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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