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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