

## **Executive Summary of Issues**

### **Employee Benefits and Payroll**

#### **A. Employer and Insurer Shared Responsibilities Under the Patient Protection and Affordable Care Act**

With respect to the above Act, IRPAC encourages the IRS to continue to work with IRPAC in developing educational materials for employers to assist in their understanding of the shared employer responsibility provisions and assessment process. IRPAC strongly urges the IRS to release proposed regulations immediately on the shared employer responsibility provision in §4980H as it is effective January 1, 2014. We recommend the IRS provide an alternative affordability safe harbor in addition to the currently proposed safe harbor that is based on an employee's Form W-2 wages. Since most employee W-2 wage income will be less than many employees' 'two wage earner' household income, there is a need for an alternative safe harbor.

#### **B. Employer and Insurer Reporting Under the Patient Protection and Affordable Care Act**

IRPAC would like to highlight the need for a separate form other than the Form W-2 to report this new information and IRPAC encourages the IRS to review those recommendations in the 2011 IRPAC Public Report.

#### **C. \$2,500 Limit on Health Flexible Spending Arrangements**

IRPAC recommends that the IRS provide transitional relief for all health flexible spending arrangements that adopted the \$2,500 limit before Notice 2012-40 were issued.

#### **D. Health Care Valuation on Form W-2**

IRPAC created a health care value chart for Form W-2 to facilitate compliance reporting to employees on the cost of group health care insurance. IRPAC commends the IRS for publishing this chart with modifications.

#### **E. Patient-Centered Outcomes Research Trust Fund**

IRPAC has requested the IRS to clarify the applicability date for self-insured

#### **F. Integrated Plans**

IRPAC requests the IRS to clarify that non-Health Reimbursement Account (HRA) integrated plans are not required to satisfy the lifetime and annual rules on a stand-alone basis provided that the combined benefit satisfies the requirements.

## **Executive Summary of Issues**

### **G. Third Party Sick Pay**

The third party sick pay is now reported to the Social Security Administration (SSA) who does not need or use the information. The SSA is revamping their Annual Wage Reporting System and wants to eliminate third party sick pay reporting. IRPAC recommends that the IRS receive and process the third party sick pay filings.

### **H. Proper Reporting for Flexible Spending Arrangement improper payments**

IRPAC recommends that the IRS provide guidance in the form of Frequently Asked Questions (“FAQ”) on IRS.gov to address the steps involved in correcting improper payments from cafeteria plan flexible spending arrangements/accounts by employer contracted Third Party Administrators and/or employers.

### **I. Form 5558, Application for Extension of Time to File Certain Employee Plan Returns, Penalty Relief**

Prior to an August 2012 revision, the Form 5558, Application for Extension of Time to File Certain Employee Plan Returns, could accommodate the listing of up to three plans for an extension request. IRPAC recommends relief of penalties for late filing of Form 5500 in certain circumstances where the filer can demonstrate that the failure to file timely is due to a lack of knowledge, before the applicable extension request due date, that the IRS had rejected an otherwise timely filed extension request.

### **J. Employee Stock Ownership (ESOP) and Cash Balance Plan Prototypes**

IRPAC recommends the IRS develop prototype and volume submitter procedures for ESOPs and cash balance retirement plans. IRPAC would wholeheartedly endorse an IRS effort in this area, and would provide assistance and input into the process as applicable.

### **K. Withholding of Tax on Nonresident Aliens and Foreign Entities**

IRPAC recommended corrections to the Tax Treaty Tables in Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities, to royalty income withholding rates for Film & TV for Egypt, Germany, Netherlands, Norway and Switzerland.

## **Executive Summary of Issues**

### **Burden Reduction Issues**

#### **A. Cost Basis Proposed Regulations for Debt and Options**

Through its public comment letter and subsequent interactions with the IRS, IRPAC has recommended a variety of measures to be considered in formulation of final regulations regarding cost basis reporting for debt instruments and options. Our recommendations are intended to ensure that new reporting requirements are consistent with existing requirements, practices and capabilities while providing information to taxpayers and practitioners in a consistent, understandable and efficient manner.

Toward those ends we have highlighted areas where reporting for income is inextricably tied to basis and have proposed consistent application of requirements across both realms. These concerns are particularly concentrated on areas such as original issue discount. Also of concern was the relatively small subset of fixed income securities that were excluded from the definition of covered securities. Here we have proposed similar treatment (or delayed implementation) for contingent payment debt instruments, inflation protection securities and structured investment products.

The requirements for including cost basis and related information in transfers of assets between financial institutions were also addressed in IRPAC's recommendations. In particular, we have proposed the standard for this information be concentrated on basis at the time of transfer rather than requiring receiving firms to recalculate basis from the time of acquisition. This distinction ensures that no implied changes to prior year income recognition are imposed on the taxpayer, minimizes the number of data elements that must be transmitted and captures correctly any wash sale adjustments that have occurred since the initial purchase of a tax lot.

For reporting cost basis for options, IRPAC's recommendations have addressed the proposed presentation of information and the differing needs of equity and nonequity options. We have proposed that equity options be presented on information returns in a manner consistent with how other investments are reported. This differs from the net gain or loss methodology illustrated in the proposed regulations. Further, we suggested that the approach to reporting options under §1256 be reconsidered because such instruments do not require determination of term as either long or short and are taxed on a mark to market approach rather than any gain or loss that is derived from purchase cost.

Since information returns are intended to give taxpayers the data necessary for completing their tax returns, IRPAC provided some additional recommendations to address scenarios that provide information on Form 1099-B in the new cost basis regime that are not adequately identified on the information return or accommodated on

## Executive Summary of Issues

the Form 1040 Schedule D/Form 8949. In particular, IRPAC identified classes of assets for which gains are treated as income rather than capital such as currency shares subject to § 988 or contingent payment debt instruments.

### **B. Substitute Information Returns**

Financial institutions that are required to file forms 1099 and other information returns are permitted to create substitute versions of these forms within the guidelines of Publication 1179 distributed annually by the IRS. Modifications are made to this document annually, but, over time, the publication has not received a thorough overhaul that is required by technological changes and the realities of the marketplace. In fact, the IRS asked IRPAC for “*assistance in updating, streamlining, and simplifying*” the Publication. In addition to the observations shared in meetings throughout the year, IRPAC furnished a marked up copy of the current publication.

IRPAC’s recommendations were intended to help modernize the approach to substitute statements since much of Publication 1179 is devoted to filing paper copies of returns. There are also several instances of important information spread across multiple sections. Our proposed revisions sought to consolidate these situations. We further recommended that subtle distinctions between *substitute* and *composite* statements be removed and that the publication be more oriented toward directing which data elements must be part of a substitute statement and less on how the information should be formatted. For example, the publication encourages information to be presented in the order of box numbers on the official form, yet from 2011 to 2012, information on Form 1099-B that was in box 15 one year was moved to box 2b the next. Another item moved from box 8 to box 1c. And we have had years in which items have moved from numbered boxes to unnumbered boxes. The redesign suggested by such changes, if followed explicitly by a filer, would serve only to make year to year presentation to taxpayers inconsistent and confusing. Also with regard statement formatting, IRPAC has recommended that superfluous repetitions of information be eliminated from the requirements.

To further promote modernization of this guidance, IRPAC proposed that explicit direction be given that allows filers to include additional or alternative information that fulfills established goals. For instance a phone number is required on forms 1099, but no explicit provision is given for inclusion of web addresses or email addresses that are established by form filers to similarly serve taxpayer needs. Additionally, explicit prohibitions on inclusion of extraneous information with substitute forms dampens the likelihood of filers risking inclusion of this information. For these reasons, IRPAC has also recommended clarification about the use of logos on permitted enclosures.

## Executive Summary of Issues

The structure of securities has gotten more complex over time. It is now possible for a single investment vehicle to generate several types of income, for example, interest, dividend, royalties and rents. Nevertheless, Publication 1179 restricts some forms and even specific boxes from certain forms from being presented on a consolidated statement. The result is that a taxpayer will see all the income and other relevant tax information for a given investment spread across several documents. IRPAC has proposed that such restrictions be eliminated.

### **C. Reporting Tax Credits on Form 1097-BTC, Bond Tax Credit**

Increased authorizations of tax credit bond issuance has created the need for a new information reporting regime. IRPAC has worked over the last 3 years to assist the IRS and Treasury with the development of Form 1097-BTC, Bond Tax Credit, which is intended to cover the amounts of tax credit allowances earned to bondholders and the IRS. In this area we have made recommendations regarding the granularity and frequency of reporting. We have additionally, addressed issues of how corrections should be handled and helped to minimize the number of data elements required on the form without compromising its utility. As the first reporting deadline approaches in November of 2012, a variety of IRPAC recommendations have been implemented in the final forms being used.

### **D. *De minimis* Threshold for Form 1099 Corrections**

In an effort to reduce overall burden to information return filers, taxpayers and the IRS, IRPAC recommends that the IRS adopt a *de minimis* dollar threshold for corrections to information returns. IRPAC specifically recommends a threshold \$50 be adopted so that net changes of \$50 or less (up or down) do not require the filing of a corrected information return. Regulatory changes under IRC §§ 6721 and §6722 should be considered so that filers of Forms 1099 have clear authority for suppressing these immaterial corrections. Specifically, a failure to correct a *de minimis* amount of previously reported income should be defined as an “inconsequential error” that is not subject to the penalty provisions of IRC §§ 6721 and §6722.

Currently, in instances where information returns and payee statements are found to contain an error, substantial resources are being expended by withholding agents, including financial institutions (for printing, mailing, reputation, etc.), taxpayers (for filing amended returns), and the IRS (for processing and data matching, etc.) to correct and process corrected statements that, in many cases, have no impact on tax liability. This burden on resources is unnecessary when the correction is for an inconsequential sum that changes neither the taxpayer’s liability nor the Government’s revenues.

## **Executive Summary of Issues**

In response to the IRS's request for burden reduction assistance, IRPAC has forwarded this issue to Chief Counsel for possible inclusion in the 2013 Priority Guidance Plan. Further, IRPAC has discussed the need for a *de minimis* threshold amount with The National Taxpayer Advocate, Nina Olson, and her staff.

This is not a new issue, and the lack of guidance in this area has created a long history of on-going concerns and wasted resources. Everyone involved in the process, including issuers, recipients and processors of information returns would be well served by the IRS putting a protocol in place to reduce the number of unnecessary corrected filings.

### **E. Third Party Agent Reporting Using Form 2678, Employer/Payer Appointment Agent**

IRPAC recommends that the IRS clarify the liability of an agent reporting using Form 2678, Employer/Payer Appointment Agent, such that the agent is only responsible for the acts authorized by the employer. IRPAC recommends that the IRS also provide more detailed and updated instructions for an agent who reports and deposits backup withholding taxes for payers under § 3.02 of Rev. Proc. 84-33.

An agent who is authorized by an employer to pay the wages of the employer's employees generally has the same withholding tax liability as the employer. When the agent is authorized to pay only a portion of the wages to some of the employees, then the agent should only be responsible for withholding taxes with respect to the wages it paid, not all of the wages of the employer. Prop. Reg. § 31.3504-1(a), Third Party Arrangement Chart on [www.irs.gov](http://www.irs.gov), and instructions to Form 2678 should be revised to clarify this limitation. Form 2678 should provide space for employer to specify the particular type or portion of wages and compensation for which the agent is responsible.

In addition, the instructions to Form 2678 refer to Rev. Proc. 84-33, which allows an agent to deposit backup withholding taxes on behalf of a payer. Rev. Proc. 84-33 should be updated, and Form 2678 should also have more detailed and updated instructions, for an agent who reports and deposits backup withholding taxes for payers under § 3.02 of Rev. Proc. 84-33. This updated information should cover the withholding aspect of all relevant forms in the 1099 series.

## **Emerging Compliance Issues**

### **A. IRC § 6050W and Form 1099-K, Payment Card and Third Party Network Transactions**

IRPAC recommends that the IRS clarify in instructions to Form 1099-K, Payment Card and Third Party Network Transactions, that payment settlement entities and third

## **Executive Summary of Issues**

party settlement organizations that do not use merchant category codes (MCCs) to classify payees in their trade or business do not need to complete box 2 and clarify in the instructions that box 3 is optional. The IRS adopted this recommendation in the 2012 Instructions for Form 1099-K. As stated in its 2011 Report, IRPAC continues to believe the IRS must provide clear guidance to further address many open questions regarding IRC § 6050W.

### **B. Form 1098-T, Tuition Statement**

IRPAC recommends clarifying in IRS publications and instructions that information reported on Form 1098-T, Tuition Statement, in boxes 1 and 2 might not be the appropriate amount used to calculate education tax credits.

### **C. Withholding and Reporting on Payments for Freight, Shipping, and Other Transportation Expenses under IRC §1441 and §1442**

Significant confusion has long existed regarding the proper withholding and reporting treatment of U.S. source payments for freight, shipping, and other transportation expenses. This confusion relates to the interplay between the 4% excise tax on U.S. source Gross Transportation Income under IRC § 887 and the 30% gross-basis withholding tax under IRC §§ 871 and §881 as well as the documentation necessary to establish the responsibilities of withholding agents for the latter. In its 2010 and 2011 reports, IRPAC provided a detailed discussion of this issue and other related issues, including recommendations for improvements to forms and instructions. Although the IRS has heard repeatedly about the challenges regarding this issue and the potential compliance benefits to the Government of adopting IRPAC's recommendations, the IRS has made little progress in addressing these concerns. IRPAC renews the recommendations it made in its 2010 and 2011 reports, recommends specific changes to new Form W-8BEN-E, Certificate of Status of Beneficial Owner for United States Tax Withholding (Entities), and Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, and also recommends that the IRS promptly correct the discussion of this issue included in Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities, because the existing discussion is misleading to taxpayers and withholding agents.

### **D. Electronic Furnishing to Recipients of Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding**

Prompted by the guidance issued in Rev. Proc 2012-17 with respect to the electronic furnishing of Schedule K-1 to partners, IRPAC recommends that the IRS issue guidance to permit the electronic furnishing of Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, to the recipient.

## **Executive Summary of Issues**

### **E. Central Withholding Agreements: Addressing Needs of Venues and Foreign Artists Through a Mini-CWA Program and Problems Encountered by Foreign Artists when Applying for U.S. Social Security Numbers**

IRPAC began discussions with IRS LB&I regarding Central Withholding Agreements (CWA) in 2010 and diligently worked during 2011 to develop a mini-CWA process and to address concerns about missing Social Security Numbers/Individual Taxpayer Identification Numbers. A structure for a new simplified CWA was developed during 2011 and IRPAC believed that it would become part of a revenue procedure that was under revision at that time. Nevertheless, no changes have been made, so IRPAC plans to continue pursuing a solution.

### **F. Form 8938, Statement of Specified Foreign financial Assets, and Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, Requirements**

The Foreign Account Tax Compliance Act has resulted in a new annual compliance responsibility on Form 8938, Statement of Specified Foreign Financial Assets, used by U.S. citizens, resident aliens, and certain other individual taxpayers to report their specified foreign financial assets, as required by IRC § 6038D. This filing was required beginning with 2011 income tax returns filed in 2012. Individual taxpayers who are required to file Form 8938 often also have an obligation to file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (FBAR). IRPAC recommends that the IRS supplement the instructions to Form 8938 to include the chart entitled “Comparison of Form 8938 and FBAR Requirements” that appears on the IRS website. IRPAC also recommends that the IRS consider alternatives to eliminate or reduce duplication and confusion associated with compliance with these two separate sets of filing requirements.

## **International Reporting and Withholding**

### **A. Preexisting Account Definition**

The Proposed Regulations define the term preexisting obligation to mean an account, instrument or contract maintained by a withholding agent as of January 1, 2013. In the case of a participating foreign financial institution, a preexisting obligation is one maintained prior to the effective date of its agreement with the IRS (July 1, 2013 or later). IRPAC recommends that the definition of preexisting obligations of all withholding agents be changed to obligations maintained as of January 1, 2014.

## **Executive Summary of Issues**

### **B. Reason to Know Standards**

IRPAC recommends that the Final Regulations clarify that the reason to know standards under Chapter 4 should be applied only to accounts of a customer found on a common computer system of the withholding agent.

### **C. FFI Verification Process**

The Proposed Regulations provide that a withholding agent who receives a Form W-8 that states that the entity furnishing the form is a participating FFI or registered deemed compliant FFI must verify that the entity is on a list published by the IRS. IRPAC recommends that the verification be based primarily on FATCA ID and that a name on the Form W-8 that is reasonably similar to the name on the published list should be considered a match.

### **D. Presumption Rules for Certain Exempt Recipients**

The Proposed Regulations provide that certain entities that may be treated as exempt under Chapter 24 and Chapter 61 without the need for furnishing a Form W-9 will be presumed foreign under Chapter 4. IRPAC recommends that such entities should not be presumed foreign unless there are indicia of foreign status associated with the entity's account.

### **E. Ordinary Course of Business Payments**

The Proposed Regulations provide that payments made in the ordinary course of a withholding agent's business for nonfinancial services are excluded from the definition of a withholdable payment under Chapter 4. It is unclear how a withholding agent should distinguish between payments for financial services and nonfinancial services. IRPAC believes that both types of payments represent a low risk of tax evasion and, therefore, recommends that all payments made in the ordinary course of business for services be excluded from the definition of withholdable payments under Chapter 4.

### **F. Model Intergovernmental Agreements**

The model Intergovernmental Agreements (IGAs) appear to include in the definition of FATCA Partner Financial Institution a branch of a U.S. Financial Institution located in the FATCA Partner, as well as a controlled foreign corporation (CFC) resident in the FATCA Partner. As a result, it is possible that such branches and CFCs may be subject to reporting obligations to the FATCA Partner. IRPAC believes that the Regulations under Chapter 4 and the terms of an IGA entered into with a FATCA

## **Executive Summary of Issues**

Partner should provide that a branch of a U.S. Financial Institution and a CFC will only be subject to reporting to the IRS.

### **G. New Forms W-8BEN, Certification of Foreign Status of Beneficial Owner for United States Tax Withholding**

IRPAC reviewed the early release draft versions of the new Form W-8BEN and Form W-8BEN-E. IRPAC is pleased that the IRS adopted the recommendation in the 2011 IRPAC Annual Report that there be two separate versions of the Form W-8BEN—one for individuals and one for entities. IRPAC provided several comments on the draft forms and will continue to discuss the draft forms with the IRS.

### **H. Coordination of Chapter 3 and Chapter 4**

IRPAC discussed with the IRS the need for the Regulations under Chapter 3 and Chapter 4 to be coordinated. In particular, IRPAC renewed the recommendations discussed in the 2011 IRPAC Public Report concerning Chapter 3 issues. IRPAC is pleased to note that certain of these issues, such as the capacity line on Forms W-8, are being addressed by the IRS.

### **I. Short-Term Debt**

IRPAC recommended that interest (including original issue discount) on debt having a term of 183 days or less be excluded from the definitions of “withholdable payment” and “financial account” under Chapter 4. IRPAC is pleased to note that the Proposed Regulations do exclude such interest (including original discount) from the definition of withholding payment. We believe that the Final Regulations should provide a similar exclusion from the definition of financial account.