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out of each subsequent payment made before January 1, 1984.

*g–22. Q. Will the notice requirements of section 3405 apply before July 1, 1983, with respect to recipients of periodic payments that total less than $5400 per year?*

A. No.

*g–23. Q. Will the notice and withholding requirements of section 3405 apply before July 1, 1983, with respect to payments to nonresident alien individuals?*

A. No.

*g–24. Q. Does a payor or plan administrator who requested a delay prior to the publication of these procedures in the* FEDERAL REGISTER *need to resubmit the request in light of these procedures?*

A. Yes. In order to be entitled to a delay, payors and plan adminstrators must follow the procedures required by these temporary regulations.

*g–25. Q. Will the notice and withholding requirements of section 3405 apply before January 1, 1984, with respect to the exchange or complete or partial surrender of a commercial annuity under which the recipient had not irrevocably chosen, prior to January 1, 1984, to receive payments in the form of an annuity?*

A. In the case of the exchange or complete or partial surrender of a commercial annuity under which the recipient had not irrevocably chosen, prior to January 1, 1984, to receive payments in the form of an annuity, the application of the notice and withholding provisions of this section may be delayed, so long as undue hardship exists, up to January 1, 1984. Prior approval from the Internal Revenue Service is not required for such delay, and should not be requested. For purposes of this delay, undue hardship will be presumed to exist, in the absence of bad faith, so long as the payor can establish that at least one of the conditions in question g–6 is present. The payor should prepare and retain a statement of undue hardship as described in question g–9 and should maintain any documents necessary to support the representations made in that statement.

[T.D. 7839, 47 FR 45868, Oct. 14, 1982; 47 FR 47241, Oct. 25, 1982; as amended by T.D. 7858, 47 FR 54066, Dec. 1, 1982; 47 FR 57021, Dec. 22, 1982; T.D. 7904, 48 FR 35091, Aug. 3, 1983; 48 FR 36449, Aug. 11, 1983. Redesignated by T.D. 8873, 65 FR 6007, Feb. 8, 2000]

EFFECTIVE DATE NOTE: By T.D. 8873, 65 FR 6007, Feb. 8, 2000, §35.3405–1T was redesignated from §35.3405–1, effective Jan. 1, 2001.

# PART 35a—TEMPORARY EMPLOYMENT TAX REGULATIONS UNDER THE INTEREST AND DIVIDEND TAX COMPLIANCE ACT OF 1983

Sec.

35a.3406–2 Imposition of backup withholding for notified payee underreporting of reportable interest or dividend payments.
35a.9999–0 Effective date.
35a.9999–1 Questions and answers concerning the due diligence requirement and the certification requirements in connection with backup withholding and other related issues.
35a.9999–2 Questions and answers concerning due diligence and issues in connection with backup withholding.
35a.9999–3 Questions and answers concerning backup withholding.
35a.9999–3A Question and answer relating to exemption from backup withholding for certain principal payments made outside the United States by brokers on certain obligations.
35a.9999–4T Questions and answers relating to the application of information reporting and backup withholding to payments by foreign offices of United States and foreign brokers and by United States offices of banks and brokers, and other related matters (temporary).
35a.9999–5 Questions and answers relating to repeal of 30 percent withholding by section 127 of the Tax Reform Act of 1984 and to the application of information reporting and backup withholding in light of such repeal.

AUTHORITY: 26 U.S.C. 7805; §35a.3406–2 also issued under 26 U.S.C. 3406(c)(3)(D) and 3406(i).

## §35a.3406–2 Imposition of backup withholding for notified payee underreporting of reportable interest or dividend payments.

(a) *Requirement that a payor backup withhold due to a notified payee underreporting*—(1) *In general.* Except as otherwise provided in paragraph (a)(5) of this section, backup withholding under section 3406(a)(1)(C) applies to any reportable interest or dividend payment (as defined in section 3406(b)(2) and paragraph (a)(4) of this section) made to a payee, if the Internal Revenue Service or a broker (as defined in section 3406(h)(5) and paragraph (a)(7) of this section and pursuant to section 3406(d)(2)(B)(ii)(III)) notifies a payor (as defined in section 3406(h)(4) and in paragraph (a)(6) of this section) that

the payee is subject to backup withholding due to a notified payee underreporting (as defined in paragraph (a)(2) of this section). The payor is required under section 3406(c)(4) and paragraph (c)(1) of this section to inform the payee that backup withholding under section 3406(a)(1)(C) has begun. The requirements for the notice that a payor must send to a payee are set forth in paragraph (c) (2) and (3) of this section. The period for which backup withholding is required due to a notified payee underreporting is described in section 3406(e)(3)(A) and in paragraph (e) of this section. See section 3406(c)(3) and paragraph (g) of this section for the rules regarding how a payee may obtain a determination from the Internal Revenue Service that withholding under section 3406(a)(1)(C) be stopped or not started.

(2) *Definition of notified payee underreporting.* The term ''notified payee underreporting'' means that the Internal Revenue Service has—

(i) Determined that there was a payee underreporting as defined in paragraph (a)(3) of this section,

(ii) Mailed at least four notices to the payee (over a period of at least 120 days) with respect to the underreporting as prescribed in paragraph (f)(1) of this section, and

(iii) Assessed any deficiency attributable to the underreporting in the case of any payee who has filed a return.

(3) *Definition of a payee underreporting.* The term ''payee underreporting'' means that the Internal Revenue Service has determined, for a taxable year, that—

(i) A payee failed to include in his return of tax under chapter 1 of the Internal Revenue Code for such year any portion of a reportable interest or dividend payment required to be shown on such tax return, or

(ii) A payee may be required to file a return for such year and to include a reportable interest or dividend payment in such return, but failed to file such return.

See paragraph (a)(5) of this section for certain payments to be taken into account in determining whether there is payee underreporting even though those payments may not be defined as reportable interest or dividend payments in paragraph (a)(4) of this section or even though backup withholding under section 3406(a)(1)(C) may not apply to such payments.

(4) *Definition of a reportable interest or dividend payment*—(i) *In general.* See section 3406(b)(2), A–2 of § 35a.9999–1, A–5 of § 35a.9999–3, and A–15 of § 35a.9999–2 for the definition of reportable interest or dividend payment.

(ii) *Exceptions*—(A) *Patronage dividends.* Patronage dividends are treated as reportable interest or dividend payments for purposes of backup withholding under section 3406(a)(1)(C) only if 50 percent or more of the reportable amount is paid in money or by qualified check (as defined in section 1388(c)(4)), and then only to the extent that the payment is in money or by qualified check. See the second paragraph in A–10 of § 35a.9999–3 for an example of how this rule applies.

(B) *Window payments.* Pursuant to section 3406(b)(7), window payments as defined in A–42 of § 35a.9999–1 and A–9 of § 35a.9999–2 are not treated as reportable interest or dividend payments for purposes of backup withholding under section 3406(a) (1)(C).

(5) *Reportable interest or dividend payments excluded from backup withholding.* The following reportable interest or dividend payments are not subject to backup withholding:

(i) *Certain dividends.* Certain dividend payments as defined in A–9 of § 35a.9999–3.

(ii) *Minimal payments.* Minimal payments as defined in A–19 of § 36a.9999–2 if the payor elects not to impose backup withholding on such amounts.

(iii) *Original issue discount.* Original issue discount as defined in section 1273, unless there is a payment in cash. See A–15 of § 35a.9999–2.

(iv) *Payments subject to other withholding.* Payments already subject to withholding under another provision of the Internal Revenue Code.

Reportable minimal payments (to the extent reported on an information return), patronage dividends, original issue discount, and window payments shall be taken into account in determining whether underreporting (as defined in paragraph (a)(3) of this section) has occurred, even though those

payments may not be defined as reportable interest or dividend payments under paragraph (a)(4) of this section or even though backup withholding under section 3406(a)(1)(C) may not apply to such payments.

(6) *Definition of payor.* See section 3406(h)(4), A–41 of § 35a.9999–1, and A–1 of § 35a.9999–3 for the definition of payor. The term payor includes a broker who holds an instrument in street name.

(7) *Definition of broker.* See section 3406(h)(5) for the definition of broker.

(b) *Notice to payors and brokers regarding backup withholding*—(1) *Notice from the Internal Revenue Service.* The Internal Revenue Service will notify—

(i) Payors to begin backup withholding on reportable interest or dividend payments due to a notified payee underreporting pursuant to section 3406(a)(1)(C); and

(ii) Brokers pursuant to section 3406(c)(5) that a payee is subject to backup withholding under section 3406(a)(1)(C).

(2) *Notice from a broker.* A broker who receives a notice from the Internal Revenue Service that a payee is subject to backup withholding due to a notified payee underreporting and through whom the payee subsequently acquires a readily tradable instrument (as defined in section 3406(h)(6)) with respect to which the broker is not the payor is required to notify the payor of that instrument that the payee is subject to backup withholding under section 3406(a)(1)(C) in the time and manner provided in A–41 of § 35a.9999–1.

(3) *Accounts subject to backup withholding.* (i) *In general.* After receiving notice from the Internal Revenue Service or from a broker, as provided in section 3406(d)(2)(B) and paragraphs (b)(1)(i) and (2) of this section, that a payee is subject to backup withholding under section 3406(a)(1)(C), payors are required to withhold 20 percent of all reportable interest or dividend payments subject to backup withholding made with respect to all accounts of the payee.

(ii) *Joint accounts.* Payors are required to withhold on joint accounts if the payee subject to backup withholding under section 3406(a)(1)(C) is the first person listed on the account at the time the payor receives the notice to begin backup withholding. Backup withholding shall continue to apply to reportable interest and dividend payments made to that account even if the order of the names on the account is subsequently changed, provided that the name of the payee subject to backup withholding remains on the account.

(iii) *Exception.* Payors are not requied to withhold on reportable interest or dividend payments made with respect to an account of the payee that could not be located with reasonable care. The payor will be considered to have exercised reasonable care if the payor uses the name and taxpayer identification number (or names and taxpayer identification numbers if a joint return was filed by the payees) provided on the notice from the Internal Revenue Service or from a broker as prescribed in paragraphs (b)(1)(i) and (2) of this section and in certain circumstances identified in this paragraph (b)(3)(iii) any account numbers provided by the Internal Revenue Service in locating all accounts of a payee or payees. If a payee uses a different name on an account than the name stated on the notice from the Internal Revenue Service or from a broker (for instance, due to marriage or adoption) and the payor can associate both names with the payee using records kept in the ordinary course of business, the payor will be treated as exercising reasonable care if the payor uses both names to locate accounts of the payee. If the taxpayer identification number is not provided to the payor or broker by the Internal Revenue Service, or if the taxpayer identification number provided by the Internal Revenue Service does not match the taxpayer identification number of the payee on the records that the payor or broker maintains in the ordinary course of business, the payor or broker is required to use any account numbers provided by the Internal Revenue Service to identify the payee and the payee's taxpayer identification number. This information must be used by the payor to locate other accounts of the payee and by the broker to locate the payors with respect to whom the payee subsequently

acquires a readily tradable instrument through that broker.

(c) *Notice from payors of backup withholding due to a payee underreporting*—(1) *In general.* A payor is required under section 3406(c)(4) to notify the payee in accordance with paragraph (c)(2) of this section that backup withholding has begun because of a notified payee underreporting. Payors who are notified by a broker that a payee is subject to backup withholding under section 3406(a)(1)(C) are also required to send the notice in accordance with paragraph (c)(2) of this section. As a result, the notice requirements provided in A–39 of § 35a.9999–1 and in the appendix to § 35a.9999–2 shall not apply to those payors notified by a broker that a payee is subject to backup withholding under section 3406(a)(1)(C). The payor must send the notice required by paragraph (c)(2) of this section to the payee no later than 15 days after the date that the payor makes the first payment subject to backup withholding under section 3406(a)(1)(C). The payor must send the notice of backup withholding by first-class mail to the payee at his last known address. Rules similar to the rules in A–17, A–18, A–19, and A–20 of § 35a.9999–1 shall apply to the requirement to provide notice by first-class mail.

(2) *Form of the notice to the payee with respect to notified payee underreporting.* The notice to the payee required by paragraph (c)(1) of this section must state—

(i) That the Internal Revenue Service has given notice that the payee has underreported reportable interest or dividends;

(ii) That, as a result of such underreporting, the payor is required under section 3406(a)(1)(C) of the Internal Revenue Code to withhold 20 percent of reportable interest and dividend payments made to the payee no later than the close of the day 30 days after the date that the payor received the notice;

(iii) The date that the payor received the notice to begin backup withholding under 3406(a)(1)(C);

(iv) That the payee must obtain a determination from the Internal Revenue Service in order to stop the backup withholding under section 3406(a)(1)(C); and

(v) That while he is subject to backup withholding due to payee underreporting, the payee may not certify to a payor making reportable interest or dividend payments (or to a broker acquiring a readily tradable instrument for the payee) that he is not subject to backup withholding under section 3406(a)(1)(C). See section 3406(a)(1)(D) for the backup withholding rules with respect to a payee's failure to make the certification under section 3406(a)(1)(D).

(3) *Exceptions.* A notice provided to a payee on or before April 23, 1987, will be deemed to satisfy the provisions of paragraph (c)(2) of this section if it informs the payee that the payor has been instructed by the Internal Revenue Service to start backup withholding on reportable interest or dividend payments to the payee. If a payor who has started backup withholding due to notified payee underreporting on or before April 23, 1987, has not provided adequate notice to the payee on or before April 23, 1987, then the payor must provide notice to the payee in the manner prescribed in paragraph (c)(2) of this section by the date that is 45 days after April 23, 1987.

(d) *Notice to stop backup withholding*—(1) *In general.* The Internal Revenue Service will provide written certification to the payee that backup withholding is to stop and will notify the payors who were contacted pursuant to paragraph (b) of this section to stop withholding after the Internal Revenue Service makes a determination under paragraph (g) of this section that backup withholding with respect to a payee should stop. The Internal Revenue Service will also notify the brokers who were contacted pursuant to paragraph (b) of this section that the payee is no longer subject to backup withholding under section 3406(a)(1)(C) and that the brokers are no longer obligated to provide notices to payors under paragraph (b)(2) of this section. A broker who receives certification under this section from the Internal Revenue Service is not required to provide the certification to any payors to

which the broker has previously provided the notice required under paragraph (b)(2).

(2) *Date notice to stop withholding will be provided*—(i) *Underreporting corrected or bona fide dispute.* If the Internal Revenue Service makes a determination as set forth in paragraph (g)(1) (ii) or (iv) of this section during the 12-month period ending on October 15, of any calendar year, the Internal Revenue Service will provide the certification or notice required by paragraph (d)(1) of this section no later than December 1 of such calendar year.

(ii) *No underreporting or undue hardship.* If the Internal Revenue Service makes a determination as set forth in paragraph (g)(1) (i) or (iii), the Internal Revenue Service will provide the notices required by paragraph (d)(1) of this paragraph no later than the 45th day after the day on which the Internal Revenue Service makes its determination.

(e) *Period during which withholding is required*—(1) *In general.* Upon receiving notice from the Internal Revenue Service after April 23, 1987, to begin backup withholding under section 3406(a)(1)(C) or notification from a broker stating that the payee is subject to backup withholding under section 3406(a)(1)(C), the payor must impose backup withholding on all reportable interest and dividend payments made to the payee during the period beginning after the close of the 30th day after the day on which the payor receives the notice provided in paragraph (b) (1)(i) or (2) of this section and ending as of the close of the day before the stop date (as described in paragraph (e)(2) of this section). Pursuant to section 3406(e)(5)(C), the payor may elect to begin backup withholding at any time during the 30-day period described in this paragraph.

(2) *Stop date*—(i) *Underreporting corrected or bona fide dispute.* In the case of a determination that the underreporting has been corrected or that a bona fide dispute exists (as defined in paragraphs (g)(1)(ii) or (iv) of this section), the stop date is—

(A) January 1 following the 12-month period ending on October 15th of any calendar year in which the determination has been made or, if later,

(B) The day that is 30 days after the earlier of—

(*1*) The date on which the payor receives written notification from the Internal Revenue Service (under paragraph (d)(2) of this section) that withholding is to stop; or

(*2*) The date on which the payor receives a copy of the written certification provided to the payee by the Internal Revenue Service that withholding is to stop.

(ii) *No underreporting or undue hardship.* In the case of a determination that no payee underreporting occurred or that an undue hardship exists or could exist (as defined in paragraph (g)(1)(i) or (iii) of this section), the stop date is that date specified in paragraph (e)(2)(i)(B) of this section.

(iii) *Payor election to shorten or eliminate grace period.* The payor with respect to any payee may elect to determine the stop date without regard to the grace period provided in section 3406(e)(5)(B) (*i.e.*, without regard to the words ''the day that is 30 days after'' in paragraph (e)(2)(i)(B) of this section) or by substituting a shorter grace period.

(iv) *Examples.* The provisions of paragraph (e)(2)(i) may be illustrated by the following examples:

*Example 1.* The Internal Revenue Service makes a determination by October 15, 1987, that any underreporting with respect to A has been corrected. X, a payor who has been notified to backup withhold on payments of interest to A due to notified payee underreporting, receives written notice from the Internal Revenue Service on December 1, 1987, informing X that A is no longer subject to backup withholding under section 3406(a)(1)(C) and that X must stop backup withholding as of the close of December 31, 1987, or if later, the earlier of the close of the day 30 days after receipt of the notice from the Internal Revenue Service or receipt of the copy of the written certification provided to the payee by the Internal Revenue Service. The stop date, as provided in paragraph (e)(2)(i)(A) of this section, is January 1, 1988, and the payor must stop backup withholding as of the close of December 31, 1987.

*Example 2.* Assume the same facts as in *Example 1* except that X, due to a change of address or for other reasons, does not receive the notice from the Internal Revenue Service to stop backup withholding until December 15, 1987. In addition, A does not provide X with a copy of the certification that was provided to A by the Internal Revenue Service until December 15, 1987. The stop date, as

provided in paragraph (e)(2)(i)(B) of this section, is January 14, 1988 (30 days after December 15, 1987), because that date is later than January 1, 1988. However, if a payor elects pursuant to section 3406(e)(5)(C) and paragraph (e)(2)(iii) of this section to determine the stop date without regard to that 30-day grace period, the stop date is January 1, 1987.

*Example 3.* Assume the same facts as in *Example 2* except that on December 10, 1987 (rather than on December 15, 1987), A provides X with a copy of the certification from the Internal Revenue Service. The stop date, as provided in paragraph (e)(2)(i)(B) of this section, is January 9, 1988 (30 days after December 10, 1987), because that date is earlier than January 14, 1988 (30 days after the day X received notice from the Internal Revenue Service), but later than January 1, 1988.

(f) *Notice to payees from the Internal Revenue Service*—(1) *Notice period.* After the Internal Revenue Service determines that a payee underreporting exists as defined in paragraph (a)(3) of this section, the Internal Revenue Service, pursuant to section 3406(c)(1)(B), will mail to the payee at least four notices over a period of at least 120 days (hereafter referred to as the ''notice period'') before payors and brokers will be notified that the payee is subject to backup withholding due to a notified payee underreporting as provided in paragraph (b)(1) of this section. The notices may be incorporated with other notices provided to the payee by the Internal Revenue Service.

(2) *Payee subject to withholding.* After the Internal Revenue Service provides the notices described in paragraph (f)(1) of this section, the Internal Revenue Service will send the notices required by paragraph (b) of this section unless—

(i) A payee obtains a determination under paragraph (g) of this section, or

(ii) In the case of a payee who has filed a tax return, the Internal Revenue Service has not assessed the deficiency attributable to the underreporting.

(3) *Disclosure of names of payors and brokers.* The Internal Revenue Service pursuant to section 3406(c)(5) may require a payee subject to backup withholding due to a notified payee underreporting to disclose the names of all of his payors of reportable interest or dividend payments and the names of all of the brokers with whom the payee has accounts which may involve reportable interest or dividend payments. To the extent required in the request from the Internal Revenue Service, the payee shall also provide his account numbers and other information necessary to identify the payee's accounts.

(4) *Backup withholding certification.* Once a payee receives a final notice from the Internal Revenue Service notifying him that his reportable interest or dividend payments are subject to backup withholding due to notified payee underreporting under section 3406(a)(1)(C), the payee shall not certify to any payor or broker, under penalties of perjury, that he is not subject to backup withholding under section 3406(a)(1)(C). See paragraph (k)(2) of this section for the penalties that will apply to a payee who makes a false certification. The payee may not make the certification until the payee receives the certification provided in paragraph (d)(1) of this section from the Internal Revenue Service advising the payee that he is no longer subject to backup withholding under section 3406(a)(1)(C) (as provided in A–33 of § 35a.9999–1). See A–37 of § 35a.9999–1 for the rule applicable to a payor who makes reportable interest or dividend payments to a payee who fails to certify that he is not subject to backup withholding due to notified payee underreporting.

(g) *Determination by the Internal Revenue Service that backup withholding should not start or should be stopped*—(1) *In general.* A payee may prevent backup withholding from starting or stop it once it has started if, for the taxable year with respect to which there is a notified payee underreporting and any other taxable payee—

(i) Shows that there was no payee underreporting (as provided in paragraph (g)(2) of this section);

(ii) Corrects any payee underreporting (as provided in paragraph (g)(3) of this section);

(iii) Shows that backup withholding will cause or is causing an undue hardship (as defined in paragraph (g)(4) of this section) and that it is unlikely that the payee will underreport interest or dividend payments again; or

(iv) Shows that a bona fide dispute exists as to whether any underreporting has occurred (as provided in paragraph (g)(5) of this section).

(2) *No underreporting.* A payee may show that no underreporting of interest or dividends exists by presenting receipts or other satisfactory documentation to the Internal Revenue Service showing that all taxes relating to such payments were reported and paid timely or evidence showing that the payee did not have to file a return for the taxable year in question or that the underreporting determination is based upon a factual, clerical, or other mistake.

(3) *Correcting any payee underreporting*—(i) *Before issuance of a statutory notice of deficiency*. Before a statutory notice of deficiency is issued to a payee pursuant to section 6212, the payee may correct underreporting by filing a return if one was not previously filed and paying taxes, penalties, and interest due with respect to any underreported interest or dividend payments.

(ii) *After issuance of a statutory notice of deficiency*. After a statutory notice of deficiency is issued to a payee, the payee may correct underreporting at any time by filing a return if one was not previously filed and paying the entire deficiency and any other taxes including penalties and interest attributable to any payee underreporting of interest or dividend payments. Thus, for example, a payee may correct underreporting after assessment of a deficiency by paying the entire assessment with respect to that deficiency and any other taxes including penalties and interest attributable to any payee underreporting of interest or dividend payments for other taxable years.

(4) *Undue hardship.* A determination of undue hardship will be based on the overall impact to the payee of having 20 percent of reportable interest and dividend payments withheld. Factors that will be considered in determining whether backup withholding causes undue hardship include, but are not limited to, the following:

(i) Whether estimated tax payments, and other credits for current tax liabilities, or amounts withheld on employee wages or pensions, in addition to backup withholding, would cause significant over-withholding;

(ii) The payee's health, including the payee's ability to pay foreseeable medical expenses;

(iii) The extent of the payee's reliance on interest and dividend payments to meet necessary living expenses and the existence, if any, of other sources of income;

(iv) Whether other income of the payee is limited or fixed (*e.g.*, social security, pension, and unearned income);

(v) The payee's ability to sell or liquidate stocks, bonds, bank accounts, trust accounts, or other assets, and the consequences of doing so;

(vi) Whether the payee reported and timely paid the most recent year's tax liability, including interest and dividend income; and

(vii) Whether the payee has filed a bankruptcy petition with the United States Bankruptcy Court.

In addition to the above factors, the Internal Revenue Service must conclude that it is unlikely that any payee underreporting will occur again.

(5) *Bona fide dispute.* The Internal Revenue Service may make a determination under this paragraph if there is a dispute between the payee and the Internal Revenue Service on a question of fact or law that is material to a determination under paragraph (g)(1)(i) and, based upon all the facts and circumstances, the Internal Revenue Service finds that the dispute is asserted in good faith by the payee and there is a reasonable basis for the payee's position. See the example provided in paragraph (j)(2)(ii) of this section for an illustration of this provision.

(h) *Requests for determinations*—(1) *In general.* A payee may request a determination under one or more of the provisions of paragraph (g) of this section. Following its review of a request for a determination under paragraph (g) of this section, the Internal Revenue Service will either provide the payee with a written certification as prescribed in paragraph (d) of this section if the evidence presented warrants the requested determination or will provide the payee with a written notice informing him that a determination was not made.

(2) *Determinations made during the notice period.* In general, if a determination is made during the notice period as defined in paragraph (f)(1) of this section, then the payee will not be subject to backup withholding due to a notified payee underreporting with respect to any taxable year for which a determination was made.

(3) *Determinations made after the notice period.* If a determination is made after the notice period, as defined in paragraph (f)(1) of this section, the Internal Revenue Service will provide a notice to payors and brokers, and a certification to the payee as provided in paragraph (d)(1) of this section.

(i) [Reserved]

(j) *Payees filing a joint return*—(1) *In general.* For purposes of section 3406(a)(1)(C), if payee underreporting is found to exist with respect to a joint return filed by a husband and wife, then the provisions of this section shall apply to the payees collectively. As a result, both payees will be subject to backup withholding on accounts in their individual names as well as accounts in their joint names. Either or both payees may satisfy the criteria for a determination that no payee underreporting exists, that the underreporting has been corrected, or that a bona fide dispute exists (as provided in paragraphs (g)(1) (i), (ii), or (iv) of this section). Both payees, however, must satisfy the criteria for a determination that backup withholding will cause or is causing undue hardship (as provided in paragraph (g)(1)(iii) of this section).

(2) *Exceptions*—(i) *Innocent spouse.* A spouse who files a joint return may obtain a determination that withholding should stop or not start with respect to payments made to his or her individual accounts, if the spouse—

(A) Shows that he or she did not underreport income because he or she is an innocent spouse as described in section 6013(e), or

(B) Shows that there is a bona fide dispute as to whether he or she is an innocent spouse and hence did not underreport income.

(ii) *Example.* The provisions of paragraph (j)(2)(i) may be illustrated by the following example:

*Example.* H and W filed a joint return in 1986 on which H failed to include $2,000 of interest income. In 1987, the Internal Revenue Service determined that a payee underreporting exists with respect to H and W for the 1986 tax year. After properly notifying H and W of the underreporting and assessing the tax, the Internal Revenue Service sent notices to payors to begin backup withholding on the joint and individual accounts of H and W and to brokers informing them that H and W are subject to backup withholding under section 3406(a)(1)(C) on their joint and individual accounts. W claims that she is an innocent spouse and requests a determination that she did not underreport interest or dividend income so that her individual accounts will not be subject to backup withholding.

The Internal Revenue Service questions her status as an innocent spouse. If the Internal Revenue Service determines, based upon all the facts and circumstances, that there is a reasonable basis for W's claim to be an innocent spouse and that the claim is made in good faith, W will have a bona fide dispute with the Internal Revenue Service. Consequently, the individual accounts of W will not be subject to further backup withholding due to a notified payee underreporting as provided in paragraph (g)(5) of this section.

The Internal Revenue Service will notify payors to stop backup withholding under section 3406(a)(1)(C) and brokers that W is no longer subject to backup withholding under section 3406(a)(1)(C) on W's individual accounts. Backup withholding will not restart on those accounts unless the Internal Revenue Service ultimately determines that W is not an innocent spouse. In that event the Internal Revenue Service will notify the payors to start backup withholding under section 3406(a)(1)(C) and the brokers that W is subject to backup withholding under section 3406(a)(1)(C) with respect to the individual accounts of W.

(iii) *Divorced or legally separated payee.* A payee who, at the time of the request for a determination under paragraph (g) of this section, is divorced or legally separated under state law may obtain a determination that undue hardship exists (or would exist) under paragraph (g)(1)(iii) of this section with respect to reportable interest and dividend payments made to his or her individual accounts if the divorced or legally separated payee satisfies the

criteria for a determination under paragraph (g)(4) of this section.

(k) *Penalties*—(1) *Failure to withhold.* See A–2 of § 35a.9999–3 for rules relating to penalties applicable to a payor who fails to withhold on reportable interest and dividend payments made to a payee subject to backup withholding.

(2) *False certification*—(i) *Criminal penalty under section 7205(b).* If any individual willfully makes a false certification under section 3406(d) (1) or (2), then that individual shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(ii) *Civil penalty under section 6682*—(A) *In general.* In addition to any criminal penalty provided by law, if any individual makes a statement under section 3406 which results in a decrease in the amounts deducted and withheld under chapter 24 of the Internal Revenue Code and, as of the time the statement was made, there was no reasonable basis for the statement, the individual shall pay a penalty of $500 for the statement. The penalty is due upon notice and demand and pursuant to section 6682 collection is not subject to the deficiency procedures of subchapter B of chapter 63 of the Internal Revenue Code. See section 6682.

(B) *Waiver of penalty*. The payee may obtain a waiver (in whole or part) of the penalty imposed under section 6682(a) and paragraph (k)(2)(ii)(A) of this section if it is established to the satisfaction of the Internal Revenue Service that the taxes imposed under subtitle A of the Internal Revenue Code with respect to the payee for the taxable year in which the false certification was made are equal to or less than the sum of—

(*1*) The credits against taxes allowed by part IV of subchapter A of chapter 1 of the Internal Revenue Code, and

(*2*) The payments of estimated tax which are considered payments on account of such taxes.

(C) *Procedure for seeking a waiver.* To request a waiver under section 6682(b) and paragraph (k)(2)(ii)(B) of this section, the payee must submit to the Internal Revenue Service a written statement with supporting documents to establish all the facts necessary in order to obtain the waiver. The statement must be signed by the person that otherwise would be subject to the penalty imposed by section 6682(a) and paragraph (k)(2)(ii)(A) of this section and must contain a declaration that it is made under penalties of perjury.

(3) *Delay of assessment.* If a payee institutes or maintains a suit with the United States Tax Court primarily to delay assessment and the payee's position is frivolous or groundless, or the payee unreasonably failed to pursue available administrative remedies, the court may award up to $5,000 in damages under section 6673. The damages will be assessed against and collected from the payee in the same manner as the underlying tax.

(l) *Effective Date.* This section is effective until December 31, 1996.

[T.D. 8137, 52 FR 13432, Apr. 23, 1987, as amended at 60 FR 66134, Dec. 21, 1995; 61 FR 11308, Mar. 20, 1996]

### § 35a.9999–0 Effective date.

See § 31.9999–0 of this chapter for applicability dates for §§ 35a.9999–1 through 35a.9999–5.

[T.D. 8734, 62 FR 53494, Oct. 14, 1997]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 35a.9999–0 was added, effective Oct. 14, 1997, through Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was extended until Jan. 1, 2000. By T.D. 8856, 64 FR 73408, Dec. 30, 1999, the effective date was extended until Jan. 1, 2001.

### § 35a.9999–1 Questions and answers concerning the due diligence requirement and the certification requirements in connection with backup withholding and other related issues.

The following questions and answers principally concern the due diligence exception to the penalty on payors of reportable interest or dividend payments for failure to provide the payee's correct taxpayer identification number on certain information returns and the certification requirements in connection with backup withholding under the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369):

IN GENERAL

*Q–1. What payors are subject to the new due diligence requirement with respect to their obligation to provide payees' correct taxpayer identification numbers on information returns?*

*A–1.* Payors of reportable interest or dividend payments are subject to the new due diligence requirement.

*Q–2. What is a reportable interest or dividend payment?*

*A–2.* A reportable interest or dividend payment is a payment of interest, dividends, or patronage dividends that is of a kind, and to a payee, that is subject to information reporting.

IMPOSITION OF PENALTY FOR FAILURE TO PROVIDE A CORRECT TAXPAYER IDENTIFICATION NUMBER

*Q–3. Is a payor subject to a penalty for failure to provide a correct taxpayer identification number on an information return with respect to a reportable interest or dividend payment if the payee has certified, under penalties of perjury, that the taxpayer identification number furnished to the payor is the payee's correct number, the payor provided that number on an information return, and the number is later determined not to be the payee's correct number?*

*A–3.* No. A payor is not subject to a penalty for failure to provide the payee's correct taxpayer identification number on an information return, if the payee has certified, under penalties of perjury, that the taxpayer identification number provided to the payor was his correct number, and the payor included such number on the information return.

*Q–4. Is a payor subject to a penalty for failure to provide a correct taxpayer identification number on an information return if the payee does not certify, under penalties of perjury, that the taypayer identification number provided to the payor is correct, and the number is later determined not to be the payee's correct number?*

*A–4.* A payor is subject to a penalty if the taxpayer identification number of a payee provided on an information return is determined not to be the payee's correct number, unless the payor exercised due diligence in soliciting the payee's correct taxpayer identification number and in furnishing such number on the information return. See A–51 of § 35a.9999–3 for the general rule for the actions that a payor of an account or instrument that is not a pre-1984 account (as defined in A–34 of § 35a.9999–1 and A–20 of § 35a.9999–3) must take to exercise due diligence under section 6676(b).

DUE DILIGENCE DEFINED FOR PRE-1984 ACCOUNTS AND INSTRUMENTS

*Q–5. In order for a payor of a reportable interest or dividend payment to be considered to have exercised due diligence in furnishing the correct taxpayer identification number of a payee with respect to a pre-1984 account or instrument, what actions must the payor take?*

*A–5.* First, by the applicable date provided in A–6, the payor must send a separate mailing by first-class mail to any payee who has not previously certified, under penalties of perjury, that the taxpayer identification number furnished to the payor is the payee's correct number. This mailing must contain a notice that: (1) Informs the payee what a taxpayer identification number is, (2) advises the payee that he must provide a correct taxpayer identification number to the payor, (3) states that if the payee has not furnished a correct taxpayer identification number to the payor the payee may be subject to a $50 penalty and that payments to the payee may be subject to backup withholding starting on January 1, 1984, and (4) advises the payee how to provide a correct taxpayer identification number to the payor. The form of the notice is described in A–7. The payor must also include in the mailing a postage-prepaid reply envelope and a certification form on which the payee may certify, under penalties of perjury, that he is furnishing his correct taxpayer identification number to the payor. The specific requirements for the form of this certification are set forth in A–9 and A–10.

Second, in the case of a pre-1984 account or instrument for which the payee has provided no taxpayer identification number or for which the taxpayer identification number provided is obviously incorrect (*i.e.*, contains an incorrect number of digits), the payor

must have commenced backup withholding on payments made after December 31, 1983.

Third, the payor must use the same care in processing taxpayer identification numbers provided by payees that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

Fourth, the payor must send a mailing in each year subsequent to 1983 to payees who have not by that time provided a taxpayer identification number under penalties of perjury. This mailing need not be sent separately from other mail to the payee. This mailing also need not contain a postage-prepaid reply envelope. The payor is required to process responses to this mailing in the same manner described in the preceding paragraph. See A–7A of this section for the rule for nonseparate annual mailings. See A–56 of this section for the actions that payors who failed to exercise due diligence as described in A–5 and A–6 and the related questions and answers on due diligence under this section on all or part of their pre-1984 accounts or instruments may take to be relieved of the penalty otherwise due under section 6676(b).

*Q–6. In order to be considered to have exercised due diligence in soliciting the payee's taxpayer identification number, by what date must the payor send the separate mailing described in A–5 to a payee who has not previously provided his correct taxpayer identification number to the payor under penalties of perjury?*

*A–6.* The separate mailing must be made on or before December 31, 1983, unless the payor complies with the alternative procedure set forth in the following two paragraphs.

A payor may defer the separate mailing referred to above, *Provided,* That the payor: (1) Sends a separate mailing by December 31, 1983, to all payees who have not furnished a taxpayer identification number to the payor or who have furnished an obviously incorrect number; (2) sends a mailing, which need not be separate from other mail, on or before December 31, 1983, to all other payees who have not previously provided their taxpayer identification numbers to the payor under penalties of perjury; and (3) sends, on or before March 31, 1984, a separate mailing to all payees who have not by that date certified under penalties of perjury that their taxpayer identification numbers provided to the payor are correct.

The separate and nonseparate mailing required in 1983 and the separate mailing required on or before March 31, 1984, must include the notice, certification form, and postage-prepaid reply envelope as required in A–5. Any separate mailing made in 1984 pursuant to the prior paragraph does not replace a 1984 nonseparate mailing that is otherwise required by the fourth paragraph of A–5.

*Q–7. In what form should the payor notify the payee of the information set forth in A–5 and solicit the payee's correct taxpayer identification number, in order to satisfy the due diligence requirement with respect to a pre-1984 account or instrument?*

*A–7.* The notice will satisfy the requirement of A–5 if it is conspicuous and contains language substantially similar to the following:

IMPORTANT NEW TAX INFORMATION

Under the Federal income tax law, you are subject to certain penalties as well as withholding of tax at a 20 percent rate if you have not provided us with your correct social security number or other taxpayer identification number. Please read this notice carefully.

You (as a payee) are required by law to provide us (as payor) with your correct taxpayer identification number. If you are an individual, your taxpayer identification number is your social security number. If you have not provided us with your correct taxpayer identification nunber, you may be subject to a $50 penalty imposed by the Internal Revenue Service. In addition, interest, dividends, and other payments that we make to you may be subject to backup withholding starting on January 1, 1984.

Backup withholding is different from the 10 percent withholding on interest and dividends that was repealed in 1983. If backup withholding applies, a payor is required to withhold 20 percent of interest, dividends, and other payments made to you. Backup withholding is not an additional tax. Rather, the tax liability of persons subject to backup withholding will be reduced by the amount of tax withheld. If withholding results in an overpayment of taxes, a refund may be obtained.

Enclosed is a postage-prepaid reply envelope in which you may return the enclosed form to furnish us your correct name and

taxpayer identification number. Please sign the form and return to us.

SUBSEQUENT YEAR'S MAILING

Q–7A. In order for a payor of reportable interest or dividend payments to be considered to have exercised due diligence in soliciting a taxpayer identification number of a payee with respect to a pre-1984 account or instrument, what information is the payor required to include in the subsequent year's mailing (nonseparate annual mailings) described in the fourth paragraph of A–5 of § 35a.9999–1 to a payee who has not provided the payor with a certification, under penalties of perjury, that his taxpayer identification number is correct?

A–7A. The payor is required to include (1) an appropriately modified copy of the notice described in A–7 of § 35a.9999–1, (2) a Form W–9 or acceptable substitute form for the payee to provide a correct taxpayer identification number, and (3) a reply envelope (self-addressed) for the payee to return the Form W–9 or acceptable substitute form. However, for those subsequent mailings described in A–5 or A–6 made before the 1988 calendar year, the mailings should, but are not required to, contain the reply envelope.

Q–7B. In order to be considered to have exercised due diligence in soliciting the payee's certified taxpayer identification number, by what date must the payor of reportable interest or dividends mail the subsequent year's mailing described in the fourth paragraph of A–5 and in A–7A of this section to a payee of a pre-1984 account who has not certified, under penalties of perjury, that his taxpayer identification number is correct?

A–7B. The payor may send the mailing at any time during each year that a nonseparate annual mailing is required, but in no event later than December 31 of such year. Section 7503 shall apply in determining the time for sending the subsequent year's mailing if December 31 falls on a Saturday, Sunday, or a legal holiday.

*Q–8. In order to be considered to have exercised due diligence, is a payor required to request the payee to return the form certifying that the taxpayer identification number provided to the payor is correct?*

*A–8.* The payor may request the payee to sign and return the form irrespective of whether the taxpayer identification number shown for the payee is the payee's correct taxpayer identification number. Alternatively, the payor may request that the payee return the form only in the event that the taxpayer identification number shown for the payee is incorrect, or if no taxpayer identification number is shown. If the payor uses the alternative instruction described in the preceding sentence, the payor may make suitable changes to the last paragraph of the notice prescribed in A–7.

If, however, the payee does not return the form certifying his taxpayer identification number under penalties of perjury, the payor is required in each subsequent year to request the payee to provide his correct taxpayer identification number under penalties of perjury (until the payee so certifies his taxpayer identification number).

*Q–9. What form may the payee use to certify that the taxpayer identification number provided to the payor is correct?*

*A–9.* The Internal Revenue Service is currently preparing Form W–9 on which a payee may certify his taxpayer identification number under penalties of perjury. Form W–9 will be available in mid October upon request to any Internal Revenue Service district director.

*Q–10 May a payor use a substitute form instead of Form W–9 for a payee to certify, under penalties of perjury, that the taxpayer identification number provided to the payor is correct?*

*A–10.* Yes. A substitute form must include space for the payee to provide his name, address, and taxpayer identification number. The form also must include space for the payee to certify under, penalties of perjury, that he is furnishing his correct taxpayer identification number to the payor. The wording of the certification must be substantially similar to the following: ''Under penalties of perjury, I certify that the number shown on this form is my correct taxpayer identification number.'' If a payor uses a substitute form, the payor must provide either

the Internal Revenue Service's instructions for Form W–9 or the substance of those instructions on or with the substitute form.

A signed copy of the Form 4029 or Form 8812 which contains the payee's name, address, and taxpayer identification number is deemed to be a substitute Form W–9 signed under penalties of perjury with respect to such number. However, the penalties associated with the penalties of perjury statement will not apply with respect to the taxpayer identification number on such form.

*Q–11. In order to satisfy the due diligence requirement for pre-1984 accounts and instruments, is a payor required to send the mailing or mailings described in A–5 and A–6 to a payee who has previously furnished a taxpayer identification number to the payor, but who has not certified under penalties of perjury that the number provided to the payor is his correct taxpayer identification number?*

*A–11.* Yes. A payor must send the mailing or mailings as required in A–5 and A–6 to any payee of a reportable interest or dividend payment who has not previously certified under penalties of perjury that the taxpayer identification number provided to the payor is the payee's correct number.

*Q–12. May a payor satisfy the due diligence requirement by sending the separate mailings described in A–5 and A–6 with other mail the payor sends to the payee?*

*A–12.* No. The separate mailing soliciting a certificate providing the payee's correct taxpayer identification number under penalties of perjury must not include any other communication to the payee. No material may be included in the separate mailing to the payee other than the notice, certification form and instructions, and postage-prepaid reply envelope.

*Q–13. What action must a payor take with respect to accounts opened, or instruments acquired, subsequent to the date on which the payor prepares its list of payees for a mailing required in 1983 but prior to January 1, 1984?*

*A–13.* The payor is required to send the mailing otherwise required to be made by December 31, 1983, to the payees of such accounts and instruments not later than January 31, 1984, unless the payee has previously provided his taxpayer identification number to the payor under penalties of perjury.

*Q–14. If a payor makes no reportable interest or dividend payments to a payee with respect to an account or instrument during 1983, so that the payor is not required to make a 1983 information return with respect to the payee, is the payor nevertheless required to send the mailing or mailings to the payee as provided in A–5 and A–6?*

*A–14.* The payor must *either:* (1) Send the mailing or mailings in the manner and within the time periods provided in A–5 and A–6 or (2) send the separate mailing described in A–5 to the payee not later than October 1 of the year in which a payment to the payee with respect to the account or instrument first becomes reportable, or, if later, within 30 days after such reportable payment occurs. Thus, if payments to the payee aggregate less than $10 in 1983, so that no 1983 information return is required, the payor need not make the mailing or mailings described in A–5 and A–6 within the time period provided in A–6; the payor must, however, make the separate mailing described in A–5 to the payee in the first year that payments to the payee aggregate $10 or more.

*Q–15. If the payor has obtained a certificate, signed under penalties of perjury, setting forth the payee's taxpayer identification number within the applicable time period in A–6, must the payor nevertheless make the mailing or mailings described in A–5 and A–6 to the payee in order to be considered to have exercised due diligence in obtaining the payee's correct taxpayer identification number?*

*A–15.* No. The mailing requirement applies only to a payee from whom the payor has not previously received a taxpayer identification number certified under penalties of perjury.

*Q–16. May a payor obtain the form containing the payee's taxpayer identification number, signed under penalties of perjury, through a solicitation for such certification, in addition to the mailing or mailings required by A–5 and A–6, contained in a regular mailing to the payor's customers?*

*A–16.* Yes. Such a certification may be obtained by a solicitation contained

in a regular business mailing, by a request in person to a payee, or otherwise.

SPECIAL RULES RELATING TO THE DUE DILIGENCE REQUIREMENT FOR PRE-1984 ACCOUNTS AND INSTRUMENTS

*Q–17. Is a payor considered to have exercised due diligence in soliciting the correct taxpayer identification number with respect to pre-1984 accounts and instruments if the payor sends the required mailings to the last known address of the payee?*

*A–17.* Yes.

*Q–18. Is a payor required to send the required mailing or mailings to a payee's last known address in a case where other mailings to that address have been returned to the payor because the address was incorrect and no new address has been provided to the payor?*

*A–18.* No. In such a situation, the payor is required to handle the required mailings in the same manner that he handles other correspondence to the payee.

*Q–19. Is a payor required to send the mailing or mailings to the payee of an account or instrument with respect to which there is currently a ''do not mail'' or a ''stop mail hold'' instruction pursuant to which the payor does not send any mail to the payee?*

*A–19.* No. A payor must, however, handle all required mailings in the same manner that the payor handles other correspondence with the payee.

*Q–20. Is a payor required to send mailings to all payees listed on a joint account or jointly held instrument?*

*A–20.* No. A payor is required to send mailings only to the first person listed on an account or instrument because the taxpayer indentification number of that person is the one required to be provided on an information return.

*Q–21. If a payor has a Form W–6 or W–7 exemption certificate, relating to the now-repealed 10 percent withholding on interest and dividends, signed by a payee, must the payor send the mailings to the payee?*

*A–21.* Generally, yes. The Internal Revenue Service Forms W–6 and W–7 did not contain a certification, under penalties of perjury, that the taxpayer identification number furnished by the payee was correct. If, however, the payor utilized a substitute Form W–6 or W–7 on which a payee certified under penalties of perjury in the manner provided on Form W–9 or in A–10 that the taxpayer identification number furnished to the payor was the payee's correct number, the payor is not required to send mailings to the payee.

*Q–22. Is a payor of reportable interest or dividends required to send mailings to a corporation or other exempt recipient?*

*A–22.* No. A payment of interest to a corporation or other exempt recipient described in §1.6049–4(c)(1)(ii) of the Income Tax Regulations generally is not subject to information reporting. Thus, mailings to such recipients are not required. Although a payment of dividends or patronage dividends to a corporation and certain other exempt recipients generally is subject to information reporting, payors are not required to send mailings to persons described in §31.3452(c)–1 (b) through (p) of the Income Tax Regulations in order to satisfy the due diligence requirement. A payee shall be considered an exempt recipient for the purpose of this rule if (1) the payee could be treated as an exempt recipient without the requirement of filing an exemption certificate under §31.3452(c)–1 (b) through (p) of the Income Tax Regulations or (2) the payee has provided the payor with a certificate, signed under penalties of perjury, stating that the payee is an exempt recipient described in one or more paragraphs of §31.3452(c)–1 (b) through (p) of the Income Tax Regulations. Form W–9 may be used for the purpose of making this certification. Alternatively, the payor may provide the payee with a substitute form for such certification, provided that the form conforms generally to Form W–9 and the instructions related to exempt recipients.

*Q–23. Is a payor required to send mailings to a payee with respect to an account established under the Uniform Gift to Minors Act?*

*A–23.* Yes. The law requires that the social security number of the minor be provided to the payor with respect to accounts established under the Uniform Gift to Minors Act. If the minor does not have a social security number, the minor may obtain one by filing a

Form SS–5 with a Social Security Administration Office. The form certifying that the minor's social security number provided is correct may be signed by the custodian of the Uniform Gift to Minors Act account.

*Q–24. Is a payor required to send mailings to a payee where the account is held as a club account, bowling league account, recreation account, or other informal account?*

*A–24.* Yes. The law requires that the taxpayer identification number of the organization be provided to the payor. If the club, league, or other informal association does not have an employer identification number, one may be obtained by filing a Form SS–4 with an Internal Revenue Service Center.

*Q–25. Must the payee sign and return to the payor the form certifying the payee's correct taxpayer identification number under penalties of perjury in order for the payor to satisy the due diligence requirement?*

*A–25.* No. The determination of whether the payor exercised due diligence in soliciting the payee's correct taxpayer identification number does not depend upon whether the payee signs and returns the form certifying his correct taxpayer identification number. If, however, the payee does not provide his taxpayer identification number to the payor under penalties of perjury, the payor is required to continue to solicit a certified taxpayer identification number from the payee in each year subsequent to 1983 until the payee has provided a certified taxpayer identification number. Such subsequent annual solicitations need not be made, however, in a separate mailing.

REQUIREMENT OF BACKUP WITHHOLDING

*Q–26. If a payee does not provide a taxpayer identification number to the payor what action is a payor required to take?*

*A–26.* Starting January 1, 1984, the payor is required to commence backup withholding with respect to reportable payments to payees who have not provided a taxpayer identification number to the payor. If an individual payee does not have a social security number, he may obtain one by filing Form SS–5 with a Social Security Administration Office. Other payees may obtain an employer identification number by filing Form SS–4 with an Internal Revenue Service Center.

*Q–27. Is a payor of reportable interest or dividends required to impose backup withholding with respect to payments made after December 31, 1983, to a payee of an account that existed, or an instrument that was held by the payee, on December 31, 1983, if the payee has not provided the payor with a written certification under penalties of perjury that the taxpayer identification number furnished is correct?*

*A–27.* No. A payor of reportable interest or dividends that are paid with respect to an account or instrument existing on December 31, 1983, is not required to impose backup withholding starting on January 1, 1984, simply because the payee has failed to certify his taxpayer identification number under penalties of perjury.

*Q–28. Is a payor required to impose backup withholding with respect to a reportable interest or dividend payment made on or after January 1, 1984, if the taxpayer identification number furnished by the payee does not contain the proper number of digits?*

*A–28.* Yes. A payor shall treat the payee as having failed to furnish a taxpayer identification number if the number provided does not contain the proper number of digits. The proper number of digits is nine for both the social security number and the employer identification number.

*Q–29. Is a payor of reportable interest or dividend payments required to impose backup withholding on a payment made to an exempt recipient?*

*A–29.* No. A payor is not required to withhold on a payment made to a person described in §31.3452(c)–1 (b) through (p) of the Income Tax Regulations. A payee shall be considered an exempt recipient for purposes of this rule if (1) he may be treated as an exempt recipient without the requirement of filing an exemption certificate under the cited regulation or (2) the payee has provided the payor with a certificate, signed under penalties of perjury, stating that a payee is an exempt recipient described in one or more paragraphs of the cited regulation. Form W–9 may be used for the purpose of making this certification. Alternatively, the payor may provide

the payee with a substitute form for such certification, provided that the substitute form conforms generally to Form W–9 and the instructions related to exempt recipients. A payor may in any case require an exempt recipient not otherwise required to file a certificate as to his status as an exempt recipient to file such a certificate, and may treat an exempt recipient who fails to file such a certificate as a person who is not exempt. A payor may require a separate certificate for each account or instrument maintained by an exempt recipient. A payor may require that any certification that a payee is an exempt recipient be made only on the substitute form provided by the payor; in that case, the payor must comply with the pertinent portions of § 31.3452(f)–1(b)(2) of the Income Tax Regulations relating to the procedures that a payor must follow upon receipt of an unacceptable form.

*Q–30. Is a payor required to impose backup withholding on a pension or annuity distribution made on or after January 1, 1984, if the payee has not provided his taxpayer identification number to the payor?*

*A–30.* If pension withholding under section 3405 applies to a pension or annuity distribution and the payee does not make an election not to have pension withholding apply under that section, backup withholding does not apply. If, however, the payee makes such election under section 3405 or pension withholding does not otherwise apply, and the payee does not provide his taxpayer identification number to the payor (or the taxpayer identification number provided is obviously incorrect), the payor is required to withhold 20 percent of any payment to the payee to which section 6041 applies, unless the conditions of the following paragraph are satisfied.

If the annual distributions to a payee total $5,400 or less (in which case withholding under section 3405 generally is not required), and if the payor has no social security number for the payee (or the social security number provided is obviously incorrect), the payor shall not impose backup withholding until the first payment made after June 30, 1984. By that date, the payee will have been able to obtain a social security number and provide it to the payor, in which case no amounts will be withheld.

*Q–31. In determining whether a payee has failed to provide a taxpayer identification number with respect to an account that was in existence or an instrument held on December 31, 1983, so that backup withholding is imposed starting January 1, 1984, within what period of time just a taxpayer identification number provided by a payee be treated as having been received?*

*A–31.* A payor must process a taxpayer identification number within 30 days after the payor receives the taxpayer identification number from the payee. Thus, for example, if a payor has no taxpayer identification number for a payee, and the payee provides his taxpayer identification number to the payor on December 15, 1983, the payor must process the number not later than January 14, 1984. As a result, the payor would be authorized to commence backup withholding with respect to payments made to the payee commencing January 1, 1984, but backup withholding must cease by January 14, 1984. The payor also is authorized to treat the taxpayer identification number as having been received at any time after it is provided, so that backup withholding need not be commenced in the circumstance outlined above.

CERTIFICATION REQUIREMENTS FOR ACCOUNTS OPENED AND INSTRUMENTS ACQUIRED AFTER 1983

*Q–32. What actions must a payor take with respect to accounts that are opened or instruments acquired on or after January 1, 1984, in order to avoid imposing backup withholding on reportable interest or dividend payments?*

*A–32.* In order to avoid imposing backup withholding with respect to accounts that are opened or instruments acquired on or after January 1, 1984, a payor of reportable interest or dividend payments must obtain a certification from the payee, signed under penalties of perjury, (1) that the taxpayer identification number provided to the payor is the payee's correct number and (2) that the payee is not subject to backup withholding due to notified payee

underreporting. The form for these certifications is prescribed in A–35 and A–36.

*Q–33. What payees can make the certification that they are not subject to backup withholding due to notified payee underreporting?*

*A–33.* Any payee who has not been notified that he is subject to backup withholding as a result of notified payee underreporting can make the certification under the law. In addition, a payee who was subject to backup withholding due to notified payee underreporting may certify that he is not subject to backup withholding due to notified payee underreporting if the Service has provided the payee with written certification that backup withholding due to notified payee underreporting has terminated.

*Q–34. Under what circumstances will an account be considered to have been in existence, or an instrument be considered to have been held, before January 1, 1984 (a ''pre-1984 account'')?*

*A–34.* An account that is in existence before January 1, 1984, will be considered a pre-1984 account, irrespective of whether additional deposits are made to the account on or after January 1, 1984. In addition, if shares of a corporation are held before January 1, 1984 (or considered held before such date by operation of this rule), and additional shares are received by the holder, irrespective of whether such shares are received by reason of a stock dividend, as a result of an infusion of new cash, or otherwise, the new shares received will be considered a pre-1984 account, in the discretion of the payor. Where an account is opened, or an instrument is acquired automatically on the maturity or termination of an account that was in existence or instrument held before January 1, 1984 (or considered to have been in existence or held before such date by operation of this rule), without the participation of the payee, the new account or instrument will be considered a pre-1984 account, in the discretion of the payor. For purposes of the preceding sentence, a payee shall not be considered to have participated in the acquisition of the new account or instrument solely by reason of the failure to exercise a right to withdraw funds on maturity or termination of the old account or instrument. Where a discount instrument with a maturity not exceeding one year (a ''short-term instrument'') is acquired upon the maturity of a short-term instrument, the participation of the payee in the acquisition of the newly-acquired instrument shall not be taken into account, and the new instrument shall be considered to have been acquired automatically, with respect to instruments acquired prior to January 1, 1985. In the case of insurance policies in effect on December 31, 1983, the election of a dividend accumulation option pursuant to which interest is paid, or the creation of an ''account'' in which proceeds of a policy are held for the policy beneficiary, may, in the payor's discretion, be treated as a pre-1984 account.

*Q–35. What form may a payee of reportable interest or dividends use to certify under penalties of perjury, that the taxpayer identification number provided to the payor is correct and that he is not subject to backup withhholding due to notified payee underreporting?*

*A–35.* A payee may use Internal Revenue Service Form W–9 for both required certifications.

*Q–36. May a payor of reportable interest or dividends or a broker provide a substitute form for a payee to certify under penalties of perjury that his taxpayer identification number is correct and that he is not subject to backup withholding due to notified payee underreporting?*

*A–36.* Yes. A payor or broker may use a substitute form provided the language of the certification is substantially similar to the following: ''Under penalties of perjury, I certify (1) that the number shown on this form is my correct taxpayer identification number and (2) that I am not subject to backup withholding either because I have not been notified that I am subject to backup withholding as a result of a failure to report all interest or dividends, or the Internal Revenue Service has notified me that I am no longer subject to backup withholding.'' A payor or broker may use separate substitute forms to have the payee certify under penalties of perjury that (i) his taxpayer identification number is correct, provided the language is substantially similar to the certification in A–10 and (ii) he is not subject to backup

withholding due to notified payee underreporting provided the language is substantially similar to clause (2) of the preceding sentence. A payor or broker also may incorporate both required certifications into other business forms, customarily used, such as account signature cards, provided the required certifications are clearly set forth.

If a payor or broker uses a single substitute form for both certifications, which does not follow the Form W–9 format, the form must contain an instruction to the payee that he must strike out the language certifying that the payee is not subject to backup withholding due to notified payee underreporting if he has been notified that he is subject to backup withholding due to notified payee underreporting, and the payee has not received a notice from the Internal Revenue Service advising him that backup withholding has terminated. If the payor or broker requires that the payee make the certification on a substitute form provided by the payor, the payor or broker may refuse to accept certifications (including certifications provided on Form W–9) that are not made on the form or forms provided by the payor or broker. If the payor or broker refuses to accept the form provided by the payee, the payor or broker then must comply with the pertinent portions of § 31.3452(f)–1(b)(2) of the Income Tax Regulations related to the procedures that a payor must follow upon receipt of an unacceptable form.

*Q–37. With respect to reportable interest or dividends that are paid on an account opened or an instrument acquired on or after January 1, 1984, if a payee fails to certify, under penalties of perjury, (1) that the number furnished is his correct taxpayer identification number, and (2) that he is not subject to backup withholding due to notified payee underreporting, what action is a payor required to take?*

*A–37.* A payor is required to withhold 20 percent of any reportable interest or dividend payment on such an account or instrument if either of the certifications specified is not provided. See A–4 of § 35a.9999–1 and the answers under § 35a.9999–3 beginning with A–51 for the actions that a payor of an account or instrument that is not a pre-1984 account must take to exercise due diligence and thereby avoid a penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number.

*Q–38. Is a payor ever required to withhold more than 20 percent of a payment?*

*A–38.* No. Irrespective of how many conditions exist which cause backup withholding to apply, a payor is required to withhold only 20 percent of a payment until all of the conditions no longer apply.

*Q–39. Is a payor required to send a notice to the payee when the payor commences backup withholding?*

*A–39.* In general, no. However, a payor of a readily tradable instrument that is not acquired directly from the payor must notify the payee that backup withholding has commenced, or will commence. The notice must be sent to the payee not later than 15 days after the payor makes the first payment to the payee that is subject to backup withholding. The notice must explain the steps the payee must take to stop backup withholding. The text of this notice will be provided in a regulation to be issued in the near future.

*Q–40. Do special rules apply to payments made with respect to readily tradable instruments?*

*A–40.* Yes. Special backup withholding rules apply with regard to readily tradable instruments when (1) the payee did not acquire the instrument directly from the issuer of the instrument and (2) a broker does not hold the instrument as nominee for the payee (*i.e.*, in street name). Under the special rules, a payor is required to impose backup withholding only if (1) the payor does not receive the payee's taxpayer identification number, or (2) the payor is notified by a broker that the payee failed to make the required certifications (described in A–32) to the broker and the payee did not make the certifications to the payor. When the payee acquires the instrument directly from the issuer of the instrument or when a broker holds the instrument as nominee for the payee, the rules applicable to payors apply.

*Q–41. What rules apply to brokers?*

*A–41.* When a broker is a payor (*i.e.*, the broker holds the instrument in street name), the regular rules for payors apply. If a broker is not the payor with respect to an instrument, different rules apply to the broker depending on whether the payee's account with the broker is treated as a ''post-1983 account.''

A ''post-1983 account'' is any account other than an account established prior to January 1, 1984, through which, during 1983, the broker either bought or sold an instrument for the payee or acted as nominee for the payee. (Both the determinations of (1) whether an account or instrument is treated as a post-1983 account of the payor for purposes of the payor's due diligence requirements (see A–34) and (2) when backup withholding applies to an instrument are made without regard to whether the instrument is acquired through a post-1983 account of a broker.)

When a readily tradable instrument is acquired through a ''post-1983 account'' and the broker is not the payor of the instrument, the broker must (1) obtain the certifications (described in A–32) from the payee but only once with respect to each account, (2) furnish the payee's taxpayer identification number to the payor, and (3) notify the payor to impose backup withholding if the payee failed to make either of the required certifications to the broker. The broker is required to give the information required by clauses (2) and (3) of the prior sentence to the payor in connection with the transfer instructions for the acquisition. The notice under clause (3) shall state that: ''The [named payee] is subject to backup withholding under sections 3406(a)(1)(A), 3406(a)(1)(B), 3406(a)(1)(C), or 3406(a)(1)(D) of the Internal Revenue Code [circle whichever section applies].'' A magnetic media, machine readable, or other similar notice substantially to the same effect also may be employed. After the transfer instructions are transmitted, the broker is not required to seek a missing taxpayer identification number or missing certification or to give any further notices with regard to the acquisition of the instrument.

When a readily tradable instrument is acquired through an account that is not a ''post-1983 account'' and the broker is not the payor of the instrument, the broker's sole responsibility is to furnish the payee's taxpayer identification number to the payor (unless the broker has been notified that the payee is subject to backup withholding under section 3406 (a)(1)(B) or (a)(1)(C) of the Internal Revenue Code).

WINDOW TRANSACTIONS PRE-1984 INSTRUMENTS

*Q–42. Is a payor required to exercise due diligence in soliciting the taxpayer identification number of a payee with respect to the following payments (''window transactions''): Redemptions of United States savings bonds, and payments upon interest coupons, commercial paper, and banker's acceptances?*

*A–42.* No. The due diligence requirements do not apply to such payments. Thus, the certification requirements set forth in A–32 do not apply to such transactions. A payor is required to withhold 20 percent with respect to such payments only if the payee does not provide his taxpayer identification number to the payor. Payors remain obligated, however, to make an information return with respect to window transactions.

Q–42A. Is a payor on a pre-1984 instrument in a window transaction subject to a penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number with respect to that transaction?

A–42A. No. However, see A–42 in this section which provides, in part, that a payor is required to backup withhold if a payee fails to provide a taxpayer identification number (*i.e.*, there is a missing taxpayer identification number). See A–66 of § 35a.9999–3 for the actions that payors of post-1983 window transactions, as defined in A–42B, must take to avoid a penalty under section 6676(b).

POST-1983 INSTRUMENTS

Q–42B. Is a payor required to treat an instrument that is negotiated in a window transaction (as defined in A–42 of § 35a.9999–1 and A–9 of § 35a.9999–2) after

December 23, 1987, as an instrument acquired after December 31, 1983?

A–42B. Yes. A window transaction occurring on or after December 23, 1987, will be considered made with respect to an instrument acquired after December 31, 1983, regardless of when the instrument was issued by the payor or acquired by the payee. See A–66 of § 35a.9999–3 for the actions that payors must take to avoid a penalty under section 6676(b) with respect to a post-1983 window transaction.

*Q–43. Will a payor be allowed to furnish an information return to the payee with respect to a window transaction at the time the obligation or instrument is presented?*

*A–43.* Yes. A payor may furnish an information return to the payee at the time of the transaction or any time prior to January 31 of the year following the calendar year in which the transaction occurs. In general, however, the payor must provide information returns with respect to window transactions to the Internal Revenue Service on magnetic tape, in accordance with section 6011(e)(2) of the Internal Revenue Code, effective for transactions after December 31, 1983.

SEPARATE FORM 1099

*Q–44. Is a payor of interest, dividends, or patronage dividends paid in 1983 required to send a separate official Form 1099 to a payee?*

A–44. No. A payor of interest, dividends, or patronage dividends paid in 1983 is not required to send a separate official Form 1099 to a payee. A payor may satisfy his obligation to furnish the required statement to the recipient by sending the statement with other business correspondence to the payee, such as a monthly statement.

*Q–45. Is a payor of interest, dividends, or patronage dividends paid after January 1, 1984, required to send a separate official Form 1099 to a payee?*

*A–45.* Yes. For payments made in 1984 and subsequent years, a payor is required to provide an official Form 1099 to a payee either in a separate mailing or in person. Payors also may use a substitute Form 1099 which contains provisions substantially similar to those of the prescribed form if the payor complies with all revenue procedures relating to substitute Form 1099 in effect at the time.

*Q–46. Is a payee required to attach Form 1099 to his tax return?*

*A–46.* No.

MISCELLANEOUS

*Q–47. In what manner is a payor required to remit to the Internal Revenue Service amounts withheld from any reportable payment?*

*A–47.* A payor must deposit amounts withheld under the backup withholding provisions with a Federal Reserve Bank or an authorized financial institution in accordance with the deposit rules of § 31.6302(c)–1(a)(1)(i) of the Income Tax Regulations that apply to an employer with respect to employment taxes. The payor of a reportable payment may elect, however, in accordance with the instructions provided with Form 941, to deposit such amounts separately from social security taxes and income tax withheld from wages. Thus, a payor may treat amounts withheld under section 3406 separately from amounts withheld from wages for purposes of determining when to remit the withheld amounts from any reportable payment. If, however, the payor elects to aggregate the amount withheld from wages with the amounts withheld under section 3406, the payor may do so. Regardless of the manner in which the payor elects to treat the withheld amounts for purposes of determining the time within which such amounts are required to be deposited, a payor must report the amounts withheld under section 3406 on the same Form 941 that the payor uses to report the employment taxes deposited.

*Q–48. May a payor refuse to open an account for, or issue an instrument to a person on or after January 1, 1984, if the person fails to furnish his taxpayer identification number to the payor under penalties of perjury?*

*A–48.* Yes. If the payor refuses to open an account or issue an instrument because the person fails to provide his taxpayer identification number under penalties of perjury, the payor will not be in violation of the Internal Revenue Code. If, however, the payor allows a person who has not provided his taxpayer identification number under penalties of perjury to open an account or

acquire an instrument, the payor is required to impose backup withholding with respect to any interest or dividend payments thereafter made with respect to such account or instrument (unless the payee thereafter provides his taxpayer identification number certified under penalties of perjury). The payor is not permitted, however, to refuse to open an account or to issue an instrument if the payee fails to certify under penalties of perjury, that the payee is not subject to backup withholding due to notified payee underreporting. See A–4 of § 35a.9999–1 and the answers under § 35a.9999–3 beginning with A–51 for the actions that a payor of an account or instrument that is not a pre-1984 account or instrument must take to exercise due diligence and thereby avoid a penalty under section 6676(b) or filing an information return with a missing or an incorrect taxpayer identification number.

*Q–49. May a payor treat a certificate respecting a taxpayer identification number as valid if it is signed by a person other than the payee?*

*A–49.* In certain instances, yes. A certificate may be signed by any person who, under the pertinent portions of sections 6061, 6062, 6063, and 6065 of the Internal Revenue Code and the regulations thereunder, is authorized to sign a declaration under penalties of perjury on behalf of the payee.

*Q–50. What procedures must a payor follow in order to demonstrate that it has exercised due diligence in furnishing the correct taxpayer identification number of a payee, as required in A–5?*

*A–50.* A payor is not required to retain a copy of the communication sent to each individual payee or to prove that the communication was sent to a particular payee. Instead, payors must establish the existence of procedures that are reasonably calculated to insure that each person required to receive a mailing as prescribed in A–5, in fact received such mailing, and that the payor exercised reasonable care in processing responses to such mailings.

SPECIAL RULES FOR ACCOUNTS, INSTRUMENTS AND TRANSACTIONS OF FOREIGN PERSONS

*Q–51. Is a payor required to send the mailing or mailings described in A–5 and A–6 to foreign persons?*

*A–51.* Generally no. A payor is required to send the mailing or mailings described in A–5 and A–6 to any payee to whom the payor makes a payment that is subject to information reporting. Generally, a payment of interest to a foreign person is not subject to information reporting. See §1.6049–5 (b) (2) and (3) of the Income tax Regulations for the procedures to determine whether a payee of interest is a foreign person. See § 1.6042–3(b) (1), 2, and (3) and § 1.6044–3(c) of the Income Tax Regulations concerning exceptions from the information reporting requirements for payments of dividends and patronage dividends by and to certain foreign persons.

*Q–52. Is a payor required to send the mailing or mailings described in A–5 and A–6 to foreign persons with respect to pre-1984 accounts and instruments if payments on those accounts and instruments would not have been reportable payments but for the fact that the foreign person failed to provide the penalty of perjury statement described in § 1.6049–5(b)(2)(iv) of the Income Tax Regulations?*

*A–52.* A payor need not send the mailing or mailings described in A–5 and A–6 to a payee who has not previously provided the penalty of perjury statement described in § 1.6049–5(b)(2)(iv) of the Income Tax Regulations if (1) the payor sends a separate mailing to the payee on or before December 31, 1983, requesting the required penalty of perjury statement and (2) the payor has evidence in its records that the payee is a foreign person (provided that the payor has no actual knowledge that such evidence is false). If the payor has sent a nonseparate mailing on or before December 31, 1983, requesting the required penalty of perjury statement, the payor may send the separate mailing referred to in clause (1) on or before March 31, 1984. The separate mailing, whether sent in 1983 or 1984, must be by first-class mail, or by airmail if sent to

a foreign address, and must contain a notice describing the penalty of perjury statement set forth in §1.6049–5(b)(2)(iv) and advising the payee that backup withholding may commence if the statement is not provided. The payor also must provide a reply envelope and a form on which the payee may make the statement described in §1.6049–5(b)(2)(iv) under penalties of perjury. Neither the separate nor nonseparate mailing is required if the payor has received the required penalty of perjury statement from the payee.

The rules of A–18 and A–19 relating to a ''do not mail'' or ''stop mail hold'' instruction and to payees for whom the payor has no address, shall apply. The other evidence referred to in clause (2) above on which the payor may rely for treating a payee as a foreign person includes a written statement from the payee that he is neither a resident nor a citizen of the United States or an affidavit from an employee of the payor stating that he knows that, or the payee has represented orally that, he is a foreign person. The mere fact that the payee has provided an address outside the United States is insufficient evidence to establish that the payee is a foreign person for this purpose.

*Q–53. Is a payor required to commence backup withholding on January 1, 1984, on payments with respect to accounts and instruments described in A–52 if the foreign person failed to provide the penalty of perjury statement described in §1.6049–5(b)(2)(iv) of the Income Tax Regulations?*

*A–53.* The payor need not commence backup withholding with respect to such payments made before July 1, 1984, provided that the payor (1) made the separate mailing described in A–52 before December 31, 1983, or has made the nonseparate mailing described in A–52 before December 31, 1983, and sends a separate mailing to those payees who have not provided the required statement by March 31, 1984, and (2) has in its records the evidence described in A–52 that the payee is a foreign person.

*Q–54. Do the backup withholding provisions apply to payments of interest within the United States by a payor that is an international organization or by a person acting in its capacity as a paying agent for such organization?*

*A–54.* No, provided the international organization is in organization of which the United States is a member and which enjoys immunity or exemption from any liability or obligation to pay, withhold, or collect tax pursuant to an international agreement having full force and effect in the United States.

*Q–55. Is a broker required to impose backup withholding with respect to transactions effected for pre-1984 accounts if the customer is an exempt foreign person who fails to provide the broker with the penalty of perjury statement described in §1.6045–1(g)(1) of the Income Tax Regulations?*

*A–55.* With respect to such transactions effected before July 1, 1984, a broker is not required to impose backup withholding if (1) the broker sends a separate mailing to the customer on or before December 31, 1983, requesting the penalty of perjury statement described in §1.6045–1(g)(1) of the Income Tax Regulations and (2) the broker has evidence in his records that the customer is a foreign person (provided that the broker has no actual knowledge that such evidence is false). If the payor sent a nonseparate mailing on or before December 31, 1983, requesting the required penalty of perjury statement, the payor may send the separate mailing on or before March 31, 1984. The separate mailing, whether made in 1983 or 1984, must be by first-class mail, or by airmail if sent to a foreign address, and must contain a notice describing the required penalty of perjury statement and advising the customer that backup withholding may commence if the statement is not provided. The broker must also include in the mailing a reply envelope and provide a form on which the customer may make the required penalty of perjury statement. Neither the separate nor nonseparate mailing is required if the payor has received the penalty of perjury statement from the customer.

The rules of A–18 and A–19 relating to ''do not mail'' or a ''stop mail hold'' instructions, and to payees for whom the payor has no address shall apply. The other evidence referred in clause (1) above on which the broker may rely for treating a customer as as foreign person may include a written statement

from the customer that he is neither a resident nor a citizen of the United States or an affidavit from an employee of the broker stating that he knows that, or the customer has orally represented that, he is a foreign person. The mere fact that the customer has provided an address outside the United States is insufficient evidence to establish that the customer is a foreign person for this purpose.

NONASSESSMENT OF THE PENALTY BY ADMINISTRATIVE DISCRETION

Q–56. Is a payor of a pre-1984 account or instument who did not undertake the mailings in accordance with A–5 and A–6 and the related questions and answers on due diligence under this section liable for the penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number for all years in which the payor did not have a certified Form W–9 or acceptable substitute form from a payee?

*A–56.* Yes. The payor is liable for the penalty under section 6676(b) for each year the payor files an information return with a missing or an incorrect taxpayer identification number for a pre-1984 account or instrument if the payor has not exercised due diligence as described in A–5 and A–6 and in the related questions and answers on due diligence under this section or obtained a certified taxpayer identification number from the payee. However, in its administrative discretion the Internal Revenue Service will not impose the penalty on a payor for an information return filed for calendar years after 1987 if the payor makes or has made a separate mailing of the type described in A–5 (as applicable under such Q and A) on or before June 30, 1988, and makes or has made the nonseparate mailing described in A–5 (as applicable under such Q and A) in each year subsequent to the year of the separate mailing claimed as the basis for administrative relief. Such separate and nonseparate mailings must be made with respect to all pre-1984 accounts or instruments of payees to whom the payor will make a reportable payment in 1988 or a subsequent calendar year if such payees have not previously certified, under penalties of perjury, that the taxpayer identification number furnished to the payor is the payee's correct taxpayer identification number or established the payee's foreign status (under §1.6049–5(b)(2)(iv)) with respect to interest payments or under Q and A 36 of §35a.9999–3 with respect to dividend payments). If a reportable payment will not be made to a pre-1984 account or instrument in 1988, the mailing with respect to the account or instrument may be made, in the discretion of the payor, by (1) June 30, 1988, or (2) the later of October 1 of the calendar year in which the payment to the account or instrument is subsequently reportable or within 30 days after such reportable payment occurs.

A payor will not be ineligible for administrative relief under this Q/A–56 with respect to a calendar year (for those accounts for which mailings were made as described in this A–56) due to a failure to make a mailing with respect to a *de minimis* number of accounts. A *de minimis* number of accounts is the lesser of 5,000 accounts or one percent (or less) of the total number of accounts for which a mailing should have been made under this Q/A–56. In addition, a payor will not be ineligible for administrative relief with respect to a calendar year (for those accounts for which mailings were made as described in this A–56) due to an inadvertent failure to make a mailing for a few accounts that could not be located using reasonable care.

In its administrative discretion, the Internal Revenue Service will not impose the penalty under section 6676(b) on those *de minimis* accounts or on those accounts that could not be located using reasonable care in any calendar year for which a payor undertakes a mailing, as described in Q–5 in this section, with respect to *all* such accounts.

The rules described in A–5 and the related questions and answers on due diligence under this section shall apply, to the extent not inconsistent with this Q and A 56, as shall the rules described in A–8, A–9, A–10, A–11, A–12, A–14, A–15, and A–16. Further, the special rules in A–17, A–18, A–19, A–20, A–21, A–22, A–23, A–24, and A–25 also shall apply to the mailing described in A–56 of this section.

In order to receive administrative relief each year, a payor must make a written statement, under penalties of perjury, affirmatively showing to the satisfaction of the district director or the director of the Internal Revenue Service Center that the person otherwise liable for such penalty fulfilled the requirements of this paragraph. A payor should make the request from the Internal Revenue Service ninety days before the due date of the Form 8210. A payor will remain liable for any applicable penalties under section 6676(b) for years prior to 1988.

[T.D. 7916, 48 FR 45362, Oct. 4, 1983, as amended by T.D. 7922, 48 FR 53111, Nov. 25, 1983; T.D. 8163, 52 FR 44873, Nov. 23, 1987; T.D. 8248, 54 FR 14350, Apr. 11, 1989]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 35a.9999–1 was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000. By T.D. 8856, 64 FR 73408, Dec. 30, 1999, the effective date was delayed until Jan. 1, 2001.

### § 35a.9999–2 Questions and answers concerning due diligence and issues in connection with backup withholding.

The following questions and answers principally concern the backup withholding requirement with respect to reportable payments and the due diligence exception to the penalty on payors of reportable interest and dividend payments for failure to provide a payee's correct taxpayer identification number on certain information returns. These requirements are issued under the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369):

DUE DILIGENCE

*Q–1. If a payor of reportable interest or dividends does not send the mailing or mailings described in A–5 and A–6 of § 35a.9999–1 of the Temporary Employment Tax Regulations, issued under the Interest and Dividend Tax Compliance Act of 1983, T.D. 7916 (''§ 35a.9999–1''), to all payees who have not certified under penalties of perjury that their taxpayer identification numbers are correct, will a payor be considered to have exercised due diligence with respect to a payee to whom the payor sends the required mailing or mailings?*

*A–1.* Yes. Due diligence applies on a payee-by-payee basis. For example, if a payor sends the separate mailing described in A–5 of § 35a.9999–1 by December 31, 1983, only to certain payees, the payor will be considered to have exercised due diligence with respect to the payees to whom the mailing was sent. However, the payor will not be considered to have exercised due diligence with respect to those payees to whom the payor did not send the required mailing or mailings.

A penalty for failure to provide a correct taxpayer identification number will not be imposed merely because the payor fails to send the required mailing or mailings. Rather, a penalty will be imposed only in the case of an information return filed by a payor of reportable interest or dividends if the required mailing or mailings were not sent to the payee and the payor fails to include a taxpayer identification number or includes an incorrect number on the return filed with respect to the payee.

*Q–2. Does the due diligence standard apply to reportable payments other than reportable interest or dividends?*

*A–2.* No. The due diligence standard does not apply to payments reportable under sections 6041, 6041A(a), 6045, or 6050A. Thus, payors of these other reportable payments are not required to send the mailings described in A–5 and A–6 of § 35a.9999–1.

*Q–3. Do the rules of section 7503 of the Internal Revenue Code, regarding the time for performance of an act where the last day to perform the act falls on Saturday, Sunday, or a legal holiday, apply to the time limits for the mailings described in A–5, A–6, A–52, A–53, and A–55 of § 35a.9999–1?*

*A–3.* Yes. For example, a mailing that must be sent on or before Saturday, December 31, 1983, will be considered timely if sent on or before Tuesday, January 3, 1984.

*Q–4. Are trustees, custodians, or other fiduciaries subject to the due diligence standard?*

*A–4.* The due diligence standard does not apply to a trustee, custodian, or other fiduciary, unless such person is a

payor of reportable interest or dividends. A trustee, custodian, or other fiduciary is not a payor of reportable interest of dividends simply because the trustee, custodian, or fiduciary receives a payment of reportable interest or dividends. If a trust is considered a payor of reportable interest or dividends under A–20, below, however, the due diligence standard applies.

*Q–5. Is a payor required to send the mailings described in A–5 and A–6 of § 35a.9999–1 by first-class mail, if it is the practice of the payor not to send correspondence to the payee by first-class mail, but rather to deliver personally, or to use intra-office mail to communicate with the payee?*

*A–5.* No. A payor may send the mailing or mailings by first-class mail, by personal delivery, or by intra-office mail, provided that the mailing or mailings are delivered by the same method used by the payor in sending account activity and balance information and other correspondence to the payee.

*Q–6. Must a payor affix postage to the return envelope to satisfy the requirement of including a postage-prepaid reply envelope in the mailings described in A–5 and A–6 of § 35a.9999–1?*

*A–6.* The requirement that a payor must include a postage-prepaid reply envelope will be satisfied by the use of a ''postage-prepaid envelope,'' a ''business reply mail envelope,'' or by affixing the required postage to a self-addressed reply envelope. (A ''business reply mail envelope'' involves an arrangement in which postage is charged only when a customer returns the reply envelope.)

*Q–7. Must a payor who sends the mailings described in A–5 and A–6 of § 35a.9999–1 to a foreign address affix postage to the reply envelope?*

*A–7.* No. A payor is required to include only a self-addressed reply envelope in a mailing to a foreign address. A payor is not required to affix postage to a reply envelope included in a mailing to a foreign address, regardless of whether the payee is a United States citizen, a United States resident, or a non-resident alien.

*Q–8. Will a payor who sends the mailings described in A–5, A–6, A–52, A–53, and A–55 of § 35a.9999–1 violate the separate mailing requirement if the payor sends both a form W–9 (or substitute form) and a Form W–8 (or substitute form) in the same mailing?*

*A–8.* No. The payor may include in any separate mailing both a solicitation of the payee's taxpayer identification number (Form W–9) and a solicitation of a certification of the payee's foreign status (Form W–8).

*Q–9. Do ''window transactions,'' as defined in Q–42 of § 35a.9999–1, include payments on Treasury bills and other instruments not in definitive form?*

*A–9.* No. Because Treasury bills are not in definitive form, payments upon Treasury bills are not treated as window transactions. Similarly, payments upon other instruments not in definitive form are not treated as window transactions. The special rules for window transactions set forth in A–42 of § 35a.9999–1 thus apply only to redemptions of United States savings bonds, and to payments upon interest coupons, commercial paper, and banker's acceptances, if such instruments are in definitive form. The due diligence requirements set forth in A–5 and A–6 of § 35a.9999–1 are thus applicable to payors of payments on Treasury bills and other instruments not in definitive form, if those instruments are considered to have been acquired before 1984, and mature after December 31, 1983. In addition, the certification requirements set forth in A–32 of § 35a.9999–1 and all other relevant backup withholding requirements apply to payments on Treasury bills and other instruments not in definitive form.

REQUIREMENT OF BACKUP WITHHOLDING

*Q–10. Does backup withholding apply to reportable payments other than reportable interest and dividend payments?*

*A–10.* Yes. Backup withholding also applies to payments that are subject to reporting under sections 6041(a) or (b), 6041A(a), and 6045, and to certain payments reportable under section 6050A (''other reportable payments''). Backup withholding applies to other reportable payments, other than payments reportable under section 6045, only if: (1) The payee fails to furnish a taxpayer identification number to the payor; or (2) the Internal Revenue Service notifies

the payor that the taxpayer identification number furnished by the payee is not correct. Except in the case of payments reportable under section 6045, a payee of other reportable payments is not required to make any certifications under penalties of perjury, unless the payee seeks to claim the exemption from withholding while waiting for receipt of a taxpayer identification number (as explained in A–18, below). See A–12 and A–13, below, for rules regarding the application of backup withholding to transactions subject to reporting under section 6045.

*Q–11. Under what circumstances is a payor of payments reportable under section 6041 or section 6041A(a) required to impose backup withholding?*

*A–11.* A payor is required to withhold on reportable payments under sections 6041 and 6041A(a) only if: (1) A payee is subject to backup withholding under A–10, above, (*i.e.,* the payee fails to furnish a taxpayer identification number to the payor or the Internal Revenue Service notifies the payor that the taxpayer identification number furnished by the payee is not correct); and (2) any one of the following three conditions is satisfied: (a) Reportable payments to the payee aggregate $600 or more during the calendar year; (b) the payor was required to file an information return under section 6041 or section 6041A(a), whichever is applicable, with respect to that payee for the preceding calendar year (*i.e.,* payments subject to reporting under section 6041 or section 6041A(a), whichever is applicable, aggregated $600 or more to the payee for the preceding calendar year); or (c) the payor was required to impose backup withholding on payments made to the payee during the preceding calendar year (and the payments subject to backup withholding were of a type reportable under section 6041 or section 6041A(a), whichever is applicable).

If a payor pays amounts aggregating $600 or more to a payee during a calendar year (condition (a) above), the amount subject to withholding is: (1) The amount of the payment that causes the aggregate payments to the payee during the calendar year to total $600 or more (assuming that the payor made no payments during the preceding calendar year that were subject to either reporting under section 6041 or section 6041A(a), whichever is applicable, or backup withholding); and (2) the amount of any additional payments of a type subject to reporting under section 6041 or section 6041A(a), whichever is applicable, made to the payee before the payee provides a taxpayer identification number to the payor or after the Internal Revenue Service notifies the payor that the taxpayer identification number furnished by the payee is not correct. For example, if a payor made payments of $200 each on March 31 1984, June 30, 1984, and September 30, 1984, to a payee, which were reportable under section 6041, the payments on March 31 and June 30 would not be subject to backup withholding, because the $600 threshold would not have been reached as a result of making either of those payments (assuming that payments made to the payee during 1983 did not aggregate $600 or more and were thus not subject to reporting). However, the payor would be required to withhold 20 percent of the $200 payment made on September 30, if the payee did not furnish a taxpayer identification number to the payor, or the Internal Revenue Service notified the payor that the number provided by the payee is incorrect, prior to the payment date (September 30). If the payor made a $50 payment of a type reportable under section 6041, on December 31, 1984, to the same payee, the payor would be required to withhold 20 percent of the $50 payment, if the payee had not provided a taxpayer identification number, or the Internal Revenue Service notified the payor that the number provided by the payee is incorrect, prior to the date of payment (December 31).

If, in the preceding calendar year, a payor was required to file an information return with respect to payments to the payee under section 6041 or section 6041A(a) (condition (b) above), or a payor is required to impose backup withholding with respect to payments of a type that were reportable under such sections (condition (c) above), the payor is required to withhold 20 percent of any payment of a type reportable under section 6041 or section 6041A(a) made to the payee during the following year, regardless of the

amount of the payment, if, prior to the date of the payment, the payee fails to provide a taxpayer identification number to the payor, or the Internal Revenue Service notifies the payor that the number provided by the payee was not correct. Assume, for example, that a payor made reportable payments under section 6041 to a payee that aggregated $600 or more during 1983, so that the payor was required to file an information return with respect to the payments for 1983. If the payor paid $300 to the payee on January 31, 1984, and the payment was of a type reportable under section 6041, the payor would be required to withhold 20 percent of the $300 payment, if, prior to January 31, 1984, the payee did not provide a taxpayer identification number to the payor, or the Internal Revenue Service notified the payor that the number provided by the payee was not correct. Moreover, because payments during 1984 to the payee, of a type subject to reporting under section 6041, would be subject to backup withholding, the payor would be required to withhold 20 percent of any payment of a type reportable under section 6041 that was made to the payee in 1985, unless the payee provided a taxpayer identification number prior to the payment date, or corrected the number provided, if the payor was notified by the Service that the previous number was not correct.

In making the determination of whether payments to a payee aggregate $600 or more during a calendar year or whether condition (b) or condition (c) applies to a payee, the payor must aggregate and take into account payments of the same kind made to the same payee. Payments that are reportable under section 6041 are not required to be aggregated with payments reportable under section 6041A(a). Payors may, in their discretion, aggregate: (1) Payments not of the same kind to the same payee, reportable under section 6041 and 6041A(a), and (2) payments reportable under section 6041 with payments reportable under section 6041A(a).

*Q–12. Does backup withholding apply to gross proceeds subject to reporting under section 6045?*

*A–12.* Yes. Backup withholding applies to gross proceeds reportable by brokers, if the customer does not furnish a taxpayer identification number to the broker in the manner required, or the Internal Revenue Service notifies the broker that the number furnished by the customer was incorrect. With respect to a post-1983 account (as defined in A–41 of § 35a.9999–1), the taxpayer identification number provided by a customer must be certified under penalties of perjury. With respect to all other accounts, the customer's taxpayer identification number is not required to be certified under penalties of perjury. For example, if a customer who had no prior relationship with a broker opens an account, arranges for the broker to sell readily tradable securities for $100 during 1984, and the sale is required to be reported under section 6045, the gross proceeds of the sale are subject to backup withholding, if the customer does not provide: (1) His taxpayer identification number to the broker and certify it under penalties of perjury; or (2) an awaiting TIN certification (described in A–18, below).

Special rules governing backup withholding with respect to commodity futures contracts, margin account transactions, and short sale transactions will be issued in the near future.

*Q–13. Does backup withholding apply to barter exchanges that are subject to reporting under section 6045?*

*A–13.* Yes. If the barter exchange is required to report an exchange under section 6045, it is required to impose backup withholding if a member of the barter exchange does not provide a taxpayer identification number in the manner required or the Internal Revenue Service notifies the barter exchange that the number provided by the member is incorrect. With respect to an account or ongoing relationship established between a barter exchange and a member after December 31, 1983, the member is required to provide a taxpayer identification number to the barter exchange under penalties of perjury. With respect to all other accounts, the member's number is not required to be certified under penalties of perjury.

*Q–14. What action is a payor of reportable interest or dividends required to take*

*with respect to payments made on a readily tradable instrument held by a payee, if: (1) Additional readily tradable instruments of the same issue are purchased by the same payee, (2) it is the practice of the payor to combine in one account all the readily tradable instruments of the same issue owned by the same payee (and to make a single aggregate payment with respect to all readily tradable instruments of the same issue included in the account), and (3) certain of the readily tradable instruments of the same issue owned by the payee are subject to backup withholding and others are not subject to backup withholding?*

*A–14.* If it is the practice of a payor to combine in one account all readily tradable instruments of the same issue owned by a payee and if certain of those instruments are subject to backup withholding and others are not subject to backup withholding, the payor is required to withhold 20 percent of the aggregate payment made with respect to all the instruments in the account. If it is not the practice of the payor to combine in one account all readily tradable instruments of the same issue owned by a payee, the payor is required only to withhold 20 percent of the payment made on the instrument or instruments with respect to which the payee is subject to backup withholding.

For example, assume that a payee, prior to 1984, held a readily tradable instrument and that a taxpayer identification number had been provided to the payor. Assume further, during 1984: (1) The payee acquired another readily tradable instrument of the same issue through a post-1983 brokerage relationship, (2) the broker notified the payor that the payee failed to certify that he was not subject to backup withholding due to notified payee underreporting, and (3) the payor, in accordance with its customary practice, combined in one account both readily tradable instruments of the same issue owned by the payee and made an aggregate payment with respect to both instruments in the account. In this circumstance, the payor would be required to withhold 20 percent of the aggregate payment made with respect to both of the instruments of the same issue owned by the payee.

*Q–15. Does backup withholding apply to original issue discount?*

*A–15.* Yes. Original issue discount is treated as a payment of interest reportable under section 6049. Thus, original issue discount is subject to backup withholding in the same circumstances in which backup withholding applies to an actual payment of interest. In determining the timing and amount of original issue discount subject to backup withholding, rules consistent with § 31.3455(b)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations shall apply. Thus, the amount to be withheld is limited to the amount of cash paid.

*Q–16. If an exempt recipient files a Form W–9 (or a substitute form) in order to be exempt from backup withholding, may the payor rely on the form if the payee fails to include its taxpayer identification number on the form?*

*A–16.* No. A Form W–9 (or substitute form) may be relied upon by a payor only if it includes the payee's taxpayer identification number. Thus, if the Form W–9 (or substitute form) provided by the payee does not contain a taxpayer identification number, the payor must withhold 20 percent of all payments made to the payee. If, however, the payor treats the payee as an exempt recipient under A–29 of § 35a.9999–1 and § 31.3452(c)–1 (b) through (p) of the Employment Taxes and Collection of Income Tax at Source Regulations without requiring the payee to file a Form W–9 (or substitute form), the payor is not required to withhold, even though the payee has not furnished a taxpayer identification number to the payor. This exception, however, is not available to barter exchanges subject to reporting under section 6045.

*Q–17. In determining whether a payee failed to provide a taxpayer identification number to a payor, within what period of time must a payor treat a taxpayer identification number or an ''awaiting TIN certification'' (as defined in A–18, below) provided by a payee as having been received?*

*A–17.* As provided in A–31 of § 35a.9999–1, a payor is required to process a taxpayer identification number within 30 days after the payor receives the taxpayer identification number from the payee. Thus, for example, if a payor of

a payment reportable under section 6041 or section 6041A(a) receives a taxpayer identification number on January 16, 1984, the payor must process the number on or before February 15, 1984. As a result, the payor should commence backup withholding with respect to payments made to the payee after January 16, 1984, if the payee were subject to backup withholding under A–10 and A–11, above, but the payor must cease backup withholding by February 15, 1984. The payor may, however, treat the taxpayer identification number as having been received at any time within 30 days after it is provided, so that backup withholding in the example outlined above would not have to be imposed on any payment if the payor processed the number prior to making the payment.

A payor also has 30 days after delivery by a payee of an awaiting TIN certification (as defined in A–18, below) to treat the certificate as having been received.

EXCEPTIONS TO BACKUP WITHHOLDING

*Q–18. Is a payor required to impose backup withholding during a period when a payee is waiting for receipt of a taxpayer identification number?*

*A–18.* In general, if a payee does not provide a taxpayer identification number to a payor, the payor must withhold 20 percent of all payments made to the payee on or after January 1, 1984. However, the payee will not be subject to backup withholding for a period of 60 days, if the payee is waiting for receipt of a taxpayer identification number. In order to be entitled to the 60 day exemption, the payee must comply with the requirements of this A–18.

A payee shall be treated as if he provided a certified taxpayer identification number for a period of 60 days following the day the payor receives a certificate signed under penalties of perjury (an ''awaiting TIN certification''). (See A–17, above, for rules related to the day on which an awaiting TIN certification may be treated as having been received.) If the payor does not receive a taxpayer identification number within 60 days after the payee delivers the awaiting TIN certification to the payor, the payor must withhold 20 percent of all payments made to the payee, until the payee provides a taxpayer identification number to the payor. The awaiting TIN certification must contain statements: (1) That the payee has not been issued a taxpayer identification number, (2) that the payee has applied for a number or intends to apply for a number in the near future, and (3) that the payee understands that if the payee does not provide a taxpayer identification number to the payor within 60 days, the payor is required to withhold 20 percent of any payments made thereafter to the payee until a number is provided. Language that is substantially similar to the following will satisfy this requirement:

> I certify, under penalties of perjury, that a taxpayer identification number has not been issued to me, and that I mailed or delivered an application to receive a taxpayer identification number to the appropriate Internal Revenue Service Center or Social Security Administration Office (or I intend to mail or deliver an application in the near future). I understand that if I do not provide a taxpayer identification number to the payor within 60 days, the payor is required to withhold 20 percent of all reportable payments thereafter made to me until I provide a number.

The foregoing certification, at the discretion of the payor, may be included on the same form as the certifications required by A–32 of § 35a.9999–1.

The payor may use Form W–9, as currently issued by the Internal Revenue Service, to satisfy the requirements of this A–18. If the Form W–9 is used, the payee should write ''Applied For'' in the space reserved for the taxpayer identification number. The payor also should inform the payee, in supplemental instructions or orally, ''that if a taxpayer identification number is not received by the payor within 60 days, the payor is required to withhold 20 percent of all reportable payments thereafter made to the payee until the payor receives a number from the payee.'' Future editions of the Form W–9 will contain the supplemental instruction.

A payee who seeks to qualify for the 60 day exemption from backup withholding also must certify, under penalties of perjury, that the payee is not subject to backup withholding due to

notified payee underreporting, when required to do so by A–32 of § 35a.9999–1 or A–12 or A–13, above. Thus, a payee who establishes an account or acquires an instrument after December 31, 1983, will be subject to backup withholding irrespective of whether the payee certifies that the payee is waiting for receipt of a taxpayer identification number, if the payee fails to make the certification described in A–32 of § 35a.9999–1 or A–12 or A–13, above, concerning notified payee underreporting.

When a payee who opens an account or acquires an instrument after December 31, 1983, and who qualifies for this 60 day exemption furnishes a taxpayer identification number to the payor, the payee is required to certify under penalties of perjury, in accordance with A–32 of § 35a.9999–1 or A–12 or A–13, above, that the taxpayer identification number provided is correct. If no such certification is provided, the payor must institute backup withholding.

A special rule is provided for accounts that are established, or instruments that are acquired (in the case of reportable interest or dividend payments) or relationships established (in the case of other reportable payments) before January 1, 1984. All payees of such accounts, instruments, or relationships will be treated as if they are waiting for receipt of a taxpayer identification number, without any action on their part, until January 16, 1984. The payor must withhold 20 percent of any payment made after January 16, 1984, unless: (1) The payee has certified, as required by this A–18, that the payee is waiting for receipt of a taxpayer identification number or (2) the payor receives a taxpayer identification number from the payee. If, however, a payor has been provided with a Form W–9 (or substitute form) with an ''Applied For'' designation, by a payee of an account, instrument, or relationship established before January 1, 1984, the form will be valid for 60 days, notwithstanding the fact that the supplemental instruction referred to above was not provided to the payee.

Assume, for example, that the payee of an account established before January 1, 1984, delivered an awaiting TIN certification to the payor on December 30, 1983 and the payor processed the certification that day. The payor should not impose backup withholding on payments made to the payee prior to February 29, 1984, because the payee is treated under this A–18 as having provided a taxpayer identification number during that period. If the payor did not receive a number from the payee prior to February 29, the payor would be required to withhold 20 percent of any payment made to the payee on or after February 29, and before the payee provided a number. (See A–17, above, however, for the rules relating to the date on which the payor may be treated as having received the awaiting TIN certification or a taxpayer identification number.) As another example, assume that a payee of an account established before January 1, 1984, delivered an awaiting TIN certification to the payor on January 12, 1984 and processed it that day. The payor should not impose backup withholding on payments made between January 1 and January 12, because the payee would be treated during that period as if he had provided a taxpayer identification number under the rule set forth above. Moreover, backup withholding would not apply to payments made during the 60 days following January 12, because the payee on that date delivered an awaiting TIN certification. Backup withholding would begin only if the payor had not received a taxpayer identification number within that 60 day period. (See A–17, above, however, for the rules relating to the dates on which the payor may be treated as having received the certificate or the taxpayer identification number.)

The 60 day exemption applicable when a payee provides an awaiting TIN certification applies to payments made on readily tradable instruments only if the instrument is acquired directly from the payor (including a broker that holds the instrument in street name), unless the payee provides an awaiting TIN certification directly to the payor. Thus, if a broker opens a new account after 1983 and acquires a readily tradable instrument for a payee who has no taxpayer identification number, and the instrument is not held in street name, the broker must advise the payor that the payee failed to provide a taxpayer identification number

under penalties of perjury, regardless of whether an awaiting TIN certification is provided to the broker. The payor in such a situation, however, must include in the notice sent to a payee (as required by A–39 of § 35a.9999–1) a statement informing the payee that, if the payee does not have a taxpayer identification number, the payee will be exempt from backup withholding for a period of 60 days following the payor's receipt of an awaiting TIN certification, provided that the payee signs an awaiting TIN certification and returns it to the payor. (See A–17, above, for the rules relating to the date on which the payor may be treated as having received the certificate.) An awaiting TIN certification, in a form permitted by this A–18, should be included with the notice. The form of the notice described in A–39 of § 35a.9999–1 and this A–18 is set forth in the Appendix to this temporary regulation.

Neither the 60 day exemption nor the special presumption applicable to accounts, instruments, and relationships established before January 1, 1984 applies to window transactions, as defined a A–9, above, and Q–42 of § 35a.9999–1. Therefore, a payor is required to withhold 20 percent of any window transaction payment whenever a payee of such a payment does not provide a taxpayer identification number of the payor. See A–56, A–57, A–58 and A–59 of § 35a.9999–3 for the actions that a payor must take to exercise due diligence after December 31, 1987, for an account with respect to which the payor received an awaiting–TIN certification to avoid a penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number. Payors will remain liable for any applicable penalties under section 6676 for years prior to 1988.

*Q–19. Are payors required to withhold on payments that are less than $10, or that, if determined on an annualized basis, would be less than $10 (a ''minimal payment'')?*

*A–19.* A payor of reportable interest or dividends has the option not to withhold on minimal payments, or, alternatively, to withhold on payments of any amount. The principles of § 31.3452(d)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations shall be utilized in determining whether a reportable interest or dividend payment may be treated as a minimal payment with respect to which backup withholding is not required.

The annualization requirement of § 31.3452(d)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations shall not apply to window transaction payments. A payor may choose not to withhold on any window transaction payment that is less than $10. However, all window transaction payments made at the same time must be aggregated.

The $10 minimal payment exception does not apply to other reportable payments (*i.e.,* payments other than reportable interest or dividends), except payments reportable under section 6045. Payments reportable under section 6045, like reportable interest and dividends, are subject to backup withholding, at the payor's option, only if the reportable amount exceeds $10. The annualization rule of § 31.3452(d)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations is inapplicable to payments reportable under section 6045.

*Q–20. Are beneficiaries of trusts or estates subject to backup withholding on distributions from the trust or estate?*

A–20. A beneficiary of a trust or estate is subject to backup withholding only if the trust or estate is a payor of a reportable payment. If a trust or estate receives a payment of interest, dividends or any other reportable amount, and if the trust or estate is not a grantor trust (and thus reports receipt of the reportable amount on a Form 1041 (see § 1.671–4 of the Income Tax Regulations)), distributions by the trust or estate to the beneficiaries will not be considered to be a payment of interest, dividends or other reportable amounts.

Special rules are provided, however, with respect to trusts when a grantor is considered the owner of all or a portion of the trust (and there are included in computing the grantor's tax liability those items of income attributable to that portion of the trust) (a ''grantor trust''). The special rules applicable to such trusts do not affect

payors of payments made to a grantor trust. Rather, the payments to the trust are subject to the general rules of backup withholding. Payments between a grantor trust and its grantors, however, are subject to the special rules, which differ depending on the number of grantors.

If a trust has ten or fewer grantors, payments of interest, dividends or other reportable amounts (except gross proceeds reportable under section 6045) made to the trust are considered payments of the same kind made by the trust (as payor) to each grantor (as payee), in proportion to each grantor's ownership ot the trust. Each grantor of such a trust is treated as having received his or her proportionate share of the reportable payment on the day the payment is received by the trust. Accordingly, any reportable payments made to the trust are treated as reportable payments made by the trust to the grantor or grantors and are subject to all applicable backup withholding requirements. If, for example, a grantor of a trust having 10 or fewer grantors had not provided a taxpayer identification number to the trust in the manner required, the trustee would be required to withhold and remit 20 percent of the reportable payment. In addition, the trustee of a grantor trust having ten or fewer grantors, established on or after January 1, 1984, may not certify either that the trust is not subject to backup withholding due to notified payee underreporting or that the taxpayer identification number provided is correct, unless each grantor has furnished the trustee with such a certification signed under penalties of perjury. See Q/A-54 of § 35a.9999-3 which revises the rule in this paragraph.

If a grantor trust has more than ten grantors, the trustee is required to treat payments of interest, dividends or other reportable payments (except gross proceeds reportable under section 6045) made to the trust as payments of the same kind made by the trust to each grantor, in an amount equal to the distribution made by the trust to each grantor, on the date on which the distribution to the grantor is paid or credited. The trust is thus treated as a payor of the same types of payments received by the trust, for the purpose of the backup withholding requirements. The trustee of such a trust is required to withhold 20 percent of amounts paid or credited to any grantor who is subject to backup withholding if: (1) The grantor fails to provide a taxpayer identification number to the trust, (2) the grantor fails to provide a certification required by A–32 of § 35a.9999–1, (3) the trust is required to impose backup withholding under the special rules applicable to readily tradable instruments (A–40 of § 35a.9999–1), or (4) the Internal Revenue Service notifies the trustee that the grantor provided an incorrect taxpayer identification number. If the reportable amount of the distribution is greater than the amount distributed, the trustee may, in its discretion subject the entire reportable amount to backup withholding.

For example, if a grantor trust having 100 grantors received a reportable interest payment of $1,000,000, which was of a type reportable under section 6049, and made a cash distribution of $900 to each grantor (after deducting certain expenses), the trustee would be required to withhold 20 percent of the $900 payment made to any grantor who was subject to backup withholding. Similarly, if a grantor trust having 100 grantors received an oil royalty payment of $100,000, which was of a type reportable under section 6041, and the trust made a cash distribution of $8,000 to each grantor (after deducting certain production related taxes and expenses), the trustee would be required to withhold 20 percent of the $8,000 payment made to any payee who had not provided a taxpayer identification number to the trust. Because the certifications required by A–32 of § 35a.9999–1 do not apply to payments of a type reportable under section 6041, grantors of the trust would not be subject to backup withholding if they failed to make such certifications.

In addition, the trustee of a grantor trust having more than ten grantors may certify that the trust's taxpayer identification number is correct and that the trust is not subject to backup withholding due to notified payee underreporting, without regard to the status of the individual grantors of the trust.

*Q–21. Are reportable payments made to exempt recipients subject to backup withholding?*

*A–21.* Answer 29 (A–29) of §35a.9999–1 provides that a payor of reportable interest of dividends is not required to withhold on payments made to exempt recipients. Backup withholding also is not required with respect to any other reportable payment made to an exempt recipient described in §31.3452(c)–1 (b) through (p) of the Employment Taxes and Collection of Income Tax at Source Regulations, except in the case of (1) payments with respect to barter exchange transactions reportable under section 6045, and (2) payments reportable under sections 6041, 6041A, and 6050A. A middleman, however, shall include only a nominee or custodian known generally in the investment community as a nominee or listed in the most recent publication of the American Society of Corporate Secretaries, Inc. Nominee List. The exempt recipients described in this A–21 shall also be so treated for purposes of §1.6045–1(c)(3)(i) of the Income Tax Regulations.

FOREIGN PERSONS

*Q–22. Will a form relating to exemptions for foreign persons be issued by the Internal Revenue Service?*

*A–22.* The Service is currently preparing Form W–8, on which a payee may sign, under penalties of perjury, the statement described in §1.6049–5(b)(2)(iv) and §1.6045–1(g)(1) of the Income Tax Regulations, whichever is applicable. See A–51, A–52 and A–55 of §35a.9999–1 for other requirements. The Form W–8, however, may not be available prior to the time that payors intend to make the mailing or mailings required by A–52 or A–55 of §35a.9999–1. Accordingly, payors should use the substitute form described in §1.6049–5(b)(2)(iv) or §1.6045–1(g)(1), whichever is applicable, on which a payee may make the certifications concerning the payee's foreign status and provide his name, address, and taxpayer identification number (if any). If a payor sends a substitute Form W–9 to a payee, the payor may incorporate the required foreign status certification on the substitute Form W–9.

RECORD RETENTION

*Q–23. Under what circumstances are payors required to retain the documents they receive from payees?*

*A–23.* With respect to a pre-1984 account or instrument (as defined in A–34 of §35a.9999–1) or any brokerage relationship that is not a post-1983 account (as defined in A–41 of §35a.9999–1), the payor is not required to retain either: (1) A form on which a payee certified concerning the correctness of a taxpayer identification number, or (2) an awaiting TIN certification, if the payor can establish the existence of procedures that are reasonably calculated to ensure that a payee who so certified is accurately identified in the payor's records. With respect to all other accounts or instruments, however, payors are required to retain all certification documents in the same manner and for the same period of time that the payor retains other account-creation or instrument-purchase documents.

APPENDIX

The notice required by A–39 of §35a.9999–1 and A–18, above, shall be substantially in the form provided below:

Recently, you purchased [identify security acquired]. Because of the existence of one or more of the following conditions, payments of interest, dividends, and other reportable amounts that are made to you will be subject to backup withholding of tax at a 20 percent rate: [specify the condition or conditions applicable]

(1) You failed to provide a taxpayer identification number, or failed to provide such number under penalties of perjury, in connection with the purchase of the acquired security. (An individual's taxpayer identification number is his social security number.)

(2) The taxpayer identification number that you provided is not your correct number.

(3) You are subject to backup withholding due to notified payee underreporting (section 3406(a)(1)(C) of the Internal Revenue Code).

(4) You failed to certify that you are not subject to backup withholding due to notified payee underreporting (section 3406(a)(1)(D) of the Internal Revenue Code).

If condition (1) or (2) applies, you may stop withholding by providing your taxpayer identification number on the enclosed Form W–9, signing the form, and returning it to us. If you do not have a taxpayer identification number, but have (or will soon) apply for one, you may so indicate on the Form W–9;

in that case, you will not be subject to withholding for a period of 60 days, but you must provide us with your taxpayer identification number promptly after you receive it in order to avoid withholding after the end of the 60-day period. Certain persons, described on the enclosed Form W–9, are exempt from withholding. Follow the instructions on that form if applicable to you.

If condition (3) applies, and you do not believe you are subject to withholding due to notified payee underreporting, please contact your local Internal Revenue Service office.

If condition (4) applies, you may stop withholding by certifying on the enclosed Form W–9 that you are not subject to backup withholding due to notified payee underreporting, signing the form, and returning it to us.

If more than one condition applies, you must remove *all applicable conditions to stop withholding.*

Please address any questions concerning this notice to:

[Insert Payor Identifying Information]

(Do not address questions to the broker who purchased the securities for you.)

[T.D. 7922, 48 FR 53106, Nov. 25, 1983, as amended by T.D. 7929, 48 FR 56342, Dec. 20, 1983; 49 FR 9417, Mar. 13, 1984; T.D. 8163, 52 FR 44874, Nov. 23, 1987; T.D. 8248, 54 FR 14350, Apr. 11, 1989]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, § 35a.9999–2 was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000. By T.D. 8856, 64 FR 73408, Dec. 30, 1999, the effective date was delayed until Jan. 1, 2001.

### § 35a.9999–3 Questions and answers concerning backup withholding.

The following questions and answers principally concern the backup withholding requirement with respect to reportable payments. These requirements are issued under the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369):

IN GENERAL

*Q–1. Who has the legal obligation to withhold on reportable payments made to a payee who is subject to backup withholding?*

*A–1.* The person required to withhold (the payor) is the person who is required by the applicable provision to make an information return with respect to a payment under section 6041, 6041A(a), 6042, 6044, 6045, 6049, or 6050A. For example, in the case of a person who has a paying agent making a reportable payment to a payee, the paying agent is not the payor but is merely an agent for the principal (payor). In the case of a payment which is collected on behalf of, or for the account of, a payee, the payor (''middleman'') is the person collecting or receiving the payment, irrespective of whether he is acting as the agent of the payee, or as agent for the issuer of the instrument. For example, a payee may establish a custodial account with a financial institution or brokerage firm where instruments are held for the benefit of the payee. The interest or dividends may be paid to a nominee of the financial institution or brokerage firm. The financial institution or brokerage firm will, in turn, credit the payee's custodial account. The financial institution or brokerage firm is the payor since it receives and credits payment to the payee's account and is required to make an information return showing such payment to the payee. See A–20 of § 35a.9999–2 for special rules related to grantor trusts.

*Q–2. What consequences result if a payor fails to withhold on payments made to a payee who is subject to backup withholding?*

*A–2.* A payor is subject to the same requirements and penalties for failing to impose backup withholding as an employer making a payment of wages. Consequently, under section 3403 and § 31.3403–1 of the Employment Taxes and Collection of Income Tax at Source Regulations, a payor is liable for the tax whether or not the payor withholds the tax from a payee who is subject to backup withholding. A payor may be relieved of liability for the tax which was required to be withheld if the payor can show that the tax has been paid by the payee, as provided in section 3402(d) and § 31.3402(d)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations. In addition to liability for the tax, a payor who fails to withhold when required may be subject to civil penalties under section 6651 (addition to the tax for failure to pay any tax required to be shown on the payor's return), section 6656 (penalty for failure to make deposit of taxes) and section 6672 (penalty

for failure to collect and pay over tax) and to criminal penalties under section 7201 (penalty for willfully attempting to evade or defeat any tax or the payment of any tax), section 7202 (penalty for willful failure to collect or pay over any tax), and section 7203 (penalty for willful failure to pay tax). The fact that a payor shows that the tax has been paid by the payee will not relieve the payor of liability for any civil or criminal penalty. The payor is not liable to any person for any withheld amount. The payor will only be liable to the United States for the tax which was required to be withheld as provided in §31.3403–1 of the Employment Taxes and Collection of Income Tax at Source Regulations.

REQUIREMENT TO WITHHOLD

*Q–3. Is a payor required to withhold if the taxpayer identification number furnished by a payee is an ''obviously incorrect number''?*

*A–3.* Yes. As provided in A–28 of §35a.9999–1, a payee shall be treated as having failed to furnish a taxpayer identification number to the payor if the number furnished is obviously incorrect. An obviously incorrect number is any taxpayer identification number that does not contain nine digits or a number that includes one or more alpha characters.

*Q–4. When are payments considered to be paid and thus subject to backup withholding?*

*A–4.* With respect to reportable interest or dividends, backup withholding applies when the payor pays interest, dividends, or patronage dividends to a payee who is subject to backup withholding. Amounts are paid when they are credited to the account of or set apart for the payee. Amounts are not considered paid solely because they may be withdrawn by the payee, so long as they are not credited to the payee's account, until either actual withdrawal or a specified crediting date.

Amounts are considered paid, however, upon withdrawal or crediting. If a bank credits interest on savings accounts only on the last day of each month or when the account is closed, then backup withholding applies at the time interest is paid on the last day of each month and when the account is closed.

When bonds are sold between interest payment dates, the portion of the sales price representing interest accrued to the date of sale is not considered to be a payment of interest for purposes of section 6049, but will be considered a reportable payment under section 6045. Therefore, if the gross proceeds of the sale are subject to backup withholding under A–12 of §35a.9999–2, 20 percent of the sales price, including the portion representing accrued interest, will be subject to backup withholding.

In the case of stock for which the record date is earlier than the payment date, the dividend is considered paid on the payment date. For example, if a corporation declares a dividend on September 1 to the record holders as of September 12, and the dividends are payable on October 12, backup withholding applies on October 12 (the payment date). In the case of a corporate reorganization, if a payee is required to exchange stock held in the former corporation for stock in the new corporation before the dividends which have been paid with respect to the stock in the new corporation will be provided to the payee, the dividend is considered paid on the payment date without regard to when the payee actually exchanges the stock and receives the dividend.

If a payor (such as a money market fund) computes interest or dividends daily but credits the interest or dividends on the last day of each month, then backup withholding applies on the last day of each month. If a payor computes *and* credits interest or dividends daily, backup withholding applies daily.

With respect to any reportable payment other than reportable interest or dividends, backup withholding applies at the time the payment is made or in the case of a transaction reportable under section 6045 when the amount subject to backup withholding is determined. Except in the case of forward contracts, regulated futures contracts, and security short sales, the amount subject to backup withholding in the case of a transaction reportable under section 6045 is determined on the date of the sale or exchange. See §1.6045–1

(d)(4) and (f)(3) of the Income Tax Regulations (and Announcement 88-6, 1988-3 I.R.B. 52) for the applicable sale or exchange date and A–23 through A–25 and A–27 for special rules applicable to forward contracts, regulated futures contracts, security short sales, and issuer payment of debt securities. The date by which the payor is required to make an information return is irrelevant for purposes of determining when the payment is made and thus subject to backup withholding.

In the case of a middleman required to withhold tax, rules similar to §31.3453(b)–1 (b) of the Employment Taxes and Collection of Income Tax at Source Regulations shall apply. In the case of a United States savings bond, see §1.6049–4(d)(9) of the Income Tax Regulations.

PAYMENTS AND AMOUNTS SUBJECT TO BACKUP WITHHOLDING

*Q–5. Is interest paid on a mortgage escrow account with a financial institution or interest earned on certain premiums paid with respect to an insurance policy, subject to backup withholding?*

*A–5.* Yes. Both a payment of interest to a mortgage escrow account with a financial institution and a payment that represents an increment in value of ''advance premiums,'' ''prepaid premiums,'' or ''premium deposit funds'' which is applied to the payment of premiums due on an insurance policy, or is made available for withdrawal by the policyholder, are subject to reporting under section 6049 and thus are subject to backup withholding.

*Q–6. If a payor imposes a penalty for premature withdrawal of funds deposited in a time savings account, certificate of deposit, or similar class of deposit, is the payor required to calculate the tax to be withheld on the amount of the reportable interest payment (not reduced by any penalty)?*

*A–6.* No. A payor may, at its option, take into account any penalty it actually imposes on a payee when it calculates the amount to be withheld. If the payor chooses to take the penalty into account, the amount subject to backup withholding would be the amount of interest the payee actually receives. The gross amount of the payment, however, is subject to information reporting.

*Q–7. If a payor is able to estimate the portion of a distribution which is not a dividend, is the payor nevertheless required to impose backup withholding on the gross amount of the distribution?*

*A–7.* If the payor is unable to determine the portion of a distribution which is a dividend, backup withholding applies to the entire amount of the distribution. If a payor is able reasonably to estimate the portion of the distribution which is not a dividend, however, backup withholding does not apply to such portion. A payor making a payment all or a portion of which may not be a dividend may use previous experience to estimate the portion of such payment which is not a dividend. An estimate of the portion of a distribution which is not a dividend shall be considered reasonable if the estimate does not exceed the proportion of the distributions made by the payor during the most recent calendar year for which Forms 1099 and 1087 were required to be filed which was not reported by the payor as a dividend.

*Q–8. Are dividends which are reinvested in stock of the company subject to backup withholding?*

*A–8.* Dividends which are reinvested pursuant to a qualified plan in stock of a public utility are not subject to backup withholding. For this purpose, the amount of the reinvested dividend paid to any person, the identity of the recipient, and whether the recipient makes the election required by section 305(e)(2)(B) are irrelevant. All other reinvested dividends are subject to backup withholding.

Backup withholding shall apply to the amount of any dividend available to the shareholder, or credited to the shareholder's account. At the discretion of the payor, backup withholding need not be applied: (1) To any excess of the fair market value of the shares of stock received by the shareholder or credited to the shareholder's account over the purchase price of such shares (including additional shares acquired by the shareholder at a discount in connection with the dividend distribution) or (2) to any fee which is paid by the payor in the nature of a broker's fee for purchase of the stock or service

charge for maintenance of the shareholder's account. The payor must, however, treat such excess amounts and fees on a consistent basis for each calendar year. Thus, the payor is not required to impose backup withholding on any amount in excess of the actual cash value of the dividend declared which the payee would have received had the payee not been a participant in the dividend reinvestment plan.

*Q–9. Are there any payments of dividends that are not subject to backup withholding?*

*A–9.* Yes. Backup withholding does not apply to—

(i) Any amount treated as a taxable dividend by reason of section 302 (relating to redemptions of stock).

(ii) Any amount treated as a taxable dividend by reason of section 306 (relating to disposition of certain stock).

(iii) Any amount treated as a taxable dividend by reason of section 356 (relating to receipt of additional consideration in connection with certain reorganizations).

(iv) Any amount treated as a taxable dividend by reason of section 1081(e)(2) (relating to certain distributions pursuant to an order of the Securities and Exchange Commission).

(v) Any amount which is an exempt-interest dividend, as defined in section 852(b)(5)(A), of a regulated investment company.

(vi) Any amount paid or treated as paid during a year by a regulated investment company, provided that the payor reasonably estimates, as provided in A–7, that 95 percent or more of all dividends paid or treated as paid during the year are exempt-interest dividends.

(vii) Any dividend that is reinvested pursuant to a qualified plan in stock of a public utility as provided in A–8.

The foregoing exceptions do not apply to backup withholding on gross proceeds reportable under section 6045.

*Q–10. What amount of a payment reportable under section 6044 is subject to backup withholding?*

*A–10.* If a payee fails to provide his taxpayer identification number or, for relationships with or memberships in a cooperative that are established after December 31, 1983, fails to provide a taxpayer identification number under penalties of perjury, the amount subject to backup withholding is any amount subject to reporting under section 6044, but only to the extent that the payment is made in money or by qualified check (as defined in section 1388(c)(4)). Thus, the payor shall withhold 20 percent of the amount paid in money or by qualified check to a payee who has failed to provide a taxpayer identification number in the manner required. For example, if a cooperative pays a patronage dividend of $2,000, consisting of $200 in cash, $300 by a qualified check and $1,500 in a qualified written notice of allocation, the amount subject to backup withholding is $500 (the amount paid in money and by qualified check). Thus, if the payee failed to provide a taxpayer identification number in the manner required, the cooperative would be required to withhold 20 percent of the $500.

If a payee (whose relationship with or membership in a cooperative was established after December 31, 1983) fails to certify that the payee is not subject to backup withholding due to notified payee underreporting, the amount subject to backup withholding is the amount of any payment reportable under section 6044 that is paid in money or by qualified check, but only if 50 percent or more of the reportable amount is paid in money or by qualified check. Therefore, in the case where there has been a payee certification failure, if a payment is made 50 percent or more in cash and by qualified check, the payor is required to withhold 20 percent of the amount of the cash and qualified check. If less than 50 percent of the payment is paid in cash or by qualified check, no amount is subject to backup withholding. For example, if a cooperative pays a patronage dividend consisting of $350 in cash, $250 by a qualified check, and $400 in a qualified written notice of allocation, 20 percent of $600 (the amount paid in money and by qualified check) is required to be withheld if there is a payee certification failure. If $100 were paid in cash, $250 by a qualified check, and $650 in a qualified written notice of allocation, however, the payment would not be subject to backup withholding even though there is a payee certification failure because

less than 50 percent of the patronage dividend is paid in cash or by qualified check.

*Q–11. If a payor makes a reportable payment in property (other than money), is the payor required to impose backup withholding?*

*A–11.* Yes. In the case of a payment that is made in property, backup withholding applies to the fair market value of the property determined on the date of payment except in the case of certain payments subject to reporting under section 6050A.

*Q–12. If the payor is required to withhold on a payment made in property, in what manner may the payor withhold?*

*A–12.* The payor may withhold on the principal amount being deposited with the payor, or the payor may withhold from another account or source maintained by the payor for the payee. The account or source from which such tax is withheld must be payable to at least one of the persons listed on the account subject to backup withholding. If the account or source is not payable solely to the same person or persons listed on the account subject to backup withholding, then the payor must obtain a written statement from all other persons to whom the account or source is payable authorizing the payor to withhold the tax from such account or source. The payor electing to withhold from an alternative source may determine the account or source from which the tax is to be withheld. The payor is liable for any tax that is required to be withheld if the recipient of the payment is subject to backup withholding. A payor may not withhold from an alternative source except with respect to payments in property.

AMOUNTS SUBJECT TO REPORTING UNDER SECTION 6041 OR 6041A(A)

*Q–13. Under what circumstances will a payment of a type subject to information reporting under section 6041 be exempt from backup withholding?*

*A–13.* An information return is not required to be made with respect to payments described in §1.6041–3 of the Income Tax Regulations and, therefore, such payments are not subject to backup withholding. In addition, payments otherwise reportable under section 6041 that are made to the following persons will not be subject to backup withholding:

(i) An organization exempt from taxation under section 501(a), or an individual retirement plan,

(ii) The United States,

(iii) A State, the District of Columbia, a possession of the United States, or any political subdivision of any of the foregoing,

(iv) A foreign government or political subdivision of a foreign government,

(v) An international organization,

(vi) Any wholly owned agency or instrumentality of any person described in (ii), (iii), (iv), or (v), or

(vii) A foreign central bank of issue.

The provisions of §31.3452(c)–1 of the Employment Taxes and Collection of Income Tax at Source Regulations shall apply for the purpose of determining whether a payee to whom a payment is made is subject to information reporting and backup withholding. For example, during 1984, payor K, in the course of its trade or business makes a payment of rent of $700 to R Inc. for the use of premises owned by R Inc. Under §1.6041–3(c) of the Income Tax Regulations payments to a corporation are not subject to information reporting (except in the case of certain payments not relevant here). Under §31.3452(c)–1(b)(2) of the Employment Taxes and Collection of Income Tax at Source Regulations, K may treat R Inc. as a corporation because its name contains the unambiguous expression of corporate status, ''Inc.'' Because the payment of rent to R Inc. is not subject to information reporting, it is not subject to backup withholding. If, however, K made the payment of rent to S Company, K would not be authorized to treat S Company as a corporation because ''company'' is not an unambiguous expression of corporate status. *See* §31.3452(c)–1(b)(2) of the Employment Taxes and Collection of Income Tax at Source Regulations. Accordingly, K would be required to make an information return with respect to the payment under sections 6041 and withhold 20 percent of the payment to S Company, if S Company did not furnish a taxpayer identification number to K.

*Q–14. Do the exceptions under section 6041 and the regulations thereunder apply*

*to payments subject to reporting under section 6041A(a)?*

*A–14.* For purposes of both information reporting and backup withholding, the exceptions under section 6041 shall apply to payments of a type reportable under section 6041A until regulations are issued under section 6014A; the rules of A–13 shall apply to such payments. Thus, in general, payments of the type reportable under section 6041A(a) that are made to corporations or general agents are not subject to information reporting or backup withholding. (See A–15 relating to payments to certain medical corporations.)

*Q–15. Does backup withholding apply to a payment reportable under section 6041 or section 6041A(a) that is paid to a corporation engaged in providing medical and health care services or engaged in the billing and collection of payments in respect of medical and health care services (other than certain tax-exempt or governmental facilities described in § 1.6041–3(c) (1) and (2) of the Income Tax Regulations)?*

*A–15.* Yes. Such amounts are subject to information reporting under section 6041 and 6041A(a) and thus are subject to backup withholding. The exception from backup withholding for payments to exempt recipients (described in A–21 of § 35a.9999–2) does not apply in the case of payments that are subject to reporting under sections 6041, 6041A(a) or 6050A.

*Q–16. Does backup withholding apply to oil royalty payments that are subject to reporting under section 6041 or effective for royalty payments made after December 31, 1986, section 6050N?*

*A–16.* Backup withholding does not apply to an oil royalty payment if windfall profit tax is actually withheld under section 4986. If windfall profit tax is not actually withheld from the oil royalty payment (because, for example, payment is made with respect to ''exempt royalty oil'' (as defined in section 4993(f)), the oil royalty payment is subject to backup withholding. The amount subject to backup withholding is the amount the payee receives (*i.e.*, the gross proceeds less production related taxes such as State severance tax). The payor shall not be liable to any person other than the United States for the amount of tax withheld.

*Q–17. Does backup withholding apply to net commissions paid to an unincorporated special agent with respect to insurance policies that are subject to reporting under section 6041?*

*A–17.* Backup withholding does not apply to commissions reportable with respect to such an unincorporated special agent, provided that no cash is actually paid by the payor to the special agent.

*Q–18. Does backup withholding apply to ''designated distributions'' (as defined in section 3405(d)(1)) if the distribution is not subject to reporting under section 6041?*

*A–18.* No. As specified in A–30 of § 35a.9999–1, backup withholding applies only to distributions from pensions, annuities, or other plans of deferred compensation that are subject to reporting under section 6041. Thus, the following distributions are among those exempt from backup withholding because they are not subject to reporting under section 6041: (1) Distributions from an individual retirement account (subject to reporting under sections 408(i) and 6047(d)); (2) distributions from an owner-employee plan (subject to reporting under section 6047(b)); (3) certain surrenders of life insurance contracts (subject to reporting under section 6047(e)); and (4) distributions from a qualified bond purchase plan (subject to reporting under section 6047(c)).

*Q–19. Does backup withholding apply to payments of gambling winnings that are subject to reporting under section 6041?*

*A–19.* Backup withholding does not apply to any portion of reportable gambling winnings with respect to which tax is actually withheld under section 3402(q). In any case in which the reportable gambling winnings are not withheld upon under section 3420(q), backup withholding applies. Thus, gambling winnings reportable under section 6041 are subject to backup withholding if the payee does not furnish a taxpayer identification number and the payment is not withheld upon under section 3402(q). Answer 11 of §35a.9999–2 does not apply to gambling winnings. Thus, the payor is not required to determine whether any of the three conditions

specified therein applies with respect to the payee.

For purposes of information reporting and backup withholding, (1) the reportable gambling winnings is the amount paid with respect to the amount of the wager reduced, at the option of the payor, by the amount of the wager, and (2) amounts paid with respect to identical wagers are treated as paid with respect to a single wager for purposes of calculating the amount of proceeds from a wager. The determination of whether amounts paid with respect to a single wager are identical shall be made under the rules of §31.3402(q)–(1,)(c)(1)(ii) of the Employment Taxes and Collection of Income Tax at Source Regulations. In addition, until further regulations are issued, gambling winnings in excess of $600 are reportable only if the payout is based on betting odds of 300 to 1, or higher. The applicability of the odds requirement to information reporting and backup withholding is being studied by the Service and is subject to change in further regulations. Notwithstanding the odds requirement, winning from bingo, keno, and slot machines are subject to backup withholding if reportable under §7.6041–1 of the temporary Income Tax Regulations.

DEFINITION OF A PRE-1984 ACCOUNT

*Q–20. Under what circumstances is an account or instrument treated as a pre-1984 account?*

*A–20.* Answer 34 of §35a.9999–1 describes generally the accounts and instruments that are treated as a pre-1984 account. In addition, the purchase of additional shares in a credit union, where a prime account existed before 1984, shall be considered a pre-1984 account. If funds taken from one account, in existence prior to January 1, 1984, are used to create a new account on or after such date, however, the new account generally does not constitute a pre-1984 account. For example, with respect to a disposition of shares in a mutual fund and the purchase of shares of another fund within a group of mutual funds which occurs after December 31, 1983, the shares acquired in the second fund are not treated as a pre-1984 account unless the payee owned shares in the second fund prior to January 1, 1984.

If a shareholder is enrolled before January 1, 1984, in a dividend reinvestment program to purchase additional shares of the corporation sponsoring the program, the shares acquired through the program are considered a pre-1984 account, in the discretion of the payor. In the case of a qualified employee trust that distributes instruments in kind, any instrument distributed from the trust will be considered a pre-1984 account with respect to employees who were participants in the plan before January 1, 1984. Similarly, when a payor offers participants in a plan the opportunity to purchase stock of the payor after a specified time using the money that the payee invested during that period of time, the stock so purchased after December 31, 1983, shall be considered a pre-1984 account with respect to participants in the plan who either owned shares or invested money in the plan before January 1, 1984.

An instrument with respect to which a broker is the payor is a pre-1984 account if the brokerage account in which the instrument is held is not a ''post-1983 account.'' Answer 41 of §35a.9999–1 describes generally the manner of determining whether a brokerage relationship is a post-1983 account. In addition, a brokerage relationship will not be treated as a post-1983 account if (i) a broker redeems or repurchases securities which were acquired by the seller prior to January 1, 1984, and (ii) either (A) the issuer of the securities is the broker obligated to make an information return under section 6045 or (B) the broker was obligated during 1983 to redeem the securities.

BROKERAGE ACCOUNTS AND TRANSACTIONS

*Q–21. Does backup withholding apply to bonds the interest from which is exempt from taxation under section 103?*

*A–21.* Interest on a tax-exempt obligation is not reportable under section 6049 if the payee provides a written certification to the payor (other than the issuer) that interest on the obligation is exempt from tax. See §1.6049–

5(b)(1)(ii) of the Income Tax Regulations. If the interest is not reportable under section 6049, it is not subject to backup withholding. A broker, however, is required to report the gross proceeds of a sale of a tax-exempt bond (including redemption of the bond at maturity) under section 6045. Thus, the gross proceeds from the sale of such a bond are subject to backup withholding. Any accrued and unpaid tax-exempt interest included in the sales proceeds is not reportable under §1.6045–1(d)(3) of the Income Tax Regulations. Accordingly, backup withholding is not required with respect to the portion of the proceeds of the sale that represents accrued tax-exempt interest.

*Q–22. Does backup withholding apply to a redemption of a share in a mutual fund?*

*A–22.* Generally, yes. A redemption of shares of a mutual fund (other than a redemption at an issue price described in §1.6045–1(c)(3)(iv) of the Income Tax Regulations) is a reportable payment under section 6045, and thus the gross proceeds are subject to backup withholding if the fund is considered a broker or a broker is otherwise involved.

*Q–23. What amounts are subject to backup withholding upon the disposition of forward contracts or regulated futures contracts?*

*A–23.* If a customer is subject to backup withholding with respect to an account containing forward contracts or regulated futures contracts, the broker must withhold 20 percent of the following amounts:

(i) All cash or property withdrawn from the account by the customer during the year. A withdrawal includes the use of money or property in the account to purchase any property other than property acquired in connection with the closing of a contract. For this purpose, the acceptance of a warehouse receipt or other taking delivery to close a contract is in connection with the closing of a contract only if the property acquired is disposed of by the close of the seventh trading day following the trading day that the customer takes delivery under the contract. In addition, the making delivery to close a contract is in connection with the closing of a contract only if the broker is able to determine that the property used to close the contract was acquired no earlier than the seventh trading day prior to the trading day on which delivery is made. Cash withdrawals do not include repayments of debt incurred in connection with a making or taking delivery that meets the requirements of the preceding three sentences. A withdrawal also does not include payments of variation margin, commissions, fees, a transfer of cash from the account to another futures account that is subject to the rules of this A–23, or cash withdrawals traceable to dispositions of property other than futures (not including profit on the contract separately reportable under §1.6045–1(c)(5)(i)(*b*) of the Income Tax Regulations).

(ii) The amount of cash in the account available for withdrawal by the customer at the relevant year-end (as described in §1.6045–1(c)(5) of the Income Tax Regulations).

The payor must include the amount withheld and the amounts subject to withholding, in addition to the amounts otherwise reportable under section 6045, on the Form 1099–B filed with respect to a customer who is subject to backup withholding. The determination of whether the customer is subject to backup withholding should be made at the time of (1) the cash or property withdrawals or (2) the relevant year-end, whichever is applicable.

*Q–24. What amount is subject to backup withholding with respect to security sales made through a margin account?*

*A–24.* The amount subject to backup withholding in the case of a security sale made through a margin account (as defined in 12 CFR Part 220 (Regulation T)) is the gross proceeds (as defined in §1.6045–1(d)(5) of the Income Tax Regulations) on such sale. The amount required to be withheld with respect to such a sale, however, is limited to the amount of cash available for withdrawal by the customer immediately after the settlement of the sale. For this purpose, the amount available for withdrawal by the customer does not include amounts required to satisfy margin maintenance under: Regulation

T, rules and regulations of the National Association of Securities Dealers and national securities exchanges, and generally applicable self-imposed rules of the margin account carrier. Thus, for example, if the broker forces a customer sale to meet the requirements of Regulation T (a maintenance call), none of the proceeds of such a sale are subject to backup withholding (except to the extent of the fractional amount of the last share sold which exceeds the amount needed to meet the Regulation T margin requirement).

*Q–25. What amount is subject to backup withholding with respect to security short sales?*

*A–25.* The amount subject to backup withholding with respect to a short sale of securities is ordinarily the gross proceeds (as defined in §1.6045–1(d)(5) of the Income Tax Regulations) on such short sale. At the option of the broker, however, the amount subject to backup withholding may be the gain upon the closing of the short sale (if any) and the obligation to withhold can be deferred until the closing. A broker may use this alternative method of determining the amount subject to backup withholding with respect to a short sale only if at the time the short sale is initiated the broker expects that the amount of gain realized upon the closing of the short sale will be determinable from the broker's records. If, due to events unforeseen at the time the short sale was initiated, the broker is unable to determine the basis of the property used to close the short sale, the property shall be assumed to have a basis of zero. The determination of whether a short seller is subject to backup withholding shall be made on the date (1) of the initiation or closing, as the case may be, or (2) that the initiating or closing, as the case may be, is entered on the broker's books and records.

*Q–26. How does backup withholding apply to foreign currency contracts (as defined in section 1256(g))?*

*A–26.* In general, brokers shall report with respect to foreign currency contracts in accordance with the rules for reporting with respect to regulated futures contracts (see §1.6045–1(c)(5)). For purposes of §1.6045–1(c)(5)(i)(*b*) of the Income Tax Regulations realized profit (or loss) from a foreign currency contract is determined—

(1) In the case of making or taking delivery, by comparing the contract price to the spot price for the contract currency at the time and place specified in the contract, and

(2) In the case of a closing by entry into an offsetting contract, by comparing the contract price to the price of the offsetting contract.

For purposes of §1.6045–1(c)(5)(i) (*c*) and (*d*), unrealized profit in a foreign currency contract is determined by comparing the contract price to the broker's price for similar contracts at the close of business of the relevant year. Appropriate additions will be made to §1.6045–1(c) of the Income Tax Regulations in the near future. For rules determining the amount subject to backup withholding under §1.6045–1(c)(5), see A–23.

*Q–27. When does backup withholding apply to payments arising as a result of the retirement or redemption of a debt security subject to reporting under section 6045?*

*A–27.* With respect to the retirement or redemption of a debt security before January l, 1988, backup withholding applies on the sale date under §1.6045–1(d)(4) of the Income Tax Regulations. Additionally, a broker that is also the obligor on a debt security may elect to apply backup withholding on the payment date.

With respect to the retirement or redemption of a debt security after December 31, 1987, backup withholding applies on the date the ''sale'' is entered on the books of the broker. Additionally, a broker that is also the obligor on a debt security may elect to apply backup withholding on the payment date if later than the ''sale'' date.

A broker must determine whether backup withholding applies on the same date (either the date entered on the books of the broker or the payment date) for all similarly situated payees receiving payments on the same type of debt security.

### Special Rules With Respect to Readily Tradable Instruments

*Q–28. Do special rules apply if an account or instrument is acquired directly*

*from the payor or reportable interest or dividends after December 31, 1983?*

*A–28.* Yes. Special rules apply depending on the manner in which the instrument is acquired. In the case of a readily tradable instrument acquired directly from the payor by means of electronic transmission (*e.g.,* telephone or wire transfer), the payee, at the payor's option, shall be given 30 days after such acquisition to provide the certifications required in A–32 of § 35a.9999–1, before the payor is required to impose backup withholding on the reportable interest or dividends, *Provided* That the payee furnishes a taxpayer identification number to the payor at the time of the acquisition. If the payee withdraws any of the interest or dividends before the certifications are received, however, the payor must withhold 20 percent of the reportable amounts. For purposes of the preceding sentence, all cash withdrawals in an amount up to the reportable amounts are assumed to be interest or dividends. In addition, the payor must commence withholding on all reportable interest or dividends in connection with the instrument or account 30 days after the acquisition, if the payee has not provided the required certifications to the payor by such date.

The special rule described in the preceding paragraph shall also supply to acquisitions that are effected before January 1, 1985, by mail communication. With respect to accounts or instruments acquired by mail or after January 1, 1985, the payor is required to impose backup withholding on the reportable interest or dividend payments if the payee has not provided the required certifications at the time that the first reportable payment is made.

*Q–28A. Do special rules apply if a broker sells securities for a customer pursuant to a telephone instruction, in circumstances in which the customer failed to provide a certified taxpayer identification number as required by A–12 of § 35a.9999–2?*

*A–28A.* Yes. The customer, at the payor's option, shall be given 30 days after the date of the sale to furnish a certification as required by A–12 of § 35a.9999–2, provided that (1) the payee furnishes his taxpayer identification number before the sale and (2) the customer does not withdraw the proceeds of the sale prior to the time the required certification is provided (or backup withholding is applied). For purposes of the preceding sentence, an investment of the cash proceeds of the sale in other property shall be considered a withdrawal by the customer; however, investment in other property shall be permitted if, at all times, at least 20 percent of all gross proceeds reportable under section 6045 are held in cash by the broker. If the customer does not provide the required certification within 30 days after the date of the sale, the broker must withhold 20 percent of all reportable gross proceeds on the 31st day after the date of the sale.

*Q–28B. Will transition rules apply to backup withholding on gross proceeds reportable by brokers under section 6045?*

*A–28B.* Yes. The following transition rules will apply until April 1, 1984. First, for purposes of backup withholding on gross proceeds reportable by brokers, the penalties of perjury certification required by A–12 of § 35a.9999–2 (for post-1983 accounts) may be waived, at the broker's option, until April 1, 1984. A customer who opens an account after December 31, 1983, and who consummates a sale prior to April 1, 1984, will not be subject to backup withholding, provided that the customer furnishes a taxpayer identification number to the broker prior to the sale. The gross proceeds from sales made through post-1983 accounts after March 31, 1984, however, will be subject to backup withholding if the customer does not provide a taxpayer identification number certified under penalties of perjury. See A–28A for special rules applicable when a sale is made pursuant to a telephone instruction.

Second, until April 1, 1984, the gross proceeds from a sale made through a pre-1984 account, by a customer who has not provided a taxpayer identification number, will not be subject to backup withholding, at the broker's option, *Provided* that (1) the customer furnishes his number to the broker within 30 days after the date of the sale, and (2) the customer does not withdraw the proceeds of the sale prior to the time his taxpayer identification

number is furnished to the broker (or backup withholding is applied). For purposes of the preceding sentence, an investment of the cash proceeds shall be considered a withdrawal by the customer; however, investment of the proceeds in other property shall be permitted if, at all times during the 30-day period, at least 20 percent of all gross proceeds reportable under section 6045 are held in cash within the customer's account by the broker. If the customer does not furnish his taxpayer identification number within 30 days after the date of sale, the broker must withhold 20 percent of all reportable gross proceeds on the 31st day after the date of the sale.

If, with respect to forward contracts, regulated futures contracts, security short sales, or issuer payment of debt securities, the broker applies backup withholding on a date other than the sale date (see A–23 through A–25 and A–27), the rules of this A–28B shall apply as if any date on which the broker determines whether backup withholding applies were a sale date.

*Q–29. If a readily tradable instrument is transferred in a transaction between parties unrelated to the payor of the instrument without the assistance of a broker, is the transferee required to certify either the correctness of the taxpayer identification number or that the transferee is not subject to backup withholding due to notified payee underreporting?*

*A–29.* No. Certification is not required in the case of a transfer of a readily tradable instrument between parties unrelated to the payor if the parties act without the assistance of a broker.

*Q–30. If a bond in bearer form is redeemed by the obligor after December 31, 1983, is the payee required to certify under penalties of perjury the correctness of the payor's taxpayer identification number?*

*A–30.* Yes. The redemption of such an obligation is subject ot reporting under section 6045 if a broker is otherwise involved. However, the reedemption of an interest coupon is considered a window transaction as provided in A–42 of § 35a.9999–1, so the payee is not required to certify the correctness of the taxpayer identification number.

FOREIGN TRANSACTIONS

*Q–31. What representations must a person make, on a certificate signed under penalties of perjury, to establish that the is an exempt foreign person under § 1.6045–1(g)(1) of the Income Tax Regulations and, consequently, that the gross proceeds of his broker transactions are not section 6045 reportable payments which may be subject to backup withholding?*

*A–31.* In order to be treated as an exempt foreign person under § 1.6045–1(g)(1) of the Income Tax Regulations with respect to transactions effected by a broker during a calendar year, a customer will only be required to certify to the broker the following: (1) That the foreign person is neither a citizen nor a resident of the United States, (2) that the foreign person has not been, and at the time the statement is furnished reasonably expects not to be, present, in the United States for a period aggregating 183 or more days during the calendar year, and (3) that the foreign person is not, and at the time the statement is furnished reasonably expects not to be, engaged in a United States trade or business with respect to which any gain derived from transactions effected by the broker during that calendar year is effectively connected. In lieu of making the certifications in (2) or (3) of the preceding sentence, the person may instead certify that he is a beneficiary of an income tax treaty to which the United States is a party and pursuant to which gains from his broker transactions are exempt from Federal income taxation. A person may make this latter certification only if all conditions to the exemption provided by the treaty are actually satisfied.

In accordance with the foregoing, the Service will amend § 1.6045–1(g) of the Income Tax Regulations to indicate that a foreign person need make no express representations to a broker concerning the application of section 877 or section 6013 (g) or (h) (although a person with respect to whom a section 6013 (g) or (h) election is in effect may not make the representation in (1) above that he is not a resident of the United States). These amendments will apply with respect to substitute forms prepared by the broker, as well as to

the Form W–8 (which is being developed by the Service for use under the requirements both of §1.6049–5(b)(2)(iv) and §1.6045–1(g)(1) of the Income Tax Regulations). Subject to A–32, all other provisions of §1.6045–1(g) of the Income Tax Regulations will remain in effect.

*Q–33. With respect to payments of United States source original issue discount on obligations having maturities of six months or less from the date of original issue, must a payor obtain the statement described in §1.6049–5(b)(2)(iv) of the Income Tax Regulations from a payee who is neither a citizen nor a resident of the United States in order to avoid section 6049 information reporting and the possible application of backup withholding?*

*A–33.* Generally, when making payments of United States source interest or original issue discount to a payee who is a foreign person, the payor need not obtain the certificate described in §1.6049–5(b)(2)(iv) of the Income Tax Regulations since the payor usually either withholds tax on the amounts paid in accordance with subchapter A of chapter 3 of the Code or obtains a Form 1001 from the payee with respect to such payments. See §1.6049–5(b)(2)(i) and (ii) of the Income Tax Regulations. However, as original issue discount on obligations having maturities of six months or less from the date of original issue is not subject to United States tax when paid to a foreign person, there is neither withholding under subchapter A of chapter 3 of the Code nor the receipt of a Form 1001 with respect to such amount. In order to treat original issue discount on obligations having maturities of six months or less from the date of original issue the same under §1.6049–5(b)(2) of the Income Tax Regulations as interest and original issue discount on other obligations, the Service will allow a payee who is a foreign person to substitute a Form 1001 for the statement described in §1.6049–5(b)(2)(iv) of the Income Tax Regulations with respect to original issue discount on obligations having maturities of six months or less from the date of original issue. Despite the substitution of the Form 1001 for the Form W–8 or substitute form prepared by the payor, all other procedures of §1.6049–5(b)(2)(iv) of the Income Tax Regulations will apply.

Section §1.6049–5(b)(2) of the Income Tax Regulations will be amended to reflect the modifications made by this A–33.

*Q–34. Are payments of foreign source interest made on deposits outside the United States by a foreign branch of a United States bank reportable payments that may be subject to backup withholding?*

*A–34.* As provided in §1.6049–5(b)(1)(ix) of the Income Tax Regulations, such payments are not required to be reported under section 6049. However, except to the extent such payments are less than $600 in a taxable year or are made to persons who are neither citizens nor residents of the United States, they are subject to information reporting under section 6041(a).

For purposes of section 6041(a), a foreign branch of a United States bank may treat a person as being neither a citizen nor a resident of the United States if the bank has evidence in its records to such effect (provided it does not have actual knowledge that the evidence is false). Such evidence may include a written indication from the payee (e.g., appearing on an account application form) that the payee is neither a citizen nor a resident of the United States. The mere fact, however, that the payee has provided in address outside the United States is insufficient evidence to establish for this purpose that the payee is neither a citizen nor a resident of the United States. For payments made on or before November 20, 1984 on deposit accounts opened on or before August 22, 1984, an affidavit by an employee of the bank stating that the employee knows, or that the payee has represented orally, that the payee is not a U.S. person will be sufficient to establish such foreign status. For all other payments on deposits, the employee's affidavit will be sufficient to establish the payee's foreign status only if the affidavit states that the employee has a reasonable basis, founded on documentary evidence, for believing that the payee is neither a citizen nor a resident of the United States. Foreign source interest payments made on deposits outside the United States by foreign branches of United States

banks to United States persons, although reportable payments under section 6041(a), are not subject to backup withholding at this time. However, the issue of whether backup withholding should be applied with respect to payments described in this A–34, as well as the issue of the standard of evidence required to provide foreign status for information reporting purposes, is presently under further consideration. If backup withholding is subsequently determined to be appropriate, or the circumstances in which information reporting is required are changed, such will be provided in future regulations. Such changes, in that case, would apply on a prospective basis only.

The foregoing provisions do not apply, however, with respect to a payment by the branch of interest on a deposit evidenced by a bearer obligation that it has issued in accordance with the procedures of §1.163–5T(c)(2)(i) (B) or (C) (which include, in the case of §1.163–5T(c)(2)(i)(C), the requirement that the issuer maintain documentary evidence that demonstrates that the purchaser is either not a United States person, or if it is a United States person, that it is not an individual who is either a citizen or resident of the United States, and that it will comply with section 165(j)(3) (A), (B), or (C) and the regulations thereunder), provided that the branch does not act in the capacity of a custodian, nominee, or other agent of the payee with respect to the obligation. Where the branch is not acting in that capacity with respect to the obligation, it is not subject to the information reporting provisions of section 6041(a) unless it has actual knowledge that the payee is a United States person. Notwithstanding any provision of Q–37 of §35a.9999–3 to the contrary, a payment of interest on deposits evidenced by obligations issued in accordance with the procedures of §1.163–5(c)(2)(i) (B) or (C) shall not be considered to be made outside the United States if it is made to a United States address, whether by mail or by electronic transfer.

*Q–35. In the case of a payment to joint payees, must a payor obtain the statement described in §1.6049–5(b)(2)(iv) of the Income Tax Regulations (or other verification of foreign status described in §1.6049–5(b)(2) (ii) or (iii) of the Income Tax Regulations) with respect to each payee in order for such payment to be exempt from information reporting under §1.6049–5(b)(1)(vi) of the Income Tax Regulations and from the possible application of backup withholding?*

*A–35.* Yes. In order for a payment to be exempt from information reporting under §1.6049–5(b)(1)(vi) of the Income Tax Regulations (and in order not to constitute a reportable payment to which backup withholding may apply), the payor must ascertain in accordance with the provisions of §1.6049–5(b)(2) of the Income Tax Regulations that each payee is a foreign person. A broker similarly must verify the independent status of each person on a joint account as an exempt foreign person in accordance with the provisions of §1.6045–1(g)(1) of the Income Tax Regulations, and of A–31 and A–32, in order to exempt transactions effected on behalf of such account from section 6045 information reporting and from the possible application of backup withholding.

If the first payee named on the account, but not every joint payee, provides the verification of foreign status referred to in this A–35, backup withholding shall commence unless any one of the joint payees has provided a taxpayer identification number to the payor in the manner otherwise required in §§35a.9999–1 and 35a.9999–2. This is contrary to the general rule of section 3406(h)(3), which would require backup withholding to commence unless a taxpayer identification number is obtained from the first payee listed in the payment.

*Q–36. In order to avoid information reporting under section 6042 and the possible application of backup withholding, must a payor of United States source dividends to a person having an address outside the United States obtain from such person a statement, signed under penalties of perjury, that the person is neither a citizen nor a resident of the United States?*

*A–36.* No. The regulations under section 6042 exempt from information reporting any United States source dividends that are subject to withholding under section 1441 or section 1442 or

that would be subject to such withholding either but for the provisions of a treaty or but for the fact of the application of §1.1441–4 (a) or (f) of the Income Tax Regulations (relating to income effectively connected with a United States trade or business). See §1.6042–3(b)(2) of the Income Tax Regulations. The regulations under section 1441 indicate that, absent definite knowledge of the status of a payee, a payor of United States source dividends may determine whether withholding is required under section 1441 (absent the receipt of a Form 4224 evidencing effectively connected income) or whether a payee is entitled to exemption from such withholding under the applicable provisions of a treaty by reference to the address of the payee. See §1.1441–3(b)(3) of the Income Tax Regulations. Therefore, provided a payor does not have definite knowledge that a payee is a United States person, the payor may treat payments of United States source dividends to a payee with a foreign address as exempt from information reporting under section 6042 and from the possible application of backup withholding. (Note, however, that the use of the address method for purposes of section 1441 is under reconsideration in accordance with the provisions of section 342 of the Tax Equity and Fiscal Responsibility Act of 1982. Future elimination of such a method could impact prospectively on the requirement of backup withholding with respect to dividends).

Payments of dividends to United States persons by a foreign corporation which are not exempt from information reporting under §1.6042–3(b)(1) (relating to payments by a foreign corporation that is not engaged in business in the United States and that does not have an office or place of business or a fiscal or paying agent in the United States) will nevertheless not be subject to backup withholding beginning January 1, 1984. However, the issue of whether backup withholding should be applied with respect to such payments is presently under further consideration. If backup withholding is determined to be appropriate, such will be provided in future regulations. Backup withholding, in that case, would apply no earlier than July 1, 1984, and would apply on a prospective basis only.

*Q–37. With respect to a payment of interest that would be subject to information reporting under section 6049 but for the fact that it is made outside the United States, how is the place of payment to be determined?*

*A–37.* For purposes of the reporting requirements of section 6049 and backup withholding, the place of payment of interest is considered to be the place where the payor or middleman completes the acts necessary to effect payment. The fact that payment is made from an account with a United States office of a United States or foreign bank by means of a draft drawn on the bank or by a wire or other electronic transfer from an account with the United States office of the bank is not alone determinative of the place of payment. Similarly, the fact that payment is made by means of a transfer into an account of the payee witha United States office of a United States or foreign bank, whether by means of a wire or other electronic transfer, is not determinative of the place of payment, unless such office is expressly authorized by the payee to act as agent for collection of the interest or unless the records of such office otherwise reasonably evidence the nature of the funds transferred as interest and the amount of such interest.

Subject to the foregoing provisions concerning the receipt of wire and other electronic transfers, a bank or similar financial institution is generally considered to complete the acts necessary to effect payment of interest on its deposits at the branch or office at which it credits the interest to the account of the payee or at which payment is made in cash. However, in no event shall interest be considered to be paid for purposes of section 6049 at a branch or office of the financial institution unless all the following conditions are met: (1) The branch or office is a permanent place of business which is regularly maintained, occupied, and used to carry on a banking or similar financial business, (2) the business is conducted by at least one employee of the branch or office who is regularly in attendance at such place of business during normal business hours, and (3)

the branch or office receives deposits of funds from the public and in addition also engages in one or more of the other activities listed in §1.864–4(c)(5)(i) of the Income Tax Regulations.

In the case of a coupon bond (including a certificate of deposit with detachable interest coupons), the acts necessary to effect payment of interest are considered to be completed within the United States either if: (1) A coupon is presented to a payor or middleman within the United States (regardless of whether the funds paid are credited to an account of the payee maintained outside the United States); or (2) the coupon is presented at an office of a payor or middleman outside the United States but the interest on the coupon is credited to an account of the payee maintained with another office of the payor or middleman within the United States. The application of the provisions of this A–37 will be illustrated by examples to be published in future regulations.

REFUND OF ERRONEOUSLY WITHHELD AMOUNTS

*Q–38. What action should a payor take if the payor erroneously imposes backup withholding?*

*A–38.* If a payor erroneously withholds tax or withholds more than the proper amount of the tax, the payor may refund the amount withheld as provided in section 6413 and A–39. A payor shall be considered to have withheld erroneously only if (1) the amount is withheld because of an error by the payor (*e.g.,* an error in ''flagging'' or identifying an account that is subject to backup withholding), or (2) the Internal Revenue Service directs the payor to refund an amount withheld pursuant to section 3406(a)(1)(C). If the payor requires a payee described in §31.3452 (c)–(1) (b) through (p) of the Employment Taxes and Collection of Income Tax at Source Regulations (*e.g.,* a corporation) (See T.D. 7880, 1983–1 C.B. 242, 251, Removed by T.D. 7949, 1984–1 C.B. 204) to certify as to its status as exempt from backup withholding, the payee fails to make the required certification, and the payor subsequently withholds the tax from a payment to such payee, the payor may, in its discretion, treat the amount withheld as an amount erroneously withheld and refund it to the payee. The result is the same if the payor does not require such a payee to certify as to its status and the payor withholds.

If a payor withholds from a payee after the payee provides a taxpayer identification number or required certification to the payor but before the payor has processed the number or required certification (*i.e.,* prior to the time that the payor is treated as having received the number or certification under A–17 of §35a.9999–2), the payor may, in its discretion, treat the amount withheld as an amount erroneously withheld and refund it to the payee. If a payor withholds, however, because the payor has not received a taxpayer identification number or required certification and the payee subsequently provides a taxpayer identification number or the required certification to the payor, the payor may not refund the tax to the payee because the payor properly imposed backup withholding. The amount withheld is a credit against tax that the payee may take into account in computing estimated tax payments and may claim on the payee's income tax return.

*Q–39. In what manner should a payor treat erroneously withheld tax?*

*A–39.* If a payor withholds from a payee in error or withholds more than the correct amount of tax, the payor may refund the amount improperly withheld to the payee so long as the refund is made prior to the end of the calendar year and prior to the time the payor furnishes a Form 1099 to the payee with respect to the payment for which the improper withholding occurred. If the amount of the improper withholding is refunded to the payee, the payor shall keep as part of its records a receipt showing the date and amount of refund. For this purpose, a cancelled check or an entry in a statement, a copy of which is provided to the payee by the payor, will suffice for a receipt showing the refund of tax improperly withheld provided that the check or statement contains a specific notation that it is a refund of tax improperly withheld.

If the payor has not deposited the amount of the tax prior to the time

that the refund is made to the payee, the payor shall not deposit the amount of the tax improperly withheld. If the amount of the improperly withheld tax has been deposited prior to the time that the refund is made to the payee, the payor may adjust any subsequent deposit of tax collected under chapter 24 of the code which the payor is required to make in the amount of the tax which has been refunded to the payee. A payor shall not report on a Form 1099 as tax withheld any amount of tax which the payor has refunded to a payee.

*Q–40. If a ''middleman'' payor of reportable interest or dividends (e.g., a broker holding stock in ''street name'') receives a payment a portion of which was improperly withheld upon prior to payment to the ''middleman'' payor, what action may the ''middleman'' take?*

*A–40.* A middleman who receives a payment (referred to as a ''receiving payor'') from which tax has been improperly withheld may seek a refund of the tax withheld by the payor from whom the receiving payor received the payment (referred to as the ''upstream payor'') or, alternatively may obtain a refund of the tax by claiming a credit for the amount of tax withheld by the upstream payor against the deposit of any tax collected under chapter 24 of the Code which the receiving payor is required to withhold and deposit. The receiving payor shall make or credit the gross amount of the payment (including the tax withheld) to its payee as though it had received the gross amount of the payment from the upstream payor and shall withhold the tax if any of the conditions for imposing backup withholding exist with respect to its payee.

WHEN BACKUP WITHHOLDING STOPS

*Q–41. When may a payor stop withholding?*

*A–41.* If a payee is subject to backup withholding because the payee failed to furnish a taxpayer identification number in the manner required, the payor is required to withhold until a taxpayer identification number is received from the payee in the manner required. Once the payor receives the payee's taxpayer identification number in the manner required, the payor must stop withholding. See A–17 of § 35a.9999–2 for determining when a payor is treated as having received a taxpayer identification number. The same rule applies with respect to a payee certification failure under section 3406(a)(1)(D). If more than one condition applies for imposing backup withholding, a payor is required to withhold until all of the conditions for imposing backup withholding cease to apply.

CONFIDENTIALITY

*Q–42. What use may a payor make of information obtained under the backup withholding rules?*

*A–42.* A payor may use information obtained under the backup withholding rules (including any information with respect to any payee certification failure other than failure to certify the payee's taxpayer identification number) only for the purposes of complying with the backup withholding and information reporting requirements, or to the extent otherwise permitted by the Code. Any other use of this information may subject the payor to civil damages under section 7431 of at least $1,000 plus the cost of the action.

*Q–43. May a payor impose a surcharge to cover the cost of backup withholding on an account?*

*A–43.* No. If the payor imposes a surcharge on such an account, the payor is liable to the payee under section 7431 for an unauthorized use of information obtained by the payor under section 3406.

*Q–44. If a payor imposes backup withholding on a payee, may the payor use this information in determining whether to extend credit to the payee?*

*A–44.* No. If the payor uses this information in making its decision, the payor is liable to the payee under section 7431 for an unauthorized use of information obtained pursuant to section 3406.

*Q–45. If a payor is notified to begin withholding on payments made with respect to a payee and the payor provides notice to the payee of the withholding, has the payor made an unauthorized disclosure under section 7431?*

*A–45.* No. If, for example, a payor receives a notice from a broker of the requirement to withhold with respect to a payee and the payor, pursuant to A–

39 of § 35a.9999–1 and A–18 of § 35a.9999–2, provides notice to the payee of such withholding, the payor has no liability to the payee under section 7431.

MISCELLANEOUS

*Q–46. If a payor withholds on any payment and the payment is less than the minimum amount for which an information return is required, is the payor required to make an information return and furnish a statement to the recipient?*

*A–46.* Yes. Whenever the payor imposes backup withholding, the payor is required to make an information return regardless of the amount of the payment. The information return shall show the payee's name, address, and taxpayer identification number, the amount of the payment (or aggregate payments to the payee during the calendar year), and the amount of tax withheld. The information return must be provided to the Service no later than February 28 of the year following the calendar year of payment. In addition, the payor is required to furnish a statement to the payee showing the same information, including the amount of tax withheld no later than January 31 of the year following the calendar year of payment.

*Q–47. Does backup withholding apply to partnerships?*

*A–47.* Backup withholding generally will apply to a payment to a partnership if the partnership does not provide its correct employer identification number to the payor in the manner required. In addition, the partnership will be required to withhold on all reportable payments that a partnership makes to a payee who is subject to backup withholding. Distributions by a partnership to its partners of their distributive share of partnership income, however, are not reportable payments, so that backup withholding does not apply to such distributions, except to the extent such distributions are reportable under section 6045.

*Q–48. May payors require that a separate Form W–9 be filed for each account or instrument held by a payee?*

*A–48.* Yes. See A–29 of § 35a.9999–1. However, a payor at its option, may require a payee to file only one Form W–9 for all accounts or instruments of the payee. For example, a bank may permit a payee to file one Form W–9 for all savings, interest-bearing checking, or other accounts the payee has with the bank. In addition, a payee of a mutual fund that has a common investment advisor or common principal underwriter with other mutual funds will be permitted, in the discretion of the mutual fund, to provide one Form W–9 with respect to shares acquired or owned in any of the funds. The payee must provide the actual Form W-9 or acceptable substitute form to the fund (or payor) in order for this A-48 to apply.

*Q–49. Do the general rules for deposit, payment, penalties, and reporting of taxes withheld from wages apply to backup withholding?*

*A–49.* Yes. Section 3406(h)(1) provides generally that payments subject to backup withholding shall be treated as wages. Thus, the general procedures for withholding, deposit, payment, and reporting of Federal tax withheld shall apply to payments subject to backup withholding. For example, section 6205 provides that an employer (payor) who makes an undercollection of income tax required to be withheld shall correct such error for the return period in which the undercollection is ascertained. Accordingly, section 6205 requires the employer (payor) to withhold amounts from subsequent payments to the employee (payee) that should have been withheld from prior payments, whether or not such subsequent payments are subject to withholding. Thus, a payor who does not impose backup withholding when required must withhold from subsequent payment to the payee even though the conditions for imposing backup withholding may not exist at the time the subsequent payment is made to the payee.

*Q–50. If a payor uses a single employer identification number to report the tax withheld by all its subsidiaries, must all tax withheld with respect to reportable payments by its subsidiaries be aggregated for purposes of determining when tax withheld by them with respect to reportable payments must be deposited under section 6302?*

*A–50.* Yes. All tax withheld under a single employer identification number with respect to reportable payments

must be aggregated for purposes of determining when such tax must be deposited.

DUE DILIGENCE DEFINED FOR ACCOUNTS OPENED AND INSTRUMENTS ACQUIRED AFTER DECEMBER 31, 1983

*Before Notification of an Incorrect TIN*

*Q–51. In order for a payor of a reportable interest or dividend payment (other than in a window transaction) to be considered to have exercised due diligence in furnishing the correct taxpayer identification number of a payee with respect to an account opened or an instrument acquired after December 31, 1983, what actions must the payor take?*

*A–51.* In general, the payor of an account or instrument that is not a pre-1984 account (see A–34 of § 35a.9999–1 and A–20 of § 35a.9999–3) nor a window transaction (as defined in A–42 of § 35a.9999–1 and A–9 of § 35a.9999–2) must use a taxpayer identification number provided by the payee under penalties of perjury on information returns filed with the Internal Revenue Service to satisfy the due diligence requirement. Therefore, if, after 1983, a payor permits a payee to open an account without obtaining the payee's taxpayer identification number under penalties of perjury and files an information return with the Internal Revenue Service with a missing or an incorrect taxpayer identification number, the payor will be liable for the $50 penalty for the year with respect to which such information return is filed. However, in its administrative discretion, the Internal Revenue Service will not enforce the penalty with respect to a calendar year if the certified taxpayer identification number is obtained after the account is opened and before December 31 of such year, provided that the payor exercises due diligence in processing such number *i.e.*, the payor uses the same care in processing the taxpayer identification number provided by the payee that a reasonably prudent payor would use in the course of the payor's business in handling account information such as account numbers and balances. See Q/A–73 of this section.

Once notified by the Internal Revenue Service (or a broker) that a number is incorrect, a payor is liable for the penalty for all prior years in which an information return was filed with that particular incorrect number if the payor has not exercised due diligence with respect to such years. See A–56 through A–70A of this section for the exceptions to due diligence. A pre-existing certified taxpayer identification number does not constitute an exercise of due diligence after the Internal Revenue Service or a broker notifies the payor that the number is incorrect if the Internal Revenue Service or a broker notifies the payor on or after January 1, 1989, unless the payor undertakes the actions specified in A–88 of this section.

*Q–52. Is a payor as described in A–51 liable for the penalty if the payor obtained a certified taxpayer identification number from a payee but inadvertently processed the name or number incorrectly on the information return?*

*A–52.* Yes. The payor is liable for the penalty unless the payor exercised that degree of care in processing the taxpayer identification number and name and in furnishing it on the information return that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

*Payors and Trustees of Certain Grantor Trusts*

*Q–53. Is a payor of reportable interest or dividend payments to a grantor trust that was established on or after January 1, 1984, and which has ten or fewer grantors, liable for the penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number if the trustee could not provide a certified taxpayer identification number to the payor at the time the account was opened because each grantor had not furnished the trustee with a certified taxpayer identification number under penalties of perjury as provided under A–20 of § 35a.9999–2?*

*A–53.* A payor of a post-1983 grantor trust which has ten or fewer grantors is liable for the penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number unless the payor has exercised due diligence or comes within one of the exceptions to due diligence in this

section. In general, a payor of a post-1983 grantor trust exercises due diligence by obtaining a certified taxpayer identification number from the payee (trust) as described in A–4 of § 35a.9999–1 and A–51 of this section.

*Q–54. What are the legal obligations with respect to a grantor trust with ten or fewer grantors under sections 3406 and 6676(b)?*

*A–54.* Backup withholding will apply to a reportable payment to a grantor trust with ten or fewer grantors that was established on or after January 1, 1984, if one of the conditions for imposing backup withholding exists with respect to the trust. The trustee of a grantor trust with ten or fewer grantors may not certify either that the trust is not subject to backup withholding due to notified payee underreporting or that the trust's taxpayer identification number provided by the trustee is correct unless each grantor has furnished the trustee with certifications, signed under penalties of perjury, that the grantor is not subject to backup withholding due to notified payee underreporting and that the grantor's taxpayer identification number provided to the trustee is correct, and the trustee uses such taxpayer identification numbers provided by the grantors on any Form 1041 that is filed by the trustee pursuant to section 671.

Effective June 12, 1989, a trustee of a grantor trust with ten or fewer grantors is not considered a payor for purposes of backup withholding. Therefore, distributions by the trust of amounts to beneficiaries will not be considered payments of reportable amounts subject to backup withholding. With respect to reportable payments (except gross proceeds reportable under section 6045) made prior to the above period, see Q/A–20 of § 35a.9999–2 under which a grantor trust with ten or fewer grantors is considered a payor for purposes of backup withholding.

However, a grantor trust with ten or fewer grantors may be a payor under the respective information reporting sections. As such, the trust may be subject to the penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number. No penalty, however, will be imposed on the trust with respect to information returns filed for the 1987 or 1988 calendar year.

*Special Rules Under Q/A 28 of § 35a.9999–3*

*Q–55. Is a payor who obtains a taxpayer identification number pursuant to the special rule under A–28 of this section, relating to readily tradable instruments, liable for the penalty under section 6676 (b) for those years in which the payor filed an information return with an incorrect taxpayer identification number if the payor did not obtain a certified taxpayer identification number from the payee within the 30-day grace period provided in A–28 of this section?*

*A–55.* Yes. A payor of a post–1983 account is liable for the penalty under section 6676 (b) for filing an information return with an incorrect taxpayer identification number unless the payor has exercised due diligence. In general, a payor of a post–1983 account exercises due diligence by obtaining a certified taxpayer identification number from the payee as described in A–4 of § 35a.9999–1 and A–51 of this section. Thus, the payor described in Q–55 will be liable for the penalty for filing an information return with an incorrect taxpayer identification number if the payee did not provide the required certification to the payor within the 30-day period whether or not the payor backup withholds on the account. The rule described in this answer is effective with respect to information returns filed for the 1988 and subsequent calendar years.

EXCEPTIONS TO DUE DILIGENCE

*(1) Awaiting-TIN Certification*

*Q–56. In general, what actions must a payor who receives an awaiting-TIN certification prior to January 1, 1988 (a ''pre–1988 awaiting-TIN certification''), take to be considered to have exercised due diligence?*

*A–56.* In general, a payor with respect to an account or instrument that is not a pre–1984 account, instrument or relationship nor a window transaction will be considered to have exercised due diligence if the payee has complied with the requirements of A–18 of

§ 35a.9999–2 (exception for a payee who is waiting for receipt of a taxpayer identification number) prior to January 1, 1988, provided that the payor imposes backup withholding if the payee fails to provide a taxpayer identification number in the manner and within the period required by A–18 of § 35a.9999–2. This provision applies only with respect to information returns filed for calendar years before 1988.

*Q–57. Is a payor who receives an awaiting-TIN certification before January 1, 1988, liable for the penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number for the 1988 or a later calendar year?*

*A–57.* A payor who receives a pre–1988 awaiting-TIN certification for an account of a payee and files an information return with a missing taxpayer identification number for the 1988 or a later calendar year with respect to that account will be subject to the penalty under section 6676 (b) unless the payor continues to exercise due diligence by undertaking additional actions described in A–58 below to solicit the payee's taxpayer identification number.

*Q–58. What actions must a payor with a pre–1988 awaiting-TIN certification take in order to exercise due diligence after December 31, 1987, so that the payor will not be subject to a $50 penalty for filing an information return with a missing taxpayer identification number for a calendar year after 1987?*

*A–58.* A payor with a pre–1988 awaiting-TIN certification may exercise due diligence after December 31, 1987, by: (1) Continuing to backup withhold on the account, instrument, or relationship until a certified taxpayer identification number is received, (2) sending a mailing before December 31 of each year after 1987, requesting the certified taxpayer identification number from a payee who has not by that time provided a certified TIN, and (3) including a Form W–9 or acceptable substitute form in the mailing for the payee to provide his certified taxpayer identification number. The payor must include a reply envelope (self-addressed) in the mailing. The envelope sent to the payee must contain the following statement in a bold and conspicuous manner: ''Important Tax Document Enclosed.'' The payor may include other information in the mailing. The payor must continue to backup withhold and send the mailing each year until the payor receives a certified taxpayer identification number from the payee or until the account is closed.

*Q–59. What actions must a payor take in order to exercise due diligence on an account, instrument or relationship for which the payor receives an awaiting-TIN certification after December 31, 1987 (a ''post–1987 awaiting-TIN certification'') and before July 1, 1988?*

*A–59.* In order to exercise due diligence a payor who receives a post-1987 awaiting-TIN certification from a payee before July 1, 1988, must: (1) Obtain a certified taxpayer identification number from the payee within 60 days after the date that the payor receives the awaiting-TIN certification, and (2) backup withhold on any withdrawals made after the close of 7 business days after the date the awaiting-TIN certification is received and before the earlier of (i) the date that the payor receives a certified taxpayer identification number from the payee, (ii) the date the account is closed, or (iii) the date backup withholding commences on all reportable payments made to the account, instrument, or relationship. For purposes of subsection (ii) in this A–59, a payor is also required to backup withhold on any reportable payment made at the time the account or relationship is closed. For purposes of subsection (2) in this A–59, all cash withdrawals in an amount up to the reportable payments made from the day after the date of receipt of the awaiting-TIN certification to the date of withdrawal are treated as reportable payments. For purposes of this Q/A–59, the term ''cash'' has the same meaning as the term ''cash'' set forth in § 35a.3406–1(d)(1) of T.D. 8163, 52 FR 44867. Thus, a payor who receives a post-1987 awaiting-TIN certification (as described in this Q/A–59) from a payee who does not provide the payor with a certified taxpayer identification number within the 60 days described in A–18 of § 35a.9999–2 is liable for the penalty if reportable payments are paid to the account after

the 60 days and the payor files an information return with respect to the account with a missing taxpayer identification number. The payor is liable for the penalty whether or not the payor backup withholds on the reportable payments made after the 60-day period.

However, in its administrative discretion, the Internal Revenue Service will not enforce the penalty for a calendar year against a payor who has properly withheld under this Q/A–59 if the payor (A) obtains the certified taxpayer identification number after the 60-day period (described above) and before December 31 of such calendar year, provided that the payor exercises due diligence in processing such number on the information return filed for such year, *i.e.,* the payor uses the same care in processing the taxpayer identification number provided by the payee that a reasonably prudent payor would use in the course of the payor's business in handling account information such as account numbers and balances (See Q/A–73 of this section), or (B) effective with respect to the 1988 and subsequent calendar years, undertakes an annual mailing as described in Q/A–59A of this section. The 1988 annual mailing must be made between January 1, 1988, and June 12, 1989.

*Q–59A. What actions must a payor take in order to exercise due diligence on an account, instrument, or relationship for which the payor receives a post-1987 awaiting-TIN certification on or after July 1, 1988?*

*A–59A.* In order to exercise due diligence a payor who receives a post-1987 awaiting-TIN certification on or after July 1, 1988, may elect on a payee-by-payee basis or in general to: (1) Follow the rules for due diligence as set forth in Q/A–59 above, (2) follow such due diligence rules but apply the definition of the term ''cash'' set forth in § 35a.3406–1(d)(1), or (3) commence backup withholding on the account no later than 7 business days after the date the payor receives the awaiting-TIN certification on reportable payments thereafter made to the account (whether or not the payee makes a cash withdrawal). Under (3) above the payor must backup withhold until the earlier of (i) the date the payor receives a certified taxpayer identification number from the payee. (ii) the date the account is closed, or (iii) the date backup withholding commences on all reportable payments made to the account, instrument, or relationship. In addition with respect to (3), a payor must obtain a certified taxpayer identification number from a payee within 60 days after the date that the payor receives the awaiting-TIN certificate or undertake a mailing each year as described in Q/A–5 and 6 of § 35a.9999–1 (except that the first required mailing may be, but need not be, a separate mailing) soliciting the certified taxpayer identification number from the payee. The payor must make a mailing each year until the earlier of (i) the calendar year that the certified taxpayer identification number is received, or (ii) the calendar year in which the account is closed. However, if the account is closed in December of a calendar year, the mailing must be made after the account is closed and before January 31 of the subsequent calendar year.

Effective August 16, 1988, a payor who has elected to apply subsection (3) above must refund the amounts withheld during the 60-day period in accordance with the procedures described in Q/A–39 of this section if the payor receives the certified taxpayer identification number from the payee on or after August 16, 1988, and within the 60-day period, provided that the payee is not subject to backup withholding under section 3406(a)(1) (C) or (D) during any part of such period. For purposes of the preceding sentence, the amounts withheld are deemed to be withheld erroneously as described in Q/A–39 of this section. If a certified taxpayer identification number is not received by the payor within the 60-day period, the amounts withheld shall not be refunded unless the amounts are erroneously withheld without regard to the rules described in this Q/A–59A. The payor is also required to backup withhold after the 60-day period until the payor receives a certified taxpayer identification number from the payee or the account is closed.

*(2) Instruments Acquired From a Broker*

*Q–60. Under what circumstances will a payor whose readily tradable instrument*

*was acquired by a payee through a broker be considered to have exercised due diligence?*

*A–60.* Generally, a payor will be considered to have exercised due diligence with respect to a readily tradable instrument that is not a pre–1984 account of the payor as described in A–41 of § 35a.9999–1 if the payor uses a taxpayer identification number furnished by a broker. In addition, to exercise due diligence a payor must use the same care in processing the taxpayer identification number and name provided by the broker that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances. A taxpayer identification number acquired from a broker as described in this A–60 will not constitute an exercise of due diligence after the Internal Revenue Service or a broker notifies the payor that the number is incorrect unless the payor undertakes the actions specified in A–88 of this section.

*Q–61. Is the payor in A–60 liable for the penalty if the payor obtained the taxpayer identification number and name from a broker but inadvertently processed the number or name incorrectly and thus put an incorrect number on the information return?*

*A–61.* Yes. The payor is liable for the penalty unless the payor exercised that degree of care in processing the certified taxpayer identification number and name and in furnishing it on the information return that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

*Q–62. What actions must a payor who was notified by a broker that a payee failed to certify or furnish a taxpayer identification number take to be considered to have exercised due diligence?*

*A–62.* A payor who is notified by a broker that a payee failed to certify or furnish a taxpayer identification number to the broker will be considered to have exercised due diligence if the payor: (1) Imposes backup withholding if the payee did not certify his taxpayer identification number to the payor, (2) provides notice to the payee as provided in A–39 of § 35a.9999–1 and A–18 of § 35a.9999–2, and (3) encloses a postage-paid reply envelope (self-addressed) in the mailing of the notice. A payor described in this A–62 will be liable for the penalty under section 6676(b) for filing an information return with a missing taxpayer identification number for the 1988 or subsequent calendar years unless the payor complies with the procedures described in this A–62 in each such calendar year until the payor receives a certified taxpayer identification number from the payee or until the account is closed. A subsequent mailing is required to contain a reply envelope which may, but is not required to be, postage prepaid. For years prior to 1988, no penalty will be imposed on a payor who has complied with the requirements in this A–62 in the year the payor was notified by a broker.

A payor as described in this A–62 who receives a noncertified taxpayer identification number from a broker may be liable for the penalty under section 6676(b) for the 1988 or subsequent calendar years with respect to which the number provided by a payor on an information return filed with the Internal Revenue Service is determined to be incorrect unless the payor complies with the procedures described in this A–62 in each such calendar year until the payor receives a certified taxpayer identification number from the payee, the account is closed, or the payor undertakes the actions described in A–88 of this section after being notified of the incorrect taxpayer identification number.

*(3) Instruments Transferred Without the Assistance of a Broker*

*Q–63. With respect to an instrument transferred without the assistance of a broker, is a payor liable for the penalty under section 6676(b) if the payor records on its books a transfer of a readily tradable instrument in a transaction in which the payor was not a party?*

*A–63.* Generally, a payor as described in Q–63 will be considered to have exercised due diligence with respect to a readily tradable instrument that is not part of a pre-1984 account with the payor if the payor records on its books a transfer in which the payor was not a party. This exception applies until the

calendar year in which the payor receives a certified taxpayer identification number from the payee.

*Q–64. Is the payor described in A–63 required to solicit the taxpayer identification number of a payee of an account with a missing TIN in order to be considered as having exercised due diligence in a subsequent calendar year?*

*A–64.* There is no requirement on the payor to solicit the taxpayer identification number in order to be considered to have exercised due diligence in a subsequent calendar year under the rule set forth in A–63.

*Q–65. Is a payor as described in Q–63 considered to have exercised due diligence if the payee provides a taxpayer identification number to the payor (whether or not certified), the payor uses that number on the information return filed for the payee, and the number is later detemined to be incorrect?*

*A–65.* A payor as described in Q–63 who records on its books a transfer in which it was not a party is considered to have exercised due diligence under the rule set forth in A–63 where the transfer is accompanied with a taxpayer identification number provided that the payor uses the same care in processing the taxpayer identification number provided by a payee that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances. Thus, a payor will not be liable for the penalty if the payor uses the taxpayer identification number provided by the payee on information returns that it files, even if the taxpayer identification number provided by the payee is later determined to be incorrect. However, a payor will not be considered as having exercised due diligence under A–63 after the Internal Revenue Service or a broker notifies the payor that the number is incorrect unless the payor undertakes the actions described in A–88 of this section.

*(4) Window Transactions*

*Q–66. What action must a payor of a post-1983 window transaction (as defined in A–42 and A–42B of § 35a.9999–1 and A–9 of § 35a.9999–2) take to be considered as having exercised due diligence?*

*A–66.* A payor of a post-1983 window transaction shall be considered to have exercised due diligence only if the payor uses the taxpayer identification number provided by the payee on information returns filed with the Internal Revenue Service. If no number is provided, the payor will not be considered to have exercised due diligence.

*(5) Undue hardship*

*Q–67. Is a payor liable for a penalty under section 6676(b) with respect to a post-1983 account or instrument if the payor could have met the due diligence requirements but for the fact that the payor incurred an undue hardship?*

*A–67.* A payor of a post-1983 account or instrument is not liable for a penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number if the Internal Revenue Service determines that the payor could have satisfied the due diligence requirements but for the fact that the payor incurred an undue hardship. An undue hardship is an extraordinary or unexpected event such as the destruction of records or place of business of the payor by fire or other casualty (or the place of business of the payor's agent who under a pre-existing written contract had agreed to fulfill the payor's due diligence obligations under section 6676(b) with respect to the account subject to the penalty and there was no means for the obligations to be performed by another agent or the payor). Undue hardship will also be found to exist if the payor could have met the due diligence requirements only by incurring an extraordinary cost.

*Q–68. How does a payor obtain a determination from the Internal Revenue Service that the payor has met the undue hardship exception to the penalty under section 6676(b) for the year with respect to which the payor is subject to the penalty?*

*A–68.* A determination of undue hardship may be established only by submitting a written statement to the Internal Revenue Service signed under penalties of perjury that sets forth all the facts and circumstances that make an affirmative showing that the payor could have satisfied the due diligence requirements but for the occurrnece of

an undue hardship. Thus, the statement must describe the undue hardship and make an affirmative showing that the payor either was in the process of exercising or stood ready to exercise due diligence when the undue hardship occurred. A payor may request an undue hardship determination from the district director or the director of the Internal Revenue Service Center where the payor is required to remit the penalty under section 6676(b).

*(6) Error in Agency Records*

*Q–69. Is a payor liable for the penalty under section 6676(b) if the taxpayer identification numnber is incorrect as a result of an intrinsic error in the number records of the Social Security Administration or Internal Revenue Service?*

*A–69.* Generally, a payor will not be liable for a penalty under section 6676(b) if a taxpayer identification number is determined to be incorrect as a result of an intrinsic error in the records of the Social Security Administration or the Internal Revenue Service (for instance, because the records of such agencies in the normal course of business should be, but are not, up-to-date at the time the Internal Revenue service makes a determination that a taxpayer identification number is incorrect). The records of the Social Security Administration or the Internal Revenue Service will not be treated as in error if the records contain the name and taxpayer identification number of a person (or business) who subsequently changes his or her name (or business name) and does not communicate the change of name to the Social Security Administration or the Internal Revenue Service before the Internal Revenue Service determines that the taxpayer identification number is incorrect. The burden of proof will be on the payor to substantiate that the records of the Social Security Administration or the Internal Revenue Service are in error. A photocopy of the payee's social security card or the document provided by the Internal Revenue Service issuing the payee's employer identification number (that contains identical information to that on the information return with respect to which the penalty may be imposed) will be sufficient proof to come within this exception.

*(7) Exempt Recipients*

*Q–70. Is a payor liable for the penalty under section 6676(b) if the payor files an information return with a missing or an incorrect taxpayer identification number for an exempt recipient whom the payor determined was exempt at the time of the payment pursuant to the rules under A–29 of § 35a.9999–1?*

*A–70.* A payor is not liable for the penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number if the payee is exempt from information reporting under the applicable information reporting provisions of the Internal Revenue Code.

*(8) Life-Insurance Beneficiaries*

*Q–70A. Under what circumstances will a payor of reportable interest to a beneficiary of a life-insurance contract be considered to have exercised due diligence?*

*A–70A.* Generally, a payor of reportable interest to a beneficiary of a life-insurance contract under which payment to the beneficiary commenced on or before December 31, 1983, will be considered to have exercised due diligence with respect to a calendar year if: the payor (1) uses a taxpayer identification number provided by the payee beneficiary under penalties of perjury as described in Q/A–51 of this section on the information return filed for such year, or (2) undertakes a mailing as described in Q/A 5 or 6 (or Q/A–56) of § 35a.9999–1 prior to or at the time of payment, and (3) backup withholds on the reportable interest paid to the account if no taxpayer identification number has been provided (See Q/A–34 of § 35a.9999–1).

A payor of reportable interest to a beneficiary of a life-insurance contract under which payment to the beneficiary commenced on or after January 1, 1984, will be considered to have exercised due diligence with respect to a calendar year if the payor: (i) uses a taxpayer identification number provided by the payee-beneficiary under penalties of perjury as described in Q/A–51 of this section on the information

return filed for such year, or (ii) effective with respect to the 1989 and subsequent calendar years, undertakes a mailing as described in Q/A–5 and 6 of § 35a.9999–1 prior to or at the time of payment.

With respect to payments of reportable interest in calendar years prior to the 1989 calendar year (on a life-insurance contract under which payments to the beneficiary commenced on or after January 1, 1984), a payor will be considered to have exercised due diligence if the payor requested a certified taxpayer identification number from the payee beneficiary prior to, or at the time of, the reportable interest payment provided that at the time of such request the payor had in effect written procedures or policies that required the solicitation of the certified taxpayer identification number of the payee beneficiary prior to or at the time of payment.

CIRCUMSTANCES WHERE DUE DILIGENCE IS NOT SHOWN

*Both Pre-1984 and Post-1983 Accounts and Instruments*

*Q–71. Is a payor liable for the penalty under section 6676(b) if, after the due date of an information return (including extensions of time for filing), the payor files a corrected information return that contains the correct taxpayer identification number?*

*A–71.* Yes. The payor is still liable for the penalty under section 6676(b) for filing an information return with an incorrect or a missing taxpayer identification number. The payor is not liable for the penalty, however, if the payor files a corrected information return with the correct taxpayer identification number before the due date of the return with regard to extensions.

*Q–72. Is a payor liable for the penalty under section 6676(b) if the payor has been assessed (or has self-assessed) a $5 penalty under section 6723(a) for the failure to put correct information (which may include an incorrect taxpayer identification number) on an information return?*

*A–72.* Yes. The payor is liable for the penalty under section 6676(b) if the payor files an information return with a missing or an incorrect taxpayer identification number without exercising due diligence, coming within one of the exceptions to due diligence, or coming within the rule described in A–56 of this section, whether or not the payor is liable for or has been assessed the penalty under section 6723(a) with respect to the information return. To the extent that a penalty under sections 6723(a) and 6676(b) is assessed with respect to the same information return, the payor should file for a refund of the penalty under section 6723(a). Thus, with respect to the failure to include the correct taxpayer identification number (a missing or an incorrect taxpayer identification number) on an information return, the provisions under section 6676(b) shall apply and not the provisions under section 6723(a). If the penalty for the intentional failure to include the correct taxpayer identification number on an information return under section 6723(b) is assessed, no penalty shall be assessed under section 6676(b).

*Q–73. Is a payor who is not exercising due diligence liable for the penalty under section 6676(b) if the taxpayer identification number is determined to be incorrect because the payor (or his agent) improperly prepared or formatted the information return?*

*A–73.* Yes. A payor who is not satisfying all the due diligence requirements for the account in question is liable for a penalty under section 6676(b) if the taxpayer identification number is determined to be missing or incorrect due to a human, clerical, or processing error on the part of the payor (or the payor's agent) in preparing or formatting the information return. In general, a payor (or his agent) will not be considered to have erroneously prepared or formatted an information return if the payor (or his agent) has complied with all pertinent income tax regulations, revenue rulings, and procedures in effect with respect to information returns.

REVISED DUE DILIGENCE STANDARDS FOR TRANSACTIONS WITH FOREIGN PERSONS

*Q–74. What actions must a payor or broker of a pre-1984 account or instrument take to establish due diligence with respect to the penalty under section 6676(b) for filing an information return with a missing taxpayer identification number*

*for the 1984 and subsequent calendar years if payment on the account would not have been a reportable payment under section 6045 or 6049 but for the fact that the foreign person failed to provide the prescribed penalty of perjury statement under §1.6045–1(g)(1) or under §1.6049–5(b)(2) (iv) of the Income Tax Regulations?*

*A–74.* The payor or broker will be considered to have exercised due diligence on the account, if—

(1) The payor or broker sent the separate and nonseparate annual mailings to the payee as described in A–5 and A–6 and in the related questions and answers on due diligence in §35a.9999–1 and imposed backup withholding on the account beginning on January 1, 1984 (or, alternatively, imposed backup withholding under A–18 of §35a.9999–2 on payments made on or after January 16, 1984), until the taxpayer identification number is received from the payee, or

(2) The payor or broker sent a separate mailing as described in A–52 or A–55 of §35a.9999–1 to the payee requesting the required penalty of perjury statement (provided that the payor or broker has evidence in its records that the payee is a foreign person and provided that the payor or broker has no actual knowledge that such evidence is false), commenced backup withholding on payments made on or after July 1, 1984, and sends a nonseparate mailing by December 31 of the 1987 calendar year and each calendar year thereafter until the required penalty of perjury statement is received from the payee, or

(3) The payor or broker sent a mailing as described in A–52 or A–55 of §35a.9999–1 to the payee requesting the required penalty of perjury statement (provided that the payor or broker has evidence in its records that the payee is a foreign person and has no actual knowledge that such evidence is false), imposed backup withholding on payments made on or after January 1, 1985, and sent an additional mailing as described in A–3 of §35a.9999–4 during the 1984 and 1987 calendar years and each calendar year thereafter, until the payor or broker receives the required penalty of perjury statement.

*Q–75. What actions must a payor or broker of a post-1983 account or instrument take to establish due diligence with respect to the penalty under section 6676(b) for filing an information return with a missing taxpayer identification number for the 1984 and subsequent calendar years when payment on the account would not have been a reportable payment under Code section 6045 or 6049 but for the fact that the foreign person failed to provide any prescribed penalty of perjury statement under §1.6045–1(g)(1) or under §1.6049–5(b)(2)(iv) of the Income Tax Regulations?*

*A–75.* Generally, payor or broker will be treated as having satisfied the due diligence requirements with respect to post-1983 account or instrument if at the time the account or instrument was opened or acquired the payor or broker obtained a certified taxpayer identification number from the payee and used that number on the information return that was filed for the particular calendar year that is subject to the penalty. See A–51 of this section for the due diligence requirements for payors of accounts or instruments that are not pre-1984 accounts or instruments.

*Q–76. What actions must a payor or broker take to exercise due diligence with respect to an account for which a Form W–8 is no longer in effect so that the payor or broker is not liable for the penalty for filing an information return with a missing taxpayer identification number?*

*A–76.* A payor or broker of a pre-1984 or a post-1983 account or instrument that becomes subject to information reporting because of Form W–8 is no longer in effect may exercise due diligence with respect to such account by (1) sending a separate mailing to the payee before January 1 of the first calendar year that a Form W–8 is no longer in effect (and during which a Form W–9 or its acceptable substitute has not been received) and before December 31 of each such calendar year thereafter requesting the required penalty of perjury statement (Form W–8), and (2) imposing backup withholding on reportable payments made on the account during a year that a Form W–8 is not in effect (and during which a Form W–9 or its acceptable substitute has not been received). (For Forms W–

8 that expired in the 1986 calendar year, the payor may make one separate mailing that will satisfy the mailing requirement for both the 1986 and 1987 calendar years. This separate mailing must be made on or before June 30, 1988.) The mailing must be by first-class mail, or airmail if sent to a foreign address, and must contain the Form W–8 and a notice describing the Form W–8 and advising the payee that backup withholding may commence (or has commenced) because the form is not provided. The payor must also include a reply envelope (self-addressed) in the mailing. The rules of A–18 and A–19 shall apply to this rule provided in this A–76.

CLARIFICATION OF THE DUE DILIGENCE STANDARD PRIOR TO BEING NOTIFIED BY THE INTERNAL REVENUE SERVICE THAT A NUMBER IS INCORRECT

*Pre-1984 Accounts and Instruments*

*Q–77. What action must a payor of reportable interest or dividends on a pre-1984 account or instrument take to exercise due diligence so that the payor is not liable for the penalty under section 6676(b) for filing an information return with an incorrect taxpayer identification number?*

*A–77.* A payor of reportable interest or dividends on a pre-1984 account or instrument will be considered to have exercised due diligence in furnishing a taxpayer identification number with respect to a particular calendar year if in such year the payor (1) has made the prescribed yearly mailings as described in A–5 and A–6 and in the related questions and answers on due diligence in § 35a.9999–1 with respect to such account or instrument, or (2) obtained a certified taxpayer identification number from the payee. In addition, to be considered to have exercised due diligence the payor must have used the same care in processing the taxpayer identification number provided by the payee and in furnishing that taxpayer identification number on the information return that is filed for the year that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances. However, see A–56 of § 35a.9999–1 for the circumstances under which the penalty will not be imposed through administrative discretion with respect to information returns filed for the 1988 or subsequent calendar years.

*Q–78. Will a payor who filed an information return with an incorrect taxpayer identification number be considered to have exercised due diligence for a particular calendar year with respect to a pre-1984 account or instrument for which the payor did not have a certified taxpayer identification number if, in such calendar year,* the payor undertook a mailing as described in A–5 and A–6 and in the related questions and answers on due diligence in § 35a.9999–1 but failed to undertake one or more of the mailings required under A–5 or A–6 of § 35a.9999–1 in an earlier year?

*A–78.* No. The annual solicitation of the correct taxpayer identification number for a pre-1984 account or instrument is a cumulative requirement. Thus, if the separate mailing or one of the nonseparate annual mailings described under A–5 or A–6 of § 35a.9999–1, respectively, is not undertaken or is undertaken improperly, the payor can never demonstrate due diligence for the particular account or instrument in question through solicitation of the taxpayer identification number. Therefore, the payee is liable for the penalty under section 6676(b) with respect to the year in which the payor failed to make a mailing or makes a mailing improperly and all subsequent years (regardless of whether a mailing is made in a subsequent year) in which a return is filed with an incorrect taxpayer identification number. See A–56 of § 35a.9999–1 for the circumstances under which the penalty will not be imposed through the administrative discretion of the Internal Revenue Service with respect to information returns filed for the 1988 or subsequent calendar years.

*Q–79. Can a payor of reportable interest or dividends ever establish due diligence for a pre-1984 account or instrument if the payor missed one of the prescribed annual mailings or if one of the mailings was not undertaken in accordance with A–5 and A–6 and in accordance with the related questions and answers on due diligence described in § 35a.9999–1?*

*A–79.* The payor of a pre-1984 account or instrument who failed to undertake

one or more of the annual mailings as described in A–5 and A–6 and in the related questions and answers on due diligence described in § 35a.9999–1 (or undertook those mailings improperly) can establish due diligence by obtaining a certified taxpayer identification from the payee and using that number on the information return. Due diligence will be considered as exercised beginning in the calendar year in which the certified number is received and used on the information return filed for that year. Also, see A–56 of § 35a.9999–1 for the circumstances under which the penalty will not be imposed through the administrative discretion of the Internal Revenue Service.

*Q–80. Does a payor who subsequently obtains a certified taxpayer identification number or a Form W–8 on a pre-1984 account or instrument remain liable for the penalty for filing an information return with an incorrect or a missing taxpayer identification number in prior years if the payor did not exercise due diligence in such years by the prescribed mailings,* by obtaining a certified taxpayer identification number, or by obtaining a Form W–8 signed under penalties of perjury?

*A–80.* Yes. Obtaining a certified taxpayer identification number on a pre-1984 account or instrument may be considered an exercise of due diligence only for the year in which the certified number is received and subsequent calendar years.

*Q–81. Does the answer in A–80 change with respect to a calendar year if the payor subsequently obtains a certified number from a payee that matches the number used by the payor on a previous information return filed for such year?*

*A–81.* No. The payor remains liable for the penalty for those calendar years with respect to which the payor filed an information return with an incorrect taxpayer identification number without exercising due diligence in such year. The question of whether a payor has exercised due diligence is a year-by-year determination. Due diligence must be exercised in the particular year for which the payor is subject to the penalty.

*Q–82. Is a payor of a pre-1984 account or instrument who obtained a noncertified taxpayer identification number from a payee liable for the penalty if the payor undertook all the prescribed annual mailings but inadvertently processed the name or taxpayer identification number incorrectly on the information return?*

*A–82.* Yes. The payor is liable for the penalty unless the payor can show that the payor exercised that degree of care in processing the name and taxpayer identification number and in furnishing it on the information return that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

*Q–83. Is a payor of a pre-1984 account or instrument who has a certified taxpayer identification number from a payee liable for the penalty if the payor inadvertently processed the name or taxpayer identification number incorrectly on the information return?*

*A–83.* Yes. The payor is liable for the penalty unless the payor can show that the payor exercised that degree of care in processing the name and taxpayer identification number and in furnishing it on the information return that a reasonably prudent payor would use in handling account information, such as account numbers and balances.

### DUE DILIGENCE DEFINED AFTER NOTIFICATION BY THE INTERNAL REVENUE SERVICE THAT A TAXPAYER IDENTIFICATION NUMBER IS INCORRECT

#### *In General*

*Q–84. Is a payor of a reportable interest or dividend payment liable for the penalty under section 6676(b) in 1989 and subsequent calendar years if the Internal Revenue Service or a broker notifies the payor on or after January 1, 1988, and before the original due date of an information return that a payee's taxpayer identification number is incorrect, and the payor later provides that number on an information return?*

*A–84.* Yes. A payor will be liable for the penalty under section 6676(b) for providing an incorrect taxpayer identification number on an information return for the 1988 and subsequent calendar years if the payor is notified by the Internal Revenue Service on or after January 1, 1988, and before the

original due date of an information return that such number is incorrect, unless the payor is exercising due diligence.

*Pre-1984 Accounts and Instruments*

*Q–85. What actions must a payor of a pre-1984 account or instrument take to exercise due diligence to avoid the penalty under section 6676(b) for filing an information return with an incorrect taxpayer indetification number for the 1989 and subsequent calendar years, if the Internal Revenue Service or a broker notifies the payor, on or after January 1, 1989, and before the original due date of such information return, that the payee's taxpayer identification number is incorrect?*

*A–85.* A payor of a pre-1984 account or instrument will not be liable for the penalty if (1) at the time that the payor receives the first notice of an incorrect taxpayer identification number on or after January 1, 1989, the payor is considered to be exercising due diligence as described in A–5 and A–6 and the related questions and answers on due diligence under §35a.9999–1 or is complying or with the rule described in A–56 and the related questions and answers on due diligence under §35a.9999–1, (2) the payor sent the notice to the payee in the manner prescribed in §35a.3406–1(c), (3) if the payor received a Form W–9 or acceptable substitute Form W–9 (including a recertified taxpayer identification number) from the payee before the original due date of an information return (see A–31 under §35a.9999–1 and §35a.3406–1(d)(2) as to when a payor may treat a Form W–9 or substitute Form W–9 as being received), the payor used the new name and taxpayer number provided on the Form W–9 or acceptable substitute form on information returns filed after the calendar year in which the number is received, and (4) the payor sends the notice prescribed in §35a.3406–1(c) in each year subsequent to the year in which the notice was first sent to the payee (who has not by the end of such year provided a certified Form W–9 or acceptable substitute form) until the Internal Revenue Service or a broker sends a second notice (of an incorrect taxpayer identification number for the payee) to the payor within 3 calendar years. If a second notice is sent, due diligence is met according to the rules set forth in A–89 of this section.

*Q–86. Is a payor of a pre-1984 account or instrument who is considered to be exercising due diligence through the prescribed annual mailings in A–5 and A–6 (or who is undertaking the actions described in A–56 of §35a.9999–1) and through the related questions and answers on due diligence under §35a.999–1 in the year that the Internal Revenue Service notifies the payor of an incorrect taxpayer identification number required to undertake those mailings in addition to mailing the notice required in §35a.3406–1(c) (or in §35a.3406–1(f)(2) in the case of the notification of two incorrect taxpayer identification numbers in 3 calendar years)?*

*A–86.* No. A payor of a pre-1984 account or instrument is not required to undertake the mailings prescribed in A–5 and A–6 of §35a.9999–1 (or A–56 of §35a.9999–1) in any year in which the payor is also required to send the notice prescribed in §35a.3406–1(c) (or in §35a.3406–1(f)(2)). Thus, for example, assume that Payor X pays reportable interest on a pre-1984 account and has undertaken all the prescibed mailings in A–5 and A–6 by December 31, 1989, for the account of Payee A. Also assume that Payor X filed the calendar year 1984 return on February 28, 1985, with respect to Payee A with an incorrect taxpayer identification number and the 1985, 1986, 1987, and 1988 calendar year information returns on February 28, 1986, March 2, 1987, February 29, 1988, and February 28, 1989, respectively, with the same incorrect taxpayer identification number. Payor X has filed neither a Form 8210 for any of these years to remit the penalty under section 6676(b) nor the certification statement set forth in CP2100 (or letter 2137) for calendar years before 1988. In October of 1989 the Internal Revenue Service notifies Payor X that the number set forth on the 1988 calendar year information return (*i.e.*, filed in 1989 with respect to Payee A) was filed with an incorrect taxpayer identification number. Under these facts, Payor X is not liable for the penalty for filing the 1988 information return with an incorrect taxpayer identification number because (1) Payor X filed the 1988 information return before being notified by

the Internal Revenue Service of the incorrect taxpayer identification number, and (2) Payor X exercised due diligence in 1988 through the prescribed annual mailing (*i.e.,* Payor X made the separate mailing in 1983 and the nonseparate mailings in 1984, 1985, 1986, 1987, and 1988 with respect to Payee A).

Similarly, Payor X is not liable for the penalty for the 1984, 1985, 1986, and 1987 calendar year information returns filed on February 28, 1985, February 28, 1986, March 2, 1987, and February 29, 1988, respectively.

Payor X will be liable for the penalty, however, for filing the 1989 calendar year information return with the same incorrect taxpayer identification number (*i.e.,* the number that the Internal Revenue Service notified was incorrect) unless Payor X (1) sends the notice information as described in §35a.3406–1(c), and (2) uses the certified taxpayer identification number that is furnished by the payee, if one is received before the end of 1989, on the information return that is filed for the 1989 calendar year. If Payor X sends the notice described in §35a.3406–1(c) in the 1989 calendar year, Payor X is not also required to send the mailing described in A–5 and A–6 (or A–56) of §35a.9999–1 in 19B9. If the payee does not provide a new taxpayer identification number to the payor, the payor must continue to use the existing taxpayer identification number on information returns filed for such payee.

*Q–87. Is Payor X in the example in A–86 required to send the notice to Payee A described in §35a.3406–1 (c) if, earlier in the year, Payor X sent the 1989 annual mailing to Payee A as described in A–5 and A–6 of (or A–56) §35a.9999–1?*

*A–87.* Yes. Once a payor is notified of an incorrect taxpayer identification number, the payor must send the mailing prescribed in §35a.3406–1 (c) in order to continue exercising due diligence.

*Post-1983 Accounts or Instruments*

*Q–88. What actions must a payor of a post-1983 account or instrument take to exercise due diligence so as to avoid the penalty for filing an information return with an incorrect taxpayer identification number after being notified by the Internal Revenue Service or a broker on or after January 1, 1989, and before the original due date of such return that the number is incorrect?*

*A–88.* A payor as described in Q–88 of an account or instrument that is a post-1983 account or instrument will not be liable for the penalty for filing an information return with an incorrect taxpayer identification number after the Internal Revenue Service notifies the payor that the number is incorrect if (1) the payor is considered to be exercising due diligence at the time of the notice from the Internal Revenue Service because the payor has a certified taxpayer identification number from the payee or comes within one of the exceptions to due diligence, (2) the payor sent the notice in the manner prescribed in §35a.3406–1(c), and (3) if the payor received a new certified Form W–9 or acceptable substitute form (which may contain a recertified taxpayer identification number) from the payee in a calendar year prior to the calendar year that is the original due date of an information return, the payor used the new name and taxpayer identification number provided on the Form W–9 or acceptable substitute form on information returns filed after the calendar year in which the taxpayer identification number is received. (See A–31 under §35a.9999–1 and §35a.3406–1(d)(2)(ii) as to when a payor may treat a taxpayer identification number as being received.)

In order to continue the exercise of due diligence, the payor must send the notice as described in §35a.3406–1(c) in each calendar year until the payor obtains a certified taxpayer identification number from the payee or until the Internal Revenue Service sends a second notice (of an incorrect number for the payee) to the payor within 3 calendar years with respect to the account in question in which case due diligence is met according to the rules set forth in A–89 of this section.

DUE DILIGENCE DEFINED AFTER TWO NOTIFICATIONS OF AN INCORRECT TAXPAYER IDENTIFICATION NUMBER WITHIN 3 CALENDAR YEARS

*Both Pre-1984 and Post-1983 Accounts and Instruments*

*Q–89. What actions must a payor take, if the payor is notified twice within 3 calendar years that a payee has provided an incorrect taxpayer identification number, to exercise due diligence so that the payor will not be subject to the penalty for the continued use of that incorrect taxpayer identification number?*

*A–89.* The payor (1) must send the notice to the payee as prescribed in § 35a.3406–1(f)(2), (2) must code all subsequent information returns that are filed in the calendar year after the calendar year in which the second notice is received with the words ''2ND NOTICE'', and (3) must, if the payor receives from the payee a copy of the notice from the Internal Revenue Service that the payee has provided a correct taxpayer identification number as described in paragraph (h) of § 35a.3406–1, obtain and use such name and taxpayer identification number combination on the information returns that are filed after the calendar year in which the name and number are received.

A payor shall not count any notice received from the Internal Revenue Service or a broker prior to January 1, 1990, as the second of two notices within 3 calendar years. Further, a payor shall treat two or more notices received in a calendar year with respect to a payee as one notice received in that calendar year for that payee. The preceding sentence applies only with respect to a payor who receives such two or more notices under the same payor employer identification number (or social security number). See § 35a.3406–1(f).

PROCEDURAL ITEMS

*Q–90. In what year does the liability for the penalty under section 6676(b) arise?*

*A–90.* The liability for the penalty arises on the day following the date that the payor files an information return with an incorrect (or a missing taxpayer identification number) with respect to a calendar year in which the payor failed to exercise due diligence.

*Q–91. When must the payor remit the penalty to the Internal Revenue Service?*

*A–91.* The penalty is due by April 1 of the year following the calendar year for which the information return is filed.

*Q–92. Will interest accrue on the penalty if it is not timely paid?*

*A–92.* Yes. The interest rate will be determined pursuant to section 6621 of the Internal Revenue Code. For example, assume Bank Y is notified by the Internal Revenue Service in November 1986 that Y filed 1500 information returns with respect to the 1984 calendar year with incorrect taxpayer identification numbers. Y exercised due diligence in 1984 on 1,000 of the accounts for which Y filed information returns with incorrect taxpayer identification numbers. As a result, Y is liable for a $25,000 penalty (500×$50) with respect to the information returns filed for the 1984 calendar year. Further, interest will be charged on the $25,000 beginning April 1, 1985. To the extent Y filed information returns for the calendar year 1985 (or a later calendar year) with those same incorrect taxpayer identification numbers, Y may also be liable for a penalty and interest beginning on April 1, 1986 (or April 1 of the year following such later calendar year), with respect to such information returns.

*Q–93. In what manner should a payor remit the penalty to the Internal Revenue Service?*

*A–93.* Generally, the payor shall remit the penalty with a properly executed Form 8210. However, effective for information returns filed for the 1984, 1985, 1986, and 1987 calendar years with missing or incorrect taxpayer identification numbers, the payor may remit the penalty only with the certification statement set forth in CP 2100 and letter 2137 provided by the Internal Revenue Service for notifying payors of missing or incorrect taxpayer identification numbers. The submission to the Internal Revenue Service of the signed certification statement shall constitute the filing of a return. With respect to information returns filed with missing or incorrect taxpayer identification numbers for the 1988 or a later calendar year, the payor must remit the penalty with the Form 8210.

*Q–94. What method should the payor use to contest any part of the proposed penalty under section 6676(b)?*

*A–94.* A payor may contest the penalty judicially and administratively. With respect to a judicial contest, each penalty with respect to a return or statement is separable; therefore, a payor may contest its liability for the penalty by paying one such penalty and suing for a refund in a case in which the same issue arises with respect to multiple failures. A payor may also request an administrative appeals conference with the Internal Revenue Service. A request for an appeals conference may be made and granted after the penalty has been imposed by the Internal Revenue Service. The manner for requesting an appeals conference is set forth in Publication 556.

*Q–95. When does the period for the statute of limitations on assessment begin to run on the penalty under section 6676(b)?*

*A–95.* The period for the statute of limitations on assessment begins to run on a penalty that is due under section 6676(b) on the date the payor files the respective Form 8210 or, with respect to the penalty due for the 1984, 1985, 1986, and 1987 calendar year information returns, the earlier of the date the payor files the Form 8210 or files the certification statement set forth in CP 2100 and Letter 2137. The period for the statute of limitations on assessment runs for a period of 3 years. See section 6501.

*Q–96. May a payor surcharge or pass the penalty on to the account of the payee with respect to which the payor was liable for the penalty under section 6676(b)?*

*A–96.* No. A payor shall not surcharge or otherwise pass the penalty on directly or indirectly to the account of a particular payee. Section 6676 provides for a separate $50 penalty for a payee who fails to provide a correct taxpayer identification number to a payor.

MISCELLANEOUS ITEMS

*Q–97. Is a payor of a pre-1984 account or instrument who does not undertake the prescribed mailings in A–5 and A–6 of (or A–56) § 35a.9999–1 but obtained a certified taxpayer indentification number from a payee required to retain a copy of the document containing the certified number in its files?*

*A–97.* No. See Q/A–23 of § 35a.9999–2.

*Q–98. If a payor is notified that a payee is subject to backup withholding under both section 3406(a)(1) (B) and (C), with which rules should the payor comply and subject the payee to backup withholding?*

*A–98.* A payor should comply with both provisions. Certain reportable payments that are subject to backup withholding under section 3406 (a)(1)(B) are not subject to backup withholding under section 3406(a)(1)(C). In a case where a reportable payment, such as interest reportable under section 6049, is potentially subject to backup withholding under both provisions, the payor must comply with the notice requirements under both section 3406(A)(1) (B) and (C). The payor should stop backup withholding on the account only when all conditions subjecting the account to backup withholding have been satisfied by the payee. Backup withholding should be stopped according to the provision that applies last to the account in question.

*Acquisitions and Mergers*

*Q–99. Under what circumstance is a taxpayer liable for the penalty under section 6676(b) with respect to another taxpayer?*

*A–99.* A taxpayer will be liable for the penalty under section 6676(b) of another taxpayer if there is a validly enforceable agreement under State law by which the taxpayer agreed to pay the Federal tax liability of the other taxpayer or has guaranteed the payment of such taxpayer's tax liabilities. Alternatively, the penalty may be collectible from the taxpayer as a transferee of property of the other taxpayer pursuant to section 6901 if the liability arises on the liquidation of a partnership or corporation, or on a reorganization within the meaning of section 368(a). See section 6901 and the regulations thereunder. In the latter situation the taxpayer will be liable for any interest on the penalty if the value of the assets transferred exceeds the amount of such penalty, other taxes, related penalties, and interest as precribed under the Internal Revenue Code. However, if the value of such transferred assets is less than the penalty, interest will not be collected from the transferee taxpayer.

*Q–100. Is a pre-1984 account or instrument of a payor that is exchanged for an account or instrument of another payor as a result of a merger of the other payor or acquisition of the acounts or instruments of such payor transformed into a post-1983 account or instrument if the merger or acquisition occurs after December 31, 1983?*

*A–100.* No. A pre-1984 account or instrument that is exchanged for another account or instrument pursuant to a statutory merger or the acquisition of accounts or instruments is not transformed into a post-1983 account or instrument because the exchange occurs without the participation of the payee. See A–34 of § 35a.9999–1.

*Q–101. May the acquiring taxpayer described in A–100 rely upon the business records and past procedures of the merged payor or the payor whose accounts or instruments were acquired in order to establish that due diligence has been exercised on the acquired pre-1984 and post-1983 accounts or instruments?*

*A–101.* Yes. The acquiring payor may rely upon the business records and past procedures of the merged payor or of the payor whose accounts or instruments were acquired in order to establish due diligence to avoid the penalty under section 6676(b) with respect to information returns that have been or will be filed.

*Q–102. If the business records of a merged payor or of a payor whose accounts or instruments were acquired do not disclose whether an account is a pre-1984 or post-1983 account or instrument, how should the payor classify such account or instrument?*

*A–102.* The payor described in Q–102 may presume that such account or instrument is a pre-1984 account or instrument for purposes of backup withholding and due diligence. A payor who so treats such accounts and instruments may comply with the provisions of A–56 of § 35a.9999–1 in the calendar year of such merger or acquisition to obtain relief from the penalty under section 6676(b) with respect to information returns filed for the year following the year of the acquisition or merger and subsequent calendar years. With respect to the requirement to backup withhold on such accounts or instruments with respect to which there is a missing or an obviously incorrect taxpayer identification number, the payor may commence such backup withholding no later than sixty days following the date of the merger or acquisition of such accounts or instruments. A payor who withholds as described under the prior sentence will meet the backup withholding criterion under A–56 § 35a.9999–1. A payor as described in this answer is not required to obtain a determination from the Internal Revenue Service as described in A–56 of § 35a.9999–1.

*Q–103. Is a payor required to retain the notice of an incorrect taxpayer identification number described in § 35a.3406–1(b)(1) or (2) that the Internal Revenue Service or a broker sends to the payor?*

*A–103.* Yes. The payor is required to maintain the notices (whether or not such payor imposes backup withholding on the account to which the notice relates or incurs any liability for backup withholding) for a period of four years after the later of (1) the due date of such tax (backup withholding) for the return period to which the notice relates, (2) the date an information return is filed reflecting the final payments that are subject to backup withholding as a result of the notice described in § 35a.3406–1(b) (1) or (2), or (3) the date the tax is paid with respect to the notice. See section 6001 and the regulations issued thereunder for other rules on record retention.

*Q–104. Is a payor required to retain the ''statement of SSA or IRS contact'' (as described in the Appendix to § 35a.3406–1) that a payee has returned to the payor?*

*A–104.* No. A payor is not required to retain the ''statement of SSA or IRS contact''.

*Q–105. Does the rule of A–5 of § 35a.9999–2 which allows a payor to deliver the mailings described in A–5 and A–6 of § 35a.9999–1 in person or by intra-office mail, apply with respect to mailings requesting a penalties of perjury statement from foreign payees described in A–52 and A–55 of § 35a.9999–1?*

*A–105.* Yes. A payor or broker may deliver the mailings requesting the penalties of perjury statement from foreign payees described in A–52 and A–55 of § 35a.9999–1 provided the mailings are delivered by the same method used by the payor or broker in sending account

activity and balance information and other correspondence to the payee.

[T.D. 7929, 48 FR 56332, Dec. 20, 1983, as amended by T.D. 7933, 49 FR 63, Jan. 3, 1984; T.D. 7966, 49 FR 33236, Aug. 22, 1984; T.D. 8163, 52 FR 44874, Nov. 23, 1987; T.D. 8248, 54 FR 14351, Apr. 11, 1989]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, §35a.9999–3 was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000. By T.D. 8856, 64 FR 73408, Dec. 30, 1999, the effective date was delayed until Jan. 1, 2001.

### §35a.9999–3A Question and answer relating to exemption from backup withholding for certain principal payments made outside the United States by brokers on certain obligations.

The following question and answer concerns the exemption from information reporting and backup withholding for certain principal payments on obligations made outside the United States. The question and answer is issued under the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369):

*Q. Are payments of principal on obligations subject to information reporting under section 6045 or to backup withholding if made outside the United States?*

*A.* Such payments are not subject to section 6045 information reporting or backup withholding if made with respect to obligations the interest on which would be from sources outside the United States. The determination of whether a payment of principal is made outside the United States for this purpose shall be determined under rules similar to those contained in A–37 of §35a.9999–3 of the regulations.

[T.D. 7946, 49 FR 7227, Feb. 28, 1984]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, §35a.9999–3A was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000. By T.D. 8856, 64 FR 73408, Dec. 30, 1999, the effective date was delayed until Jan. 1, 2001.

### §35a.9999–4T Questions and answers relating to the application of information reporting and backup withholding to payments by foreign offices of United States and foreign brokers and by United States offices of banks and brokers, and other related matters (temporary).

The following questions and answers concern the application of information reporting and backup withholding to payments by foreign offices of United States and foreign brokers and by United States offices of banks and brokers, and other related matters. These questions and answers are issued under the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369):

*Q–1. Was a foreign office of a U.S. broker required to commence backup withholding on July 1, 1984, with respect to transactions effected by that office for a foreign customer who has not provided the broker with the penalty of perjury statement described in §1.6045–1(g)(1) of the regulations?*

*A–1.* Although it has not received a statement described in §1.6045–1(g)(1), a foreign office of a U.S. broker may treat a cusotmer as an exempt foreign person with respect to a transaction effected by that office for that customer if, in the case of both pre-1984 and post-1983 brokerage accounts, the broker has evidence in its records that the customer is a foreign person (provided the broker does not have actual knowledge that the evidence is false, the customer does not, except in infrequent and isolated circumstances, transmit instructions to the foreign office from within the United States, by mail, telephone, electronic transfer or otherwise, and the customer has not opened an account with a United States office of the broker). Such evidence may include a written indication from the customer (e.g., appearing on an account application form) that the customer is neither a citizen nor a resident of the United States. The mere fact, however that the customer has provided an address outside the United States is insufficent evidence to establish for this purpose

that the customer is neither a citizen nor a resident of the United States. For payments made on or before November 20, 1984 on brokerage accounts opened on or before August 22, 1984, an affidavit by an employee of the broker stating that the employee knows, or that the customer has represented orally, that the customer is not a U.S. person will be sufficient to establish such foreign status. For all other payments on brokerage accounts, the employee's affidavit will be sufficient to estblish the customer's foreign status only if the affidavit states that the employee has a reasonable basis, founded on documentary evidence, for believing that the cusomter is neither a citizen nor a resident of the United States.

A foreign office of a U.S. broker may also treat a customer as an exempt foreign person with respect to payments made outside the United States on a transaction effected by that office on behalf of that customer if any one of the following conditions is satisfied: (i) During the 12-month period immediately preceding the transaction, the broker has withheld tax on any amount, including interest and dividends, paid to such person under subchapter A of chapter 3 of the Code in accordance with the provisions of chapter 3; (ii) during the 12-month period immediately preceding the transaction another payor or middleman has withheld tax under subchapter A of chapter 3 of the Code in accordance with the provisions of chapter 3 on any amount, including interest and dividends, collected by the broker on behalf of the customer; or (iii) the broker, in accordance with §1.1441–6 (b) or (c) of the regulations, has received from the customer a Form 1001 (Ownership, Exemption or Reduced Rate Certificate) or special variation thereof that is in effect with respect to any amount, inlcuding interest, that is or may be paid to the customer during the calendar year in which the transaction is effected. (Notwithstanding the foregoing, the Internal Revenue Service is reconsidering the question of whether a broker should be permitted to treat a customer as an exempt foreign person for purposes of either information reporting or backup withholding merely by virtue of the fact that the broker or another person withheld tax under subchapter A of chapter 3 of the Code on any amount collected by the broker on behalf of the customer; any change in this rule will be announced in future regulations and will apply prospectively only).

If the broker does not obtain the statement described in §1.6045–1(g)(1) and does not otherwise establish in accordance with any of the foregoing procedures that a customer is not a U.S. citizen or resident, the information reporting provisions of section 6045 will apply. However, the issue of whether backup withholding should apply with respect to transactions effected by a foreign office of a U.S. broker, as well as the issue of the standard of evidence required to prove foreign status for information reporting purposes, is still under consideration. Until provided otherwise, backup withholding shall not apply with respect to such transactions. If backup withholding is subsequently determined to be appropriate, or the circumstances in which information reporting is required are changed, such will be provided in future regulations, and such changes will apply on a prospective basis only.

*Q–2. Are payments made with respect to transactions effected for a U.S. customer of a foreign office of a foreign broker reportable payments under section 6045 that may be subject to backup withholding?*

*A–2.* A payment made with respect to a transaction effected for a U.S. customer by a foreign office of a foreign broker is subject to information reporting under section 6045 only in the following circumstances: (i) The foreign broker is a controlled foreign corporation within the meaning of section 957(a); or (ii) 50 percent or more of the gross income of the foreign broker from all sources for the 3-year period ending with the close of its taxable year preceding the payment (or for such part of the period that the foreign broker has been in existence) was effectively connected with the conduct of a trade or business within the United States.

For purposes of determining whether a customer is an exempt foreign person, the foreign office of a foreign broker may use the same procedures as used by a foreign office of a U.S.

broker. If the foreign broker does not obtain the statement described in §1.6045–1(g)(1) and does not otherwise establish in accordance with those procedures that a customer is not a U.S. citizen or resident, the information reporting provisions of section 6045 will apply. However, as in the case of foreign offices of United States brokers, the issue of whether backup withholding should be applied with respect to such foreign offices, as well as the issue of the standard of evidence required to prove foreign status for information reporting purposes, is still under consideration. If backup withholding is subsequently determined to be appropriate, or the circumstances in which information reporting is required are changed, such will be provided in future regulations, and such changes will apply on a prospective basis only.

*Q–3. Was a U.S. office of a bank or a broker required to commence backup withholding on July 1, 1984, with respect to the pre-1984 account of a foreign payee or customer (other than a payee or customer who may be treated as an exempt recipient) if the bank or broker has not received a taxpayer identification number or the penalty of perjury statement described in §1.6049–5(b)(2)(iv) or §1.6045–1(g)(1) from that payee or customer?*

*A–3.* The bank or broker is not required to commence backup withholding with respect to the pre-1984 account of a foreign payee or customer until January 1, 1985, provided, however, that the following conditions are satisfied: (i) The bank or broker has otherwise complied with the requirements of A–52 or A–55 of §35a.9999–1 of the regulations and (ii) the bank or broker sends an additional mailing (which need not be a separate mailing) during calendar year 1984 requesting the payee or customer to provide the requisite statement signed under penalties of perjury. The additional mailing must be by first-class mail, or by airmail if sent to a foreign address, and must contain a notice describing the requisite statement and advising the payee or customer that backup withholding may commence if the statement is not provided. The mailing must include a reply envelope and a form on which the payee or customer may provide the requisite statement. However, no further mailing is required by this A–3 after the bank or broker has received the statement signed by the payee or customer under penalties of perjury. The rules of A–18 of §35a.9999–1 relating to persons for whom the payor has no correct address, the rules of A–19 of §35a.9999–1 relating to ''do not mail'' or ''stop mail hold'' instructions, and the rules of A–52 of §35a.9999–3 relating to the delivery of mailings shall apply with respect to the mailings required by this A–3.

Backup withholding must commence with respect to payments on pre-1984 accounts of foreign payees or customers on or after January 1, 1985, if the bank or broker has received neither a taxpayer identification number nor a statement described in §1.6049–5(b)(2)(iv) or §1.6045–1(g)(1) from the foreign payee or customer.

*Q–4. Do the backup withholding provisions apply to a payment in redemption or retirement of an obligation issued by an international organization if the payment is made within the United States by the international organization or by a person acting in its capacity as a paying agent for such organization?*

*A–4.* No, provided the international organization is an organization of which the United States is a member and which enjoys immunity or exemption from any liability or obligation to pay, withhold, or collect tax pursuant to an international agreement having full force and effect in the United States.

*Q–5. For purposes of the regulations under §35a.9999–5, under what circumstances is a custodian, nominee or other agent of a payee subject to information reporting or backup withholding with respect to interest or original issue discount paid or collected outside the United States?*

*A–5.* (i) The provisions of Q&A's 2, 3, 4, 5, 6, and 16 of §35a.9999–5 indicate that the payment or collection outside the United States of interest or original issue discount on obligations described therein by a person acting as a custodian, nominee or other agent of the payee with respect to those obligations may be subject to information reporting under section 6049 unless the

payee is an exempt recipient or a foreign person.

(ii) For purposes of the provisions described in subdivision (i), a payment or collection of interest or original issue discount outside the United States by a person acting in its capacity as a custodian, nominee or other agent of the payee with respect to such payment or collection is not subject to information reporting under section 6049 by that agent unless the agent is either (A) a United States person, (B) a controlled foreign corporation within the meaning of section 957(a), or (C) a foreign person 50 percent or more of the gross income of which from all sources for the 3-year period ending with the close of its taxable year preceding the collection or payment was effectively connected with its conduct of a trade or business within the United States.

(iii) For purposes of section 6049 and the regulations under §35a.9999–5, an agent (described in subdivision (ii)) of the payee paying or collecting interest or original issue discount outside the United States with respect to an obligation described in §35a.9999–5 may treat the payee as a person who is not a United States citizen or resident if the agent has evidence in its records to such effect (provided it does not have actual knowledge that the evidence is false). Such evidence may include a written indication from the payee (*e.g.*, appearing on an account application form) that the payee is neither a citizen nor a resident of the United States. The mere fact, however, that the payee has provided an address outside the United States is insufficient evidence to establish for this purpose that the payee is neither a citizen nor a resident of the United States. For payments made on or before November 20, 1984, on accounts opened on or before August 22, 1984, an affidavit by an employee of the agent stating that the employee knows, or the payee has represented orally, that the payee is not a U.S. person will be sufficient to establish such foreign status. For all other payments, an affidavit of an employee will be sufficient to establish the foreign status of the payee only if the affidavit states that the employee has a reasonable basis, founded on documentary evidence, for believing that the payee is neither a citizen nor a resident of the United States. (Notwithstanding the foregoing, the issue of the standard of evidence required to prove foreign status for information reporting purposes is still under consideration; any change in such standard would be made in future regulations and would apply on a prospective basis only.)

(iv) Payments described in this Q&A–5 are not subject to information reporting by a custodian, nominee or other agent of the payee under section 6041, if they are exempt from reporting under section 6049. In addition, although payments outside the United States of interest or original issue discount described in this Q&A–5 may be reportable payments as, for example, payments made by foreign offices of U.S. persons to U.S. persons, these payments are not subject currently to backup withholding by the custodian, nominee or other agent of the payee. (However, the issue of whether backup withholding should apply in this case is still under consideration; any change with respect to backup withholding in this regard would be made in future regulations and would apply on a prospective basis only.)

(v) For purposes of Q&A–7 and Q&A–17 of §35a.9999–5, the question of whether a broker is otherwise subject to information reporting under section 6045 shall be determined in accordance with the provisions of Q&A–1 and Q&A–2 of this §35a.9999–4.

[T.D. 7966, 49 FR 33237, Aug. 22, 1984, as amended by T.D. 7972, 49 FR 34340, Aug. 29, 1984]

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### § 35a.9999–5 Questions and answers relating to repeal of 30 percent withholding by section 127 of the Tax Reform Act of 1984 and to the application of information reporting and backup withholding in light of such repeal.

The following questions and answers concern the repeal of 30 percent withholding by section 127 of the Tax Reform Act of 1984 and the application of

information reporting and backup withholding in light of such repeal.

(a) *Rules concerning obligations in bearer form.*

*Q–1. When will interest qualify as portfolio interest within the meaning of section 871(h)(2)(A) or section 881(c)(2)(A)?*

*A–1.* Interest is portfolio interest within the meaning of section 871(h)(2)(A) or section 881(c)(2)(A) only if it paid with respect to an obligation issued after July 18, 1984, that is in bearer form and described in section 163(f)(2)(B).

*Q–2. Is a payment of portfolio interest described in section 871(h)(2)(A) or section 881(c)(2)(A) from sources within the United States subject to information reporting under section 6041 or 6049 or to backup withholding if the payment is made outside the United States?*

*A–2.* Unless an issuer or its agent has actual knowledge that a payee is a United States person, no information reporting under section 6041 or 6049 is required with respect to a payment of U.S. source portfolio interest by the issuer or agent if the payment is made outside the United States. As a payment of U.S. source portfolio interest made outside the United States by the issuer or agent is not subject to information reporting under section 6041 or 6049, it is not a reportable payment within the meaning of section 3406(b)(1) and is not subject to backup withholding by the issuer or its agent. Whether a payment of this interest is considered to be made outside the United States shall be determined for this purpose under the rules of A–37 of §35a.9999–3 of the regulations. However, notwithstanding the rules of A–37, for purposes of this A–2, payment shall not be considered to be made outside the United States if the interest is paid to a United States address, whether by mail or by electronic transfer. The payment or collection outside the United States of U.S. source portfolio interest on a bearer obligation by a person acting as a custodian, nominee or other agent of the payee with respect to the obligation is subject to information reporting under section 6049 if that person is otherwise required to report amounts paid to or collected on behalf of the payee. For example, a foreign branch of a U.S. bank holding the bearer obligation on behalf of a customer is required to report or backup withhold with respect to the portfolio interest collected for the customer unless the customer is an exempt recipient described in §1.6049–4(c)(1)(ii) or unless the branch has documentary evidence in its files that the customer is not a citizen or resident of the United States. See, *e.g.*, revised Q–34 of §35.9999–3.

*Q–3. Is a payment of interest from sources outside the United States on an obligation of a issuer that is a United States person or a controlled foreign corporation subject to information reporting under section 6041 or 6049 or to backup withholding if the obligation was issued in accordance with procedures described in §1.163–5(c)(2)(i) (A) or (B)?*

*A–3.* Unless an issuer or its agent has actual knowledge that a payee is a United States person, no information reporting under section 6041 or 6049 is required with respect to the payment of interest described in Q–3 by the issuer or agent if the payment is made outside the United States. As a payment of interest described in this A–3 is not subject to information reporting under section 6041 or 6049, it is not a reportable payment within the meaning of section 3406(b)(1) and is not subject to backup withholding by the issuer or its agent. Whether a payment of this interest is considered to be made outside the United States shall be determined for this purpose under the rules of A–37 of §35a.9999–3 of the regulations. However, payment will not be considered to be made outside the United States for purposes of this A–3 if the interest is paid to a United States address by mail or by electronic transfer. In the case of obligations issued prior to September 21, 1984, the foregoing sentence shall apply only with respect to interest paid more than 90 days after August 22, 1984. Notwithstanding any provision to the contrary in §1.6049–5(b)(1) (vii) or (ix), the payment or collection outside the United States of interest described in this A–3 by a person acting as a custodian, nominee, or other agent of the payee with respect to the obligation is subject to information reporting under section 6049 if that person is otherwise required to report amounts paid to or collected on

behalf of the payee. For example, a foreign branch of a U.S. bank holding the bearer obligation on behalf of a customer is required to report or backup withhold with respect to interest described in this A–3 unless the customer is an exempt recipient described in §1.6049–4(c)(1)(ii) or unless the branch has documentary evidence that the customer is not a citizen or resident of the United States. See, *e.g.*, revised Q–34 of §35a.9999–3. The provisions of this Q–3 do not apply with respect to interest on obligations described in A–4 or A–5.

*Q–4. Is information reporting under section 6041 or 6049 required with respect to interest described in section 861(c) that is paid outside the United States on an obligation that would be a registration-required obligation within the meaning of section 163(f)(2)(A) but for the fact that the obligation is described in section 163(f)(2)(B)?*

*A–4.* Unless the issuer or its agent has actual knowledge that the payee is a United States person, interest described in section 861(c) is not subject to information reporting under section 6041 or 6049 when paid by the issuer or agent outside the United States if the following conditions are met: (i) The obligation with respect to which the interest is paid is in bearer form; (ii) the obligation would be a registration-required obligation within the meaning of section 163(f)(2)(A) but for the fact that it is described in section 163(f)(2)(B); and (iii) the obligation is part of a larger single public offering of obligations. As a payment of interest by the issuer or its agent that meets these requirements is not subject to information reporting under section 6041 or 6049, it is not a reportable payment within the meaning of section 3406(b)(1) and is not subject to backup withholding by the issuer or agent. Whether a payment of this interest is considered to be made outside the United States shall be determined for this purpose under the rules of A–37 of §35a.9999–3 of the regulations. However, notwithstanding the rules of A–37, for purposes of this A–4, payment shall not be considered to be made outside the United States if the interest is paid to a United States address, whether by mail or by electronic transfer. The payment or collection outside the United States of interest on an obligation described in the foregoing paragraph by a person acting as a custodian, nominee or other agent of the payee with respect to the obligation is subject to information reporting under section 6049 if that person is otherwise required to report amounts paid to or collected on behalf of the payee. For example, a foreign branch of a U.S. bank holding the obligation on behalf of a customer is required to report or backup withhold with respect to this interest collected for the customer unless the customer is an exempt recipient described in §1.6049–4(c)(1)(ii) or unless the branch has documentary evidence that the customer is not a citizen or resident of the United States. See, *e.q.*, revised Q–34 of §35a.9999–3.

*Q–5. Is information reporting under section 6041 or 6049 required with respect to interest described in section 861(c) that is paid outside the United States on an obligation that would be a registration-required obligation but for the fact that it has a maturity (at issue) of not more than one year?*

*A–5.* Unless the issuer or its agent has actual knowledge that a payee is a United States person, no information reporting by the issuer or agent is required with respect to a payment of interest on such an obligation, whether in registered or bearer form, if the following conditions are satisfied: (i) the payment is made outside the United States; (ii) the face amount of the obligation is not less than $500,000 (determined by reference to the spot rate on the date of issuance, in the case of an obligation not denominated in United States dollars); (iii) the obligation satisfies the requirements of section 163(f)(2)(B)(i) and (ii)(I) and the regulations thereunder (as if the obligation would otherwise be a registration-required obligation within the meaning of section 163(f)(2)(A)) (However, an original issue discount obligation with a maturity of 183 days or less from the date of issuance is not required to satisfy the certification requirement of §1.163–5(c)(2)(i)(D)(3).); (iv) the obligation, if in registered form, is registered in the name of an exempt recipient described in §1.6049–4(c)(1)(ii); and (v) the obligation contains the following

statement (or a similar statement having the same effect): ''By accepting this obligation, the holder represents and warrants that it is not a United States person (other than an exempt recipient described in section 6049(b)(4) of the Internal Revenue Code and the regulations thereunder) and that it is not acting for or on behalf of a United States person (other than an exempt recipient described in section 6049(b)(4) of the Internal Revenue Code and the regulations thereunder).'' As a payment by the issuer or its agent of interest meeting these requirements is not subject to information reporting under section 6041 or section 6049, it is not a reportable payment within the meaning of section 3406(b)(1) and is not subject to backup withholding by the issuer or agent. Whether a payment of interest is made outside the United States shall be determined for this purpose under the rules of A–37 of §35a.9999–3 of the regulations. However, notwithstanding the rules of A–37, payment shall not be considered to be made outside the United States for purposes of this A–5 if the interest is paid to a United States address, whether by mail or electronic transfer. The payment or collection outside the United States of interest on an obligation described in the foregoing paragraph by a person acting as a custodian, nominee or other agent of the payee with respect to the obligation is subject to information reporting under section 6049 if that person is otherwise required to report amounts paid to or collected on behalf of the payee. For example, a foreign branch of a U.S. bank holding the obligation on behalf of a customer is required to report or backup withhold with respect to the interest collected for the customer unless the customer is an exempt recipient described in §1.6049–4(c)(1)(ii) or unless the branch has documentary evidence that the customer is not a citizen or resident of the United States.

*Q–6. Is a payment of original issue discount from sources within the United States on an obligation that is payable six months or less from the date of its original issue subject to information reporting under section 6041 or 6049 or backup withholding if it is paid outside the United States?*

*A–6.* Whether original issue discount described in Q–6 is subject to information reporting or backup withholding shall be determined under the same rules as those set forth in A–5 with respect to interest described in section 861(c).

*Q–7. Is information reporting under section 6045 required by an issuer or its agent with respect to the redemption or retirement of an obligation described in A–2, –3, –4 or –5?*

*A–7.* An issuer or its agent is not subject to the information reporting requirements of section 6045 with respect to the redemption or retirement of an obligation described in A–2, –3, –4 or –5, provided (i) that the issuer or agent does not have actual knowledge that the payee is a United States person, (ii) that the obligation is presented for retirement or redemption, or payment is otherwise made, at the office of the issuer or its agent outside the United States, and (iii) that if the obligation is in registered form, it is registered in the name of an exempt recipient described in §1.6049–4(c)(1)(ii). The determination of whether a payment is made at the office of the issuer or its agent outside the United States shall be made for this purpose under rules similar to those contained in A–37 of §35a.9999–3 of the regulations. However, notwithstanding the rules of A–37, the provisions of this A–7 shall not apply if payment with respect to the retirement or redemption is made to an address within the United States by mail or electronic transfer. (In the case of obligations described in A–3 and issued prior to September 21, 1984, the foregoing sentence shall apply only with respect to amounts paid more than 90 days after August 22, 1984). As a retirement or redemption by an issuer or its agent that meets the requirements of this A–7 is not subject to reporting under section 6045, it is not a reportable payment within the meaning of section 3406(b)(1) and is not subject to backup withholding by the issuer or its agent. Notwithstanding any provision to the contrary in §35a.9999–3A, a person acting as a custodian, nominee or other agent for a customer with respect to an obligation described in A–2,

–3, –4 or –5 that presents such obligation to the issuer or its agent for redemption or retirement, or that otherwise acts as a broker with respect to the obligation, is subject to information reporting under section 6045 if that person is otherwise required to report transactions effected on behalf of the customer. For example, a foreign office of a United States broker presenting an obligation outside the United States for retirement or redemption on behalf of a customer who is an individual is required to report or backup withhold unless the broker has documentary evidence in its files that the customer is a foreign person. See, *e.g.*, revised Q–34 of section 35a.9999–3.

(b) *Rules concerning obligations in registered form.*

*Q–8. When will interest qualify as portfolio interest within the meaning of section 871(h)(2)(B) or 881(c)?*

*A–8.* To qualify as portfolio interest described in section 871(h)(2)(B) or 881 (c)(2)(B), the interest must be paid with respect to an obligation (i) that is in registered form (within the meaning of section 163 (f)), issued after July 18, 1984, and (ii) with respect to which the United States person (including a foreign paying agent of an issuer who is a United States person) who would otherwise be required to deduct and withhold tax from the interest under section 1441 (a) or 1442 (a) receives the statement described in A–9 (or described in A–14, in the circumstances described in A–12) from the beneficial owner or a financial institution described in section 871(b)(4)(B).

*Q–9. In order for interest on a registered obligation to qualify as portfolio interest within the meaning of section 871(h)(2)(B) or section 881(c)(2)(B), what form of statement must be provided to a United States person (including a foreign paying agent of an issuer who is a United States person) who would otherwise be required to withhold tax on that interest under section 1441(a) or 1442(a)?*

*A–9.* Interest on a registered obligation may be treated as portfolio interest by a United States person otherwise required to deduct and withhold tax under section 1441(a) or 1442(a) if that person receives a statement that (i) is signed by the beneficial owner under penalties of perjury, (ii) certifies that such owner is not a United States person, or in the case of an individual, that he is neither a citizen nor a resident of the United States, and (iii) provides the name and address of the beneficial owner. The statement may be made, at the option of the person otherwise required to withhold, on a Form W–8 or on a substitute form that is substantially similar to Form W–8. The statement must be prepared, renewed and retained in accordance with the procedures prescribed in §1.6049–5(b)(2)(iv). If the information provided on the statement changes, the beneficial owner must so inform the person otherwise required to withhold within 30 days of such change. Interest paid on a registered obligation also may be treated as portfolio interest if an appropriate statement is provided to the United States person otherwise required to withhold by a securities clearing organization, a bank, or another financial institution that holds customers' securities in the ordinary course of its trade or business. In such case the statement must be signed under penalties of perjury by an authorized representative of the financial institution and must state (i) that the institution has received from the beneficial owner a Form W–8 or substitute form in accordance with the provisions of §1.6049–5(b)(2) (iv) or (ii) that it has received from another financial institution a similar statement that it, or another financial institution acting on behalf of the beneficial owner, has received the Form W–8 or substitute form from the beneficial owner. In the case of multiple financial institutions between the beneficial owner and the person otherwise required to withhold, this certificate must be given by each financial institution to the one above it in the chain. No particular form is required for the certificate provided by the financial institutions. However, the certificate must provide the name and address of the beneficial owner, and a copy of the Form W–8 provided by the beneficial owner must be attached. The certificate must be prepared, renewed and retained in accordance with procedures similar to those prescribed in §1.6049–5(b)(2)(iv). If the information on the Form W–8 changes, the beneficial

owner must so notify the financial institution acting on its behalf within 30 days of such changes, and the financial institution must promptly so inform the United States person otherwise required to withhold. This notice also must be given if the financial institution has actual knowledge that the information has changed but has not been so informed by the beneficial owner. In the case of multiple financial institutions between the beneficial owner and the person otherwise required to withhold, this notice must be given by each financial institution to the institution above it in the chain. A United States person otherwise required to deduct and withhold tax under section 1441(a) or section 1442(a) who receives the certificate described in A–9 must make an information return on Form 1042S of the payment with respect to which the certificate described in A–9 is required for the calendar year in which the payment is made. A payment described in the preceding sentence shall be treated as a payment for which there is a requirement to file a Form 1042S within the meaning of §1.1461–2(c)(1), and thus all the provisions of §1.1461–2(c) relating to the time and manner of filing the Form 1042S relate to the payment. The certificate described in A–9 received with respect to the payment shall be attached to the Form 1042S required to be filed with respect to the payment. Section 1.1461–2(c) will be amended to conform with the provisions of this paragraph.

*Q–10. In the absence of the receipt of a certificate described in A–9 (or a certificate described in A–14 in the circumstances described in A–12) or a Form W–9 (or a substitute form that is substantially similar and completed under penalties of perjury), what United States persons are required to deduct and withhold tax under section 1441(a) or 1442(a) from interest otherwise qualifying as portfolio interest within the meaning of section 871(h)(2)(B) or 881(c)(2)(B)?*

*A–10.* In general, any United States person who is otherwise a withholding agent for purposes of section 1441(a) or 1442(a) is required to deduct and withhold unless the certificate described in A–9 (or a certificate described in A–14 in the circumstances described in A–12) or a Form W–9 (or a substitute form that is substantially similar and completed under penalties of perjury) is received. However, a United States person is not required to withhold under section 1441(a) and 1442(a) regardless of whether the certificate is received under the following circumstances:

(i) The interest is paid to or collected on behalf of an exempt recipient at an address within the United States (other than an exempt recipient who is not a United States person); or

(ii) The interest is paid to a person at an address within the United States, and backup withholding is required with respect to that interest in accordance with the provisions of section 3406 (e.g., because neither a Form W–8 nor a Form W–9 has been received). For purposes of this A–10, an exempt recipient is a person described in §1.6049–4(c)(1)(ii).

*Q–11. Does information reporting under section 6041 or 6049 or backup withholding apply with respect to portfolio interest paid on a registered obligation to a payee who has provided the payor with a Form W–8 or substitute form?*

*A–11.* No. Provided the payor does not have actual knowledge that the payee is a United States person, neither information reporting under section 6041 or 6049 nor backup withholding is required in such case.

*Q–12. Is a United States person (including a foreign paying agent of an issuer who is a United States person) who is otherwise required to deduct and withhold tax in accordance with A–10 required to obtain the certificate described in A–9 with respect to interest on a registered obligation that has been targeted to foreign markets?*

*A–12.* The certificate described in A–9 is not required with respect to interest paid on a registered obligation that is targeted to foreign markets (in accordance with the provisions of A–13) if the interest is paid by a United States person to a registered owner at an address outside the United States, provided that the registered owner is a financial institution described in section 871(h)(4)(B). In that case, the United States person otherwise required to deduct and withhold tax may treat the interest as portfolio interest if it does not have actual knowledge that the

beneficial owner is a United States person and if it receives the certificate described in A–14 from a financial institution or member of a clearing organization, which member is the beneficial owner of the obligation, or the documentary evidence or statement described in A–14 from the beneficial owner, in accordance with the procedures described in A–15.

*Q–13. When is a registered obligation considered to be targeted to foreign markets for purposes of A–12?*

*A–13.* An obligation is considered to be targeted to foreign markets for purposes of A–12 if it is sold (or resold in connection with its original issuance) only to foreign persons (or to foreign branches of United States financial institutions described in section 871(h)(4)(B) in accordance with procedures similar to those prescribed in § 1.163–5(c)(2)(i)(A), (B), or (D). However, the provisions of that section that require an obligation to be offered for sale or resale in connection with its original issuance only outside the United States do not apply with respect to registered obligations offered for sale through a public auction. Similarly, the provisions of that section that require delivery to be made outside the United States do not apply to registered obligations offered for sale through a public auction if the obligations are considered to be in registered form by virtue of the fact that they may be transferred only through a book entry system. The obligation, if evidenced by a physical document other than a confirmation receipt, must contain on its face a legend indicating that it has been sold (or resold in connection with its original issuance) in accordance with those procedures.

*Q–14. What is the certificate or documentary evidence that may be provided in lieu of the Form W–8 (or substitute form) in the circumstances described in A–12?*

*A–14.* No particular form is required for the certificate or documentary evidence in lieu thereof described in this A–14, but it must be described in either subdivision (i) or subdivision (ii). The certificate described in subdivision (i) is required if the United States person otherwise required to deduct and withhold tax (the ''withholding agent'') pays interest to a financial institution described in section 871(h)(4)(B) or to a member of a clearing organization, which member is the beneficial owner of the obligation. The documentary evidence or statement described in subdivision (ii) is required if a withholding agent pays interest to a beneficial owner that is neither a financial institution described in section 871(h)(4)(B) nor a member of a clearing organization.

(i)(A) If the withholding agent pays interest to a financial institution described in section 871(h)(4)(B) or to a member of a clearing organization, which member is the beneficial owner of the obligation, the withholding agent must receive a certificate which states that, beginning at the time the last preceding certificate under this subdivision (i) was provided and while the financial institution or clearing organization member has held the obligation, with respect to each registered obligation that is targeted to foreign markets (in accordance with the provisions of A–13) which has been held by the person providing the certificate at any time since the provision of such last preceding certificate, either—

(*1*) The beneficial owner of the obligation has not been a United States person on each interest payment date; or

(*2*) If the person providing the certificate is a financial institution which is holding or has held an obligation on behalf of the beneficial owner, the beneficial owner of the obligation has been a United States person on one or more interest payment dates (identifying such date or dates), and the person making the certification has forwarded or will forward the appropriate United States beneficial ownership notification to the withholding agent in accordance with the provisions of A–15.

The person providing the certificate need not state the foregoing where no previous certificate has been required to be provided by the payee to the withholding agent under this subdivision (i).

(B) Whether or not a previous certificate has been required to be provided under this subdivision (i), each certificate under this subdivision (i) must further state that, with respect to each

registered obligation that is targeted to foreign markets (in accordance with the provisions of A–13) held and every other such obligation to be acquired and held by the person providing the certificate during the period beginning on the date of the certificate and ending on the date the next certificate is required to be provided, the beneficial owner of the obligation will not be a United States person on each interest payment date while the financial institution or clearing organization member holds the obligation and that, if the person providing the certificate is a financial institution which is holding or will be holding the obligation on behalf of a beneficial owner, such person will provide a United States beneficial ownership notification to the withholding agent (and a clearing organization that is not a withholding agent where a member organization is required by this A–14 to furnish the clearing organization with a statement) in accordance with A–15 of this section in the event such certificate (or statement in the case of a statement provided by a member organization to a clearing organization that is not a withholding agent) is or becomes untrue with respect to any obligation. A clearing organization is an entity which is in the business of holding obligations for member organizations and transferring obligations among such members by credit or debit to the account of a member without the necessity of physical delivery of the obligation.

(C) The certificate described in subdivision (i) (A) and (B) must identify the obligation or obligations with respect to which it is given, except where the certification is given with respect to an obligation that has not been acquired at the time the certification is made. An obligation is identified if it or the larger issuance of which it is a part is described on a list (*e.g.,* $5 million principal amount of 12% debentures of ABC Savings and Loan Association due February 25, 1995, $3 million principal amount of 10% U.S. Treasury notes due May 28, 1990) of all registered obligations targeted to foreign markets held by or on behalf of the person providing the certificate and the list is attached to, and incorporated by reference into, the certificate. The certificate must identify and provide the address of the person furnishing the certificate.

(D) If the withholding agent pays interest to a depository of a clearing obligation, then the clearing organization must provide the certificate to the withholding agent.

(E) Any certificate that is provided by a clearing organization must state that the clearing organization has received a statement from each member which complies with this subdivision (i) of A–14 and with A–15 (as if the clearing organization were the withholding agent and regardless of whether the member is a financial institution described in section 871(h)(4)(B)).

(F) Subject to the requirements set out in A–15, a certificate or statement in the form described in this subdivision (i) of A–14, in conjunction with the next annual certificate or statement, will serve as the certificate that may be provided in lieu of a Form W–8 with respect to interest on all foreign-targeted registered obligations held by the person making the certification or statement and which is paid to such person within the period beginning on the date of the certificate and ending on the date the next certificate is required to be provided.

(G) The certificate described in this subdivision may be provided electronically under the terms and conditions of § 1.163–5(c)(2)(i)(D)(*3*)(*ii*).

(ii) If the withholding agent pays interest to the beneficial owner of an obligation that is neither a financial institution described in section 871(h)(4)(B) nor a member of a clearing organization, then such owner must provide the withholding agent a Form W–8 (or substantially similar form completed under penalties of perjury) as set forth in A–9 of this section. However, a withholding agent that is a foreign branch of a financial institution described in section 871(h)(4)(B) and a United States person need not receive any statement or certificate from such beneficial owner, provided that the beneficial owner furnishes the withholding agent with documentary evidence as described in subdivision (iii) of Q–5 of § 35a.9999–4T that the beneficial owner is not a United States person.

*Q–15. What procedures apply with respect to the certificate described in A–14?*

*A–15.* (i)(A) Where no previous certificate with respect to registered obligations that are targeted to foreign markets (in accordance with the provisions of A–13) has been provided to the withholding agent by the person providing the certificate under subdivision (i) of A–14, such certificate must be provided within the period beginning 90 days prior to the first interest payment date on which the person holds a foreign-targeted registered obligation. (The withholding agent may, in its descretion, withhold the tax under section 1441(a) or 1442(a) if the certificate is not received by the date 30 days prior to the interest payment.) Thereafter the certificate must be filed within the period beginning on January 15 and ending January 31 of each year. If a certificate provided pursuant to the first sentence of this subdivision (i)(A) is provided during the period beginning on January 15 and ending on January 31 of any year, then no other certificate need be provided during such period in such year.

(B) If on any interest payment date after the obligation was acquired by the person making the certification the beneficial owner of the obligation is a United States person, then the person to whom the withholding agent pays interest must furnish the withholding agent with a United States beneficial ownership notification within 30 days after such interest payment date. A United States beneficial ownership notification must include a statement that the beneficial owner of the obligation has been a United States person on an interest payment date (identifying such date), that such owner has provided to the person providing the notification a Form W–9 (or a substitute form that is substantially similar to Form W–9 and completed under penalties of perjury), and that the person providing the notification has been and will be complying with the information reporting requirements of section 6049, if applicable.

(C) Where the person providing the notification described in subdivision (i)(B) of this A–15 is neither (*1*) a controlled foreign corporation within the meaning of section 957(a), nor (*2*) a foreign corporation 50 percent or more of the gross income of which from all sources for the three-year period ending with the close of the taxable year preceding the date of the statement was effectively connected with the conduct of trade or business in the United States, such person must attach to the notification a copy of the Form W–9 (or substitute form that is substantially similar to Form W–9 and completed under penalties of perjury) provided by the beneficial owner. When a person that provides the United States beneficial ownership notification does not attach to it a copy of such Form W–9 (or substitute form that is substantially similar to Form W–9 and completed under penalties of perjury), such person must state that it is either a controlled foreign corporation within the meaning of section 957(a), or a foreign corporation 50 percent or more of the gross income of which from all sources for the three-year period ending with the close of its taxable year preceding the date of the statement was effectively connected with the conduct of a trade or business in the United States. A withholding agent that receives a Form W–9 (or a substitute form that is substantially similar to Form W–9 and completed under penalties of perjury) must send a copy of such form to the Internal Revenue Service Center, Cincinnati, OH. 45999, within 30 days after receiving it and must attach a statement that the Form W–9 or substitute was provided pursuant to this A–15 with respect to a United States person that has owned a foreign-targeted registered obligation on one or more interest payment dates.

(D) If either a Form W–9 (or a substitute form that is substantially similar to a Form W–9 and completed under penalties of perjury) or the statement described in subdivision (C) of this A–15 is not attached to the United States beneficial ownership notification provided pursuant to subdivision (i)(B) of this A–15, the withholding agent is required to withhold tax under section 871 or 881 on a payment of interest made after the withholding agent has received the notification unless such form or statement (or a statement that the beneficial owner of the obligation is no longer a United States person) is

received before the interest payment date from the person who provided the notification (or transferee). If, during the period beginning on the next January 15 and ending on the next January 31, such person certifies as set out in subdivision (i) (A) and (B) of A–14 (except that such person does not certify under subdivision (i)(A)(2) that it has forwarded all United States beneficial ownership notifications to the withholding agent in accordance with the provisions of A–15), then the withholding agent is not required to withhold tax during the year following such certification (unless such person again provides a United States beneficial ownership notification without attaching a Form W–9 or substitute form that is substantially similar to Form W–9 and completed under penalties of perjury or the statement described in subdivision (C) of this A–15).

(E) Within the period beginning 10 days before the end of the calendar quarter and ending on the last day of each calendar quarter, any clearing organization (including a clearing organization that is a withholding agent) relying on annual certificates or statements from its member organizations, as set forth in A–14 of this section, must send each member organization having submitted such certificate or statement a reminder that the member organization must give the clearing organization a United States beneficial ownership notification in the circumstances described in subdivision (i)(B) of this A–15.

(F) The certificate described in subdivision (i) of A–14 must be retained in the records of the withholding agent for four years from the end of the calendar year in which it was received. The statement described in subdivision (i) of A–14 that is received by a clearing organization from a member organization must be retained in the records of the clearing organization for four years from the end of the calendar year in which it was received. The withholding agent who receives the certificate described in subdivision (i) of A–14 is not required to file Form 1042S to report payments of interest that are made with respect to foreign-targeted registered obligations held by the person providing the certificate and are made within the period beginning with the certificate date and ending on the last date for filing the next certificate.

(ii)(A) The documentary evidence (or Form W–8 or substantially similar form completed under penalties of perjury) described in subdivision (ii) of A–14 must be provided to the withholding agent within the period beginning 90 days prior to and ending on the first interest payment date on which the withholding agent pays interest to the beneficial owner. The withholding agent may, in its discretion, withhold the tax under section 1441(a) or 1442(a) if the documentary evidence (or Form W–8 or substantially similar form completed under penalties of perjury) is not received by the date 30 days prior to the interest payment. The beneficial owner must confirm to the withholding agent the continuing validity of the documentary evidence within the period beginning 90 days prior to the first day of the third calendar year following the provision of such evidence and during the same period every three years thereafter while the owner still owns the obligation. The withholding agent who receives the documentary evidence described in subdivision (ii) of A–14 is not required to file Form 1042S for payments of interest that are made with respect to foreign-targeted registered obligations held by the person who provides the documentary evidence and are made within the period beginning with the date on which the documentary evidence is provided and ending on the last date for confirming the validity of the documentary evidence. Where a Form W–8 (or substantially similar form completed under penalties of perjury) has been provided, it must be prepared, renewed, and retained in accordance with the procedures prescribed in §1.6049–5(b)(2)(iv) and must be attached to the Form 1042S required to be filed with respect to the payment.

(B) If, on any interest payment date after the obligation was acquired by the person providing the documentary evidence (or Form W–8 or substantially similar form completed under penalties of perjury) described in subdivision (ii) of A–14, the beneficial owner of the obligation is a United States person, then the beneficial owner must so inform the withholding agent within 30 days

after such interest payment date and must provide a Form W–9 (or substitute form that is substantially similar completed under penalties of perjury) to the withholding agent. However, the beneficial owner is not required to provide another Form W–9 (or substitute form that is substantially similar and completed under penalties of perjury) if such person has already provided it to the withholding agent within the same calendar year.

(iii) In accordance with the provisions of section 871(h)(4), the Secretary may make a determination in appropriate cases that a certificate or statement by any person, or class of persons, does not satisfy the requirements of that section. Should that determination be made, all payments of interest that otherwise qualify as portfolio interest to that person would become subject to the 30 percent withholding tax.

(iv) Notwithstanding the foregoing requirements of A–14 and A–15 of this section,

(A) Any certificate that is required to be filed with the withholding agent during the period beginning on January 15 and ending on January 31, 1986 is not required to state that the beneficial owner of an obligation, prior to the date of the certificate, either was not a United States person or was a United States person if the obligation was acquired by the person providing the certificate on or before September 19, 1985; and

(B) All of the requirements of A–14 and A–15 of § 35a.9999–5, as in effect prior to the effective date of these amendments, shall remain effective with respect to each interest payment prior to the filing of the certificate described in subdivision (A), except that (*1*) the provisions of A–14 relating to which persons are required to receive certificates or statements and (*2*) subdivisions (ii) of A–14 and (ii) of A–15 shall become effective with respect to each interest payment after September 19, 1985.

*Q–16. Is information reporting under section 6041 or 6049 or backup withholding required with respect to portfolio interest paid on a foreign-targeted registered obligation in the circumstances described in A–12?*

*A–16.* No. Absent actual knowledge that the beneficial owner is a United States person, neither information reporting nor backup withholding is required in such circumstances if the certificate described in A–14 is provided to the payor in accordance with the provisions of A–15. Notwithstanding the foregoing, the collection outside the United States of portfolio interest on a registered obligation by a person acting as a custodian, nominee or other agent of the payee with respect to the obligation is subject to information reporting under section 6049 if that person is otherwise required to report amounts paid to, or collected on behalf of, the payee. For example, a foreign branch of a U.S. bank holding the obligation on behalf of a customer is required to report or backup withhold with respect to portfolio interest collected for the customer unless the customer is an exempt recipient described in § 1.6049–4(c)(1)(ii) or unless the branch has documentary evidence in its files that the customer is not a citizen or resident of the United States.

*Q–17. Do the information reporting provisions of section 6045 apply with respect to the retirement or redemption of a registered obligation that has been targeted to foreign markets in accordance with A–13?*

*A–17.* The general rules of section 6045 apply. For instance, a financial institution acting as a custodian, nominee or other agent for a customer with respect to a foreign-targeted registered obligation that presents such obligation to the issuer or its agent for redemption or retirement, or that otherwise acts as a broker with respect to the obligation, is subject to information reporting under section 6045 if that person is otherwise required to report transactions effected on behalf of the customer. For example, a foreign office of a United States broker presenting an obligation to an agent of the issuer outside the United States for retirement or redemption on behalf of a customer who is an individual is required to report or backup withhold unless the broker has documentary evidence in its files that the customer is a foreign person.

(c) *Convertibility of obligations.*

*Q–18. May a bearer obligation be converted into a registered obligation that is subject to the certification requirements of A–9 or A–14 with respect to any interest payment?*

*A–18.* A bearer obligation can be converted into a registered obligation that is subject to the certification requirements of A–9 or, if the requirements of A–12 are met with respect to an interest payment and the obligation has been targeted to foreign markets under A–13, to the certification requirements of A–14. That a certificate under A–9 was required to be provided with respect to a previous interest payment on the obligation is irrelevant to whether such a certificate (rather than a certificate under A–14) must be provided with respect to the present interest payment. Unless the certification requirements of A–14 apply, the general information reporting and backup withholding requirements of sections 6045, 6049, and 3406 apply to a registered obligation. An obligation issued after July 18, 1984, and on or before September 21, 1984, that would otherwise be in registered form but for the fact that it is convertible into bearer form, shall be considered to be in bearer form for purposes of A–1 if it satisfies the applicable requirements of the relevant temporary or proposed regulations under section 163(f)(2)(B), as described in §1.163–5(c)(2)(vi). An obligation issued after September 21, 1984, that would otherwise be in registered form but for the fact that it is convertible into bearer form shall be considered to be in bearer form. See A–1 of §35a.9999–5 (a) concerning the conditions that must be satisfied for interest with respect to a bearer obligation to qualify as portfolio interest.

*Q–19. Under what circumstances is a certificate described in A–9 required with respect to a registered obligation that is considered to be targeted to foreign markets under A–12?*

*A–19.* The certificate described in A–9 is required with respect to interest paid on a registered obligation that has been targeted to foreign markets under A–13 only if the requirements of A–12 are not satisfied. Provided that the requirements of A–12 are met with respect to an obligation at the time of an interest payment, that a certificate under A–9 was required to be provided with respect to a previous interest payment on the obligation is irrelevant to whether such a certificate must be provided with respect to the present interest payment. Also the general information reporting and backup withholding provisions of section 6045, 6049, and 3406 apply unless the certification requirements of A–14 apply.

(d) *Form 1042S requirements.*

*Q–20. Is the owner of an obligation the interest on which qualifies as portfolio interest (within the meaning of section 871(h)(2) or section 881(c)(2)) required to file an ownership certificate described in §1.1461–1(b) (Form 1001) with respect to the obligation or is the withholding agent required to file an information return on Form 1042S?*

*A–20.* (i) The owner of an obligation the interest on which qualifies as portfolio interest is not required to file the certificate described in §1.1461–1(b) (Form 1001). Pursuant to A–8, the statement described in A–9 (or described in A–14, in the circumstances described in A–12) is required to be provided to the withholding agent with respect to portfolio interest on a registered obligation.

(ii) If a statement is required pursuant to A–9 with respect to portfolio interest on a registered obligation, an information return on Form 1042S, accompanied by the statement (which may be a Form W–8) described in A–9, is required to be filed with the Internal Revenue Service for the calendar year in which the payment is made. See A–9 of this section. However, if a statement is required pursuant to A–14 with respect to portfolio interest on a registered obligation, an information return on Form 1042S is not required unless a Form W–8 (or substantially similar form completed under penalties of perjury) is provided. See A–15(ii)(A) of this section. With respect to a payment of portfolio interest on a bearer obligation, an information return on Form 1042S is not required to be filed.

(e) *Application of repeal of 30 percent withholding to pass-through certificates.*

*Q–21. Will interest paid to a holder of a pass-through certificate as described in §1.163–5T(d)(1) qualify as portfolio interest for purposes of the exemption*

*from 30 percent withholding under section 871(h)(2) or section 881(c)(2)?*

*A–21.* (i) Interest paid to a holder of a pass-through certificate will qualify as portfolio interest under section 871(h)(2) or section 881(c)(2) for purposes of the exemption from 30 percent withholding if the interest satisfies the conditions described in A–1 or A–8 of this section. For purposes of A–1 or A–8 of this section and sections 871(h) and 881(c), interest is considered to be paid on or with respect to the pass-through certificate and not on or with respect to any obligations held by the fund or trust to which the pass-through certificate relates. The rule of this A–21 applies only to payments made to the holder of the pass-through certificate from the trustee of the pass-thorough trust and does not apply to payments made to the trustee of the pass-through trust. Thus, except as set forth in the last sentence of this answer, interest paid to the holder of a pass-through certificate is portfolio interest if the pass-through certificate is described in A–1 or A–8 of this section, without regard to whether any obligation held by the fund or trust to which the pass-through certificate relates is described in A–1 or A–8 of this section. For example, a mortgage pass-through certificate in bearer form must meet the requirements set forth in A–1 of this section, but the obligations held by the fund or trust to which the mortgage pass-through certificate relates need not meet the requirements set forth in A–1 and A–8 of this section. However, for purposes of A–1 and A–8 of this section and section 127 of the Tax Reform Act of 1984, a pass-through certificate will be considered as issued after July 18, 1984 only to the extent that the obligations held by the fund or trust to which the pass-through certificate relates are issued after July 18, 1984.

(ii) Interest paid to a holder of a regular or residual interest in a REMIC will qualify as portfolio interest under section 871(h)(2) or section 881(c)(2) for purposes of the exemption from 30 percent withholding if the interest paid to the holder satisfies the conditions described in A–1 or A–8 of this section. For purposes of A–1 or A–8 of this section and sections 871(h) and 881(c), interest paid to the holder of a regular interest in a REMIC is considered to be paid on or with respect to the regular interest in the REMIC and not on or with respect to any mortgage obligations held by the REMIC. The foregoing rule, however, applies only to payments made to the holder of the regular interest from the REMIC and does not apply to payments made to the REMIC. For purposes of A–1 or A–8 of this section and sections 871(h) and 881(c), interest paid to the holder of a residual interest in a REMIC is considered to be paid on or with respect to the obligations held by the REMIC, and not on or with respect to the residual interest. For purposes of A–1 and A–8 of this section and section 127 of the Tax Reform Act of 1984, a residual interest in a REMIC will be considered as issued after July 18, 1984, only to the extent that the obligations held by the REMIC are issued after July 18, 1984, but a regular interest in a REMIC will be considered as issued after July 18, 1984, if the regular interest was issued after July 18, 1984, without regard to the date on which the mortgage obligations held by the REMIC were issued.

*Q–22. In the case of a mortgage pass-through certificate, under what circumstances will the mortgage obligations held by the fund or trust to which the mortgage pass-through certificate relates be considered to have been issued after July 18, 1984?*

*A–22.* In general, a mortgage pass-through certificate will be considered to have been issued after July 18, 1984, if all of the mortgages held by the fund or trust were issued after July 18, 1984. If some of the mortgages held by the fund or trust were issued before July 19, 1984, then the portion of any interest payment which represents interest on those mortgages shall not be considered to be portfolio interest. The preceding sentence shall not apply, however, if all of the following conditions are satisfied:

(i) The mortgage pass-through certificate is issued after December 31, 1986;

(ii) Payment of the mortgage pass-through certificate is guaranteed by, and a guarantee commitment has been

issued by, an entity that is independent from the issuer of the underlying obligation;

(iii) The guarantee commitment with respect to the mortgage pass-through certificate cannot have been issued more than 14 months prior to the date on which the mortgage pass-through certificate is issued.

(iv) The fund or trust to which the mortgage pass-through certificate relates cannot contain mortgage obligations on which the first scheduled monthly payment of principal and interest was made more than twelve months before the date on which the guarantee commitment was made.

[T.D. 7967, 49 FR 33240, Aug. 22, 1984; 49 FR 36645, Sept. 19, 1984, as amended by T.D. 8046, 50 FR 33526, Aug. 20, 1985; 51 FR 11447, Apr. 3, 1986; T.D. 8111, 51 FR 45464, Dec. 19, 1986; 53 FR 17928, May 19, 1988; T.D. 8300, 55 FR 19627, May 10, 1990]

EFFECTIVE DATE NOTE: By T.D. 8734, 62 FR 53494, Oct. 14, 1997, §35a.9999–5 was removed, effective Jan. 1, 1999. At 63 FR 72183, Dec. 31, 1998, the effective date was delayed until Jan. 1, 2000. By T.D. 8856, 64 FR 73408, Dec. 30, 1999, the effective date was delayed until Jan. 1, 2001.

# PART 36—CONTRACT COVERAGE OF EMPLOYEES OF FOREIGN SUBSIDIARIES

Sec.

36.3121 (l)–0 Introduction.
36.3121 (l)(1)–1 Agreements entered into by domestic corporations with respect to foreign subsidiaries.
36.3121 (l)(1)–2 Amendment of agreement.
36.3121 (l)(1)–3 Effect of agreement.
36.3121 (l)(2)–1 Effective period of agreement.
36.3121 (l)(3)–1 Termination of agreement by domestic corporation or by reason of change in stock ownership.
36.3121 (l)(4)–1 Termination of agreement by Commissioner.
36.3121 (l)(5)–1 Effect of termination.
36.3121 (l)(7)–1 Overpayments and underpayments.
36.3121 (l)(8)–1 Definition of foreign subsidiary.
36.3121 (l)(9)–1 Domestic corporation as separate entity.
36.3121 (l)(10)–1 Requirements in respect of liability under agreement.
36.3121 (l)(10)–2 Identification.
36.3121 (l)(10)–3 Returns.
36.3121 (l)(10)–4 Payment of amounts equivalent to tax.

AUTHORITY: Secs. 3121, 7805, 68A Stat. 417, as amended, 917; 26 U.S.C. 3121, 7805.

SOURCE: T.D. 6145, 20 FR 6577, Sept. 8, 1955; 25 FR 14021, Dec. 31, 1960, unless otherwise noted.

## §36.3121(l)–0 Introduction.

(a) The regulations in this part deal with the circumstances under which a domestic corporation may enter into an agreement with the Internal Revenue Service for the purpose of extending the insurance system established by title II of the Social Security Act to certain services performed outside the United States by citizens of the United States as employees of a foreign subsidiary of the domestic corporation, and with the obligations of a domestic corporation which enters into such an agreement. The provisions of the Internal Revenue Code of 1954, as amended, to which the regulations in this part pertain are contained in section 3121(1). The liabilities assumed under an agreement entered into pursuant to such section are based on the remuneration for services covered by the agreement. Such agreement may not be effective prior to January 1, 1955.

(b) Although the obligations incurred under an agreement entered into pursuant to section 3121(1) of the Internal Revenue Code of 1954, as amended, must be distinguished from the obligations imposed on employers with respect to the taxes under the Federal Insurance Contributions Act, the two are similar in many respects. Accordingly, the regulations in this part are prescribed as a supplement to the regulations (26 CFR (1954), Part 31, Subpart B) relating to the employee tax and the employer tax imposed by the Federal Insurance Contributions Act. The terms used in the regulations in this part have the same meaning, unless otherwise provided, as when used in the regulations relating to the taxes imposed by such act.

(c) The regulations in this part constitute Part 36 of Title 26 of the Code of Federal Regulations. As used in the regulations in this part, the word ''Code'' means the Internal Revenue Code of 1954, as amended, and the term ''Federal Insurance Contributions Act''