

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 31

REG-146097-09

RIN 1545-BJ01

Guidance on Reporting Interest Paid to Nonresident Aliens

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking; notice of public hearing; and withdrawal of previously proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance on the reporting requirements for interest on deposits maintained at U.S. offices of certain financial institutions and paid to nonresident alien individuals. These proposed regulations affect persons making payments of interest with respect to such deposits. This document also provides a notice of public hearing on these proposed regulations and withdraws the notice of proposed rulemaking published on August 2, 2002 (67 FR 50386).

DATES: Written or electronic comments must be received by April 7, 2011. Outlines of topics to be discussed at the public hearing scheduled for April 28, 2011, at 10 a.m. must be received by April 8, 2011. The proposed rule published on August 2, 2002 is withdrawn as of January 7, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-146097-09), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-146097-09), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224 or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-146097-09). The public hearing will be held in auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Kathryn Holman, (202) 622-3840; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard.A.Hurst@irscounsel.treas.gov, (202) 622-7180 (not toll free numbers).

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Attn: Desk Office for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by March 8, 2011. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance and purchase of service to provide information.

The collection of information in these proposed regulations is in Sec. 1.6049-4(b)(5)(i) and Sec. 1.6049-6(e)(4)(i) and (ii). This information is required to determine if taxpayers have properly reported amounts received as income. The collection of information is mandatory. The likely respondents are businesses and other for-profit institutions.

Estimated total annual reporting burden: 500 hours.

The estimated annual burden per respondent: 15 minutes.

Estimated number of respondents: 2,000.

Estimated annual frequency of responses: Annually.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential as required by 26 U.S.C. 6103.

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

On January 17, 2001, the IRS and Treasury Department published a notice of proposed rulemaking (REG 126100-00) in the Federal Register (66 FR 3925, corrected by 66 FR 15820 and 66 FR 16019) under Section 6049 (the 2001 proposed regulations), which would provide that U.S. bank deposit interest paid to any nonresident alien individual must be reported annually to the IRS. On August 2, 2002, the Treasury Department and the IRS published a notice of proposed rulemaking (REG-133254-02) in the Federal Register (67 FR 50386) which withdrew these regulations and proposed narrower regulations (the 2002 regulations) that would require reporting only on interest payments to nonresident alien individuals that are residents of certain designated countries or, at the option of the payor, on interest payments to all nonresident alien recipients of bank deposit interest. Under the 2002 regulations currently in effect, reporting of U.S. bank deposit interest is required only if the interest is paid to a U.S. person or a nonresident alien individual who is a resident of Canada. These proposed regulations withdraw the 2002 regulations and provide new proposed regulations that extend the information reporting requirement to include bank deposit interest paid to nonresident alien individuals who are residents of any foreign country.

This extension is appropriate for several reasons. First, since the 2002 proposed regulations were released, there is a growing global consensus regarding the importance of cooperative information exchange for tax purposes that has developed. Significant agreements have been reached on international standards for the exchange of information, including, for example, the understanding that information exchange will not be limited by bank secrecy or the absence of a domestic tax interest. Second, requiring routine reporting to the IRS of all U.S. bank deposit interest paid to any nonresident alien individual will further strengthen the United States exchange of information program, consistent with adequate provisions for reciprocity, usability, and confidentiality in respect of this information. Finally, this extension will help to improve voluntary compliance by U.S. taxpayers by making it more difficult to avoid the U.S. information reporting system (such as through false claims of foreign status).

In addition to requiring reporting of U.S. bank deposit interest paid to any nonresident alien individual, the proposed regulations also make the following minor changes and clarifications. Section 1.6049-6 provides that a copy of Form 1042-S, "Foreign Person's U.S. Source Income Subject to Withholding", must be furnished to the recipient for interest paid on deposits maintained at a bank's office within the United States. Section 1.6049-6(e)(4) has been revised to clarify that the payor or middleman can satisfy this requirement by furnishing a copy of Form 1042-S either in person or to the last known address of the recipient.

Proposed Effective Date

These regulations are proposed to apply to payments made after December 31 of the year in which they are published as final regulations in the Federal Register.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation.

These regulations impose a collection of information on small entities, and the Regulatory Flexibility Act (5 U.S.C. chapter 6) applies. This rule regulates commercial banks, savings institutions, credit unions, and securities brokerages. The Small Business Administration (SBA) has established size standards for types of economic activities which are classified based on the North American Industry Classification Codes (NAICS). The regulations specifying size standards are set forth in Title 13, Code of Federal Regulations, part 121 (13 CFR part 121), Small Business Size Regulations. The NAICS Code for small commercial banks, savings institutions, credit unions, and securities brokerages is specified at 13 CFR 121.201. Pursuant to subsectors 522110, 522120, and 522130 of NAICS 2007, a small commercial bank, savings institution, or credit union is one with \$175 million or less in assets. Pursuant to subsector 523120 of NAICS 2007, a small securities brokerage is one with receipts of less than \$7 million. Because this rule will affect all institutions that maintain accounts for nonresident alien individuals, this rule may affect a substantial number of small entities.

The U.S. Census Bureau American FactFinder provides data based on the 2007 Economic Census released November 24, 2009 including the number of establishments and the annual revenue of the establishments within each NAICS Code. According to this data, for Sector 52: ECO75211: Finance and Insurance Industry Series, there were 94,192 commercial banking establishments with revenue of approximately \$609,748,098,000, 16,098 savings institutions with revenue of approximately \$91,626,050,000, 17,984 credit unions with revenue of approximately \$55,521,199,000, and 30,989 NAICS Code securities brokerages with revenue of approximately \$167,337,807,000. It is estimated that approximately 25,000 commercial banks, 4,000 savings banks, and 4,000 credit unions with less than \$175,000,000 in assets, and 15,000 securities brokerages with receipts of less than \$7,000,000 that would be classified as small businesses.

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. Section 605, the Chief Counsel certifies that this rule will not have a significant economic impact on a substantial number of small entities. This conclusion is based on all of the following. The depository accounts, the interest on which is subject to reporting under these regulations, tend to be with larger financial institutions

operating in the United States, and therefore the number of small entities that will be required to undertake this collection of information is expected to be limited. Banks are already required to gather the underlying information from nonresident aliens on Form W-8, so there will be no change in the collection of information. Currently under the 2002 regulations, banks, including small financial institutions, are required to report this information to the IRS with respect to Canadian account holders. This rule would simply extend the reporting requirement to all nonresident aliens. The reporting required by this rule would be done on Form 1042 and Form 1042-S. This rule also requires that institutions prepare and deliver a statement to nonresident alien individuals to the effect that the information on the 1042 form is being furnished to the IRS and may be furnished to the government of the foreign country where the recipient resides. The amount of time required to complete the Form 1042 and Form 1042-S is brief, and the statement that is required to be collected is brief.

The IRS requests information regarding the economic impact of this rule on small commercial banks, savings institutions, credit unions, and small securities brokerages engaged in business involving payment of bank deposit interest to a nonresident alien. The IRS invites specific comments on the economic impact of compliance from members of the public who believe there will be a significant economic impact on small businesses that are regulated by this rule. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for April 28, 2011, beginning at 10 a.m. in the auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by April 8, 2011. A period of 10 minutes will be allotted to each

person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of the regulations is Kathryn Holman, Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social Security, Unemployment compensation.

Withdrawal of Proposed Amendments

Accordingly, under the authority of 26 U.S.C. 7805, the proposed amendment to 26 CFR parts 1 and 31 that was published in the Federal Register on Friday, August 2, 2002 (67 FR 50386) is withdrawn.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 31 are proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. In Sec. 1.6049-4, paragraph (b)(5) is revised to read as follows:

Sec. 1.6049-4 Return of information as to interest paid and original issue discount includible in gross income after December 31, 1982.

* * * * *

(b) * * *

(5) Interest payments to nonresident alien individuals--(i) General

rule. In the case of interest aggregating \$10 or more paid to a nonresident alien individual (as defined in section 7701(b)(1)(B)) that is reportable under Sec. 1.6049-8(a), the payor shall make an information return on Form 1042-S, "Foreign Person's U.S. Source Income Subject to Withholding", for the calendar year in which the interest is paid. The payor or middleman shall prepare and file Form 1042-S at the time and in the manner prescribed by section 1461 and the regulations under that section and by the form and its accompanying instructions. See Sec. Sec. 1.1461-1(b) (rules regarding the preparation of a Form 1042) and 1.6049-6(e)(4) (rules for furnishing a copy of the Form 1042-S to the payee). To determine whether an information return is required for original issue discount, see Sec. Sec. 1.6049-5(f) and 1.6049-8(a). The Commissioner may by ruling or other administrative pronouncement prescribe rules pursuant to a treaty or executive agreement for uniform formatting, standards for sharing information, and for usability, reciprocity, and confidentiality of taxpayer information.

(ii) Effective/applicability date. Paragraph (b)(5)(i) of this section shall be effective for payments made after December 31 of the year in which the final regulations are published in the Federal Register. (For interest paid to a Canadian nonresident alien individual on or before December 31 of the year in which final regulations are published in the Federal Register, see paragraph (b)(5) of this section as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

* * * * *

Par. 3. Section 1.6049-5 is amended as follows:

1. In paragraph (b)(12) the last sentence is revised.
2. In paragraph (f) the last sentence is revised.

The revisions read as follows:

Sec. 1.6049-5 Interest and original issue discount subject to reporting after December 31, 1982.

* * * * *

(b) * * *

(12) * * * This paragraph (b)(12) does not apply to interest paid after December 31 of the year in which the final regulations are published in the Federal Register to a nonresident alien individual as provided in Sec. 1.6049-8.

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(f) * * * Original issue discount on an obligation (including an obligation with a maturity of not more than 6 months from the date of original issue) held by a nonresident alien individual or foreign corporation is interest described in paragraph (b)(1)(vi)(A) or (B) of this section and, therefore is not interest subject to reporting under section 6049 unless it is described in Sec. 1.6049-8(a) (relating to bank deposit interest paid after December 31 of the year in which the final regulations are published in the Federal Register to a nonresident alien individual).

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Par. 4. Section 1.6049-6 is amended as follows:

1. Paragraph (e)(4) is revised.

2. In paragraph (e)(5), the first sentence is revised and a new sentence is added at the end of the paragraph.

The additions and revisions read as follows:

Sec. 1.6049-6 Statements to recipients of interest payments and holders of obligations for attributed original issue discount.

* * * * *

(e) * * *

(4) Special rule for amounts described in Sec. 1.6049-8(a). In the case of amounts described in Sec. 1.6049-8(a) (relating to payments of deposit interest to nonresident alien individuals) paid after December 31 of the year in which the final regulations are published in the Federal Register, any person who makes a Form 1042-S, "Foreign Person's U.S. Source Income Subject to Withholding", under section 6049(a) and Sec. 1.6049-4(b)(5) shall furnish a statement to the recipient either in person or by first class mail to the recipient's last known address. The statement shall include a copy of the Form 1042-S required to be prepared pursuant to Sec. 1.6049-4(b)(5) and a statement to the effect that the information on the form is being furnished to the United States Internal Revenue Service and may be furnished to the government of the foreign country where the recipient resides.

(5) Effective/applicability date. Paragraph (e)(4) of this section applies to payee statements reporting payments of deposit interest to nonresident alien individuals paid after December 31 of the year in which the final regulations are published in the Federal Register. * * * (For interest paid to a Canadian nonresident alien individual on or before December 31 of the year in which final regulations are published in the Federal Register, see paragraph (e)(4) of this section as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

Par. 5. In Sec. 1.6049-8 the section heading and paragraph (a) are revised to read as follows:

Sec. 1.6049-8 Interest and original issue discount paid to nonresidents.

(a) Interest subject to reporting requirement. For purposes of Sec. 1.6049-4, 1.6049-6, and this section and except as provided in paragraph (b) of this section, the term interest means interest paid to a nonresident alien individual after December 31 of the year in which the final regulations are published in the Federal Register, where the interest is described in section 871(i)(2)(A) with respect to a deposit maintained at an office within the United States. For purposes of the regulations under section 6049, a nonresident alien individual is a person described in section 7701(b)(1)(B). The payor or middleman may rely upon a valid Form W-8BEN, "Beneficial Owners

Certificate of Foreign Status for U.S. Tax Withholding" to determine whether the payment is made to a nonresident alien individual. Generally, amounts described in this paragraph (a) are not subject to backup withholding under section 3406. See Sec. 31.3406(g)-1(d) of this chapter. However, if the payor or middleman does not have either a valid Form W-8BEN or valid Form W-9, "Request for Taxpayer Identification Number and Certification", the payor or middleman must report the payment as made to a U.S. non-exempt recipient if it must so treat the payee under the presumption rules of Sec. 1.6049-5(d)(2) and Sec. 1.1441-1(b)(3)(iii) and must also backup withhold under section 3406. (For interest paid to a Canadian nonresident alien individual on or before December 31 of the year in which final regulations are published in the Federal Register, see paragraph (a) of this section as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

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PART 31--EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

Par. 6. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 7. In Sec. 31.3406(g)-1, paragraph (d) is revised to read as follows:

Sec. 31.3406(g)-1 Exceptions for payments to certain payees and certain other payments.

* * * * *

(d) Reportable payments made to nonresident alien individuals. A payment of interest that is reported on Form 1042-S, "Foreign Person's U.S. Source Income Subject to Withholding," as paid to a nonresident alien individual under Sec. 1.6049-8(a) of this chapter is not subject to withholding under section 3406. (For interest paid to a Canadian nonresident alien individual on or before December 31 of the year in which final regulations are published in the Federal Register, see paragraph (d) of this section as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

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Steven T. Miller,
Deputy Commissioner for Services and Enforcement.