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paragraph (b)(3)(i) of this section does not apply if the payor was required to make an information return under section 6041 or 6041A(a) for the preceding calendar year with respect to payments to the payee, or the payor was required to withhold under section 3406 during the preceding calendar year with respect to payments to the payee that were reportable under section 6041 or 6041A(a).

(B) *Determination of whether payments aggregate $600 or more.* In determining whether payments to a payee aggregate $600 or more during a calendar year for purposes of withholding under section 3406, the payor must aggregate only payments of the same kind made to the same payee. For this purpose, payments are of the same kind if they are of the same type, regardless of whether they are reportable under the same section. However, a payor with different paying departments making reportable payments of the same kind is not required to aggregate payments made by all those departments unless it is the payor's customary method to aggregate those payments. A payor may, in its discretion, aggregate—

(*1*) Payments not of the same kind to the same payee, reportable under either section 6041 or 6041A(a); and

(*2*) Payments reportable under section 6041 with payments reportable under section 6041A(a).

[T.D. 8637, 60 FR 66117, Dec. 21, 1995]

### §31.3406(b)(3)–2 Reportable barter exchanges and gross proceeds of sales of securities or commodities by brokers.

(a) *Transactions subject to backup withholding.* A payment of a kind, and to a payee, that any broker (as defined in section 6045(c) and §1.6045–1(a)(1) of this chapter) or any barter exchange (as defined in section 6045(c) and §1.6045–1(a)(4) of this chapter) is required to report under section 6045 is a reportable payment for purposes of section 3406. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding*—(1) *In general.* The amount subject to withholding under section 3406 is the amount subject to reporting under section 6045. The amount subject to withholding with respect to broker reporting is the amount of gross proceeds (as determined under §1.6045–1(d)(5) of this chapter). The amount subject to withholding with respect to barter exchanges is the amount received by any member or client (as determined under §1.6045–1(f)(4) of this chapter).

(2) *Forward contracts, including foreign currency contracts, and regulated futures contracts*—(i) *In general.* If a customer is subject to withholding under section 3406 with respect to a forward contract (subject to information reporting under §1.6045–1(c)(5) of this chapter), including a foreign currency contract (as defined in section 1256(g)(2)), or a regulated futures contract (as defined in section 1256(g)(1)), or with respect to an account through which those contracts are disposed of or acquired, the broker must withhold on both of the following amounts:

(A) All cash or property withdrawn from the account by the customer during the relevant year; and

(B) The amount of cash in the account available for withdrawal by the customer at the relevant year-end (including both gross proceeds and variation margin).

(ii) *Rules concerning withdrawals.* A withdrawal includes the use of money (including both gross proceeds and variation margin) 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 of 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, 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. Withdrawals do not include repayments of debt incurred in connection with making or

taking delivery that meets the requirements of this paragraph (b)(2). Withdrawals also do not include payments of commissions, fees, transfers of cash from the account to another futures account that is subject to this paragraph (b)(2) 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 this chapter).

(iii) *Special rule for forward contracts, including foreign currency contracts, and regulated futures contracts.* The determination of whether the customer is subject to withholding under section 3406 with respect to an account containing forward contracts, including foreign currency contracts, or regulated futures contracts must be made at the time of the cash or property withdrawals or the relevant year-end, whichever is applicable.

(3) *Security sales made through a margin account.* The amount described in paragraph (a) of this section that is subject to withholding under section 3406 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 this chapter) of the sale. The amount required to be withheld with respect to the 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.

(4) *Security short sales*—(i) *Amount subject to backup withholding.* The amount subject to withholding under section 3406 with respect to a short sale of securities is the gross proceeds (as defined in §1.6045–1(d)(5) of this chapter) of the short sale. At the option of the broker, however, the amount subject to withholding may be the gain upon the closing of the short sale (if any); consequently, the obligation to withhold under section 3406 would be deferred until the closing transaction. A broker may use this alternative method of determining the amount subject to withholding under section 3406 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 must be assumed for this purpose to have a basis of zero.

(ii) *Time of backup withholding.* The determination of whether a short seller is subject to withholding under section 3406 must be made on the date of the initiation or closing, as the case may be, or on the date that the initiation or closing, as the case may be, is entered on the broker's books and records.

(5) *Fractional shares.* A broker is not required to withhold under section 3406 with respect to a sale of a fractional share of stock resulting in less than $20 of gross proceeds (as described in §5f.6045–1(c)(3)(ix) of this chapter).

[T.D. 8637, 60 FR 66118, Dec. 21, 1995]

### §31.3406(b)(3)–3 Reportable payments by certain fishing boat operators.

(a) *Payments subject to backup withholding.* A payment of a kind, and to a payee, that is required to be reported under section 6050A (relating to information reporting by certain fishing boat operators) is a reportable payment for purposes of section 3406. See §31.6051–4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) *Amount subject to backup withholding.* The amount described in paragraph (a) of this section subject to withholding under section 3406 is the amount subject to reporting under section 6050A, but only to the extent the amount is paid in money and represents a share of the proceeds of the catch.

[T.D. 8637, 60 FR 66119, Dec. 21, 1995]