

Announcement 96-23

The following text of a revenue procedure is proposed in conjunction with the publication of proposed regulations under chapter 3 of the Code and related Code provisions, relating to the withholding and reporting of certain income paid to foreign persons. This announcement proposes procedures for a foreign person to apply to the Internal Revenue Service for an agreement in order for that foreign person to be a qualified intermediary under § 1.1441-1(e)(5) of the proposed regulations under section 1441. Comments regarding this announcement should be submitted in the same manner and within the same time period as are prescribed for comments submitted under the proposed regulations under chapter 3 of the Code.

Rev. Proc. #

SECTION 1. PURPOSE

This revenue procedure provides guidance to persons that consider entering into a withholding agreement with the Internal Revenue Service (“Service”) in order to be treated as a Qualified Intermediary (“QI”) for pur-

poses of section 1.1441-1 (e)(5) of the Income Tax Regulations. The withholding agreements described in this revenue procedure are relevant to payments of interest, dividends, and gross proceeds on portfolio investments held through one or more intermediaries. This revenue procedure describes the application procedures for a withholding agreement and the terms that the Service will ordinarily require to be incorporated into the agreement.

SEC. 2. BACKGROUND

.01 *Withholding and reporting on payments to foreign persons.* Payors of certain types of income, which include dividends, interest, and gross proceeds described in sections 6042, 6049, and 6045, respectively, are generally required to determine whether the payee or beneficial owner is a U.S. or a foreign person for several purposes under the Internal Revenue Code (the “Code”). Under sections 1441(a) and 1442(a) of the Code, payments of U.S. source interest and dividends (but not gross proceeds from portfolio investments) are subject to a 30 percent tax withheld at source by the withholding agent if the income is paid to a non-resident alien or a foreign corporation. A foreign beneficial owner may benefit from an exemption or reduced rate under the Code, the regulations, or an income tax treaty. Under section 3406 of the Code, a payor of dividends, interest, and gross proceeds must obtain a Form W-9 from the payee or backup withhold at a 31 percent rate unless an exception applies or the payee furnishes a certificate of foreign status on Form W-8.

.02 *Proof of payee’s or beneficial owner’s status.* The regulations under section 1441, 6042, 6049, and 6045 prescribe the manner in which a beneficial owner or payee may, with respect to these types of payments, certify to a withholding agent or payor that it is a foreign person and, if applicable, that a reduced rate of withholding at source should apply. For this purpose, a withholding agent may generally rely on a certificate of foreign status (Form W-8) or documentary evidence (see procedures described in §1.1441-1(e)(2)(ii) and §1.6049-5(c)(1) and (2)). Alternative certification procedures may be used in the case of payments made outside the United States with respect to an offshore account.

03. *Certification through nominees or agents—intermediary withholding certificate.* A QI may provide an intermediary withholding certificate on behalf of its account holders or partners, including intermediaries or other QI’s. See §1.1441-1(e)(5).

SEC. 3. APPLICATION FOR WITHHOLDING AGREEMENT

01. *Eligible person and eligible financial institution.* An eligible person is a person described in §1.1441-1(e)(5)(ii) that may apply for a withholding agreement under this revenue procedure. An eligible financial institution is an eligible person described in §1.1441-1(e)(5)(ii)(A) (a clearing organization defined in section 1.163-5(c)(2)(i)(D)(8) or a financial institution defined in §1.165-12(c)(1)(iv)).

02. *Pre-application conference.* An eligible person interested in a withholding agreement under this revenue procedure may request one or more pre-application conferences with the Assistant Commissioner (International), Foreign Payments Division, to explore informally the benefits and burdens associated with such an agreement. The conference provides an opportunity to address such matters as the scope of the agreement, available alternatives, special issues regarding the institution’s ability to comply with the terms of the agreement, the legal status of the agreement under local law, and the nature of documentation, record-keeping, reporting, verification, withholding and remittances of tax that may be required under the agreement.

03. *Where to Apply.* An eligible person may apply for a withholding agreement by submitting a written request to the Assistant Commissioner (International), Foreign Payments Division CP:IN:I:WT, 950 L’Enfant Plaza, Washington D.C. 20024.

04. *Content of Application—Eligible Financial Institution.* The application shall indicate that the applicant is an eligible financial institution and that it requests a withholding agreement with the Service pursuant to this revenue procedure. In the case of an eligible financial institution, the application shall include the information described in this section 3.04(i) through (viii). Upon review of the application, the Service may request additional information and documentation.

(i) The applicant’s name, address, and employer identification number. If

the applicant does not have an employer identification number, a completed Form SS-4 must be included to obtain such number.

(ii) A description of the applicant including the country under whose laws the applicant is created or organized and status of the applicant (corporation, partnership, trust, pool, etc.) under such country’s laws.

(iii) A list of the applicant’s officers and directors, and a list of the employees who are responsible parties for performance under the agreement.

(iv) An explanation of the branches, if any, intended to be covered by the agreement and a description of their location.

(v) An explanation of the applicant’s “know-your-customer” practices and procedures for opening accounts, identifying customers, and communication with customers, and the extent to which they are mandated and verified under local law and regulations applicable at each location intended to be covered by the agreement, and the penalties or sanctions that may apply under local law in the event of a failure to comply with such procedures. Supporting documentation must be included.

(vi) An explanation of the account agreements and other account documents used by the applicant in its account relationships with its customers (or partners) at each location intended to be covered by the agreement.

(vii) Information regarding the number of account holders (or partners) likely to be covered by an intermediary certificate and the aggregate value of estimated U.S. investments associated with the account holders (or partners).

(viii) Information regarding governmental or other supervision to which the applicant is subject at each location intended to be covered by the agreement.

.05 *Content of Application—Eligible Persons Other than Financial Institutions.* The application shall indicate that the applicant is an eligible person, other than an eligible financial institution, and that it requests a withholding agreement with the Service pursuant to this revenue procedure. In the case of an applicant other than an eligible financial institution, the application shall include the information described in this section 3.05 (i) through (viii). Upon review of the application, the Service may request additional information and documentation.

(i) The applicant's name, address, and employer identification number. If the applicant does not have an employer identification number, a completed Form SS-4 must be included to obtain such number.

(ii) The reason that the applicant wishes to conclude a withholding agreement.

(iii) A description of the applicant including the country under whose laws the applicant is created or organized and status of the applicant (corporation, partnership, trust, pool, etc.) under such country's laws.

(iv) A list of the applicant's officers and directors, and a list of the employees who are responsible parties for performance under the agreement.

(v) An explanation of the branches, if any, intended to be covered by the agreement and a description of their location.

(vi) Information regarding the number of account holders (or partners) likely to be covered by an intermediary certificate and the aggregate value of estimated U.S. investments associated with the account holders (or partners).

(vii) An explanation of the applicant's "know-your-customer" practices and procedures, if any, and the extent to which they are mandated and verified under local law and regulations applicable at each location intended to be covered by the agreement, and the penalties or sanctions that may apply under local law in the event of a failure to comply with such procedures. Supporting documentation must be included.

(viii) Information regarding governmental or other supervision to which the applicant is subject at each location intended to be covered by the agreement.

SEC. 4. WITHHOLDING AGREEMENT

01. *In general.* The withholding agreement described under §1.1441-1(e)(5)(iii) is an agreement between the Service and an eligible person pursuant to this revenue procedure, by which the Service agrees to consider the entity as a QI in consideration for the entity's agreement to undertake specified responsibilities. These responsibilities are assumed under the authority of chapter 3, chapter 61, and section 3406 of the Code. The purpose of a withholding

agreement is to specify the extent to which, and the manner in which, the responsibilities imposed under these statutory provisions (and the regulations under these provisions) shall apply to a QI. The agreement will generally include procedures designed to document the identity of beneficial owners, maintain records, and report information to the Service. Withholding agreements will also address procedures to insure compliance with the terms of the agreement. The terms of a withholding agreement may vary from case to case depending upon such factors as local laws and practices dealing with bank secrecy, know-your-customer procedures, supervisory controls, tax reporting requirements, information exchange under an income tax treaty, the financial stature of the applicant, and the types of internal controls and record keeping procedures which the entity has in effect.

02. *Procedures regarding intermediary withholding certificate.*

(a) *In general.* The withholding agreement will specify that a QI may furnish an intermediary certificate with respect to interest, dividends and broker proceeds for which a Form W-8 or Form W-9 would otherwise be required to be furnished to the U.S. withholding agent or payor under section 1441, 1442, 3406, 6042, 6045, or 6049.

(b) *Tiered intermediary certificates.* Under the agreement, a QI may agree to accept an intermediary certificate from another QI and base its own certification on the intermediary certificate received from another QI. For example, where a U.S. withholding agent makes a payment to QI1, that, in turn, makes a payment to QI2, the agent may rely upon the intermediary certificate furnished by QI1; QI1 may rely on the intermediary certificate that QI2 furnishes to QI1. QI2's certificate is not required to be furnished to the withholding agent.

(c) *Designation of primary withholding responsibilities.* A QI is a withholding agent for purposes of chapter 3 of the Code and a payor for purposes of section 3406 and chapter 61 of the Code. Therefore, in order to clarify whether the U.S. withholding agent or the QI must actually withhold any amount of tax due, the withholding agreement must provide whether the QI will undertake primary responsibility with respect to the withholding of tax on payments to beneficial owners or

U.S. payees. The QI may agree to assume primary withholding responsibility only in part. For example, the QI may be willing to assume information reporting and backup withholding responsibilities for its U.S. customers and thus would assume primary withholding responsibility, but not agree to assume primary withholding responsibility on payments to its foreign customers.

(i) *Applicable procedures if QI assumes primary withholding responsibility.* A QI that assumes primary withholding responsibility under a withholding agreement must satisfy the requirements described in this section (i) in connection with the relevant payments. For purposes of determining its withholding and reporting responsibilities, a QI may rely upon the presumptions of a payee's status described in §1.1441-1(f).

(A) Provide to the withholding agent or other QI an intermediary withholding certificate indicating the extent to which the QI assumes primary withholding responsibility.

(B) Withhold the amount of tax required under sections 1441, 1442, or 3406, except to the extent of payments made to another QI that has provided an intermediary withholding certificate indicating that it has assumed primary withholding responsibility.

(C) Deposit tax and make returns under the Code and the regulations pertaining to payments made by the QI, except as may be otherwise specified in the agreement with the Service.

(ii) *Applicable procedures if QI does not assume primary withholding responsibility.* A QI that does not assume primary withholding responsibility under the agreement must satisfy the requirements described in this section (ii) in connection with the relevant payments.

(A) Provide to a withholding agent or other QI an intermediary certificate indicating that the QI does not assume primary withholding responsibility.

(B) Identify the relevant classes of assets covered by the intermediary withholding certificate (including the class of assets covered by another intermediary certificate for which the issuing QI agrees to assume primary withholding responsibility).

(C) Certify the status of each class (*i.e.* whether the assets are held by U.S. or foreign persons) and the applicable rate of withholding tax.

(D) Provide to the withholding agent or other QI W-9s for U.S. owners that are not exempt recipients and names and addresses of U.S. owners that are exempt recipients.

(iii) *Definition of class of asset.* A class of assets is any group of assets that produces the same type of income (e.g. interest or dividends), that is subject to withholding at the same rate, that is held either by foreign persons or the same U.S. person, and for which the QI giving the intermediary certificate has not assumed primary withholding responsibility. For example, an eligible financial institution has foreign customers residing in two treaty countries (the rate of tax permitted on dividend income is 15% under both treaties) and U.S. customers. All customers earn U.S. source dividend and portfolio interest. The institution, if a QI that did not assume primary withholding responsibility for all of its payments, would furnish one intermediary certificate identifying the different classes of assets: assets producing portfolio interest earned by foreign customers claiming the portfolio interest exemption at source; assets producing dividend income earned by foreign customers claiming the 15% reduced rate at source; assets producing interest income earned by each U.S. customer; and assets producing dividends earned by each U.S. customer. Assets may be identified by account. That is, the QI's intermediary certificate may indicate that all assets held in a particular account represent assets that produce portfolio interest for foreign persons. Any beneficial owner or payee for whom the QI does not hold all of the required documentation as specified under the withholding agreement must be identified as a separate class and treated, under the presumptions described in §1.1441-1(f)(2)(i)(A) as a U.S. payee that is not an exempt recipient.

(iv) *Disclosure of identify of beneficial owner or payee by QI that does not assume primary withholding responsibility.* Generally, an intermediary certificate provided by a QI that does not assume primary withholding responsibility does not disclose the identity of the beneficial owners. The documentation supporting the claim of foreign status and entitlement to treaty benefits need not be attached to the intermediary withholding certificate. However, if the QI does not assume

primary withholding responsibility for payments made to U.S. persons and, therefore, has not agreed to report U.S. source payments made to U.S. persons, the documentation supporting the claims of U.S. status must be attached to the intermediary certificate so that the withholding agent/payor may report or backup withhold with respect to such payments.

03. *Certification and documentation requirements.*

(a) *In general.* The withholding agreement will provide that an account holder is appropriately accounted for in an intermediary withholding certificate only if the QI has obtained the type of certification or documentation for the account holder as the agreement will specify. Generally, for account holders that are beneficial owners, the QI must agree to be subject to the same certification or documentation requirements as apply to withholding agents under section 1441 and the regulations thereunder and to payors under sections 6042, 6045, and 6049 and the regulations thereunder. For this purpose, a withholding agreement will specify the extent to which a QI may rely upon Form W-8 that does not state a taxpayer identification number. The QI may use such substitute form as the Service may approve under the agreement (including certifications incorporated into a form in use by the QI for the opening of new accounts). However, the agreement may provide for other types of acceptable documentation. The ability to use documentation different from that required under regulations will depend upon existing documentation procedures used by the QI to document the identity, nationality, and residence of beneficial owners and the nature of supervisory controls and reporting procedures to which it is subject under local laws. Substitute documentation must approximate the evidentiary value of the documentation required under the regulations.

(b) *Standards of reliability.* The reliability of any documentation will be evaluated on the basis of the type of information stated on the document, the source document, if any, used to substantiate the information on the document, the issuance procedures used, and the ease with which it can be counterfeited. Copies of documents will generally be acceptable if the QI certifies that the documents are correct copies of the original documents.

(c) *Account holders that are nominees.* If an account holder is not acting for its own account (e.g., is a nominee or agent for the beneficial owner) and is not a QI, the QI must obtain certification or documentation regarding the beneficial owner in the manner specified in the agreement. It must then either transmit such certification or documentation to the next intermediary in the chain or include the beneficial owner in its intermediary certificate. In the latter situation, the QI is responsible for the correctness and completeness of the certification or documentation relied upon in the same manner and to the same extent as if the beneficial owner were a direct account holder with the QI.

04. *Certification with respect to claim of tax treaty benefits.* A QI may also agree to certify the residence of an account holder for purposes of claiming benefits under an income tax treaty. If the account holder does not have a TIN, the QI may either accept a certificate of tax residence from the appropriate tax authority in the country with which the United States has an income tax treaty or agree to maintain appropriate documentary evidence regarding residence of the account holder in the treaty country.

05. *Acceptance agents.* Under a withholding agreement, the QI may agree to act as an acceptance agent for purposes of section 6109 of the Code and the regulations thereunder. [See Rev. Proc. xx-xx for the duties and obligations of an acceptance agent.]

(a) *Assistance with obtaining a taxpayer identification number.* A QI that acts as an acceptance agent with respect to obtaining identification numbers from the Service for its account holders shall agree to provide a TIN application form to the account holder (i.e., a Form W-7, Application for IRS Individual Taxpayer Identification Number, or a Form SS-4, Application for Employer Identification Number) and to assist in the preparation and submission of the TIN application forms to the Service. The QI may use such substitute form as the Service may approve under the agreement (including the terms of forms SS-4 and W-7 into a form in use by the QI for the opening of new accounts). The forms or substitute form, together with required documentation, may be forwarded to the Service by the QI. The QI may act as agent for the applicant regarding any

additional correspondence necessary in connection with the application. The Service will release the TIN to the QI on behalf of the applicant and the QI will acknowledge receipt on behalf of the applicant.

(b) *Certification on behalf of the applicant.* A QI that is an acceptance agent may, instead of forwarding the required documentation to the Service, certify that it has reviewed the required documentation and that it complies with the Service requirements. In such a case, only the TIN application form (or a substitute form) must be submitted to the Service. Further, in appropriate cases, the QI may execute the TIN application form on behalf of the applicant.

(c) *Certification of residence in a treaty country.* In the case of an applicant claiming residence in a country with which the United States has an income tax treaty, the application and subsequent issuance of a TIN will serve as certification of residence in that country pursuant to §1.1441-6(c)-(2)(iii). If the TIN is issued on the basis of a QI's certification, the QI will agree to notify the Service when the account holder's address changes to another country (based on information obtained by the QI in the ordinary course of business or as otherwise specified under the agreement) and when the account holder terminates its relationship with the QI.

06. *Record-keeping obligations.* The QI will agree that, for purposes of determining its compliance with the withholding agreement, it will maintain a record of the documentation obtained and reviewed pursuant to the documentation obligations set forth in the agreement. The documentation with respect to any account holder shall be maintained for as long as the account holder maintains an account relationship with the QI to which the agreement applies and for a period of no less than 3 years from the date such account relationship ceases or for such other reasonable period as the Service will prescribe in the agreement.

07. *Reporting obligations.* Generally, a QI that assumes primary withholding responsibility for payments relating to a class of assets will be required to make returns and provide information to the Service and beneficial owners or payees as is required under the Code and regulations on an annual basis with respect to payments on such class of

assets. However, in the case of a QI that is an eligible financial institution, these requirements may be modified under the withholding agreement. The withholding agreement may modify or waive the obligation to report beneficial owner information to the Service if access to this information is otherwise available to the Service under other procedures. For example, the obligation to report to the Service may be waived to the extent the QI otherwise reports the similar information to its own tax authorities and such information is accessible to the Service under the exchange of information provisions of an applicable income tax treaty. Similarly, certain reports may be unnecessary where the QI agrees to verification procedures as described in section 4.08, below. The withholding agreement may modify or waive the obligation to furnish a statement to a beneficial owner. The beneficial owner must, however, be able to obtain such a statement on request. A QI that assumes primary withholding responsibility for payments made to a U.S. payee shall agree to report on Form 1099 on U.S. source amounts paid to a U.S. payee.

08. *Verification procedures.*

(i) *In general.* The withholding agreement may specify the records and account information which the QI agrees to make available to the Service for inspection and the procedures for carrying out such inspection. In all cases, the Service must be able to verify that the QI has adequate procedures in effect to identify its account holders (or partners) and determine their nationality and country of residence. In addition, the Service may require procedures enabling it to verify compliance by the QI with the agreement with respect to specific accounts.

(ii) *Special procedures for eligible financial institutions.* (A) *Approved external auditors.* In appropriate cases, the Service may rely on audits of an eligible financial institution performed by the institution's approved external auditors. If, for example, under an income tax treaty or local laws, the Service would be given access to appropriate auditor's records to verify compliance, the Service may audit such records in lieu of auditing the institution's records. For this purpose, records may include workpapers, reports prepared by, and the methodology employed by, the approved external

auditors. In order for such an arrangement to be approved by the Service, an auditor must be subject to regulatory supervision under the laws of the country in which a significant part of the intermediary activities under the agreement are expected to occur, its internal procedures must require it to verify that the financial institution complies with the terms of the withholding agreement and to report non-compliance findings under the agreement in the same manner as it is required to report other findings of non-compliance with applicable local laws and regulatory requirements, and its the relevant records (*i.e.*, workpapers and reports) must be available to the Service upon request.

(B) *Verification of specific account information for eligible financial institutions.* If an eligible financial institution is not subject to audit under the approved external auditor procedure, then the withholding agreement shall contain procedures for auditing information pertaining to specific accounts. Generally, an eligible financial institution that complies with the filing requirements on Forms 1042 and 1042S (or otherwise makes account holder information available to the Service) may be exempted from normal audit procedures or subject to abbreviated audits. Where a QI has agreed to certify to the Service in connection with a TIN application based upon documentation it has obtained and reviewed, it must also agree to furnish the documentation to the Service upon written request in such manner as the Service and the QI will mutually agree. In order to conduct periodic compliance checks, the Service may rely on sampling techniques to assure reliability of the examination while ensuring the least amount of disruption to the financial institution. The withholding agreement will specify the manner in which Service compliance checks will take place. In appropriate cases, assistance may be obtained from the tax authorities of the country where the QI resides.

09. *Guarantee of payment.* The QI must, if required by the Service, obtain a letter of credit, bond, or other surety in such amount as the QI and the Service may agree upon, in order to secure any withholding liability of the QI. The amount of the bond or letter of credit must approximate the risk of underwithholding. Factors to be consid-

ered in this regard include the amount of U.S. investments made through the QI, the number of beneficial owners making U.S. investments, the type of investment and the characteristics of the beneficial owners, and the degree of reporting by the QI to the Service.

10. *Approval and Execution.* A withholding agreement shall be signed by the authorized representative of the eligible person and the Service. The Assistant Commissioner (International) shall sign on behalf of the Service upon approval by the Associate Chief Counsel (International).

11. *Expiration, Termination and Default.*

(a) *Term and events of termination.* Ordinarily, the period of the withholding agreement shall be six years, and the agreement may be renewed for further six year periods as specified in section 12. The withholding agreement may otherwise terminate earlier, *i.e.*, 30 days after delivery of notice of termination by the QI to the Service. The Service may also terminate the agreement prior to its term, *i.e.*, 30 days after delivery to the QI of a notice of termination. The Service cannot give notice of termination until thirty days after it has delivered a notice of default. The Service may deliver a notice of default at any time after an event of default under the withholding agreement has occurred.

(b) *Events of default.* Events of default include the determination upon audit by the Service that significant underwithholding has occurred, that incorrect reporting or a failure to report with respect to a significant number of accounts has occurred, that the QI has failed to comply with the procedures required by the agreement and the failure raises a significant risk that significant underwithholding or underreporting may have occurred. The withholding agreement will define when underwithholding or underreporting is deemed to be significant. An event of default shall also be deemed to occur if the QI has failed to perform any other duty or obligation required of it under the withholding agreement, the QI has misrepresented information on an intermediary withholding certificate, or the QI had actual knowledge at the time a payment was made that information (otherwise required to be provided on withholding certificates described in §1.1441-1(e)(1), as may be modified under the agreement) regarding the

beneficial owner or the payee was lacking, incorrect, or unreliable. The QI may respond to the notice of default by making an offer to cure within thirty days. The Service shall accept or reject the offer to cure, or make a counterproposal within ten days.

12. *Renewal.* A QI that wishes to renew a withholding agreement must submit an application for renewal to the Service at least six months prior to the expiration of the withholding agreement. The application for renewal shall contain the same information required in the application and shall note any changes that have occurred in the information since the previous application. Before approval of any renewal of the withholding agreement, the Service may conduct an audit of the QI by correspondence making use of statistical sampling techniques or on the basis of spot checking.

SEC. 5. LISTING OF QI's

The Service may periodically publish in the Internal Revenue Bulletin a list of the QI's that have a withholding agreement in effect with the Service and of those whose withholding agreement has been terminated or suspended.

SEC. 6. EFFECTIVE DATE

This revenue procedure is effective on the date of its publication in the Internal Revenue Bulletin.

DRAFTING INFORMATION

The principal author of this revenue procedure is Carl Cooper of the Office of the Associate Chief Counsel (International). For further information regarding this revenue procedure, please contact either Carl Cooper on (202) 622-3840 or John Manton of the Foreign Payments Division on (202) 874-1800.
