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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 31

[REG-133254-02; REG-126100-00]

RIN 1545-BA86; RIN 1545-AY62

Guidance on Reporting of Deposit 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 that are residents of certain specified countries. 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 (REG 126100-00, 66 FR 3925) published on January 17, 2001.

DATES: Written or electronic comments must be received by November 14, 2002.

Requests to speak (with outlines of oral comments to be discussed) at the public hearing scheduled for 10 a.m. on December 5, 2002, must be received by November 14, 2002.

The proposed rules published on January 17, 2001, (66 FR 3925) and corrected on March 21, 2001 (66 FR 15820) and March 22, 2001 (66 FR 16019) is withdrawn as of August 2, 2002.

ADDRESSES: Send submissions to: CC:DOM:ITA:RU (REG-133254-02), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044.

Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:ITA:RU (REG-133254-02), Courier's Desk, Internal Revenue Service 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically directly to the IRS Internet site at www.irs.gov/regs. The public hearing will be held in Room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Alexandra K. Helou, (202) 622-3840 (not a toll free number); concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Treena Garrett, (202) 622-7180 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has 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 collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer 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, W:CAR:MP:FP:S, Washington, DC 20224. Comments on the collections of information should be received by October 1, 2002. Comments are

specifically requested concerning:

Whether the proposed collection of information is necessary for the proper operation 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 (see below);

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

How the burden of complying with the proposed collection 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 §§1.6049-4(b)(5)(i) and 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.

The estimated average annual burden per respondent and/or recordkeeper required by §§1.6049-4(b)(5)(i) and 1.6049-6(e)(4)(i) and (ii) will be reflected in the burdens of Forms 1042, 1042-S and the income tax return of a foreign person.

Further, the estimated average annual burden per respondent and/or recordkeeper for the statement required by §1.6049-6(e)(4)(i) is as follows:

Estimated total annual reporting burden: 500 hours.

Estimated average annual burden per respondent: 15 minutes.

Estimated number of respondents: 2000.

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 the collection of information 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.

Background and Explanation of Provisions

On January 17, 2001, the IRS and Treasury 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. Under 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.

The IRS and Treasury requested comments on the 2001 proposed regulations, and a public hearing regarding the 2001 proposed regulations was held on June 21, 2001. The

IRS and Treasury received numerous comments on the proposed regulations, and several commentators spoke at the public hearing on the 2001 proposed regulations. After careful consideration of all the comments received, the IRS and Treasury have concluded that the 2001 proposed regulations should be withdrawn and a new notice of proposed rulemaking should be issued on this subject. Accordingly, this document withdraws the 2001 proposed regulations and provides new proposed regulations (the 2002 proposed regulations).

Most of the comments received on the 2001 proposed regulations were highly critical of the regulations. In particular, many commentators expressed the view that the administrative burden imposed by the 2001 proposed regulations would significantly outweigh any benefits obtained by the IRS from the additional information collected. Some commentators also stated that the 2001 proposed regulations could have a severe negative impact on U.S. banks, particularly U.S. banks with a deposit base that included a significant number of nonresident alien individuals, some of whom had expressed concerns that the information collected under the 2001 proposed regulations might be misused. Other commentators raised certain technical concerns regarding the 2001 proposed regulations, particularly with respect to the reporting requirements for bank deposit interest paid to joint account holders.

After consideration of the comments received, the IRS and Treasury have concluded that the 2001 proposed regulations were overly broad in requiring annual information reporting with respect to U.S. bank deposit interest paid to any nonresident alien. The IRS and Treasury have decided instead that reporting should be required only for nonresident alien individuals that are residents of certain designated countries. The IRS and Treasury

believe that limiting reporting to residents of these countries will facilitate the goals of improving compliance with U.S. tax laws and permitting appropriate information exchange without imposing an undue administrative burden on U.S. banks. Accordingly, the 2002 proposed regulations would modify the current regulations (which require reporting of U.S. bank deposit interest only if paid to Canadian residents) by requiring in addition reporting of U.S. bank deposit interest paid to residents of Australia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and the United Kingdom. Payors may, however, at their option, choose to report bank deposit interest paid to all nonresident aliens or to any nonresident alien who is a resident of a country other than the countries listed above. If the IRS and Treasury determine that this list of countries should be modified in the future, regulations providing such a modification will be proposed and comments will be requested on those proposed regulations.

In other respects, the 2002 proposed regulations generally follow the approach set forth in the 2001 proposed regulations. Thus, the 2002 proposed regulations provide that, if a nonresident alien who is a recipient of U.S. bank deposit interest is a resident of a country for which reporting of such interest is required, a copy of Form 1042-S, "Foreign Person's U.S. Source Income Subject to Withholding", must be furnished to the nonresident alien. Like the 2001 proposed regulations, the 2002 proposed regulations provide 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 nonresident alien.

In addition, to conform to the changes made in the 2002 proposed regulations, the

Form 1042-S requirements have been modified with respect to joint accounts. For example, the 2001 proposed regulations provide that, if a joint account holder is a U.S. non-exempt recipient, the payor or middleman must report the entire payment to that person. If all joint account holders are foreign persons, the 2001 proposed regulations require the payor or middleman to report the payment to the nonresident alien individual that is a resident of a country with which the United States has an income tax treaty or a tax information exchange agreement (TIEA). The 2002 proposed regulations retain the requirement that the entire payment be reported to a U.S. non-exempt recipient if there is a U.S. non-exempt recipient that is a joint account holder. However, the 2002 proposed regulations modify the 2001 proposed regulations by providing that, if all joint account holders are foreign persons, reporting is required to any one of the joint account holders that is a resident of one of the listed countries.

Section 1.6049-8(a) currently provides, for purposes of the requirement that U.S. bank deposit interest paid to individuals who are Canadian residents must be reported, that the payor or middleman may rely on the permanent address found on an applicable withholding certificate described in §1.1441-1(c)(16) (Form W-8) to make the determination of whether the nonresident alien individual resides in Canada. However, the regulation also provides that a payor or middleman may rely on its actual knowledge of the individual's residence address in Canada, even if a valid Form W-8 has not been provided, to make such a determination. The 2002 proposed regulations, like the 2001 proposed regulations, eliminate this “actual knowledge of the individual’s residence address” rule because it creates a result that is contrary to the presumption rules contained in §1.1441-

1(b)(3)(iii) (and made applicable to reportable payments by §1.6049-5(d)(2)). In this regard, the presumption rules generally provide that interest on a U.S. bank deposit that cannot be reliably associated with a valid Form W-8 or Form W-9, “Request for Taxpayer Identification Number and Certification”, must be presumed to be paid to an undocumented U.S. non-exempt recipient. Accordingly, the 2002 proposed regulations clarify that a payor of interest on such a deposit must report the payment on a Form 1099 as made to a U.S. non-exempt recipient in accordance with the presumption rules. Further, such payment is subject to backup withholding under section 3406.

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 these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

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) that are submitted timely (in the manner described in the "ADDRESSES" portion of this preamble) 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 December 5, 2002, beginning at 10 a.m. in Room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the main entrance, located at 1111 Constitution Avenue, NW. 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" portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written comments and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by November 14, 2002. 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 reviewing 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 Alexandra K. Helou, Office of Associate

Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

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 Wednesday, January 17, 2001 (66 FR 3925, corrected by 66 FR 15820 and 66 FR 16019) 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 § 1.6049-4, paragraph (b)(5) is revised to read as follows:

§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 §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 §1.6049-6(e)(4) 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 §§1.6049-5(f) and 1.6049-8(a).

(ii) Effective dates. Paragraph (b)(5)(i) of this section shall apply for payments made after December 31 of the year in which the final regulations are published in the **Federal Register** with respect to an applicable withholding certificate described in §1.1441-1(c)(16) (Form W-8) furnished to the payor or middleman after that date. (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 §1.6049-4(b)(5) in effect prior to (effective date of final rules) (see 26 CFR part 1 revised April 1, 2002.)

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Par. 3. 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 addition and revisions read as follows:

§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 §1.6049-8(a)--(i) In general. In the case of

amounts described in §1.6049-8(a) (relating to certain 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 files a Form 1042-S, “Foreign Person’s U.S. Source Income Subject to Withholding”, under section 6049(a) and §1.6049-4(b)(5) shall furnish a statement to the recipient of the interest 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 §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.

(ii) Joint account holders. In the case of joint account holders, a payor or middleman must report the entire amount of interest as paid to any one of the joint account holders that provides a valid Form W-9, “Request for Taxpayer Identification Number and Certification,” or, if any account holder has not furnished an applicable withholding certificate described in §1.1441-1(c)(16) (Form W-8) or Form W-9, any one of the joint account holders that is presumed to be a U.S. non-exempt recipient under §§1.6049-5(d)(2) and 1.1441-1(b)(3)(iii). If all of the joint account holders have furnished valid Forms W-8 certifying their status as foreign persons and any joint account holder is a resident of one of the countries specified in §1.6049-8(a), then the payor or middleman must report the payment to any one of the joint account holders that is a resident of one of the countries specified in §1.6049-8(a) (selected account holder). If, however, any joint account holder, including the selected account holder, requests its own Form 1042-S and provides information regarding the

correct amount to be reported to him, the payor or middleman must furnish a Form 1042-S to such account holder and make a corresponding reduction to the amount reported to the selected account holder. If the selected account holder makes such request, the payor or middleman must report the corrected amount to the selected account holder and report the remaining amount to any other joint account holder that is a resident of one of the countries specified in §1.6049-8(a).

(5) Effective dates. Paragraph (e)(4) of this section applies for payee statements due with respect to payments made after December 31 of the year in which the final regulations are published in the **Federal Register**, without regard to extensions. * * * (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 §1.6049-6(e)(4) in effect prior to (effective date of final rules) (see 26 CFR part 1 revised April 1, 2002.))

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Par. 4. In §1.6049-8, the section heading and paragraph (a) are revised to read as follows:

§1.6049-8 Certain Interest and original issue discount paid to nonresident alien individuals.

(a) Interest subject to reporting requirement. For purposes of §§1.6049-4, 1.6049-6, and this section and except as provided in paragraph (b) of this section, the term interest means interest described in section 871(i)(2)(A) with respect to a deposit maintained at an office within the United States by a nonresident alien individual who is a resident of any of the following countries: Australia, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and the

United Kingdom. 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 an applicable withholding certificate described in §1.1441-1(c)(16) (Form W-8) that is valid to determine whether the payment is made to a nonresident alien individual who is a resident of one of the countries for which reporting is required. Generally, amounts described in this paragraph (a) are not subject to backup withholding under section 3406. See §31.3406(g)-1(d) of this chapter. However, if the payor or middleman does not have either a valid Form W-8 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 §§1.6049-5(d)(2) and 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 §1.6049-8(a) in effect prior to (effective date of final rules) (see 26 CFR part 1 revised April 1, 2002.)

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

Par. 5. The authority citation for part 31 continues to read in part as follows:

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

Par. 6. In § 31.3406(g)-1, paragraph (d) is revised to read as follows:

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

* * * * *

(d) Reportable payments made to nonresident alien individuals. A payment of interest that is reported on Form 1042-S as paid to a nonresident alien individual under §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 §31.3406(g)-1(d) in effect prior to (effective date of final rules) (see 26 CFR part 1 revised April 1, 2002.)

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David A. Mader,
Acting Deputy Commissioner of Internal Revenue.