of privilege with respect to the information specified in paragraph (b)(3)(iii)(B) of this section.

(f) *Designation agreements.* If more than one material advisor is required to maintain a list of persons for a reportable transaction, in accordance with paragraph (b) of this section, the material advisors may designate by written agreement a single material advisor (the designated material advisor) to maintain the list or a portion of the list. A designation agreement does not relieve material advisors from their obligation to maintain a list in accordance with paragraph (b) of this section or to furnish their list to the IRS in accordance with paragraph (e)(1) of this section, but a designation agreement may allow one material advisor to maintain a list on behalf of the other material advisors who are a party to the designation agreement. A material advisor is not relieved from the requirement of this section because a material advisor is unable to obtain the list from any designated material advisor, any designated material advisor did not maintain a list, or the list maintained by any designated material advisor is not complete. The existence of a designation agreement does not affect the ability of the IRS to request a list from any party to the designation agreement. The IRS may request a list from any party to the designation agreement, and the party receiving the request must furnish their list to the IRS in accordance with paragraph (e)(1) of this section, regardless of whether their list was maintained by another party pursuant to the terms of a designation agreement.

(g) *Effective/applicability date.* In general, this section applies to transactions with respect to which a material advisor makes a tax statement under §301.6111–3 on or after August 3, 2007. However, this section applies to transactions of interest entered into on or after November 2, 2006, with respect to which a material advisor makes a tax statement under §301.6111–3 on or after November 2, 2006. Paragraphs (b)(1), (c)(3), (c)(12), and (f) of this section apply to transactions with respect to which a material advisor makes a tax statement under §301.6111–3 after *November 14, 2011.* Otherwise, the rules that apply on or before November 14, 2011 are contained in this section in effect prior to November 14, 2011 (see 26 CFR part 301 revised as of April 1, 2011).

[T.D. 9352, 72 FR 43155, Aug. 3, 2007, as amended by T.D. 9556, 76 FR 70341, Nov. 14, 2011]

§ 301.6114–1 Treaty-based return positions.

(a) *Reporting requirement*—(1) *General rule.* (i) Except as provided in paragraph (c) of this section, if a taxpayer takes a return position that any treaty of the United States (including, but not limited to, an income tax treaty, estate and gift tax treaty, or friendship, commerce and navigation treaty) overrules or modifies any provision of the Internal Revenue Code and thereby effects (or potentially effects) a reduction of any tax incurred as any time, the taxpayer shall disclose such return position on a statement (in the form required in paragraph (d) of this section) attached to such return.

(ii) If a return of tax would not otherwise be required to be filed, a return must nevertheless be filed for purposes of making the disclosure required by this section. For this purpose, such return need include only the taxpayer's name, address, taxpayer identifying number, and be signed under penalties of perjury (as well as the subject disclosure). Also, the taxpayer's taxable year shall be deemed to be the calendar year (unless the taxpayer has previously established, or timely chooses for this purpose to establish, a different taxable year). In the case of a disclosable return position relating solely to income subject to withholding (as defined in §1.1441–2(a) of this chapter), however, the statement required to be filed in paragraph (d) of this section must instead be filed at times and in accordance with procedures published by the Internal Revenue Service.

(2) *Application.* (i) A taxpayer is considered to adopt a ''return position'' when the taxpayer determines its tax liability with respect to a particular item of income, deduction or credit. A taxpayer may be considered to adopt a return position whether or not a return is actually filed. To determine whether

a return position is a ''treaty-based return position'' so that reporting is required under this paragraph (a), the taxpayer must compare:

(A) The tax liability (including credits, carrybacks, carryovers, and other tax consequences or attributes for the current year as well as for any other affected tax years) to be reported on a return of the taxpayer, and

(B) The tax liability (including such credits, carrybacks, carryovers, and other tax consequences or attributes) that would be reported if the relevant treaty provision did not exist.

If there is a difference (or potential difference) in these two amounts, the position taken on a return is a treaty-based return position that must be reported.

(ii) In the event a taxpayer's return position is based on a conclusion that a treaty provision is consistent with a Code provision, but the effect of the treaty provision is to alter the scope of the Code provision from the scope that it would have in the absence of the treaty, then the return position is a treaty-based return position that must be reported.

(iii) A return position is a treaty-based return position unless the taxpayer's conclusion that no reporting is required under paragraphs (a)(2) (i) and (ii) of this section has a substantial probability of successful defense if challenged.

(3) *Examples.* The application of section 6114 and paragraph (a)(2) of this section may be illustrated by the following examples:

Example 1: X, a Country A corporation, claims the benefit of a provision of the income tax treaty between the United States and Country A that modifies a provision of the Code. This position does not result in a change of X's U.S. tax liability for the current tax year but does give rise to, or increases, a net operating loss which may be carried back (or forward) such that X's tax liability in the carryback (or forward) year may be affected by the position taken by X in the current year. X must disclose this treaty-based return position with its tax return for the current tax year.

Example 2: Z, a domestic corporation, is engaged in a trade or business in Country B. Country B imposes a tax on the income from certain of Z's petroleum activities at a rate significantly greater than the rate applicable to income from other activities. Z claims a foreign tax credit for this tax on its tax return. The tax imposed on Z is specifically listed as a creditable tax in the income tax treaty between the United States and Country B; however, there is no specific authority that such tax would otherwise be a creditable tax for U.S. purposes under sections 901 or 903 of the Code. Therefore, in the absence of the treaty, the creditability of this petroleum tax would lack a substantial probability of successful defense if challenged, and Z must disclose this treaty-based return position (see also paragraph (b)(7) of this section).

(b) *Reporting specifically required.* Reporting is required under this section except as expressly waived under paragraph (c) of this section. The following list is not a list of all positions for which reporting is required under this section but is a list of particular positions for which reporting is specifically required. These positions are as follows:

(1) That a nondiscrimination provision of a treaty precludes the application of any otherwise applicable Code provision, other than with respect to the making of or the effect of an election under section 897(i);

(2) That a treaty reduces or modifies the taxation of gain or loss from the disposition of a United States real property interest;

(3) That a treaty exempts a foreign corporation from (or reduces the amount of tax with respect to) the branch profits tax (section 884(a)) or the tax on excess interest (section 884(f)(1)(B));

(4) That, notwithstanding paragraph (c)(1)(i) of this section,

(i) A treaty exempts from tax, or reduces the rate of tax on, interest or dividends paid by a foreign corporation that are from sources within the United States by reason of section 861(a)(2)(B) or section 884(f)(1)(A); or

(ii) A treaty exempts from tax, or reduces the rate of tax on, fixed or determinable annual or periodical income subject to withholding under section 1441 or 1442 that a foreign person receives from a U.S. person, but only if described in paragraphs (b)(4)(ii)(A) and (B) of this section, or in paragraph (b)(4)(ii)(C) or (D) of this section as follows—

(A) the payment is not properly reported to the Service on a Form 1042S; and

(B) The foreign person is any of the following:

(*1*) A controlled foreign corporation (as defined in section 957) in which the U.S. person is a U.S. shareholder within the meaning of section 951(b);

(*2*) A foreign corporation that is controlled within the meaning of section 6038 by the U.S. person;

(*3*) A foreign shareholder of the U.S. person that, in the case of tax years beginning on or before July 10, 1989, is controlled within the meaning of section 6038A by the foreign shareholder, or, in the case of tax years beginning after July 10, 1989, is 25-percent owned within the meaning of section 6038A by the foreign shareholder; or

(*4*) With respect to payments made after October 10, 1990, a foreign related party, as defined in section 6038A (c)(2)(B), the U.S. person; or

(C) For payments made after December 31, 2000, with respect to a treaty that contains a limitation on benefits article, that—

(*1*) The treaty exempts from tax, or reduces the rate of tax on income subject to withholding (as defined in §1.1441–2(a) of this chapter) that is received by a foreign person (other than a State, including a political subdivision or local authority) that is the beneficial owner of the income and the beneficial owner is related to the person obligated to pay the income within the meaning of sections 267(b) and 707(b), and the income exceeds $500,000; and

(*2*) A foreign person (other than an individual or a State, including a political subdivision or local authority) meets the requirements of the limitation on benefits article of the treaty; or

(D) For payments made after December 31, 2000, with respect to a treaty that imposes any other conditions for the entitlement of treaty benefits, for example as a part of the interest, dividends, or royalty article, that such conditions are met;

(5) That, notwithstanding paragraph (c)(1)(i) of this section, under a treaty—

(i) Income that is effectively connected with a U.S. trade or business of a foreign corporation or a nonresident alien is not attributable to a permanent establishment or a fixed base of operations in the United States and, thus, is not subject to taxation on a net basis, or that

(ii) Expenses are allowable in determining net business income so attributable, notwithstanding an inconsistent provision of the Code;

(6) Except as provided in paragraph (c)(1)(iv) of this section, that a treaty alters the source of any item of income or deduction;

(7) That a treaty grants a credit for a specific foreign tax for which a foreign tax credit would not be allowed by the Code; or

(8) For returns relating to taxable years for which the due date for filing returns (without extensions) is after December 15, 1997, that residency of an individual is determined under a treaty and apart from the Internal Revenue Code.

(c) *Reporting requirement waived.* (1) Pursuant to the authority contained in section 6114 (b), reporting is waived under this section with respect to any of the following return positions taken by the taxpayer:

(i) For amounts received on or after January 1, 2001, reporting under paragraph (b)(4)(ii) is waived, unless reporting is specifically required under paragraphs (b)(4)(ii)(A) and (B) of this section, paragraph (b)(4)(ii)(C) of this section, or paragraph (b)(4)(ii)(D) of this section;

(ii) Notwithstanding paragraph (b)(4) or (5) of this section, that a treaty has reduced the rate of withholding tax otherwise applicable to a particular type of fixed or determinable annual or periodical income subject to withholding under section 1441 or 1442, such as dividends, interest, rents, or royalties to the extent such income is beneficially owned by an individual or a State (including a political subdivision or local authority);

(iii) For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, that residency of an individual is determined under a treaty and apart from the Internal Revenue Code.

(iv) That a treaty reduces or modifies the taxation of income derived from dependent personal services, pensions, annuities, social security and other public pensions, or income derived by artistes, athletes, students, trainees or teachers;

(v) That income of an individual is resourced (for purposes of applying the foreign tax credit limitation) under a treaty provision relating to elimination of double taxation;

(vi) That a nondiscrimination provision of a treaty allows the making of an election under section 897(i);

(vii) That a Social Security Totalization Agreement or a Diplomatic or Consular Agreement reduces or modifies the taxation of income derived by the taxpayer; or

(viii) That a treaty exempts the taxpayer from the excise tax imposed by section 4371, but only if:

(A) The person claiming such treaty-based return position is an insured, as defined in section 4372(d) (without the limitation therein referring to section 4371(1)), or a U.S. or foreign broker of insurance risks,

(B) Reporting under this section that would otherwise be required to be made by foreign insurers or reinsurers on a Form 720 on a quarterly basis is made on an annual basis on a Form 720 by a date no later than the date on which the return is due for the first quarter after the end of the calendar year, or

(C) A closing agreement relating to entitlement to the exemption from the excise tax has been entered into with the Service by the foreign insurance company that is the beneficial recipient of the premium that is subject to the excise tax.

(ix) Notwithstanding paragraph (b)(1) of this section, that a nondiscrimination provision of a qualified income tax treaty, as defined in Treas. Reg. §1.5000C–1(c)(13), exempts a payment from tax under section 5000C, but only if the foreign person claiming such relief has provided a Section 5000C Certificate (such as Form W–14, ''Certificate of Foreign Contracting Party Receiving Federal Procurement Payments'') to the acquiring agency in accordance with section 5000C and the regulations thereunder.

(2) Reporting is waived for an individual if payments or income items otherwise reportable under this section (other than by reason of paragraph (b)(8) of this section), received by the individual during the course of the taxable year do not exceed $10,000 in the aggregate or, in the case of payments or income items reportable only by reason of paragraph (b)(8) of this section, do not exceed $100,000 in the aggregate.

(3) Reporting with respect to payments or income items the treatment of which is mandated by the terms of a closing agreement with the Internal Revenue Service, and that would otherwise be subject to the reporting requirements of this section, is also waived.

(4) If a partnership, trust, or estate that has the taxpayer as a partner or beneficiary discloses on its information return a position for which reporting is otherwise required by the taxpayer, the taxpayer (partner or beneficiary) is then excused from disclosing that position on a return.

(5) This section does not apply to a withholding agent with respect to the performance of its withholding functions.

(6)(i) For taxable years ending after December 31, 2004, except as provided in paragraph (c)(6)(ii) of this section, reporting under paragraph (b)(4)(ii) of this section is waived for amounts received by a related party, within the meaning of section 6038A(c)(2), from a withholding agent that is a reporting corporation, within the meaning of section 6038A(a), and that are properly reported on Form 1042–S.

(ii) Paragraph (c)(6)(i) of this section does not apply to any amounts for which reporting is specifically required under the instructions to Form 8833.

(7)(i) For taxable years ending after December 31, 2004, except as provided in paragraph (c)(7)(iv) of this section, reporting under paragraph (b)(4)(ii) of this section is waived for amounts properly reported on Form 1042–S (on either a specific payee or pooled basis) by a withholding agent described in paragraph (c)(7)(ii) of this section if the beneficial owner is described in paragraph (c)(7)(iii) of this section.

(ii) A withholding agent described in this paragraph (c)(7)(ii) is a U.S. financial institution, as defined in §1.1441–1(c)(5) of this chapter, a qualified intermediary, as defined in §1.1441–1(e)(5)(ii) of this chapter, a withholding foreign partnership, as defined §1.1441–5(c)(2)(i) of this chapter, or a withholding foreign trust, as defined in §1.1441–5(e)(5)(v) of this chapter.

(iii) A beneficial owner described in this paragraph (c)(7)(iii) of this section is a direct account holder of a U.S. financial institution or qualified intermediary, a direct partner of a withholding foreign partnership, or a direct beneficiary or owner of a simple or grantor trust that is a withholding foreign trust. A beneficial owner described in this paragraph (c)(7)(iii) also includes an account holder to which a qualified intermediary has applied section 4A.01 or 4A.02 of the qualified intermediary agreement, contained in Revenue Procedure 2000–12 (2000–1 C.B. 387), (as amended by Revenue Procedure 2003–64, (2003–2 C.B. 306); Revenue Procedure 2004–21 (2004–1 C.B. 702); Revenue Procedure 2005–77 (2005–51 I.R.B. 1176) (see §601.601(b)(2) of this chapter) a partner to which a withholding foreign partnership has applied section 10.01 or 10.02 of the withholding foreign partnership agreement, and a beneficiary or owner to which a withholding foreign trust has applied section 10.01 or 10.02 of the withholding foreign trust agreement, contained in Revenue Procedure 2003–64, (2003–2 C.B. 306), (as amended by Revenue Procedure 2004–21 (2004–1 C.B. 702); Revenue Procedure 2005–77 (2005–51 I.R.B. 1176); (see §601.601(b)(2) of this chapter).

(iv) Paragraph (c)(7)(i) of this section does not apply to any amounts for which reporting is specifically required under the instructions to Form 8833.

(8)(i) For taxable years ending after December 31, 2004, except as provided in paragraph (c)(8)(ii) of this section, reporting under paragraph (b)(4)(ii) of this section is waived for taxpayers that are not individuals or States and that receive amounts of income that have been properly reported on Form 1042–S, that do not exceed $500,000 in the aggregate for the taxable year and that are not received through an account with an intermediary, as defined in §1.1441–1(c) (13), or with respect to interest in a flow-through entity, as defined in §1.1441–1(c)(23),

(ii) The exception contained in paragraph (c)(8)(i) of this section does not apply to any amounts for which reporting is specifically required under the instructions to Form 8833.

(d) *Information to be reported*—(1) *Returns due after* December 15, 1997. When reporting is required under this section for a return relating to a taxable year for which the due date (without extensions) is after December 15, 1997, the taxpayer must furnish, in accordance with paragraph (a) of this section, as an attachment to the return, a fully completed Form 8833 (Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)) or appropriate successor form.

(2) *Earlier returns.* For returns relating to taxable years for which the due date for filing returns (without extensions) is on or before December 15, 1997, the taxpayer must furnish information in accordance with paragraph (d) of this section in effect prior to December 15, 1997 (see §301.6114–1(d) as contained in 26 CFR part 301, revised April 1, 1997).

(3) *In general*—(i) *Permanent establishment.* For purposes of determining the nature and amount (or reasonable estimate thereof) of gross receipts, if a taxpayer takes a position that it does not have a permanent establishment or a fixed base in the United States and properly discloses that position, it need not separately report its payment of actual or deemed dividends or interest exempt from tax by reason of a treaty (or any liability for tax imposed by reason of section 884).

(ii) *Single income item.* For purposes of the statement of facts relied upon to support each separate Treaty-Based Return Position taken, a taxpayer may treat payments or income items of the same type (e.g., interest items) received from the same ultimate payor (e.g., the obligor on a note) as a single separate payment or income item.

(iii) *Foreign source effectively connected income.* If a taxpayer takes the return position that, under the treaty, income that would be income effectively connected with a U.S. trade or business is not subject to U.S. taxation

because it is income treated as derived from sources outside the United States, the taxpayer may treat payments or income items of the same type (e.g., interest items) as a single separate payment or income item.

(iv) *Sales or services income.* Income from separate sales or services, whether or not made or performed by an agent (independent or dependent), to different U.S. customers on behalf of a foreign corporation not having a permanent establishment in the United States may be treated as a single payment or income item.

(v) *Foreign insurers or reinsurers.* For purposes of reporting by foreign insurers or reinsurers, as described in paragraph (c)(1)(vii)(B) of this section, such reporting must separately set forth premiums paid with respect to casualty insurance and indemnity bonds (subject to section 4371(1)); life insurance, sickness and accident policies, and annuity contracts (subject to section 4371(2)); and reinsurance (subject to section 4371(3)). All premiums paid with respect to each of these three categories may be treated as a single payment or income item within that category. For reports first due before May 1, 1991, the report may disclose, for each of the three categories, the total amount of premiums derived by the foreign insurer or reinsurer in U.S. dollars (even if a portion of these premiums relate to risks that are not U.S. situs). Reasonable estimates of the amounts required to be disclosed will satisfy these reporting requirements.

(e) *Effective/applicability date*—(1) *In general.* This section is effective for taxable years of the taxpayer for which the due date for filing returns (without extensions) occurs after December 31, 1988. However, if—

(i) A taxpayer has filed a return for such a taxable year, without complying with the reporting requirement of this section, before November 13, 1989, or

(ii) A taxpayer is not otherwise than by paragraph (a) of this section required to file a return for a taxable year before November 13, 1989, such taxpayer must file (apart from any earlier filed return) the statement required by paragraph (d) of this section before June 12, 1990, by mailing the required statement to the Internal Revenue Service, P.O. Box 21086, Philadelphia, PA 19114. Any such statement filed apart from a return must be dated, signed and sworn to by the taxpayer under the penalties of perjury. In addition, with respect to any return due (without extensions) on or before March 10, 1990, the reporting required by paragraph (a) of this section must be made no later than June 12, 1990. If a taxpayer files or has filed a return on or before November 13, 1989, that provides substantially the same information required by paragraph (d) of this section, no additional submission will be required. Foreign insurers and reinsurers subject to reporting described in paragraph (c)(7)(ii) of this section must so report for calendar years 1988 and 1989 no later than August 15, 1990.

(2) *Section 5000C.* Paragraph (c)(1)(ix) of this section applies to payments made on and after November 16, 2016 pursuant to contracts entered into on and after January 2, 2011. However, a taxpayer that receives payments exempt from tax under section 5000C by reason of a qualified income tax treaty before November 16, 2016 is not required to disclose this position on Form 8833, provided it has properly relied on Notice 2015–35, I.R.B. 2016–14, 533, in claiming the exemption.

(f) *Cross reference.* For the provisions concerning penalties for failure to disclose a treaty-based return position, see section 6712 and § 301.6712–1.

[T.D. 8292, 55 FR 9440, Mar. 14, 1990; 55 FR 10237, Mar. 20, 1990, as amended by T.D. 8305, 55 FR 28609, July 12, 1990; T.D. 8733, 62 FR 53385, Oct. 14, 1997; T.D. 8734, 62 FR 53495, Oct. 14, 1997; T.D. 8804, 63 FR 72189, Dec. 31, 1998; T.D. 8856, 64 FR 73413, Dec. 30, 1999; T.D. 9253, 71 FR 13007, Mar. 14, 2006; 71 FR 27321, May 10, 2006; T.D. 9782, 81 FR 55145, Aug. 18, 2016]

Time and Place for Paying Tax

PLACE AND DUE DATE FOR PAYMENT OF TAX

§ 301.6151–1 Time and place for paying tax shown on returns.

For provisions concerning the time and place for paying tax shown on returns with respect to a particular tax, see the regulations relating to such tax.