acting as agent lenders in a securities loan or repo transaction do not qualify for QDD status as they are acting in an agent capacity rather than a principal capacity. However, there is additional language in the agreement that appears to conflict in stating:

*“a QI must act as a QDD for any securities lending or sale-repurchase transactions (as defined in §1.871-15(a)(13)) QI enters into that are section 871(m) transactions. For purposes of this Agreement, a QDD is deemed to make and receive payments pursuant to those securities lending and sale-repurchase transactions as a principal.”*

The above language appears to indicate that although agent lenders are acting in an intermediary capacity they will be treated as a principal for purposes of the QI agreement, therefore eligible for QDD status.

The complex requirements of QDD compliance places an undue burden on these agency lenders engaged in traditional stock loan and repo transactions in an intermediary capacity. Agency lenders engaging in such transactions should be allowed to simply match the stock borrows with stock loans, as they currently do under the QSL regime, without having to perform the more complex QDD tax liability calculation. As such, IRPAC recommends the continuation of the QSL regime for this type of intermediary activity where there is generally a one to one correlation between loans and borrows.

### **Recommendation B.3 – QDD, Controlled Foreign Corporations**

IRPAC recommends that the QDD regime be expanded to allow controlled foreign corporations (CFC) to act as QDDs without having to enter into QI agreements. The foregoing should apply, at a minimum, to CFCs which are QDDs only because they enter into securities lending and/or repo transactions.

### **Discussion**

Under TD 9734, withholding on dividends and dividend equivalents will be governed by the new QDD rules - which rules, among other things, require that QDDs become QIs under Treas. Reg. §1.1441-1T(e)(5). Previously, withholding on dividends and dividend equivalents generated as a result of certain stock lending transactions were governed by the QSL rules, which generally required that the QSL either enter into a QI agreement or be otherwise subject to IRS audit under section 7602.

QI agreements are structured to give the IRS authority over entities that are not otherwise subject to IRS jurisdiction. The books and records of CFCs, in contrast, are already subject to IRS audit under section 7602 – which gives the IRS the authority to summons the U.S. shareholders of the CFC to obtain records located abroad. QI

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agreements require foreign entities to perform certain tasks as a result of the privilege of entering into the QI agreement. Existing law, in contrast, already requires CFCs to comply with information reporting and withholding rules. Because CFCs are already required to comply with these rules and are already directly or indirectly subject to IRS audit, there is no reason to force CFCs to enter into the cumbersome QI agreement.

Accordingly, IRPAC recommends that an exception be made for QDDs that are CFCs, so that CFCs will not be forced to enter into QI agreements.

### **Recommendation B.4 – QDD, Eligible Entities**

IRPAC recommends that the definition of entities eligible for QDD status extend to any entity that enters into a QI agreement or is a CFC (see recommendation B.3 above regarding CFCs).

#### **Discussion**

The updated QI agreement narrowly defines the scope of entities eligible to be QDDs to entities which are subject to regulatory oversight in their home jurisdiction. As entities operating in a QDD capacity are required to enter into a QI agreement directly with the IRS (or, if our recommendation B.3 above is adopted, be a CFC), the IRS has the necessary oversight over the QDD to ensure compliance with the QDD obligations. QDDs which are QIs will be subject to IRS reporting and reconciliation requirements as well as audit requirements, which will provide the IRS detailed information on the QDD activities. In light of this transparency and IRS control over QDDs, the definition of eligible entities should not be dependent on the entity being subject to regulatory oversight in its home jurisdiction. Similarly, as discussed in recommendation B.3 above, because the IRS has jurisdiction over CFCs, CFCs should not need to be subject to regulatory oversight in their home jurisdiction (or be QIs) to be QDDs.

### **Recommendation B.5 – QDD, Timing of Withholding**

IPRAC recommends that the QI agreement allow for flexibility in the timing of withholding when a QI is acting as a QDD.

#### **Discussion**

Section 3.03(B) of the proposed QI agreement (IRS Notice 2016-42) states that "If QI is acting as a QDD, it must assume primary Chapters 3 and 4 withholding responsibility for any dividend equivalent payment that it makes and must withhold with respect to a dividend equivalent payment on the dividend payment date for the applicable dividend (as determined in §1.1441-2(e)(4))." This direction to withhold on dividend payment date is in contradiction to IRC §871(m) and Treas. Reg. §1.1441-2(e)(8), which provide that the time for withholding on dividend equivalent payments is

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the later of 1) when the amount of a dividend equivalent is determined; and 2) when a payment occurs with respect to the 871(m) transaction.

IRPAC appreciates that there will be a coordination between the QI agreement and 871(m) regulations as stated in the preamble to the proposed QI agreement [Section 2(.01)(G)]:

"The Treasury Department (Treasury) and the IRS intend to modify, to the extent necessary, the section 871(m) regulations to coordinate with provisions of the QI agreement relevant to the requirements of QDDs and withholding agents making payments to QDDs (as those provisions are finalized)."

As part of this coordination, IRPAC recommends that the IRS allow the QI acting as a QDD flexibility in choosing the timing of the withholding so that it may either withhold on the dividend payment date or the later of when the amount of a dividend equivalent is determined and when a payment occurs with respect to the 871(m) transaction. QIs which would act as QDDs have been building their withholding systems based on the 871(m) regulations prior to the proposed QI agreement being published. Revising withholding systems in consideration of the proposed QI agreement takes time. Thus, IRPAC recommends flexibility in choosing the timing of withholding to allow for correct, consistent implementation.

### **C. Qualified Intermediary Agreement (ex QDD)**

#### **Recommendation C.1 – QI Agreement, Waiver of Periodic Review Requirement**

IRPAC recommends that the IRS modify the proposed QI agreement to clarify what a responsible officer is intended to rely upon in making its certification of effective internal controls where the QI has obtained a waiver of the requirement to conduct a periodic review.

#### **Discussion**

Notice 2016-42 sets forth the proposed QI agreement. The proposed agreement replaces the previous external audit requirement with an internal compliance and review program. As part of the proposed compliance program, the responsible officer is required to make periodic compliance certifications in regard to the QI's internal controls, and is required to provide certain factual information to the IRS. In making the certification of effective internal controls, the responsible officer may rely on the results of the periodic review, as well as any other processes or reviews that the responsible officer deems necessary in order to make the certification.

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Under certain circumstances, the proposed QI agreement permits a QI that is a foreign financial institution (FFI) that is not acting as a QDD and that is not part of a consolidated compliance group to apply for and obtain a waiver of the requirement to conduct a periodic review and to provide some of the factual information specified in Annex I of the proposed QI agreement. However, in cases where the QI applies for the waiver, it must still make the periodic certification of effective controls, and must provide certain factual information along with the periodic certification.

Accordingly, IRPAC recommends that the IRS modify the proposed QI agreement to clarify what a responsible officer is intended to rely upon in making its certification of effective internal controls where the QI has obtained a waiver of the requirement to conduct a periodic review.

### **Recommendation C.2 – QI Agreement, Extrapolation**

IRPAC recommends that the IRS remove the restriction on extrapolating cures in finalizing the proposed QI agreement as well as allow for sub-stratification when required to reach an equitable result. In the event the IRS declines to adopt this position, IRPAC recommends that the IRS refine the language of the finalized QI agreement to restrict curing after the implementation of field work by the auditor rather than after the drawing of the sample and further clarify that projection does not apply to sample items which have been cured view the use of publicly available information. Finally, IRPAC recommends that the IRS not extend this disallowance of remediation efforts and cure documentation broadly to U.S. withholding agent audits.

### **Discussion**

Section 10.05 of the proposed QI agreement provides that a sample process may be used to test accounts when the QI has more than 50 accounts. The sampling methodology both as outlined in the proposed QI agreement and broadly used as part of both the legacy QI audit process and current U.S. withholding agent audits is based on the convenience of being able to review a subset of the overall population and extrapolate any exposure for underwithholding across the broader population for purposes of determining total liability versus conducting a complete review of all accounts. This process benefits both the IRS as well as withholding agents given limited resources and the ongoing drive to keep audits current.

Appendix II, Section 3(D) of the proposed QI agreement provides that “if the reviewer has determined that underwithholding has occurred with respect to the sample, based on the original assessment of the reviewer without regard to any remediation or curing after the selection of the sample units for review, then the reviewer will determine the total amount of underwithheld tax by utilizing a projection method.” The projection of errors has historically been utilized by IRS auditors when the error made is a fungible

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item which can reasonably be extrapolated across a broader population such as the use of an invalid substitute Form W-8 or W-9 by a specific business line. However, not all withholding errors are fungible as some can be cured with the collection of additional documentation. For example, a single documentation foot fault where a formation document was not collected to cure a U.S. mailing address on a Form W-8BEN-E, Certificate of Status of Beneficial Owners for United States Tax Withholding and Reporting (Entities), is not fungible. Importantly, in the majority of cases curable errors do not result in actual loss of revenue to the IRS, but rather are technical errors where the taxpayer is not subject to tax but the withholding agent is being penalized for having missing or incomplete documentation.

Therefore, while projection does make sense for errors that are not curable, it does not make sense for those which have been cured. If a full review had taken place and the errors actually identified (assuming they even exist), they indeed could have been cured. Thus, to the extent a sample is cured the cure must also be extrapolated as otherwise the projection methodology is inherently inequitable to the QI.

Furthermore, IRPAC recommends that the audit guidance allow for different resolutions for different issues, not just extrapolation as an equitable solution in order to most accurately reflect the underwithholding that the IRS is owed. For example, in regard to errors that are not curable, there are times when it is more accurate to determine the actual amount of underwithheld tax. If, for example, the review indicates that sampled items provided for a 15% rate of withholding for dividends paid to Cayman Islands accounts, it is likely that the withholding agent's withholding table included an incorrect withholding rate for Cayman and every Cayman Islands payee receiving dividend income was likely withheld at this incorrect rate. Thus, in these scenarios, it would make more sense to sub-stratify these accounts to determine the actual amount of underwithholding. In contrast, where the error appears to be sporadic or inadvertent (e.g., a Cayman Islands payee incorrectly shows the Canadian country code of CA versus the Cayman Islands code of CJ and is inappropriately granted treaty benefits due to an input error) then projection is appropriate.

Given this, IRPAC recommends that the IRS remove the restriction on extrapolating cures in finalizing the proposed QI agreement as well as allow for sub-stratification when required to reach an equitable result.

In addition, the proposed QI agreement fails to provide a meaningful definition for the terms "remediation" and "cure" which will result in inconsistent application of these rules across audits. As mentioned previously, Appendix II, Section 3(D) states that projection is to be made "without regard to any remediation or curing after the selection of the sample units for review." Given that withholding agents generally are provided with a period of lead time to prepare materials following the selection of the sample, it is possible, even likely, that they will self-identify errors and be able to correct prior to the

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commencement of any field work by the auditor. For instance, a payee could be approached to provide a Form W-8 with an affidavit, or a certificate of formation could be requested from a country's online registry. Arguably, both of these activities would be considered curing after the selection of the sample. Therefore, to the extent the IRS does not remove the restriction on extrapolating cures, IRPAC recommends that the IRS refine the language of the finalized QI agreement with respect to timing and the use of publicly available information. For instance, in the case of the formation documents accessible via a government registry, such documents are readily available in mass and accordingly, curing is a certainty versus a Form W-8 the curing of which may vary by payee. Further, depending upon the particular type of cure, it may not be obvious when the cure documentation was obtained – e.g., was the information obtained as part of account onboarding, a previous remediation effort, or as part of preparing for the review. Therefore, IRPAC recommends the language of the finalized QI agreement at Appendix II, Section 3(D) be modified to state (changes italicized or struck-through) “if the reviewer has determined that underwithholding has occurred with respect to the sample, based on the original assessment of the reviewer without regard to any remediation or curing after the ~~selection of the sample unit for review~~ *initiation of field work by the reviewer*, then the reviewer will determine the total amount of underwithheld tax by utilizing a projection method. *Projection of underwithheld tax shall not include the sample items which have been cured via the use of publicly available information.*”

Finally, IRPAC recommends that the IRS restrict this approach to the QI review process and not extend this treatment more broadly to U.S. withholding agent audits. U.S. withholding agent audits are already inherently inequitable to the withholding agent given accounts already subjected to 30% withholding are excluded from the population subject to random sampling.

### Recommendation C.3 – QI Agreement, External Reviewer

IRPAC recommends that the definition of “external reviewer” be clarified to include those who have previously advised the QI.

### Discussion

In Section 10.04 of the proposed QI agreement, Subparagraph A(3), the external reviewer “...cannot be reviewing systems, policies, or procedures or the results thereof that it was involved in designing, implementing, or maintaining.” However, this restriction does not clarify if an external reviewer may be used who has previously advised the QI. Many QIs have worked for years with outside consultants who are familiar with the QI agreement and who have provided helpful compliance advice. It would be beneficial for the QI to be able to use such an outside consultant as an external reviewer. Thus,

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IRPAC recommends the following additional language to Subparagraph A(3) in order to clarify who may act as an external reviewer:

"An external reviewer, who has previously reviewed the QI's systems, policies or procedures or the results thereof and provided advisory services may perform the periodic review provided that the external reviewer is not involved in the ongoing maintenance of such systems, policies and procedures."

### **Recommendation C.4 – QI Agreement, Internal Reviewer**

IPRAC recommends that the IRS clarify the term "competent" in relation to an internal reviewer being competent with regards to the QI agreement.

#### **Discussion**

As defined in Subparagraph A(1), "QI may designate an internal reviewer to perform the periodic review (or a portion of the periodic review) only when the internal reviewer is competent with respect to the requirements of this Agreement."

As the use of an internal reviewer, such as an internal auditor, is a new concept for the QI agreement, it is not clear what the term "competent" means regarding the internal reviewer. An internal reviewer, such as an internal auditor, has never performed a QI audit before because of the previous QI agreement's restriction to external auditors only. Thus, he or she does not have competency in performing the review of the QI agreement. This seems to contradict the use of an internal auditor. Thus, IRPAC recommends that competence is defined as follows:

"An internal reviewer may be determined to be competent with respect to the requirements of this Agreement if the internal reviewer has been trained in the requirements of this Agreement by the Responsible Officer (or delegate of the Responsible Officer) of the QI or of the Compliance QI or by a reputable third party."

### **Recommendation C.5 – QI Agreement, Responsible Officer Certification Due Date**

IRPAC recommends that the Responsible Officer certification due date is extended by an additional six months until December 31<sup>st</sup> of the calendar year following the certification period.

#### **Discussion**

Section 10.03 of the proposed QI agreement requires that "On or before July 1 of the calendar year following the certification period, QI must make the certification described in either section 10.03(A) or (B) of this Agreement." This certification relates to the QI's internal controls. The Responsible Officer, in providing this certification, "may

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rely on any reasonable procedure, process, or review that enables the responsible officer to make the certification described in this section 10.03." Any reasonable procedure, process or review includes the periodic review. In addition, section 10.04 requires the Responsible Officer to provide the factual information as outlined in Appendix I. The factual information to be provided in Appendix I includes information regarding the periodic review. Thus, the periodic review or any reasonable procedure, process or review that the Responsible Officer is relying upon to complete the certification must be concluded within six months from the end of the certification period so that the Responsible Officer may use it timely by July 1<sup>st</sup>. Six months is a short timeframe to complete such information.

Further, QIs acting as QDDs must use 2017 as their periodic review year (see section 10.05). The periodic review includes 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, tax reporting and reconciling withholding amounts for the Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, tax return which are both due March 15<sup>th</sup> of the calendar year following the tax year. The March 15 due date of Forms 1042-S and 1042 is too close to the July 1 due date of the Responsible Officer certification. The personnel that is responsible for issuing Forms 1042-S and 1042 is often key personnel working with the individuals who are performing the periodic review and the Responsible Officer making the certification. The periodic review will need to commence in the few months prior to March 15, which is a busy period for personnel working on the Forms 1042-S and 1042. Accordingly, an overlap between the Form 1042-S and 1042 production, the periodic review and the certification period would occur causing a strain on the QI's resources to verify both internal controls and conduct the periodic review within a compressed timeframe to meet the July 1<sup>st</sup> certification deadline. Thus, IRPAC recommends an additional six months, until December 31<sup>st</sup>, for the QI to provide the certification described in section 10.03(A) or (B).

### **Recommendation C.6 – Current QI Agreement Extension**

IRPAC recommends that the current QI agreement is extended by one year to allow for consistency in providing Responsible Officer certification.

### **Discussion**

Under the current QI agreement, Revenue Procedure 2014-29, the QI Responsible Officer is required to provide certification governing the compliance period of the QI agreement (see section 10.03). The current QI agreement expires December 31, 2016. While the current QI agreement compliance period addresses 2015, 2016 and 2017 tax years, the Responsible Officer Certification would incorporate the current QI agreement for tax years 2015 and 2016 and the proposed QI agreement (Proposed Notice 2016-42) for tax year 2017. IRPAC recommends that for consistency purposes, the current QI agreement is extended through 2017. This will allow for more consistency since the Responsible Officer will certify to the new agreement (once it is finalized) starting in 2018.

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### **Recommendation C.7 – QI Agreement, Alignment of Review and Certification**

IPRAC recommends that the certification statements of Part II of the Appendix of the proposed QI agreement are restricted to QI designated accounts for QIs acting as QDDs.

#### **Discussion**

Part II of the Appendix of the proposed QI agreement (Notice 2016-42) requires all QIs, even QIs acting as QDDs, to certify to effective internal controls. The Responsible Officer of the QI must certify to several statements regarding effective internal controls in Part II. The statement of Subpart A(2) of Part II specifies that such certification of internal controls is in relation to QI designated accounts by stating, "...QI maintains effective internal controls over its documentation, withholding, and reporting obligations under the QI Agreement and according to its applicable FATCA requirements, with respect to accounts for which it acts as a qualified intermediary..." Then the following statement of Subpart A(3) requires the Responsible Officer to confirm that "...there are no material failures, as defined in section 10.03(D) of the QI Agreement..." Section 10.03(D) defines a material failure to include FATCA requirements.

Subpart B of Part II of the Appendix requires the Responsible Officer to confirm whether there have been any events of default as defined in section 11.06 of the proposed QI agreement. Section 11.06, subsection F and subsection H indicate that a failure to comply with FATCA or, for non-QI designated accounts, Chapter 3 or Chapter 61, is an event of default.

By certifying to the statements within Subpart A(3) and Subpart B of Part II of the Appendix, the Responsible Officer will be making indirect certifications as to its compliance for non-QI designated accounts. For entities that become QIs solely for the purpose of becoming QDDs, certifying compliance for non-QI designated accounts would be unreasonable as these entities have never been subject to the QI agreement before and are only entering into the agreement for a singular purpose (to be QDDs). Examining non-QI accounts, for which they are not acting as QDDs, would be an overreach of the QI agreement since such entities are not engaging in any other QI related activity other than being QDDs. Thus, IRPAC recommends that the statements within Part II of the Appendix are restricted to QI only designated accounts for QIs acting as QDDs, which would be reasonable and consistent with the periodic review the QI is required to make.

#### **D. Withholding Statement**

##### **Recommendation**

IRPAC recommends that the IRS announce as a matter of administrative convenience that information contained in valid withholding certificates attached to

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withholding statements not be required to be shown a second time on the face of those withholding statements.

### Discussion

Treas. Reg. §§1.1441-1T(e)(3)(iv)(C)(1) and 1.1471-3T(c)(3)(iii)(B)(3) set forth requirements for what information must be contained on a withholding statement provided to withholding agents for purposes of withholding under Chapter 3 and Chapter 4, respectively. To the extent these regulations require intermediaries to take information shown on valid withholding certificates and *repeat* that same information on the face of the withholding statements to which the certificates are attached, these regulations place an unnecessary administrative burden on such intermediaries (as well as withholding agents required to collect and validate such information). A requirement that information be duplicated can result in an increased failure rate by withholding agents who must then treat an account as "undocumented" due solely to the fact that the intermediary failed to provide duplicate information on the withholding statement that is already included on the attached withholding certificate.

IRPAC, therefore, recommends that the IRS provide guidance – or even an FAQ – that clarifies that information contained on a withholding certificate does not need to be shown a second time on the face of an attached withholding statement. We have attached a model withholding statement (see Appendix A) that shows what information would still need to be provided on the withholding statement after the application of such a no-duplication rule.

IRPAC believes that the regulations provide support for a no-duplication pronouncement. Treas. Reg. §1.1471-3T(c)(3)(iii)(B)(1) states that, "[a] withholding statement forms an integral part of the withholding certificate and the penalties of perjury statement provided on the withholding certificate applies to the withholding statement as well." Treas. Reg. §1.1441-1T(e)(3)(iv)(B) has a similar provision treating the withholding statement and the underlying withholding certificates as integrally related. Given that withholding statements and withholding certificates are so related, IRPAC believes the Treasury and IRS have the authority to prevent the forced duplication on the withholding statement of information already shown on an attached withholding certificate.

In addition, to avoid any confusion on a going forward basis, IRPAC recommends that the regulations setting forth the information required to be included on the withholding statement be revised to make it clear such duplicated information is not required. Specifically, IRPAC recommends revising Treas. Reg. §1.1441-1T(e)(3)(iv)(C)(1) as follows:

The withholding statement provided by a nonqualified intermediary in combination with any associated supporting documentation must contain the information required by this paragraph

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(e)(3)(iv)(C).

Similarly, IRPAC recommends revising Treas. Reg. §1.1471-3T(c)(3)(iii)(B)(1) to add the following sentence to the end:

Information required to be included in any withholding statement will be deemed provided if that information is included in the withholding certificate or any other supporting documentation required to be provided as part of the withholding certificate.

### E. Use of Form W-9 as FATCA Documentation for Certain Disregarded Entities

#### Recommendation

IRPAC recommends that the IRS issue guidance providing that where an FFI in an intergovernmental agreement (IGA) jurisdiction maintains an account for a disregarded entity which would be a U.S. person but for its disregarded status and whose sole owner is a U.S. person, the FFI may treat the sole owner as the account holder absent local IGA guidance explicitly rejecting the foregoing IRS guidance.

#### Discussion

Under U.S. tax principles, an account held by a disregarded entity is treated as owned by the sole owner. If that sole owner is a U.S. person, the financial institution maintaining the account would collect a Form W-9 in the name of the sole owner and any required Form 1099 reporting would be completed in the name of the sole owner. This principle is embedded in Treas. Reg. §1.1471-5T(a)(3)(i), which states, in relevant part, “[i]n the case of an account held by an entity that is disregarded for U.S. federal tax purposes under §301.7701-2(c)(2)(i), the account shall be treated as held by the person owning such entity.”

However, Article 1(1)(dd) of the Model 1 IGA and Article 1(1)(w) of the Model 2 IGA define account holder as the “person listed or identified as the holder of a Financial Account by the Financial Institution that maintains the account.” This definition has created significant confusion for IGA jurisdiction financial institutions given that they are required to document the disregarded entity for FATCA purposes; however, they may also be required to collect a Form W-9 from the sole owner to meet Chapter 61 requirements if required to comply with U.S. payor regulations or Chapter 3 requirements if U.S. source income is paid. Similarly, this creates confusion for personnel of the disregarded entity and / or sole owner attempting to provide documentation given they are used to providing the Form W-9 for U.S. tax purposes and FATCA is a U.S. tax requirement. These challenges hold regardless of whether the disregarded entity is a U.S. entity or non-U.S. entity. The challenges are compounded for a disregarded entity that is a U.S. entity because there is no official IRS form on

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which such an entity can provide its FATCA status (in contrast, a disregarded entity which is a non-U.S. entity can provide its FATCA status on a Form W-8 for accounts that it holds at FFIs). Also, we see no policy reason for FFIs collecting, and FATCA reporting based upon, the FATCA status of a disregarded entity that is a U.S. entity and whose single owner is a U.S. entity, as the disregarded entity is not a U.S. taxpayer (the single owner is) and, accordingly, the only FATCA status of interest to the IRS (and, as a result, of interest to the applicable IGA jurisdiction) should be FATCA status of the single owner and, therefore, a single form (the Form W-9 for the single owner) should satisfy all U.S. information reporting regimes (FATCA, Chapter 3 and Chapter 61).

Therefore, IRPAC recommends that the IRS issue guidance providing that where an FFI in an IGA jurisdiction maintains an account for a disregarded entity which would be a U.S. person but for its disregarded status and whose sole owner is a U.S. person, the FFI may treat the sole owner as the account holder absent local IGA guidance explicitly rejecting the aforesaid IRS guidance.

### F. IRS FATCA Timeline

#### Recommendation

IRPAC recommends that the IRS update the IRS Summary of FATCA Timelines at <https://www.irs.gov/businesses/corporations/summary-of-fatca-timelines> to incorporate the changes listed in Appendix B to this report.

#### Discussion

IRPAC recommended changes to the December 3, 2015 version of the IRS Summary of FATCA Timelines. Some of these recommendations have been incorporated into the June 2, 2016 version of the IRS Summary of FATCA Timelines. IRPAC recommends further changes, which are listed in Appendix B to this report.

### G. Partnership Lag Method

#### Recommendation

IRPAC recommends that in lieu of reporting based upon the “lag method” prescribed in Treas. Reg. §1.1441-5(b)(2)(i)(A), the IRS permit U.S. partnerships that are required to withhold on a foreign partner’s distributive share of partnership income the option to report the income and tax withheld on Forms 1042 and 1042-S for the year in which the partnership earns the income (rather than in the subsequent year) without suffering a late deposit penalty, where the withholding on the foreign partner’s distributive share is effected by the partnership on or before March 15 of the subsequent year.

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### Discussion

A U.S. partnership is generally required to withhold tax under Treas. Reg. §1.1441-1 as a withholding agent on an amount subject to withholding that is includible in the gross income of a partner that is a foreign person.<sup>3</sup> Withholding is generally required at the time a distribution of an amount subject to withholding is made.<sup>4</sup> However, to the extent that a foreign partner's distributive share of income subject to withholding has not actually been distributed to the foreign partner, under the so-called "lag method," the U.S. partnership is required to withhold on the foreign partner's distributive share of the income on the earlier of:

1. The date that Schedule K-1 (Form 1065) is mailed or otherwise provided to the foreign partner; or
2. The due date for furnishing Schedule K-1 (Form 1065) to the foreign partner.

If a U.S. partnership withholds on a foreign partner's share of an amount subject to withholding before the amount is actually distributed to the partner, withholding is not required when the amount is subsequently distributed to the partner.<sup>5</sup>

When the lag method is employed, the Instructions for Form 1042 indicate that the tax withheld on the foreign partner's distributive share should be shown as a liability on the partnership's Form 1042 for the year in which the withholding is performed (i.e., the subsequent year) rather than on the Form 1042 for the year that the partnership earns the income.

One of the draw backs of the using the lag method is that it creates a mismatch between the income shown on the foreign partner's Schedule K-1 (Form 1065) for the year in which the partnership earned the income and the income reported to the foreign partner on Form 1042-S for the year in which the partnership earned the income, as that Form 1042-S will not include the foreign partner's distributive share of income that was "lagged" into the subsequent year.

Many partnerships, as well as their foreign partners, would prefer that the foreign partner's Schedule K-1 (Form 1065) and Form 1042-S are consistent for each year. Thus, although the use of the lag method would appear to be mandatory, these partnerships will often report the tax actually withheld in the subsequent year as a liability on the partnership's 1042 for the year in which the partnership earned the

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<sup>3</sup> Treas. Reg. §1.1441-5(b)(2)(i)(A).

<sup>4</sup> Id.

<sup>5</sup> Treas. Reg. §1.1441-5(b)(2)(v).

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income, and the income and tax withholding credit on the foreign partner's Form 1042-S for the year in which the partnership earned the income.

When partnerships report in this manner, and show the liability on their Form 1042 for the year in which the partnership earns the income, the partnerships are generally subjected to a penalty for a late deposit. This is the case despite the fact that whether the partnership reports in this manner, or utilizes the lag method, the IRS will receive the deposit of tax withheld at the same point in time. Thus, while reporting in this manner rather than using the lag method the partnership creates a penalty situation for itself, reporting in this manner does not detriment the IRS with respect to the timing of the deposit.

Given that Form 1065 is due by the 15<sup>th</sup> day of the fourth month following the end of the partnership's tax year, and that a five month extension of time is available for filing and issuing Schedule K-1, it can be quite late in the subsequent tax year when the withholding is actually applied to the foreign partner's distributive share of partnership income earned in the prior year. However, partnerships that eschew the lag method and report in the manner described above are typically calendar year partnerships that make a determination of a foreign partner's distributive share of income by March 15 of subsequent calendar year – which is necessarily the case in order to reflect the income and withholding credit on the foreign partner's Form 1042-S for the year in which the partnership earned the income.

IRPAC recommends that the IRS permit partnerships that wish to report in the manner described above the option to do so where they apply the tax withholding to the foreign partner's distributive share of income on or before March 15 of the year following the year in which the partnership earns the income. In addition, Form 1042 and its instructions should allow a partnership that elects to report in this manner to include the tax withheld on its Form 1042 for the year in which the partnership earned the income without being subjected to a late deposit penalty (assuming the deposit of tax withheld was otherwise timely). This could presumably be implemented by having the partnership show the liability as an adjustment item (similar to current line 64a for adjustments for corporate distributions) rather than as a liability on lines 1 through 60 of the Form 1042.

### **H. Escrow Procedures**

#### **Recommendation**

IRPAC recommends that the IRS issue guidance regarding the types of payments that are eligible for the escrow procedure in Treas. Reg. §§1.1441-3T(d)(1) and 1.1471-2(a)(5)(ii), the applicable rate of tax to be applied, reporting requirements for such payments on Forms 1042 and 1042-S, and the application of the escrow procedure to withholding agents that are domestic partnerships.

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### Discussion

Under Treas. Reg. §1.1441-3T(d)(1), where a withholding agent makes a payment and does not know at the time of the payment the amount that is subject to withholding because the determination of the source of income or the calculation of the amount of income subject to tax depends upon facts that are not known at the time of payment, the withholding agent must withhold 30% (or other applicable percentage) on the amount that could be U.S. source income or income subject to tax. A similar rule is found in Chapter 4 with respect to payments made to payees that are entities.<sup>6</sup>

Alternatively, a withholding agent may elect to withhold 30% of the payment in escrow until the earlier of the date that the amount of income from sources within the U.S. or the taxable amount can be determined or one year from the date the amount is placed in escrow, at which time the withholding becomes due, or to the extent that withholding is not required, the escrowed amount must be paid to the payee.<sup>7</sup>

In terms of reporting on Form 1042-S and Form 1042, it would appear that a withholding agent employing the escrow procedure would issue a Form 1042-S for the year in which the payment is made, showing the appropriate income code, the payment amount, the amount of tax withheld and the rate applied, and would check box 7b to indicate that the withheld tax was not deposited with the IRS pursuant to the escrow procedure. In addition, it would appear that the withholding agent would not include the tax withheld as a liability for the year of payment on Form 1042.

In the subsequent year, when the amount of income from sources within the U.S. or the taxable amount of income is determined, or where such a determination is not made and the one-year period expires, it would appear that the withholding agent would issue a Form 1042-S<sup>8</sup> showing income code 50 (Income previously reported under escrow procedure), the payment amount, the actual tax liability and withholding rate, the actual amount of tax due to the IRS with respect to the payment would be deposited by the withholding agent and reflected on its Form 1042 for that year, and the excess tax withheld (if any) would be returned to the payee.

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<sup>6</sup> Treasury Regulation §1.1471-2(a)(5)(i).

<sup>7</sup> Treasury Regulation §1.1441-3T(d)(1).

<sup>8</sup> If the escrow procedure is available for use with respect to corporate distributions, it would appear that more than one Form 1042-S may need to be issued (e.g., one to report dividend income and one to report a return of capital). See discussion supra, on the application of the escrow procedure to corporate distributions.

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There has been very little guidance from the IRS in regard to the specifics of the escrow procedure. IRPAC believes that withholding agents and taxpayers would benefit from additional guidance from the IRS in regard to the escrow procedure, such as the types of payments that are eligible for the escrow procedure, as well as additional guidance regarding tax withholding on the initial payment, and with respect to Forms 1042 and 1042-S reporting with respect to the escrowed amounts.

For example, the general rule under Treas. Reg. §1.1441-3T(d)(1) indicates that a withholding agent must withhold 30% “or other applicable percentage.” This implies that if a foreign payee were subject to a lower rate of withholding on the particular type of payment, the withholding agent could apply that lower withholding rate. However, the escrow provision in Treas. Reg. §1.1441-3T(d)(1) mandates that withholding under the escrow procedure be applied at 30%. It is not clear as to whether this is the intent, or whether the language “or other applicable percentage” was inadvertently omitted.

There has also been some suggestion that the escrow provision is not available for use with respect to corporate distributions, under the premise that the criteria for entry into Treas. Reg. §1.1441-3T(d)(1) cannot be met because a withholding agent has knowledge of how a payment should be treated – having been so informed by the application of Treas. Reg. §1.1441-3(c)(1) (general rule regarding withholding on corporate distributions) – and any exceptions to §1.1441-3(c)(1) are limited to those found in §1.1441-3(c)(2).

However, in private letter ruling 200552007, the IRS approved the taxpayer’s proposed escrow procedure under Treas. Reg. §1.1441-3(d)(1), where taxpayer was not able to determine at the time of payment whether a payment made under a tender offer was a distribution of property to which IRC §301 applied, or a payment in part or full exchange for the stock under IRC §302. While a letter ruling can only be cited as precedent for the taxpayer that requested the ruling, the letter ruling can be pointed to as an example of where it would seem that the use of the escrow procedure was not pre-empted with respect to corporation distributions by Treas. Reg. §1.1441-3(c).

Moreover, one of the situations where it would be most helpful to have use of the escrow procedure is for corporate distributions where it is unclear how much of a distribution will be treated as a dividend versus a return of capital because there is uncertainty in regard to the amount of accumulated or current earnings and profits at the time of the distribution.

Treas. Reg. §1.1441-3(c)(2)(i)(C) provides some relief in that it permits the distributing corporation or an intermediary to withhold (or not withhold) on a distribution based upon a reasonable estimate by the distributing corporation at the time of the distribution in regard to the portion of the payment that is a dividend. While helpful, this option is imperfect in that when the estimate is too high, foreign payees will be overwithheld and generally required to file a tax return in the U.S. in order to obtain a

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refund of the overwithheld tax; and when the estimate is too low, the distributing corporation or intermediary is liable for the underwithheld tax.

In contrast, the escrow procedure would resolve the aforementioned problems with reliance on a reasonable estimate – and would seem to do so with minimum disruption to the timing of the deposits of withheld tax to be made to the IRS – as presumably the withholding agent would apply withholding to the portion of the payment that is known to be a dividend, and would limit application of the escrow procedure to the portion of the distribution with respect to which the treatment is in question at the time of payment.

Another area in which withholding agents and taxpayers would benefit from additional guidance is in regard to the application of the escrow procedure by U.S. partnerships with respect to distributions to foreign partners. Presumably, the escrow procedure would be available to a partnership where there was a question as to the source of income or whether a payment is taxable, to the same extent that it would be available to any other withholding agent.

However, it is unclear as to whether the escrow procedure would be available to a partnership in cases where the source and character of a payment received by a partnership was clear, but the partnership is unable to determine the amount of such payment allocable to the foreign partners at the time of distribution.

Accordingly, IRPAC recommends that the IRS issue guidance regarding the types of payments that are eligible for the escrow procedure in Treas. Reg. §§1.1441-3T(d)(1) and 1.1471-2(a)(5)(ii), the rate of tax to be applied, reporting requirements for such payments on Forms 1042 and 1042-S, and the application of the escrow procedure to withholding agents that are domestic partnerships.

## **SECTION II – RECOMMENDATIONS ON IRS FORMS AND INSTRUCTIONS**

### **I. Required Usage Date of Form W-8BEN-E (Rev. April 2016)**

#### **Recommendation**

IRPAC recommends delaying the date on which the (Rev. April 2016) version of the Form W-8BEN-E becomes mandatory to January 1, 2017. Under the current rules, withholding agents may continue to accept the old (February 2014) version of the Form W-8BEN-E for only six months after the April 2016 revision date. Therefore, the updated version will become mandatory on November 1, 2016.

#### **Discussion**

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The November 1, 2016 mandatory date poses challenges for withholding agents collecting documentation from clients as document collection efforts generally occur during the summer for accounts with end of year expiry dates. For example, a client with a current tax document on file expiring on December 31, 2016 will be included in the withholding agent's 2016 document solicitation effort generally occurring between June – September 2016. But, to be able to process the 2016 Form W-8BEN-E, withholding agents must implement system-wide changes (e.g., the systems must be capable of storing new data on the updated form and handling the complexity surrounding the LOB requirements) and must have access to the as-yet unreleased Requestor Instructions so as to develop validation procedures. Similarly, vendors that provide W-8 validation software also need time to implement the W-8BEN-E changes. Withholding agents are not in a position to accept the new W-8BEN-E before updates to validation software are available.

Because withholding agents cannot yet process the new Form W-8BEN-E, withholding agents will generally use the old, February 2014 version of the form during their 2016 solicitation outreach. However, withholding agents frequently receive delayed responses from clients who are aware that they are properly documented through the end of the year. As such, it can be expected that many, if not most, clients will submit their updated tax documentation after the November 1, 2016 mandatory date for the new form. As such, there is a substantial risk that withholding agents will receive the old, February 2014 version of the form after the current November 1, 2016 mandatory effective date, notwithstanding that they used that old form in a solicitation during a period when that old form was still appropriate.

IRPAC's proposed January 1, 2017 effective date for the new Form W-8BEN-E also coincides with several other regulatory initiatives with an effective date of January 1, 2017, for which the new form may be used by both withholding agents and their clients. Such other regulatory initiatives include: the requirement for sponsored entities to obtain a Global Intermediary Identification Number (GIIN); the new QI agreement; sunset for use of pre-existing FATCA W-8 forms [as per Treas. Reg. §1.1471-3T(d)(1)]; withholding on collateral payments securing transactions under a collateral agreement (as per Treas. Reg. §1.1473-1T(a)(4)(vii)); sunset of limited branch and limited FFI FATCA statuses; and withholding and information reporting for IRC § 871(m). It would cause less confusion for clients and the industry if the effective date for the new Form W-8BEN-E coincided with these initiatives.

In sum, to minimize the burden already placed on withholding agents in developing the procedures around the updated version, the industry requests a two month delay in the mandatory usage of the Rev. April 2016 Form W-8BEN-E.

### **J. Limitation on Benefits Transitional Relief**

#### **Recommendation**

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IRPAC recommends extending transition relief to allow withholding agents to extend treaty benefits to beneficial owners who fail to check the specific LOB box on line 14b on a Form W-8BEN-E (Rev. April 2016) provided prior to January 1, 2018. Furthermore, IRPAC requests that withholding agents be permitted to rely upon a Form W-8BEN-E (Rev. April 2016) that does not have the specific LOB box checked until that form's natural expiry.

### **Discussion**

The Form W-8BEN-E (Rev. April 2016), Part III, line 14b introduces additional requirements for both payees and withholding agents. Part III, line 14b requires the payee's LOB code, which provides the specific justification for which the payee meets the LOB provision of the applicable tax treaty between its permanent residence jurisdiction and the United States. Failure to provide this LOB code may disqualify the payee from treaty benefits and thus result in additional withholding tax applied to payments.

Both withholding agents and payees need adequate time to manage modifications to IRS form updates, especially major changes such as the new LOB codes. Treaty claimants need time to familiarize themselves with the presentation of the LOB provisions on line 14b in order to properly complete the form under penalties of perjury. Likewise, withholding agents need adequate time to enhance validation standards and update systems. These validation standards are generally derived from the Form W-8BEN-E Requestor Instructions, which as of this time have not been published. Therefore, withholding agents are unable to thoroughly implement rules and update validation tools absent such instructions.

This major update will likely result in a high error rate among treaty claimants and the potential for disallowance of treaty benefits during the earlier stages of implementation. This will place an excessive burden on treaty claimants, withholding agents, and the IRS in order to process refunds resulting from the disallowance of such claims. In turn, withholding agents need a transitional period during which time withholding agents may accept a treaty claim for which one of the line 14b sub-boxes has not been checked.

Accordingly, IRPAC requests that the IRS allow withholding agents to accept a treaty claim on a Form W-8BEN-E on which the LOB code is not provided prior to January 1, 2018 to give the industry the time necessary to implement the new requirements. Furthermore such a form accepted prior to January 1, 2018 should be able to be relied upon to extend treaty benefits until its natural expiry.

### **K. February 2016 Draft Form W-8BEN-E and Draft Instructions for Form W-8BEN-E and Corresponding Instructions for Requester of Forms W-8**

### **Recommendation**

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IRPAC made recommendations on the draft Form W-8BEN-E and draft Form W-8BEN-E instructions released in February 2016. Some of these recommendations were not incorporated into the final form and instructions. We request that the IRS consider these non-adopted recommendations when it makes updates to the Instructions for the Requester of Forms W-8.

### **Discussion**

In February 2016, the IRS released a draft Form W-8BEN-E and draft Form W-8BEN-E instructions for commentary. IRPAC made several recommendations to the form based on industry concerns regarding technicality of language and ease of implementation. See Appendix C for recommendations. Final Form W-8BEN-E and final Form W-8BEN-E instructions were released in April 2016. While IRPAC appreciates that some of our recommendations were incorporated into the final W-8BEN-E, not all recommendations were incorporated.

It is understandable that not all recommendations could be incorporated due to, among other things, the short period of time between the release of the draft form, approval milestones that the form had to meet in order to be published and the actual publication of the final form. IRPAC recommends that suggested comments which were not incorporated in the final Form W-8BEN-E and Form W-8BEN-E instructions, are addressed in the Instructions for Requestor of Forms W-8, where possible, in order to provide further clear guidance to the industry.

### **L. TIN Requirement on Form W-8BEN-E for Foreign 501(c) Organizations**

#### **Recommendation**

IRPAC recommends that the IRS issue clarifying guidance that an IRS Form W-8BEN-E submitted by a foreign 501(c) organization does not need to include a U.S. Tax Identification Number (TIN) except if a TIN is needed to claim treaty benefits.

#### **Discussion**

Treas. Reg. §1.1441-1(e)(4)(vii) provides the circumstances under which a TIN (“TIN” in this discussion means a U.S. TIN, unless otherwise stated) is required to be stated on a withholding certificate. Under Temp. Reg. §1.1441-1T(e)(4)(vii)(A), the TIN is required on a withholding certificate when the beneficial owner is claiming the benefit of a reduced rate under an income tax treaty (except if a foreign TIN is provided or for certain income on publicly traded securities). The implication left by this new rule is that a withholding certificate provided solely to establish Chapter 3 (or Chapter 4) status does not need to have a TIN as long as the beneficial owner is not using the certificate to claim the benefit of an income tax treaty.

These regulations provide two rules for foreign tax exempt organizations:

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1) Treas. Reg. §1.1441-1(e)(4)(vii)(D) provides that a TIN is required on a withholding certificate on which a beneficial owner is claiming an exemption based solely on a foreign organization's claim of tax exempt status under section 501(c) or private foundation status. Given that the foreign organization is claiming exemption from withholding, this requirement that a TIN be provided is appropriate. This status is claimed on a Form W-8EXP, Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding.

2) Treas. Reg. §1.1441-1(e)(4)(vii)(G) provides that a TIN is required on a withholding certificate provided by a foreign organization that is described in section 501(c) (i.e., a tax exempt organization). In contrast to the above requirement, this requirement does not appear to be limited to any claim of exemption under U.S. domestic law, and appears to apply to entities which provide a Chapter 3 status of "Tax exempt organization" or "Private foundation" (private foundations being a subset of tax exempt organizations) on a Form W-8BEN-E. It is unclear, therefore, why a TIN is required in this circumstance. Moreover, this requirement appears to swallow the above narrow rule. That is, if TINs are required for all foreign tax exempt organizations, why is there an additional rule requiring a TIN for foreign tax exempt organizations claiming an exemption based on that status? Moreover, there does not appear to be any reason why a foreign tax exempt organization cannot use a Form W-8BEN-E to establish Chapter 3 (or Chapter 4) status without obtaining a TIN, as almost all other entities can do.

While the regulations provide seemingly conflicting rules, the requester instructions (see page 9) and the general instructions for the IRS Form W-8BEN-E (see pages 8-9) do not specify that a foreign 501(c) organization must provide its TIN for purely status purposes.

The seemingly conflicting regulatory rules create confusion for withholding agents who need to determine whether to invalidate incomplete withholding certificates. To avoid this problem, IRPAC recommends that the IRS clarify how the rules at Temp. Reg. §1.1441-1T(e)(4)(vii)(A) and Treas. Reg. §1.1441-1(e)(4)(vii)(G) are to be applied with regard to foreign 501(c) organizations. Specifically, IRPAC recommends that the IRS make clear that an IRS Form W-8BEN-E submitted by a foreign 501(c) organization need not include a TIN except if a TIN is needed to claim treaty benefits.

### **M. GIIN Validation**

#### **Recommendation**

IRPAC recommends that visual aids, such as flowcharts, be provided by the IRS to the industry regarding proper placement of GIINs on Forms W-8.

#### **Discussion**

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With the implementation of FATCA in 2014, Forms W-8 have expanded in length and complexity. New versions of these forms continue to be issued. This increase in complexity has caused payees completing the form to be confused and complete the form incorrectly. Specifically, correct placement of the payee's GIIN on the appropriate line within the form is a source of confusion due to unclear instructions and multiple locations on the form that a GIIN may be stated. For certain FATCA status types, a GIIN is required to be stated on the form and if it is not stated in the correct section of the form, can cause the form to be invalid.

Further, in accordance with IRS Notice 2015-66, beginning January 1, 2017, sponsored entities must obtain their own GIIN and cannot exclusively use the GIIN of their sponsor on a Form W-8. (There is an exception to the requirement to obtain a GIIN by January 1, 2017 for nonreporting IGA FFIs which meet the requirements to be a sponsored entity as described in Annex II of the applicable IGA and do not have reportable accounts. See, e.g., Article IV(B)(3)(c) of Annex II of the Model 1 IGA.) This requirement will further confuse payees who must list a GIIN on a Form W-8 for the first time as the Form W-8 instructions are unclear regarding sponsored entities. For example, the Instructions for Form W-8BEN-E state that the sponsored entity's GIIN must appear on line 9a and the sponsor's GIIN must appear on line 16, except if the sponsored entity is in an IGA country. The instructions then are contradictory for IGA sponsored entities and state that the sponsor's GIIN should appear on line 9a and if it does not, to enter it on line 26. This contradiction can be confusing to payees.

Based on the above, IRPAC recommends that a visual aid, such as a flowchart, be made available to assist payees in correctly completing the form. A flowchart would reduce the frustration and confusion of a payee trying to complete the form and would assist withholding agents in validating Forms W-8. IRPAC has submitted to the IRS a draft GIIN placement flowchart for Form W-8BEN-E and would be happy to work with the IRS to finalize this flowchart.

### **N. Instructions for Form W-8ECI**

#### **Recommendation**

IRPAC recommends that the Instructions for Form W-8ECI, Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States, be modified to clarify that a foreign beneficial owner that provides Form W-8ECI to a withholding agent to claim an exemption from withholding on income that is effectively connected with a trade or business in the U.S. need not include a business address in the U.S. if the foreign beneficial owner does not have a business address in the U.S. In such cases, the foreign beneficial owner should simply be permitted to indicate that it does not have a business address in the U.S.

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IRPAC further recommends inclusion of corresponding language in the Instructions for the Requestor of Forms W-8 to clarify that a withholding agent should not treat a Form W-8ECI that indicates on line 6 that the foreign beneficial owner does not have a business address in the U.S. as invalid because of the lack of a business address in the U.S.

### **Discussion**

Form W-8ECI is used by a beneficial owner to claim an exemption from withholding where the income to be received is effectively connected with a trade or business in the U.S.

Among the information required to be provided on Form W-8ECI, line 6 of the form includes a space for the beneficial owner to enter its business address in the U.S. The Instructions for Form W-8ECI for line 6 simply provide, “Enter your business address in the United States. Do not show a post office box.”

Many withholding agents have taken the view that a Form W-8ECI will not be valid if it does not include a business address in the U.S. on line 6. The withholding agents that take this view reject the Form W-8ECI provided by the foreign beneficial owner and subject the payment to withholding. However, there are circumstances where income will be considered to be effectively connected with a trade or business conducted in the U.S. – and thereby exempt from withholding – even though the foreign beneficial owner does not have a business address in the U.S.

IRPAC believes that a clarifying modification to the instructions will alleviate this over withholding. Accordingly, IRPAC recommends that the Instructions for Form W-8ECI and Instructions for the Requestor of Forms W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals), be modified to clarify that a business address in the U.S. need not be included on line 6 of Form W-8ECI if the foreign beneficial owner does not have a business address in the U.S.

### **O. Forms W-8 with Electronic Signatures**

#### **Recommendation**

IRPAC recommends that the IRS issue clarifying guidance either as part of the Form W-8 Requestor Instructions or as a separate FAQ allowing withholding agents to accept a Form W-8 with an electronic signature that was not executed on the withholding agent’s electronic systems.

#### **Discussion**

Currently, it is unclear whether withholding agents have the ability to accept Forms W-8 with electronic signatures that are transmitted to the withholding agents as

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pdf copies via email, facsimile or other methods. Withholding agents are beginning to receive Forms W-8 that have been created and signed on electronic systems that have not been established by the withholding agents themselves. Payees will typically email or send via facsimile such electronically created W-8s containing their electronic signature. Since withholding agents may now clearly accept Forms W-8 which are scanned and received electronically (see Treas. Reg. §§1.1441-1T(e)(4)(iv)(C) and 1.1471-3T(c)(6)(iv)), it would be beneficial to the payee and the withholding agent if there was clear guidance on the withholding agent also being able to accept a Form W-8 transmitted in such a manner with an electronic signature.

IRPAC recommends the following language that may be used in a FAQ or similarly in the Form W-8 Requestor Instructions:

Q: If a payee provides a Form W-8 to document its status for purposes of Chapters 61, 3 and/or 4 and such form is electronically signed by the payee, may the withholding agent accept such electronic signature for purposes of determining the validity of the form?

A: A withholding agent may establish a system for a payee to electronically furnish a Form W-8 as set forth in § 1.1441-1T(e)(4)(iv) and § 1.1471-3T(c)(6)(iv). An electronically furnished Form W-8, which is also electronically signed under penalties of perjury by the person whose name is on this form, may be accepted by the withholding agent as an original. A payee may choose to print or create a pdf copy of such electronically signed Form W-8 created by such an electronic system and provide this form, via email or by other means, to multiple withholding agents. A withholding agent who receives a copy of an electronically signed Form W-8 from the payee or agent of the payee, may accept such form as being validly signed provided that there is an indication on the Form W-8 that the signature is an electronic signature. For example, a Form W-8 stating that it has been "Electronically signed by John Smith" may be accepted as having a valid signature.

### **P. Substitute Form 1042-S Payee Statements**

#### **Recommendation**

IRPAC recommends that the use of substitute Form 1042-S payee statements be retained but with additional minimum requirements added to aid IRS Service Center processors. Alternatively, IRPAC recommends that any prohibition to the use of such substitute statements be confined only to those statements on which withholding is shown. Finally, to accommodate information providers' desire to use substitute payee statements in future years, IRPAC recommends that the IRS take steps to develop the capability to use the newly required Form 1042-S unique identifying number ("UIN") to match substitute payee statements to information returns electronically submitted.

#### **Discussion**

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In the 2015 IRPAC Report, IRPAC recommended that the IRS modify its newly issued requirement (included in IRS Publication 1179, dated June 29, 2015) that Form 1042-S payee statements be "identical" to the IRS form. Substitute versions of payee statements have been in place for decades, and offer a more streamlined and less confusing alternative to official forms, which results in many practical and business advantages to form filers as well as to payees. The IRS Form 1042-S, in contrast, typically contains boxes for information that is not only not relevant to the taxpayer, but also makes the form exceedingly confusing. As a result, IRPAC argued that the IRS's dramatic departure from the prior substitute standard was unwarranted. IRPAC asked the IRS to reevaluate this mandate and, if necessary, to work with IRPAC to develop more specific and focused amendments to the substitute form specifications so as to address the problems IRS was having with the substitute forms.

During 2016, IRPAC and the IRS had several follow-up meetings regarding this issue. IRPAC explained to the IRS that information reporters are resistant to using the official Form 1042-S payee statements because that form is confusing and inefficient and, as such, negatively impacts communications between information reporters and their customers. The IRS, in turn, explained that its effective elimination of the use of substitute Form 1042-S payee statements was based on the difficulty that IRS Service Center processors were having identifying and transcribing key information from all the substitute Form 1042-S payee statements in processing refund or credit claims. To address the IRS concerns, IRPAC proposed a more standardized substitute form, which would allow for the elimination of irrelevant boxes in a standardized manner. See Appendix D.

While IRPAC hopes the IRS would adopt these minimum requirements for all such statements, IRPAC recommends that the IRS *at a minimum* allow withholding agents to furnish substitute Form 1042-S payee statements for those statements on which no withholding is shown. Many Form 1042-S payee statements report no withholding due to numerous exemptions from withholding for various types of income (e.g., portfolio interest). As a result, those statements in these cases are not used to make refund or credit claims – but instead are used merely to report certain payments made to the payees. This recommendation would be particularly helpful with respect to bank deposit interest paid to nonresident alien (NRA) individuals. The required Form 1042-S reporting of bank deposit interest paid to NRA individuals has been greatly expanded due to the need of the U.S. Treasury to report this information for purposes of meeting its reciprocal reporting obligations under many FATCA intergovernmental agreements (IGAs). Bank deposit interest paid to NRA individuals is not subject to Chapter 3 withholding. Although bank deposit interest is technically subject to Chapter 4 withholding, in the case of a putative NRA individual, backup withholding and Form 1099 reporting, not Chapter 4 withholding and Form 1042-S reporting, would generally apply if the individual is not properly documented. Therefore, the greatly expanded number of Form 1042-S payee statements furnished to NRA individuals with respect to bank deposit interest will neither reflect withholding nor generate associated refund or

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credit claims, which are the claims that triggered the IRS effectively eliminating substitute payee statements.

Moreover, allowing substitute Form 1042-S payee statements in the case of payments that were not subjected to withholding would greatly enhance the ability of withholding agents to deliver a simpler payee statement that can be easily understood by its customers. Where applicable, the substitute form would not contain information that is not relevant to the taxpayer and could combine multiple reportable accounts held by payees on a single payee statement. For example, if the NRA individual has multiple CDs and a savings account, all reportable accounts should be allowed to be reported on a single substitute Form 1042-S payee statement. This would be an efficient way to accomplish this reporting to the customers without running afoul of the Service's processing issues noted above. Of course, notwithstanding the allowance for a substitute payee statement, the withholding agent would continue to report the required information with respect to each account separately to the IRS, allowing the Treasury to report such information to partner countries as appropriate on an account by account basis.

Finally, regardless of the IRS position with respect to the above requests, looking ahead, beginning in 2017, withholding agents will be required to assign a UIN to each filed Form 1042-S. IRPAC recommends that the IRS develop the capacity to use this UIN to allow Service Center processors to match refund claims to electronically submitted information reports by withholding agents detailing the tax that has been withheld. This matching method of processing refund claims should completely eliminate the need to read *any* information from payee statements other than the UIN. As a result, this matching method of processing refund claims would not only save the IRS time and money in processing such claims, but it would help to prevent fraud perpetrated through the use of fraudulent payee statements. Importantly, the use of the UIN in this manner should also allow information providers the ability to send substitute payee statements in the most practical and customer-friendly way possible.

### **Q. Truncated TINs for Form 1042-S Payee Statement**

#### **Recommendation**

IRPAC recommends that the Instructions for Form 1042-S payee statements be revised to make it clear that truncated TINs ("TTIN") are permitted for all substitute Form 1042-S payee statements.

#### **Discussion**

Under Treas. Reg. § 301.6109-4(b)(1) a truncated TIN may be used to identify any person on any statement that the internal revenue laws require to be furnished to another person. Under this provision, a withholding agent may truncate the TIN of the payee on a Form 1042-S payee statement. Rev. Proc. 2015-35 confirms that TTINs are permitted on Form 1042-S payee statements and that none of the exceptions under §

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301.6109-4(b)(2) to the general rule permitting TTINs apply to Form 1042-S payee statements:

Truncating taxpayer identifying numbers on payee statements. Final regulations have been issued that allow issuers to truncate payee identifying numbers on all payee statements covered by these instructions [Form 1042-S is “covered by these instructions”], except for Form W2-G.

If TTINs are permitted on a Form 1042-S payee statement, they should similarly be permitted on a substitute Form 1042-S payee statement. The 2016 Instructions for Form 1042-S payee statements, however, appear to limit the use of truncated TINs to only substitute Form 1042-S payee statements that report bank deposit interest:

### Substitute Forms

.... Also, if you are reporting bank deposit interest to certain nonresident aliens (see Revenue Procedure 2014-64 or any superseding revenue procedure), you may truncate the recipient's TIN on the substitute form.

IRPAC recommends that the Instructions for Form 1042-S regarding payee statements be revised to conform to the regulations which allow TTINs for all substitute Form 1042-S payee statements.

## R. Instructions for Form 8966

### Recommendation

IRPAC recommends that the IRS modify the Instructions for Form 8966, FATCA Report, to provide more detail regarding a withholding agent's Form 8966 reporting obligations with respect to passive NFFEs with substantial U.S. owners, where the passive NFFE is an indirect payee of the withholding agent.

### Discussion

On page 2 of the 2015 Instructions for Form 8966 under the section titled, “Special Rules for Certain Form 8966 Filers” there is a subsection titled, “U.S. withholding agents,” wherein the first paragraph of that subsection discusses Form 8966 reporting requirements for U.S. withholding agents with respect to withholdable payments made to passive NFFEs with substantial U.S. owners. However, this paragraph does not address the requirement for reporting where the NFFE is an underlying payee of a passive NFFE that is an intermediary or flow-through entity.

On page 7 of the instructions, under the section titled, “Withholding Agent Reporting” there is a subsection titled, “Amounts paid to a passive NFFE” that explains that a withholding agent is not required to report information on a passive NFFE with substantial U.S. owners where: 1) the NFFE is an underlying payee of an FFI that is an

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intermediary or flow-through entity; 2) the FFI certifies on its withholding statement that it will perform the reporting; and 3) the withholding agent has no reason to know that the certification is incorrect or unreliable. This description of the exception from reporting where the FFI makes the requisite certification implies that reporting is required by the withholding agent where the FFI fails to make the requisite certification.

IRPAC believes that the Form 8966 reporting requirements for withholding agents making payments to passive NFFEs with substantial U.S. owners where the NFFE is an underlying payee of an FFI or passive NFFE that is an intermediary or flow-through entity may not be readily apparent to withholding agents.

Accordingly, IRPAC recommends that the IRS modify the Instructions for Form 8966 to provide more detail regarding a withholding agent's Form 8966 reporting obligations with respect to passive NFFEs with substantial U.S. owners, where the passive NFFE is an indirect payee of the withholding agent.

### **S. FATCA Reporting by Branch of U.S. Financial Institution in Model 2 Jurisdiction**

#### **Recommendation**

IRPAC recommends that the IRS provide guidance on the Form 8966 and/or Form 1099 reporting requirements for a foreign branch of U.S. financial institution in a model 2 IGA country, where the foreign branch has an account holder that is a U.S. non-publicly traded corporation, such that it is a specified U.S. person for Form 8966 reporting purposes, and is a U.S. exempt recipient for Form 1099 reporting purposes. IRPAC also recommends that IRS provide penalty relief for any incorrect or late filings by such branches for tax years prior to the year such guidance is issued.

#### **Discussion**

The IRS has issued Rev. Proc. 2014-38, which contains the FFI agreement for PFFIs and Reporting Model 2 FFIs. Section 6.02(B) of the agreement provides that a PFFI (which would include a reporting Model 2 FFI) may report its U.S. accounts on Form 8966, or alternatively, may elect to perform modified Form 1099 reporting as provided in section 6.02(B)(1) of the agreement.

Section 6.02(B)(1) provides that where an election is made to perform modified 1099 reporting, an FFI that is a non-U.S. payor must determine the payments that are subject to reporting as if it were a U.S. payor, and more broadly, 1099 reporting is required with respect to exempt recipients that are specified U.S. persons. Moreover, reporting is required for each U.S. reportable account regardless of whether the FFI makes a reportable payment to the account during the calendar year. Where no

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payment is made, the FFI is required to report on Form 1099-MISC. The election to perform Form 1099 reporting described in section 6.02(B)(1) appears to be taken from Treas. Reg. §1.1471-4(d)(5).

However, Treas. Reg. §1.1471-4T(d)(2)(iii)(A) provides special U.S. account reporting rules for U.S. payors, whereby an FFI that is a U.S. payor will be treated as having satisfied its Form 8966 reporting obligations with respect to a U.S. account if it performs the required Form 1099 reporting for the account. In contrast to the election to perform Form 1099 reporting, the U.S. payor rule would not seem to require Form 1099 reporting for exempt recipients, nor require Form 1099-MISC reporting in cases where no payment is made. It would appear however, that whether intentional or unintentional, the FFI agreement does not pick up this special reporting rule for U.S. payors.

Given these various rules, it is unclear the manner in which a foreign branch of a U.S. financial institution in a Model 2 IGA country would report (if at all) when it has a U.S. account holder that is a non-publicly traded corporation. The U.S. non-publicly traded corporation would be a specified U.S. person for purposes of Form 8966 reporting, but a U.S. exempt recipient for purposes of Form 1099 reporting.

Under the U.S. payor rule, the foreign branch of the U.S. financial institution arguably would not have to report the account. Form 1099 reporting would not be required because the account holder is an exempt recipient, and Form 8966 reporting would not be required because the U.S. payor complied with its Form 1099 reporting obligations (which in this case did not require reporting) with respect to the account.

However, under the election rule it would seem that Form 1099 reporting would be required despite the exempt recipient status of the account holder (with Form 1099-MISC reporting required if there were no payments to the account).

Given the lack of clarity, IRPAC recommends that the IRS provide guidance on the Form 8966 and/or Form 1099 reporting requirements for a foreign branch of U.S. financial institution in a model 2 IGA country under these facts. IRPAC also recommends that IRS provide penalty relief for any incorrect or late filings by such branches for tax years prior to the year such guidance is issued.

### T. Authorized Foreign Agents

#### Recommendation

IRPAC recommends that the IRS issue guidance highlighting that the regulatory requirements to establish an agent as an authorized foreign agent for Chapter 3 and Chapter 4 purposes are only required to be met when the agent is acting on the principal's behalf under the *agent's EIN* and not when the agent is acting on the principal's behalf under the *principal's EIN*.

## International Reporting and Withholding Subgroup Report

### Discussion

Treas. Reg. §§ 1.1441-7T(c)(2) and 1.1474-1(a)(3) set forth the circumstances (and requirements) under which a principal may authorize an agent to fulfill its obligations under Chapter 3 and Chapter 4. Specifically, a Form 8655, “Reporting Agent Authorization,” must be filed with the IRS by a principal if, in the context of hiring an authorized foreign agent (such as a transfer agent), that principal directs the agent to fulfill the principal's Form 1042 filing obligations or tax deposit and payment obligations under Chapter 3 and Chapter 4.

There has been some confusion in the tax community as to whether these requirements must be satisfied both: (i) when a principal requests an agent to fulfill the principal's Form 1042 filing obligations or tax deposit and payment obligations using the *principal's EIN*; and (ii) when a principal requests an agent to fulfill the principal's Form 1042 filing obligations or tax deposit and payment obligations using the *agent's EIN*.

We understand that the intent of the regulation was to require that the Form 8655 be filed only when the Form 1042 is to be filed by an agent (or the agent makes a tax deposit or payment) under the *agent's EIN*. It is our understanding that this filing of Form 8655 is required whether or not the authorized foreign agent is a withholding agent in its own right. In contrast, if the agent is asked to fulfill the principal's Form 1042 filing obligations (or tax deposit and payment obligations) using the *principal's EIN*, then the Form 8655 is not required, though it may be likely that the agent in such event should sign the Form 1042 as a paid preparer.

To clear up the confusion in the tax community, IRPAC recommends that the IRS issue some type of guidance – or even an FAQ – that highlights that the regulatory requirements (and Form 8655) are only required when an agent is acting on the principal's behalf under the agent's EIN and not when it is acting on the principal's behalf under the principal's EIN. If the IRS wishes to issue an FAQ addressing this issue, IRPAC suggests the following language:

**Q: Must a Form 8655, “Reporting Agent Authorization,” be filed with the IRS by a principal if, in the context of hiring an agent (such as a transfer agent), that principal directs the agent to fulfill the principal's Form 1042 filing obligations or tax deposit and payment obligations under Chapter 3 and Chapter 4 using the agent’s EIN?**

A: Yes. A Form 8655 must be filed when the Form 1042 is filed by an agent (or the agent makes a tax deposit or payment) under the agent's EIN. This filing is required whether or not the agent is a withholding agent in its own right. See Treas. Reg. §§ 1.1441-7T(c)(2) and 1.1474-1(a)(3) for the circumstances under which a principal may authorize an agent to fulfill its obligations under Chapter 3 and Chapter 4. In contrast, if the agent is asked to fulfill the principal's Form 1042 filing obligations or tax deposit and payment obligations using the principal's EIN,

## International Reporting and Withholding Subgroup Report

then the Form 8655 is not required, though it may be likely that the agent in such event should sign the Form 1042 as a paid preparer.

### U. Presumption Rules for Pension Payments, Form 1040 General Instructions

#### Recommendation

IRPAC recommends a new paragraph be added to the end of the instructions for line 64 of Form 1040 as follows, “Also include on line 64 any federal income tax withheld and reported to you on Form 1042-S for income included in this return.”

#### Discussion

There are instances when non-resident alien tax withholding is applied by a withholding agent based on the applicable presumption rules in the case of pension payments. The taxpayer may have received pension payments for which the withholding agent was required to presume foreign status due to lack of a proper tax certification. This presumption of foreign status for recipients of pension payments can cause withholding and Form 1042-S reporting notwithstanding that the recipient may actually be (and often is) a U.S. citizen or resident alien at the time of the payment.

In addition, withholding and Form 1042-S reporting can occur when a non-resident alien taxpayer has a change of circumstances event (to become a resident alien), but fails to notify the withholding agent on a timely basis.

The taxpayer should be able to claim the non-resident alien tax withholding as “Federal Income Tax Withheld” on line 64 of the Form 1040, U.S. Individual Income Tax Return, if the income reported on the Form 1042-S is includable in the return. The 2015 Form 1040 instructions for line 64 contain no reference to tax withheld and reported on Form 1042-S.

The 2015 Instructions for Form 1040-NR, U.S. Nonresident Alien Income Tax Return, line 62 contain helpful information about all federal income tax withheld including from Forms W-2, 1099 and 1042-S. Adding a new paragraph to the bottom of the instructions for line 64 of Form 1040 will help clarify that taxpayers may claim credit for non-resident alien tax withheld from income reportable on Form 1040. Due to space limitations, the description for line 64 on page 2 of Form 1040 should continue to reference only Forms W-2 and 1099.

Appendix A:

IRPAC Draft Proposed Withholding Statement

Appendix B:

IRPAC Recommendations on IRS Summary of FATCA Timelines

Appendix C:

IRPAC Recommendations on Draft Form W-8BEN-E and Draft Instructions for Form W-8BEN-E Released February 2016 and Corresponding Changes to Instructions for Requester of Forms W-8

Appendix D:

IRPAC Draft Recommended Substitute Form 1042-S Payee Statement

Appendix E:

Notice 2016-26 Recommendations for items that should be Included on the 2016-2017 Priority Guidance Plan

Appendix F:

Application of Withholding Tax on Section 305(c) Events Prior 1/1/2016

Appendix G:

National Taxpayer Advocate Public Hearing on Taxpayer and Stakeholder Needs and Preferences IRPAC Testimony



# **Appendix A**

## **IRPAC Draft Proposed Withholding Statement**



## Appendix A

### International Reporting and Withholding Subgroup Report

#### IRPAC Draft Proposed Withholding Statement

##### Withholding Statement

**NOTE: This IRPAC draft withholding statement has not been approved by the IRS.**

<b>Effective Date</b>	
<b>Name of Intermediary or Flow-Through Entity</b>	
<b>Address</b>	
<b>Global Intermediary Identification Number (GIIN)</b>	
<b>Chapter 4 Status and Code</b>	
<b>Chapter 3 Status and Code</b>	
<b>Employer Identification Number (if any)</b>	
<b>Account/Transaction Reference</b>	

##### Chapter 4 (FATCA) Withholding Pools

Pool Reporting Name	Pool Reporting Code	Allocation %
Recalcitrant Pool – No U.S. Indicia	42	
Recalcitrant Pool – U.S. Indicia	43	
Recalcitrant Pool – Dormant Account	44	
Recalcitrant Pool – U.S. Persons	45	
Recalcitrant Pool – Passive NFFEs	46	
Nonparticipating FFI (NPFPI) Pool	47	
U.S. Payees Pool	48	

##### Chapters 3 (NRA), Chapter 4 and Chapter 61 Information

Name of Recipient	Address of Recipient	Allocation %	Pre-existing Account Y/N

**Please Note:**

- (1) The combined allocations for Chapter 4 and Chapter 3 must total 100%
- (2) This withholding statement incorporates by reference any information contained on any underlying withholding certificates associated with the account for which this withholding statement is submitted.
- (3) This withholding statement forms an integral part of the Form W-8IMY, including the penalty of perjury certification.
- (4) This withholding statement must be updated within 30 days if any information becomes incorrect.



# **Appendix B**

## **IRPAC Recommendations on IRS Summary of FATCA Timelines**



## Appendix B

### International Reporting and Withholding Subgroup Report

#### IRPAC Recommendations on IRS Summary of FATCA Timelines

## Summary of FATCA Timelines

**NOTE: These IRPAC recommended changes (in red and ~~striketrough~~) to the IRS Summary of FATCA Timelines have not been approved by the IRS.**

### Withholding (by withholding agents)

#### 2014

- July 1 30% U.S. withholding tax will apply to payments of certain U.S. source income (e.g., dividends, interest, insurance premiums) made to non-U.S. financial institutions (FFIs) ... **UNLESS** FFI establishes **by registration** it is
- A participating FFI, including FFIs in Model 2 IGA,
  - An FFI in a jurisdiction with a Model 1 IGA treated as in effect, or
  - A low-risk FFI

#### 2019

- January 1 30% U.S. withholding tax will apply to any gross proceeds from the sale or other disposition after December 31, 2018 of any property of a type that can produce the U.S. source income described above.

- TBD U.S. withholding tax will apply to foreign passthru payment to a recalcitrant account holder or a nonparticipating FFI that is made after the later of December 31, 2018 or the date of the publication of final Treasury Regulations defining the term foreign passthru payment.

**Exception:** Certain smaller and more local FFIs and exempt beneficial owners (primarily government-owned entities and international organizations) can avoid withholding if they provide the withholding agent with documentation about their status.

### Registration (by financial institutions)

#### 2013

- August 19 Registration website available for testing purposes only

#### 2014

- January 1 Official opening date to register and obtain Global Intermediary Identification Number (GIIN)
- May 5 Final day to register for guaranteed inclusion on first registered FFI list (to avoid withholding)
- June 2 First Registered FFI list published – updated monthly thereafter

#### 2016

- January 1 All limited FFI and limited branch registrations will be placed in registration incomplete status on their online FATCA account after December 31, 2015.

Limited FFIs and limited branches that seek to continue such status during the 2016 calendar year must edit and resubmit their registrations after December 31, 2015, on the FATCA registration website.

December 31 Sponsoring entities must register their sponsored investment entities and sponsored controlled foreign corporations (CFCs) covered by Annex II of a Model 1 IGA on or before the later of December 31, 2016, and the date that is 90 days after a U.S. reportable account is first identified.

Sponsoring entities must register their sponsored investment entities and sponsored CFCs covered by Annex II of a Model 2 IGA on or before December 31, 2016.

## 2017

January 1 Sponsoring entities must register their sponsored registered deemed-compliant FFIs and sponsored direct reporting NFFEs by January 1, 2017. Sponsoring entities should consider registering to obtain GIINs well in advance of January 1, 2017, in order to give withholding agents sufficient time to complete the verification requirement.

## Reporting (by financial institutions)

2015: Reporting Begins

### When to Report

March 31 FFIs in non-IGA jurisdictions and FFIs in Model 2 IGA jurisdictions

September 30 FFIs in Model 1 IGA jurisdictions (**September 30 is the Model 1 IGA jurisdiction reporting deadline to the U.S. Internal Revenue Service; see the applicable Model 1 IGA jurisdictions guidance for the FFI reporting deadline to the Model 1 IGA jurisdiction**):

### What to Report (with respect to 2014):

1. Account holder's name  
For passive non-financial foreign entity, the name(s) of any substantial U.S. owners
2. Account holder's U.S. taxpayer identification number (TIN)  
For passive non-financial foreign entity, only the TIN(s) of any substantial U.S. owner(s)
3. Account holder's address  
For passive non-financial foreign entity, only the address(es) of substantial U.S. owner(s)
4. Account number
5. Account balance or value
6. For accounts held by recalcitrant/nonconsenting account holders: report aggregate number and balance or value

## 2016

### When to Report

March 31 FFIs in non-IGA jurisdictions and FFIs in Model 2 IGA jurisdictions

September 30 FFIs in Model 1 IGA jurisdictions (**September 30 is the Model 1 IGA jurisdiction reporting deadline to the U.S. Internal Revenue Service; see the applicable Model 1 IGA jurisdictions guidance for the FFI reporting deadline to the Model 1 IGA jurisdiction**):

**What to Report (with respect to 2015):**

- Everything reported in (1) through (6) for 2014
7. **Gross amount of Income paid on custodial and depository accounts; total gross amount paid on all other accounts** (~~except certain gross proceeds from the sale or redemption of property~~)

**2017**

**When to Report**

- March 31 FFIs in non-IGA jurisdictions and FFIs in Model 2 IGA jurisdictions
- September 30 FFIs in Model 1 IGA jurisdictions (**September 30 is the Model 1 IGA jurisdiction reporting deadline to the U.S. Internal Revenue Service; see the applicable Model 1 IGA jurisdictions guidance for the FFI reporting deadline to the Model 1 IGA jurisdiction**):

**What to Report (with respect to 2016):**

- Everything reported in (1) through (7) for 2015
8. Gross proceeds paid to custodial accounts

**After 2018<sup>7</sup>**

**When to Report**

- March 31 FFIs in non-IGA jurisdictions and FFIs in Model 2 IGA jurisdictions
- September 30 FFIs in Model 1 IGA jurisdictions (**September 30 is the Model 1 IGA jurisdiction reporting deadline to the U.S. Internal Revenue Service; see the applicable Model 1 IGA jurisdictions guidance for the FFI reporting deadline to the Model 1 IGA jurisdiction**):

**What to Report (with respect to ~~previous year~~2017):**

Everything reported in (1) through (8) for 2016

**2019**

~~**When to Report**~~ -

- ~~March 31 FFIs in non-IGA jurisdictions and FFIs in Model 2 IGA jurisdictions~~
- ~~September 30 FFIs in Model 1 IGA jurisdictions:~~

~~**What to Report (with respect to 2018):**~~

- ~~- Everything reported in (1) through (8) for 2017~~
- ~~-~~

~~**After 2019**~~

~~**When to Report**~~

- ~~March 31 FFIs in non-IGA jurisdictions and FFIs in Model 2 IGA jurisdictions~~
- ~~September 30 FFIs in Model 1 IGA jurisdictions:~~

~~**What to Report (with respect to previous year):**~~

- ~~- Everything reported in (1) through (8) for 2018~~

**Form 8966 Reporting by U.S. Withholding Agents**

2015: Reporting Begins

**When to Report**

March 31

**What to Report (with respect to 2014):**

1. Name of passive NFFE that is owned by a substantial US owner; or name of owner-documented FFI
2. The name, address and TIN of each substantial U.S. owner of the passive NFFE; or specified US person identified in an owner reporting statement by an owner-documented FFI,

- 3 Total of all withholdable payments made to the passive NFFE or owner-  
documented FFI during the calendar year.\*\*
- 4 Account balance or value of account held by an owner-documented FFI
- 5 Any other information required by Form 8966 and its instructions

**\*\*Note that beginning January 1, 2019, the definition of withholdable payment will include gross proceeds from the sale or disposition of property of a type that can produce interest or dividends that are US source FDAP income**

Form 8966 reporting by U.S. withholding agents for years after 2015 is the same as above for 2015\*\*

*Page Last Reviewed or Updated: 02-Jun-2016*

# **Appendix C**

**IRPAC Recommendations on  
Draft Form W-8BEN-E  
and  
Draft Instructions for  
Form W-8BEN-E  
Released February 2016 and  
Corresponding Changes to  
Instructions for  
Requester of Forms W-8**



## Appendix C

### International Reporting and Withholding Subgroup Report

#### IRPAC Recommendations on Draft Form W-8BEN-E and Draft Instructions for Form W-8BEN-E Released February 2016 and Corresponding Changes to Instructions for Requester of Forms W-8

##### Recommendations on Draft Form W-8BEN-E Instructions

###### 1. "Who Must Provide Form W-8BEN-E":

Draft instructions state do not provide Form W-8BEN-E if "you are acting as an intermediary (that is, acting not for your own account, but for the account of others as an agent, nominee, or custodian), a qualified intermediary (including a qualified intermediary acting as a qualified derivatives dealer), or a qualified securities lender (QSL) with regard to a payment of U.S. source substitute dividends. Instead provide a Form W-8IMY..."

As a QSL is acting in a principal capacity, it should be required to provide a W-8BEN-E not a Form W-8IMY.

*Recommendation was not incorporated into final instructions.*

###### 2. "Change in Circumstance":

Draft instructions state, "With respect to an FFI claiming a chapter 4 status under an applicable IGA, a change in circumstances includes when the jurisdiction where the FFI is organized or resident (or the jurisdiction identified in Part II of the form) was included on the list of jurisdictions treated as having an intergovernmental agreement in effect and is removed from that list or when the FATCA status of the jurisdiction changes (e.g., from Model 2 to Model 1)."

Further clarification is needed with respect to an entity claiming a chapter 4 status of reporting or nonreporting IGA FFI in the event that the FATCA status of the jurisdiction changes from Model 2 to Model 1 (or vice versa). In such an event, the re-documentation effort by the FFI and its withholding agents and/or FIs that maintain its accounts to change the chapter 4 status would be significant. Yet such a jurisdictional change would result in no substantive changes in the manner in which the FFI is treated by its withholding agents and FIs.

IRPAC recommends the following language to be added to the instructions:

*Note: If you currently maintain a Form W-8 for a payee and there is a change in circumstance relating only to the FATCA status from Model 2 to Model 1 (or vice*

*versa) of the jurisdiction under which the payee claims a chapter 4 status, you may continue to rely on such form until it expires. If there are multiple changes in circumstances, one of which includes a change to the FATCA status of the jurisdiction, then you may not continue to rely on such a form except if you satisfy the applicable curing provision(s). [Add here or something conforming to the Form 1042-S instructions: "For the chapter 4 status code of the FFI on a Form 1042-S, you may either continue to enter the chapter 4 status on such Form W-8 or enter the chapter 4 status of the FFI under the jurisdiction's new FATCA status, e.g., chapter 4 status code 7 (Registered Deemed-Compliant FFI—Reporting Model 1 FFI) if the jurisdiction changes from Model 2 to Model 1.]*

*Recommendation not incorporated into final instructions. We recommend that the above language be added to the Instructions for Requester of Forms W-8.*

### 3. Definition of "Disregarded Entity":

Definition contains the statement "A disregarded entity with a U.S. owner may provide this form to an FFI solely for purposes of documenting itself for chapter 4 purposes." A disregarded entity with a non-U.S. owner, that cannot complete Part II of Form W-8BEN-E because it is not registered with a GIIN, may also need to provide its chapter 4 status. IRPAC recommends removing the reference to U.S. owner.

*Recommendation was incorporated into final instructions.*

### 4. Line 4, Chapter 3 Status:

Draft instructions contains the statement, "However, if you are providing Form W-8BEN-E to an FFI solely for purposes of documenting yourself for chapter 4 purposes as an account holder of an FFI (and you are not receiving a withholdable payment), you do not need to complete line 4..."

IRPAC recommends adding the phrase "an account maintained by" after the words "account holder of" and before "an FFI."

*Recommendation was incorporated into final instructions.*

Draft instructions contain the statement, "A foreign pension fund should not check the "Tax-exempt organization" box unless it qualifies as a tax-exempt organization under section 501(a)..."

IRPAC recommends reference to IRC section 501(c) or 501(d) for clarification purposes so that foreign pension funds do not erroneously conclude that they fit 501(a) as the draft language appears to indicate.

*Recommendation was incorporated into final instructions.*

## 5. Line 9a, GIIN

Draft instructions, line 9a requires a "trustee documented trust" must enter a GIIN on line 9a. IRPAC recommends that the instructions clarify that while the Form W-8BEN-E is provided for the trust, the GIIN of the trustee must appear on line 9a.

*Recommendation was incorporated into final instructions.*

## 6. Limitation on Benefits:

Regarding validation of the limitations on benefits provision indicated on a payee's Form W-8BEN-E, withholding agents generally do not have the underlying facts to determine if the payee's reason for meeting the limitation on benefits ("LOB") provision is valid. Accordingly, IRPAC recommends that the following language be added to the Instructions for Requestor of Forms W-8:

*Part III, Line 14b, (Claim of LOB Rationale):*

*The Form W-8BEN-E requests the payee's LOB code, which provides the specific reason for why the payee meets the LOB provision of the applicable treaty. The facts that support that LOB Code, however, are not generally in the withholding agent's possession. Accordingly, you may accept a form in which the LOB code is provided unless you have actual knowledge that the LOB code is incorrect. Actual knowledge does not include a withholding agent's possession of information on the IRS Limitation on Benefits Table (currently "Table 4" at [https://www.irs.gov/PUP/individuals/international/Tax\\_Treaty\\_Table\\_4.pdf](https://www.irs.gov/PUP/individuals/international/Tax_Treaty_Table_4.pdf)) that is, or appears to be, inconsistent with information, including the LOB box checked, on a Form W-8BEN-E.*

*Awaiting Instructions for Requester of Forms W-8.*

## 7. Line 15, Special Rate and Conditions:

Draft instructions contain the statement, " This line is generally not applicable to claiming treaty benefits under an interest or dividends (other than dividends subject to a preferential rate based on ownership) article of a treaty..." IRPAC recommends the phrase "or other income" be inserted after "ownership)" and before "article." Certain withholding agents are demanding a line 15 claim for other income because they are unclear whether this line is needed in this case. Adding the recommended phrase "or other income" would provide clarity to withholding agents.

*Recommendation was incorporated into final instructions.*

## 8. Line 40a, Passive NFFE:

Draft instructions do not clarify that professionally managed entities are considered financial institutions as per Treas. Reg. §1.1471-5(e)(4). IRPAC recommends that the following clarifying language be added to the instructions:

*If you would be a passive NFFE but for the fact that you are professionally managed, you should not complete line 40a as you should be considered a financial institution and not a passive NFFE.*

*Recommendation was incorporated into final instructions.*

## **Recommendations on Draft Form W-8BEN-E**

### **1. "Do Not Use This Form For":**

Draft form states that instead of using Form W-8BEN-E, use Form W-8ECI or W-8EXP for "A foreign government... establishing foreign status for purposes of backup withholding, or documenting chapter 4 status."

IRPAC recommends the removal of the phrase "backup withholding" as it is unclear that the Form W-8ECI or Form W-8EXP would be used for establishing foreign status for purposes of backup withholding; these forms may be used for other instances than in reference to backup withholding.

*Recommendation was incorporated into final form.*

### **2. Part I, Line 5, FATCA status:**

While IRPAC has recommended the removal of box "Account that is not a financial account" on line 5 of the Draft W-8BEN-E (February 2016), we understand that there may not have been enough time to adopt this change. Therefore, IRPAC proposes the following additional paragraphs to the Instructions for Requestor of Forms W-8:

*Part I, Line 5 (Chapter 4 Status):*

*If you receive a Form W-8BEN-E from an entity payee that checks the box "Account that is not a financial account" and does not check any other chapter 4 status, but such payee has a financial account as defined under Treas. Reg. Section 1471-5(b)(1) or applicable IGA and which is indicated in your account files, you may not accept the form as such a claim is not valid. In such a case, you should request the payee to complete the applicable chapter 4 status. You may accept a Form W-8BEN-E from an entity payee that has failed to check this box if such payee does not have a financial account as defined under Treas. Reg. Section 1471-5(b)(1-2) or applicable IGA and there is no indication to the contrary in your account file. You may also accept such a form in which the entity payee has failed to check this box, does not have a financial account as indicated in your account file and has checked a chapter 4 status (such as Non-*

*Participating Foreign Financial Institution), as such status is not applicable for your purposes.*

*Recommendation was not incorporated into final form. We recommend that the above language be added to the Instructions for Requester of Forms W-8.*

### 3. Part III, Tax Treaty Claim:

While IRPAC has suggested that the blank, free form line that is part of line 15 is both confusing for the payee and withholding agent and ultimately unnecessary in light of (i) the new LOB codes and (ii) line 15 requiring the payee to enter the specific treaty article and paragraph or subparagraph and rate, we understand that the IRS may be concerned that the payee may need additional space to communicate important information. In consideration of this, IRPAC recommends the following language for the Instructions for Requestor of Forms W-8:

#### *Part III, Line 15, (Claim of Tax Treaty Benefits):*

*If you receive a Form W-8BEN-E which contains an explanation as to why the payee meets the terms of the treaty article, the explanation provided will be acceptable unless you have actual knowledge that it is incorrect. For example, a French resident payee may explain that it meets the terms of the treaty article cited on line 15 because it is a French resident as defined within the applicable treaty. Such an explanation is acceptable unless you have actual knowledge (e.g., based on documentation provided by the payee) that the payee is not a French resident and the treaty article it cites does not apply to the payee. You may apply a special treaty claim on a form which contains the applicable specific treaty article and paragraph or subparagraph, as applicable, withholding rate and income type on line 15 but does not contain an explanation as to why the payee meets the terms of the treaty article. You may apply a special treaty claim on a form in which the applicable specific treaty article and paragraph or subparagraph, as applicable, withholding rate and income type are listed as an explanation as to why the payee meets the terms of the treaty article but are not listed in the designated spaces on line 15 provided that such information is entered near such designated spaces.*

*Recommendation was not incorporated into final form. We recommend that the above language be added to the Instructions for Requester of Forms W-8.*

### 4. Part XXIV, Line 38, Excepted Territory NFFE

Form certification states, "Does not hold, as a substantial portion of its business, financial assets for the account of others, or Is not an insurance company (or the holding company of an insurance company) that issues or is obligated to make payments with respect to a financial account ..."

IRPAC recommends that the word "or" is removed and replaced with "and."

*Recommendation was not incorporated into final form.*

5. Part XXVI, Passive NFFE:

Lines 40 (b) and 40 (c) refer to U.S. substantial owners as follows:

40 (b) "I further certify that the entity identified in Part I has no substantial U.S. owners, or

40(c) "I further certify that the entity identified in Part I has provided the name, address, and TIN of each substantial U.S. owner of the NFFE ..."

As the Form W-8BEN-E may be used by Model I IGA FFI, IRPAC recommends that the phrase "controlling U.S. persons" is added in consideration of the definition of such term per the IGAs.

*Recommendation was incorporated into final form.*

# **Appendix D**

## **IRPAC Draft Recommended Substitute Form 1042-S Payee Statement**



**NOTE: This is an IRPAC draft and has not been approved by the IRS.**

## Appendix D

### International Reporting and Withholding Subgroup Report

#### IRPAC Draft Recommended Substitute Form 1042-S Payee Statement

AMENDED

PRO-RATA BASIS REPORTING

**Withholding Agent**

ABC Brokerage Inc.  
 1000 Wall Street  
 New York, New York 10017  
 EIN: 12-3456789  
 GIIN (if any):  
 Foreign TIN (if any):  
 Country Code: US  
 Ch. 3 Status Code: 01  
 Ch. 4 Status Code: 01

**Recipient**

Genco Corporation  
 1313 Mockingbird Lane  
 London, England EC4R OHH  
 EIN (if any): 98-1234567  
 GIIN (if any): ABCDE.99999.ME.826  
 Foreign TIN (if any): 1234  
 Country Code: UK  
 Ch. 3 Status Code: 15  
 Ch. 4 Status Code: 07  
 Date of birth (if any):  
 Account number (if any):  
 LOB code: 06

**Intermediary**

XYZ Bank Limited  
 27 Abbey Road  
 London, England EC4R OHH  
 EIN (if any): 98-7654321  
 GIIN (if any): ZYXWU.99999.ME.826  
 Foreign TIN (if any): 34567  
 Country Code: UK  
 Ch. 3 Status Code: 15  
 Ch. 3 Status Code: 07

**Payer**

Good Payer  
 EIN: 34-5679010  
 GIIN (if any):  
 Ch. 3 Status Code: 01  
 Ch. 4 Status Code: 01

Information that, if not applicable, may be excluded from substitute Form 1042-S highlighted in yellow

Box 1 Income Code	Box 2 Gross Income	Box 3 Chapter Indicator	Box 3a Exemption Code	Box 3b Tax Rate	Box 4a Exemption Code	Box 4b Tax Rate	Box 7a Federal Tax Withheld	Box 10 Total Withholding Credit
01	\$ 100.00	3	05	00.00	15	00.00	\$ 0.00	\$ 0.00
01	\$1500.00	3	04	00.00	15	00.00		
06	\$2000.00	3		15.00	15	00.00	\$300.00	\$ 300.00
52	\$ 400.00	3		15.00	15	00.00	\$ 60.00	\$ 60.00
54	\$1000.00	3		30.00	15	00.00	\$300.00	\$ 300.00

Box 5 Withholding allowance	Box 6 Net Income	Box 7b Check if tax not deposited pursuant to escrow procedure	Box 8 Tax withheld by other agents	Box 9 Tax paid by withholding agent	Box 11 Amount repaid to recipient	Box 14a Primary Withholding Agent's Name	Box 14b Primary Withholding Agent's EIN	Box 17a State income tax withheld	Box 17b Payer's state tax no.	Box 17c Name of state



# **Appendix E**

## **Notice 2016-26 Recommendations for items that should be Included on the 2016-2017 Priority Guidance Plan**



## INFORMATION REPORTING PROGRAM ADVISORY COMMITTEE (IRPAC)

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1111 Constitution Avenue, NW, Room 7563, Washington, D.C. 20224

Michael Gangwer,  
Chairperson

**Emerging Compliance  
Issues**

**Sub-Group:**

Beatriz Castaneda, Chair  
Terry Edwards  
Darrell Granahan  
Keith King  
Joel Levenson  
Nina Tross

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2016-26)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

May 16, 2016

**Employee Information  
Reporting/ Burden  
Reduction**

**Sub-Group:**

Emily Rook, Chair  
Bob Birch  
Laura Burke  
Ernesto Castro  
Alan Ellenby  
Marcia Miller

RE: Notice 2016-26  
Recommendations for items that should be included on the 2016-2017  
Priority Guidance Plan

Dear Commissioner Koskinen:

**International Reporting &  
Withholding**

**Sub-Group:**

Frederic Bousquet, Chair  
Roseann Cutrone  
Carolyn Diehl  
Dana Flynn  
Robert Limerick  
Kevin Sullivan

The Information Reporting Program Advisory Committee (IRPAC) appreciates the opportunity to respond to Notice 2016-26 and recommend matters that should be included in the 2016-2017 Priority Guidance Plan. Our recommendations for guidance are focused primarily on information reporting topics and may be adopted through new or enhanced regulations, revenue rulings, revenue procedures, notices or other appropriate guidance methods. The aim of these recommendations is to improve tax administration and reduce the growing burdens placed on payors, taxpayers, and the Internal Revenue Service.

IRPAC was established in 1991 in response to an administrative recommendation in the final Conference Report of the Omnibus Budget Reconciliation Act of 1989. IRPAC members are drawn from and represent a broad sample of the payer community, including major professional and trade associations, colleges and universities. Since its inception, IRPAC has worked closely with the IRS on a wide range of issues to improve the information reporting process and reduce the burden on taxpayers and filers.

Information returns play a vital role in ensuring taxpayers have the fundamental building blocks they need to comply with their tax filing obligations and that the IRS receives the information it needs to enforce compliance and collect the right tax. Providing information returns, instructions, and guidance that are clear, complete, and easy for stakeholders to understand should be a top priority for the Treasury and the IRS. It is also critical that the IRS and Treasury provide guidance for new information reporting requirements in a timely manner. In several annual Public Reports, IRPAC has advised that a withholding agent typically needs 18 months to 24 months to update its

systems for new reporting requirements, including time to study the requirements, plan and obtain a budget for the project, develop business requirements and systems logic, code, and test, then implement. Accordingly, it is essential that ambiguities in the law be clarified in a manner that provides information return preparers/withholding agents sufficient time to implement new and clarified reporting requirements.

Below please find IRPAC's specific recommendations for priority guidance.

### Fast Track Guidance Requests

1) Tip Withholding Sequence – Payors need basic guidance regarding the order that the various payroll taxes and deductions should be taken from the wages of employees that are tipped. Assuming an employee's wages for a given payroll period are not large enough to support all taxes and deductions, IRPAC recommends that guidance be issued detailing which taxes and deductions should be taken first.

2) IRA escheatment to states – IRPAC recommends that guidance be issued to help IRA custodians to determine the reportability of IRA assets that are escheated to state abandoned property departments. Today the rules are unclear as to whether or not Forms 1099-R are required. For detailed information, please refer to the 2015 IRPAC Public Report.

### Core Guidance Requests

#### 1) Electronic delivery to U.S. Treasury of monies withheld pursuant to an IRS levy.

IRPAC recommends the adoption of guidance that would allow employers to transmit federal tax levy proceeds electronically to the U.S. Treasury. The current procedure, as instructed by Form 668-W, is to mail a check payable to the U.S. Treasury on the employee's payday and on the face of the check show the taxpayer's name, taxpayer's SSN, tax type and the words "proceeds of levy." The 668-W directs where the check is to be sent and many times this is to a local IRS office.

The current paper check and mail procedure creates delay and confusion because payroll departments receive the levy deduction amount only a day or two prior to the employee's pay date and then must forward the information to an accounts payable department where the check will be prepared. Due to the typical differences between payroll and accounts payable departments, several types of errors can occur. Here are two examples:

- Accounts payable departments typically cut checks on a weekly, biweekly or semimonthly processing cycle but not every day creating timing issues.
- Accounts payable systems typically do not have the functionality to show the required notations on the face of the check (so detail is on an attachment which often is separated from the check before it is processed by the IRS). We find that without the detail from the face of the check, the amount is often misapplied to the employer's account (creating an inaccurate overpayment) and not to the taxpayer's account (subjecting the taxpayer to levy deductions continuing longer than necessary)

We have also found that some of the IRS offices to which checks are to be mailed have closed and employers receive telephone calls from the IRS directing them to start mailing to a different office. As a result checks already mailed to the closed office are delayed. Enabling the electronic deposit of levy proceeds will enable timely deposits to the correct taxpayer accounts and eliminate much time-consuming reconciliation and correction work for the IRS and employers.

## 2) Additional FATCA guidance

IRPAC urges the IRS and Treasury to continue to issue guidance on FATCA, the qualified intermediary program (including qualified securities dealer rules), section 871(m) withholding, and section 305(c) withholding. Clarifying guidance in these complex and evolving areas would mitigate inconsistent and inaccurate treatments by withholding agents.

## 3) Reasonable Cause Abatement Issues

As IRPAC has highlighted in its last three public reports, there continue to be problems with the administration of the penalty abatement process. Penalties have significantly increased and the IRS continues to disregard reasonable cause claims and assess penalties. This is particularly troubling in cases where a payor is denied a reasonable cause waiver request when they provided the same or similar explanation in the prior three years even though the reasonable cause claim is valid and appropriate under the current regulations and instructions. IRPAC recommends that Treasury issue guidance regarding the appropriate administration of the penalty regime.

## 4) Guidance under §6050W

This is a Tax Administration project that was previously included in the 2014-2015 and 2015-2016 Priority Guidance Plan and IRPAC recommends that it remain in the 2016-2017 plan as a high-priority guidance issue for clarification

of essential terms in amended regulations to be issued in the very near term. It has been projected that 9.4 million Forms 1099-K will be filed for 2015 [IRS Publication 6961]. The lack of essential definitions is an impediment to accurate reporting.

Key terms integral to the meaning of “third party payment network” must be defined in official guidance in order for reporting organizations to reasonably apply the rules. The unclear terms include “central organization,” “guarantee,” and “substantial number of providers of goods or services.” IRPAC’s detailed recommendations relating to the definition of these terms can be found in the March 28, 2011, comment letter which is included as Appendix D of the IRPAC 2011 Public Report, and in the 2014 and 2015 IRPAC Public Reports. Guidance should be issued that allows a reasonably informed reader to understand when IRC § 6050W reporting is required and delineate between three-party arrangements that are subject to reporting under IRC § 6050W and ones that involve three parties but are not subject to reporting under IRC §6050W.

In addition, guidance is needed to identify the entity deemed to be the payment settlement entity when there are multiple payment settlement entities. Clarification of the scope and application of rules related to “aggregated payees” and “third party payment networks” is also needed. In current guidance these rules appear to overlap; a “third party settlement organization” (TPSO) is not required to report transactions for a payee whose aggregate transactions do not exceed \$20,000 and 200 transactions, whereas the aggregated payee rules do not include a de minimis rule. IRPAC has recommended clarification that the de minimis rules applicable to TPSOs also apply to an aggregated payee that also meets the definition of a TPSO.

#### 5) Withholding and reporting guidance for pension payments made to Nonresident aliens (NRAs)

In the 2015 IRPAC Public Report, IRPAC pointed out the need for clarity when applying withholding and reporting rules for certain taxable transactions processed within U.S. pension plans for NRA plan participants. IRPAC requests guidance regarding the proper tax treatment in this and other similar situations where the existing law and regulations overlap but leave a great deal of uncertainty.

#### 6) Qualified Tuition Plans (529 plans) distributions aggregation

The PATH act contained a provision that repealed the rule requiring that all Qualified Tuition Plans (529 plans) with the same designated beneficiary be

aggregated for purposes of calculating the amount of a nonqualified distribution that is included in income. Code section 72 proration must now be calculated on an account by account basis. This creates a few immediate problems. For example, firms with systems designed to aggregate across plans/providers must now make changes so that the IRC 72 proration rules only apply to the account from which the distribution was taken. Therefore the current basis reflected on systems for each of the impacted accounts are incorrect, and such basis would need to be reallocated among remaining accounts with a positive current balance. This may require that payors look back at the life to date contributions and distributions, subtracting any gains to derive a basis for each account. Given the need for payors' systems to be programed, IRPAC requests that guidance be issued clarifying how to reapply remaining basis shown in closed accounts to the open accounts.

### Additional Requests

In addition to the above described areas for priority guidance, IRPAC wishes to highlight two other important priorities that do not require guidance, but instead require other action. Specifically, IRPAC urges the Treasury Department to pursue strongly the Administration's fiscal year 2016 recommendation for legislation amending IRC § 6103(k) "to permit the IRS to disclose to any person required to provide the TIN of another person to the Secretary whether the information matches the records maintained by the Secretary." [Treasury "Green Book" Fiscal Year 2016] This expanded use of TIN Matching will not only reduce administrative costs of the IRS and payor community, it will help reduce fraud and the size of the so called tax gap.

In addition, as part of a continuing effort to combat tax fraud, the IRS has indicated plans to reduce theft from various tax account returns. The IRS's order of priority to implement this effort was indicated to be as follows:

- 1120 – this year
- 1120S – next year
- 1040
- 1065
- 941/940

IRPAC urges the IRS to reprioritize its efforts so as to address the 941/940 return next because those forms have been targeted by fraudsters for business identity theft now that payors are required to transmit Form W-2s and Form 1099-MISCs for non-employee compensation earlier.

Again, IRPAC looks forward to partnering with the IRS to improve tax administration and reducing the growing burdens placed on payors, taxpayers and the IRS.

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Respectfully submitted,



Michael Gangwer

2016 IRPAC Chairperson

# **Appendix F**

## **Application of Withholding Tax on Section 305(c) Events Prior 1/1/2016**



## INFORMATION REPORTING PROGRAM ADVISORY COMMITTEE (IRPAC)

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1111 Constitution Avenue, NW, Room 7563, Washington, D.C. 20224

Michael Gangwer,  
Chairperson

**Emerging Compliance  
Issues**

**Sub-Group:**

Beatriz Castaneda, Chair  
Terry Edwards  
Darrell Granahan  
Keith King  
Joel Levenson  
Nina Tross

Internal Revenue Service  
Attn: CC:PA:LPD:PR (REG-133673-15)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

RE: Application of Withholding Tax on Section 305(c) Events prior to 1/1/2016

Dear Commissioner Koskinen:

**Employee Information  
Reporting/ Burden  
Reduction**

**Sub-Group:**

Emily Rook, Chair  
Bob Birch  
Laura Burke  
Ernesto Castro  
Alan Ellenby  
Marcia Miller

This letter is in response to IRPAC's understanding that the IRS is considering holding withholding agents liable for any underwithholding on Section 305(c) deemed dividends for years prior to 2016. For the below reasons, IRPAC recommends that the IRS publically announce that it will not impose withholding tax liability, penalties, or interest on withholding agents for Section 305(c) events occurring in tax years prior to 2016. In an effort to direct withholding agents on how to treat such events, proposed regulations were released in April 2016 (the "2016 Proposed Regulations"). As such, it would be unfair to penalize withholding agents for events in years prior to the release of these proposed regulations by applying withholding tax liability, penalties, or interest on a retroactive basis.

**International Reporting &  
Withholding**

**Sub-Group:**

Frederic Bousquet, Chair  
Roseann Cutrone  
Carolyn Diehl  
Dana Flynn  
Robert Limerick  
Kevin Sullivan  
Kelli Wooten

It was not until proposed regulations under Section 871(m) published in 2014, which included a brief coordinating rule with Section 305(c), that withholding agents began to struggle with understanding a potential obligation to withhold tax on Section 305(c) deemed dividends notwithstanding the absence of cash payments. To date, the withholding tax regime followed by withholding agents has been based upon cash payments and an understanding the facts and circumstances of the income giving rise to such payments. Prior to the 2016 Proposed Regulations, there was no clear guidance on how to identify Section 305(c) events, how to calculate the income arising from such events, and the withholding tax obligations in light of cashless payments.

Since 2014, withholding agents have been forthcoming and cooperatively working with the IRS to address many of the open questions and complications relating to the withholding tax issues resulting from a conversion rate adjustment on convertible bonds and other securities. While the 2016 Proposed Regulations address many of the open questions and clarify many points of issue prospectively, uncertainty regarding previous years remains, which is causing, among other things, uncertainty amongst withholding agents as to whether to collect taxes for prior years.

While IRPAC lauds IRS efforts to clarify the applicable rules by issuing the 2016 Proposed Regulations, we feel that these proposed regulations serve as an acknowledgment by the IRS that additional guidance was needed in order to administer the Section 305(c) withholding obligations. As such, we do not believe withholding agents can reasonably be expected to have put a withholding process in place in years prior to 2016. In sum, to minimize an ever-growing burden placed on withholding agents and to allow them to focus on the development of procedures and

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processes for withholding tax on Section 305(c) events for tax year 2016 and beyond, IRPAC requests public acknowledgement from the IRS that withholding agents will not be held liable with respect to Section 305(c) events that occurred prior to 2016.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Michael Goyner".

2016 IRPAC Chairperson

# **Appendix G**

## **National Taxpayer Advocate Public Hearing on Taxpayer and Stakeholder Needs and Preferences IRPAC Testimony**



National Taxpayer Advocate Public Hearing on  
Taxpayer and Stakeholder Needs and Preferences  
IRPAC Testimony  
Feb. 23, 2016

Remarks by  
Michael Gangwer, Chair  
Information Reporting Program Advisory Committee

I am Michael W. Gangwer, the current Chair of the Information Reporting Program Advisory Committee, which is known as IRPAC. Thank you for inviting me to share IRPAC's perspectives on the administration of our tax laws.

First, I want to provide a bit of context about IRPAC. In 1989, Congress authorized IRPAC to provide a public forum to discuss information reporting issues. We serve as an advisory body to the Commissioner of the Internal Revenue Service. We identify, research, analyze, and make recommendations on current and proposed information reporting policies and operations. When necessary, we suggest improvements. We also publish an annual briefing book that summarizes our activities and our recommendations, which you can find at [https://www.irs.gov/Tax-Professionals/Information-Reporting-Program-Advisory-Committee--\(IRPAC\)-Past-Briefing-Books](https://www.irs.gov/Tax-Professionals/Information-Reporting-Program-Advisory-Committee--(IRPAC)-Past-Briefing-Books).

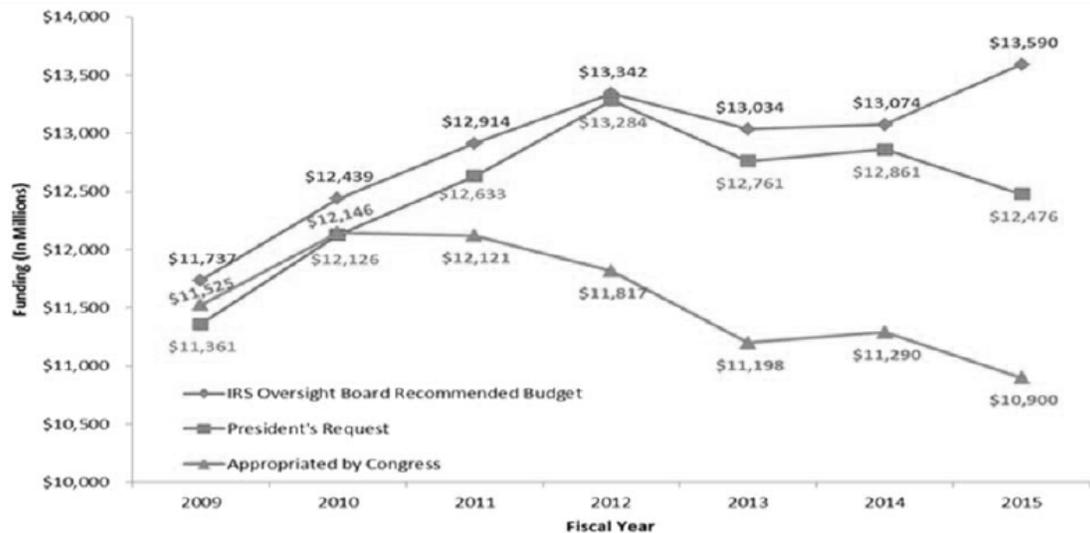
Our committee currently has 19 members, including individuals from various segments of the tax community, from major national professional and trade associations to colleges and universities—as well as large and small businesses. We meet about five times a year in Washington, D.C.—typically over two days. We are not paid for our efforts, but some of our travel expenses are reimbursed within prescribed federal limitations.

Today, I want to highlight what IRPAC believes are the three largest challenges for information reporting: (I) IRS funding levels; (II) risks and opportunities from expanding taxpayers' information reporting obligations; and (III) preventing identity theft, especially for small businesses.

I. IRS funding levels

From FY 2010 to FY 2015, the entire operating budget for the IRS dropped from \$12.1 billion to \$10.9 billion, without adjusting for inflation. At the same time, IRS responsibilities, infrastructure demands, and taxpayer needs, increased considerably.

We believe the significant and chronic mismatch between the generally declining funding level of the IRS and its growing mandate is the most important challenge to improving information reporting. In many instances, we have been told that the IRS cannot pursue our recommendations because the IRS lacks the resources to open additional projects. Both taxpayers and the IRS suffer from these shortcomings. Taxpayers may not receive the information they need to voluntarily comply with their tax obligations and the IRS may be unable to collect all of the revenue the government is entitled to receive.



Source: IRS Oversight Board's FY 2015 IRS Budget Recommendation Special Report.

## II. Risks and opportunities from increased information reporting

Information reporting is an increasingly large component of tax administration. In just the last 6 years, Congress has added information reporting for cost basis on securities sales, reporting of financial payments under the Foreign Account Tax Compliance Act (FATCA), and health care coverage and enrollment under the Affordable Care Act.

Information reporting can help taxpayers comply with the tax law--and the IRS to enforce it. But the wave of new information reports shifts new and substantial burdens to payors and financial intermediaries. For example, the Financial Institute Forum (FIF) estimated the cost to brokers and other financial intermediaries to implement cost basis reporting would exceed \$0.5 billion for the initial reporting period of 2011-2013.<sup>1</sup> Implementation costs associated with FATCA are likely to be even higher. SIFMA conducted an internal member survey and learned that the combined implementation costs of 17 respondents alone exceeded \$1 billion in 2013-2014.<sup>2</sup>

We believe the IRS should try to minimize the burden of information reporting, especially when the information reported is unnecessary or could be accomplished more simply. For example, in 2014, more than 1.1 billion of the 2.25 billion information returns are attributable to Forms 1099-B, principally from the sale of securities. We believe some of these forms could be combined, without any loss of revenue to the tax system. For example, we suggest the IRS permit a broker to aggregate its reporting of the sales from a single trade order that is filled in multiple executions on the same day, rather than report multiple sales for the same order.

<sup>1</sup> FIF cost basis working group, "Cost Basis Survey III, Final Report," at 23 (May 25, 2011).

<sup>2</sup> SIFMA Calls for Targeted Relief on FATCA. (n.d.). Retrieved February 16, 2016, from [http://www.sifma.org/newsroom/2014/sifma\\_calls\\_for\\_targeted\\_relief\\_on\\_fatca/](http://www.sifma.org/newsroom/2014/sifma_calls_for_targeted_relief_on_fatca/)

We also believe the IRS should develop more guidance on the type of information to be collected and reported when key terms are undefined and rules are not clear. We offer specific suggestions in our annual briefing books. A payor's burden to report information should not be increased by the vagueness or uncertainty of the rule.

Finally, we believe that recent advances in information technology offer new opportunities to improve tax administration. We believe the IRS can automate many more internal processes and establish external communication channels that are efficient, safe, trackable, and timely. For example, we recommend that the IRS create a web portal where small business owners could input 1099 forms and then print a copy and electronically submit a copy to the IRS.

### III. Preventing identity theft for businesses

We acknowledge the great efforts by the IRS to track and reduce individual ID theft, but we want to highlight another problem: business ID theft. Large and small businesses face an onslaught of data attacks and attempted fraud. Businesses struggle to protect themselves and their customers—and often face financial hardship or ruin if they fail. We suggest a variety of steps the IRS could take to reduce the opportunities for business ID theft.

For example, we believe the IRS should permit employers to truncate their Employer Identification number (EIN) on their payee information return statements. Truncating EINs will help keep sensitive information from data mining thieves and will reduce the risk to businesses of identity theft.

In addition, we recommend the IRS close an EIN as soon as a business has notified the IRS of its closure. Today, a business can check a box on Line 15 of part 3 of the Form 941, Employer's Quarterly Federal Tax Return, which states that the business has "closed or stopped paying wages." We suggest the IRS add two alternative boxes to the form: one box that says "If your business has closed check here" and, two "If you have stopped paying wages, check here." By adding these boxes, the IRS can quickly close the EIN if the business has closed, which will prevent fraudulent future use of old EINs.

We offered several suggestions to prevent business ID theft in our 2015 briefing book, which we encourage you to read. We are happy to discuss any of our ideas further, at any other forum or venue that you see fit.

Thank you for the opportunity to present some of IRPAC's concerns. We look forward to elaborating on these and other concerns in our annual briefing book later this year.



## Information Reporting Program Advisory Committee 2016 Member Biographies

### Robert Birch

Mr. Birch is Director of Corporate Tax at Wellmark, Inc., in Des Moines, Iowa. Wellmark Blue Cross and Blue Shield is an independent Licensee of the Blue Cross and Blue Shield Association doing business in Iowa and South Dakota. He has over 35 years of experience with tax information reporting. He advises senior management on all corporate income tax and information reporting matters and is leading an internal project to implement the new information reporting that will be required of health insurance companies. He is a former member of the Board of Directors of the Tax Executives Institute, Inc. (TEI) and was the former Chair of the TEI Employee Benefits and Payroll Committee, former Region V Vice President and the first president of the Iowa TEI Chapter and the 2006 recipient of the Iowa Chapter Meritorious Service Award. Mr. Birch, a CPA, received an AA from North Iowa Community College and a BBA in Accounting from the University of Iowa. **(Employer Information Reporting/Burden Reduction Subgroup)**

### Frederic M. Bousquet

Mr. Bousquet, a CPA, is Vice President in the Product Tax Department of State Street Bank and Trust Company in Boston, Mass. He has been with State Street for over 20 years and advises business areas globally on tax matters with an emphasis on US withholding and information reporting. He is a member of the Securities Industry and Financial Markets Association (SIFMA) Tax Compliance Committee. Mr. Bousquet has a MST and an MBA from Suffolk University and a BSBA from Stonehill College. **(Chair, International Reporting and Withholding Subgroup)**

### Laura Lynn Burke

Burke is an Enrolled Agent and Certified Fraud Examiner; practicing in the tax arena as a Tax Professional. She provides tax resolution, strategic tax planning and preparation for Individuals & Business entities. She also has working knowledge of sales & use tax, excise and GST tax in an industrial setting. Ms. Burke is a member of the Illinois CPA Society, Past Treasurer of Women in Insurance & Finance, and a member of the Association for Fraud Examiners. Laura is currently working on her Ed D, in Leadership: NFPO. She has earned an MBA, and MS, along with a Certificate in Digital Forensics from Governors State University. She earned her BA in Business Administration, with minor in Psychology. **(Employer Information Reporting/Burden Reduction Subgroup)**

### Beatriz Castaneda

Ms. Castaneda is the Managing Director of Client Reporting, Tax Reporting and Escheatment at Charles Schwab & Co., Inc. in San Francisco, Calif. She has over 17 years of tax reporting experience at Charles Schwab. She is responsible for ensuring that the firm correctly implements information reporting requirements for all new tax and cost basis legislation. She is a member of the Financial Information Forum (FIF) Cost Basis Working Group and FATCA Group. She is also a member of the Securities Industry and Financial Markets Association

## Information Reporting Program Advisory Committee 2016 Member Biographies

(SIFMA) Tax Compliance Committee and Cost Basis Working Group. Ms. Castaneda received her BA from Dominican College of San Rafael. **(Chair, Emerging Compliance Issues Subgroup)**

### Ernesto S. Castro

Mr. Castro is Manager, Government Relations, of Ultimate Software Group Inc., in Santa Ana, Calif.. He has over 20 years of experience working with tax information reporting with a concentration in compliance and problem resolution. The Ultimate Software Group is a leading human resources management system services provider in the U.S. Mr. Castro has regularly attended the IRS Reporting Agents' Forum, was a private industry representative on an IRS penalty and industry task force and was a Tax Law Specialist at the IRS National Office. He is a founding member of the National Association of Tax Reporting and Payroll Management. He has also been a contributing writer for the Bureau of National Affairs (BNA). He received a BA and a JD in Comparative Law from Tulane University. **(Employer Information Reporting/Burden Reduction Subgroup)**

### Roseann M. Cutrone

Ms. Cutrone, an attorney, is a Counsel at Skadden, Arps, Slate, Meagher & Flom LLP in Washington, D.C. Her practice includes advising clients, including large domestic and foreign commercial banks, investment funds, multi-national corporate groups and other entities with respect to all aspects of their information reporting and withholding obligations under Chapter 3, Chapter 4 (FATCA) and Chapter 61 of the Internal Revenue Code. Ms. Cutrone also represents clients in achieving voluntary disclosures agreements with the IRS for previous non-compliance with respect to information reporting/withholding obligations. Ms. Cutrone received a BA in psychology from Bucknell University and a JD from Harvard Law School. **(International Reporting and Withholding Subgroup)**

### Carolyn Diehl

Ms. Diehl is Tax Compliance Officer and Vice President with National Financial Services LLC, a Division of Fidelity Investments, in Jersey City, N.J. She has worked in the financial industry for over 35 years as both a tax preparer and tax compliance officer for a leading financial services firm specializing in high net worth clients and as a tax compliance officer for a large broker/dealer organization. She has interpreted laws and regulations including identification of the impact of Foreign Account Tax Compliance ACT (FATCA), the cost basis regulations and Section 871(m) and 305(c) on the institutional brokerage business. Ms. Diehl is a member of the Securities Industry and Financial Markets Association (SIFMA) tax compliance committee and participates in dialogue on cost basis, FATCA and 871(m) with the Financial Information Forum (FIF). Ms. Diehl received a BS in Economics from the Wharton School, University of Pennsylvania, and an MBA from the University of Delaware. **(International Reporting and Withholding Subgroup)**

## Information Reporting Program Advisory Committee 2016 Member Biographies

### Terry W. Edwards

Mr. Edwards has worked in banking for over 26 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 from Virginia Tech and a BS in Business Administration from the University of Virginia's college at Wise. **(Emerging Compliance Issues Subgroup)**

### Alan M. Ellenby

Mr. Ellenby is an executive director and an attorney serving as national tax technical advisory leader for EY'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. **(Employer Information Reporting/Burden Reduction Subgroup)**

### Dana Flynn

Ms. Flynn is a director in Group Tax at UBS AG in Stamford, Conn. She has over 11 years of experience specializing in tax advisory relating to U.S. tax information reporting and withholding. Currently she is the Group Tax Americas regional expert for the Foreign Account Tax Compliance Act (FATCA) but she also focuses on the Common Reporting Standard (CRS) and other areas relating to information reporting and withholding, such as Chapter 3 and Section 871(m) of the Internal Revenue Code. She is responsible for working with Operations, Onboarding and a variety of business divisions across the Investment Bank and Wealth Management to address their planning, implementation, and compliance issues relating to U.S. domestic and non-resident withholding and information reporting. Ms. Flynn has been a guest speaker and chairperson at tax information reporting and withholding conferences within the industry and is a member of the Securities Industry and Financial Markets Association (SIFMA) Tax Compliance Committee. She received her BA from Boston College and JD from Suffolk University Law School. **(International Reporting and Withholding Subgroup)**

## Information Reporting Program Advisory Committee 2016 Member Biographies

- Michael W. Gangwer** Mr. Gangwer is Associate Tax Advisor, Legal Department, of The Vanguard Group, Inc. in Valley Forge, Pa. He has worked at Vanguard in information reporting for over 10 years. He currently serves as the lead technical consultant for information reporting and tax withholding for Vanguard's retail, institutional retirement, brokerage and cost basis departments. These departments annually produce information returns for millions of investor accounts and retirement plan subaccounts. He also monitors legislative, regulatory and judicial developments related to information reporting and tax withholding matters, as well as advises Vanguard's tax reporting departments as they implement new tax law. He is a member of the Society of Financial Service Professionals, Investment Company Institute and the Securities Institute and Financial Markets Association (SIFMA). Mr. Gangwer received a BS in Economics from West Chester University and a Masters of Taxation & Financial Planning from Widener University. **(IRPAC Chairperson)**
- Darrell D. Granahan** Mr. Granahan, CISA and CRISC, is a Senior Director of Implementation of Tax Information Reporting Technology for the Tax & Accounting business of Thomson Reuters. In this role he works closely with customers to help them leverage technology as effectively and efficiently as possible to address the challenges of tax information reporting in the wake of ACA and other new tax reporting requirements. Before Thomson Reuters, Mr. Granahan held the role of Vice President, Controls Officer, at First Data Corporation, working in payments processing and electronic commerce solutions. Mr. Granahan is a member of Information Systems Audit and Control (ISACA) and Institute of Internal Auditors (IIA). He received a BS in Electronics Management from Southern Illinois University and an MA in Management from Bellevue University. **(Emerging Compliance Issues Subgroup)**
- Keith King** Mr. King is Senior Vice-President and Tax Executive of Bank of America. Mr. King has over 25 years of experience in the finance industry, having spent the last 17 years in the information reporting field. He is currently a senior advisor in Bank of America's Information Reporting and Withholding Advisory Group, which provides technical guidance to the bank's various lines of businesses on information and reporting regulations and its impact on their products and services. Mr. King is a current member of the American Bankers Association (ABA) Information Reporting Advisory Group and the Information Reporting Roundtable (IRR). He previously served on The Clearing House (TCH) Tax Withholding and Information Reporting Committee. He was also a past member of the Securities Industry and Financial Markets Association (SIFMA) Tax Compliance and Administration Committee. He holds a BS in Business Administration from the City University of New York and an MBA from Queens University of Charlotte. **(IRPAC Vice-Chair, Emerging Compliance Issues Subgroup).**

## Information Reporting Program Advisory Committee 2016 Member Biographies

### Joel Levenson

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) as chair, Tax Sub-Committee; and the University Tax Peer Group. He received his BS in Accounting from the University of Central Florida as well as a Master of Science, Taxation. **(Emerging Compliance Issues)**

### Robert C. Limerick

Mr. Limerick is Managing Director for the Global information Reporting Group at PricewaterhouseCoopers in New York, N.Y. He is a tax attorney specializing in tax withholding and information reporting with 24 years of experience in the public and private sectors. He has assisted banking, capital markets and asset manager clients with FATCA, Chapter 3 (withholding and reporting for payments to non-U.S. persons) and Chapter 61 (withholding and reporting for payments to U.S. persons). He is a co-author of BNA Tax Management Portfolio 6565, FATCA – Information Reporting and Withholding Under Chapter 4, a former member and past chair of the Securities Industry and Financial Markets Association (SIFMA) Tax Compliance Committee, and a member of the New York, New Jersey and Florida Bar Associations. Mr. Limerick has a BA in Mathematics from the State University of New York at Binghamton, a JD from Nova Southeastern University School of Law and an LLM from the University of Florida School of Law. **(International Reporting and Withholding Subgroup)**

### Marcia L. Miller

Ms. Miller is President & CEO of Financial Horizons, Inc. in Ft. Lauderdale, Fla. She is an Enrolled Agent working for 35 years in accounting, tax and management consulting with an emphasis on representing small business owners. She advises clients on taxes and of federal, state and foreign mandatory reporting requirements. She is an author and speaker focusing on tax management, planning and health care reform and a former adjunct professor at Nova Southeastern University, H. Wayne Huizenga School of Business. She is a recognized leader and speaker in the world of information reporting. Ms. Miller earned a BBA and an MBA from the University of Miami. **(Employer Information Reporting/Burden Reduction Subgroup)**

### Emily Z. Rook

Ms. Rook is a Consultant with Circle Financial Services in Inverness, Ill. Ms. Rook has worked in the accounting and payroll industries for 40

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years and currently consults with clients on payroll issues including processing, systems and accounting. She teaches courses for the American Payroll Association (APA) on processing and regulatory compliance. The training covers all payroll responsibilities including wage and payment deductions and tax depositing and reporting requirements. Ms. Rook is a past president of the APA, serves on its Board of Directors and is a member of the Government Relations Task Force. She is a Certified Payroll Professional and earned a BS in Commerce from Rider College. **(Chair, Employer Information Reporting/Burden Reduction Subgroup)**

### Kevin V. Sullivan

Kevin V. Sullivan is Managing Director and Tax Executive at Bank of America where he is the Head of U.S. Information Reporting Advisory in the corporate tax department. 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, Kevin 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. Kevin 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. Kevin currently serves on the IRS Information Reporting Program Advisory Committee (IRPAC) as a member of the Information Reporting and Withholding Subgroup. Kevin received his BS from American University in Washington, DC and JD from St. Thomas University School of Law in Miami, Fl. **(International Reporting and Withholding Subgroup)**

### Nina Tross

Ms. Tross accepted the position as Executive Director for the National Society of Tax Professionals (NSTP) after serving for 3 years on their Board of Directors. Currently, she also teaches NSTP sponsored tax seminars for tax professionals and writes several tax newsletters. She represents the NSTP on IRPAC and participates in the monthly National Public Liaison (NPL) committee meetings. For many years Ms. Tross owned a tax and accounting practice serving individuals and the business community. The practice was sold in 2011 but she still maintains a small client base preparing individual and business tax returns. She is a member of the National Society of Accountants, the National Federation of Independent Business, and the Arizona Association of Accounting & Tax Professionals. Ms. Tross earned her Enrolled Agent credential in 1993 and graduated with a BS in Business Administration and an MBA from Western International University. **(Emerging Compliance Issues)**

### Kelli Wooten

Ms. Wooten is a director with IHS Markit (previously Markit | CTI Tax

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Solutions) in Boston, MA. 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), the Common Reporting Standard (CRS), and the OECD's Base Erosion and Profit Shifting (BEPS) initiative. Ms. Wooten was previously Of Counsel with Burt, Staples & Maner, LLP and 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. **(International Reporting and Withholding Subgroup)**