

Part III - Administrative, Procedural, and Miscellaneous

Documentation Requirements Under Section 6050W for U.S. Payors Making Payment Outside the United States to an Offshore Account.

Notice 2011-71

PURPOSE

This notice provides interim guidance to payment settlement entities (as defined in §1.6050W-1(a)(4)(i)) (PSEs) that are United States payors or United States middlemen (each as defined in §1.6049-5(c)(5)) (U.S. payors) regarding the circumstances under which such a PSE must obtain, review, and maintain documentation to establish that a participating payee is a foreign person for purposes of section 6050W. The Treasury Department and the Internal Revenue Service (IRS) intend to amend the regulations under section 6050W to reflect the guidance provided in this notice. PSEs may rely on the interim guidance in this notice until the regulations are amended.

BACKGROUND

Section 6050W was added by section 3091 of the Housing Assistance Tax Act of 2008, Div. C of Pub. L. No. 110-289, 122 Stat. 2653 (the Act) and requires information returns to be made by certain payors with respect to payments made in settlement of payment card transactions and third party payment network transactions. Section 6050W(d)(1)(B) provides that, except as provided by the Secretary in regulations or

other guidance, the term participating payee does not include any person with a foreign address. The final regulations prescribe the circumstances in which a PSE is required to report payments made to a participating payee that has a foreign address.

Specifically, the final regulations provide that a PSE that is not a U.S. payor is not required to report payments made to a participating payee that does not have a U.S. address as long as the PSE neither knows nor has reason to know that the payee is a United States person (U.S. person). If the participating payee has any U.S. address, such a PSE may treat the participating payee as a foreign person only if the PSE has in its files documentation upon which the PSE may rely to treat the payment as made to a foreign person in accordance with §1.1441-1(e)(1)(ii).

The final regulations also provide that a PSE that is a U.S. payor is not required to report payments to payees with a foreign address as long as, prior to payment, the payee has provided the payor with documentation upon which the payor may rely to treat the payment as made to a foreign person in accordance with §1.1441-1(e)(1)(ii).

In addition, the final regulations provide a presumption under which a PSE that is a U.S. payor making a payment outside the United States (within the meaning of §1.6049-5(e)) to an offshore account (as defined in §1.6049-5(c)(1)) need not report payments to a participating payee with only a foreign address if the name of the participating payee indicates that it is a foreign *per se* corporation listed in §301.7701-2(b)(8)(i) (a foreign *per se* corporation) and the PSE neither knows nor has reason to know that the participating payee is a U.S. person. The final regulations also provide a grace period after account opening to collect documentation by applying the grace period rules of §1.6049-5(d)(2)(ii) if the participating payee has only a foreign address.

The final regulations apply to returns for calendar years beginning after December 31, 2010. The final regulations also provide a transition rule, which provides that for payments made pursuant to contractual obligations entered into before January 1, 2011, a PSE that is a U.S. payor is not required to report payments made to a participating payee with a foreign address as long as the U.S. payor neither knows nor has reason to know that the payee is a U.S. person. For this purpose, a renewal of such a contractual obligation will not result in a new contractual obligation unless there is a material modification of the contractual obligation.

DISCUSSION

Treasury and the IRS have received comments citing administrative burdens associated with implementing the final regulations and requesting that, in light of those administrative burdens, the final regulations be amended so that PSEs that are U.S. payors operating outside the United States would be required to collect documentation to determine the U.S. or non-U.S. status of a participating payee only if certain indicia of U.S. status are present.

In response to these comments, the Treasury Department and the IRS intend to amend the regulations under section 6050W to provide that a PSE that is a U.S. payor will only be required to make the return of information required under §1.6050W-1(a)(1) with respect to a payment made outside the United States to an offshore account if any of the following applies: (i) there is a U.S. address associated with the participating payee (whether a residence address or correspondence address); (ii) the PSE has standing instructions to direct the payment to a bank account maintained in the United States; (iii) the participating payee submits for payment in U.S. dollars; or (iv) the PSE

knows or has reason to know that the participating payee is a U.S. person. A PSE will not be required to make the return of information required under §1.6050W-1(a)(1) with respect to a payment made outside the United States to an offshore account in the circumstances described in the preceding sentence if the PSE obtains from the participating payee a Form W-8 or documentary evidence establishing the payee's non-U.S. status and the PSE does not know that the payee is a U.S. person. For this purpose, Forms W-8 (or the substitute forms described below) and documentary evidence: (i) must be collected by the PSE by the later of January 1, 2012, or the date that is 90 days after the date on which the PSE enters into the contractual obligations with the participating payee; and (ii) in the case of a Form W-8 (or substitute form described below), may be relied upon only when the requirements of §1.1441-7(b)(5)(i)(A) or (B), and (ii), are satisfied, or, in the case of documentary evidence, may be relied upon only when the requirements of §1.1441-7(b)(7) and -7(b)(8)(ii) and (iii) are satisfied. In the case of a payment to a foreign payee of income that is effectively connected with the conduct of a trade or business in the United States, the appropriate withholding certificate is a Form W-8ECI. For all other payments, the appropriate withholding certificate is a Form W-8BEN.

The special rule in the final regulations for a participating payee that has a name that indicates it is a foreign per se corporation will be retained. That is, a PSE that is a U.S. payor will not be required to make the return of information required under §1.6050W-1(a)(1) with respect to a payment made outside the United States to an offshore account to a participating payee with only a foreign address if the name of the participating payee indicates that it is an entity listed as a per se corporation under

§301.7701-2(b)(8)(i) unless the PSE knows or has reason to know that the payee is a U.S. person.

Treasury and the IRS also intend to amend the regulations to clarify that a PSE that is not a U.S. payor, and that has reason to know, but not actual knowledge, that a participating payee is a U.S. person, will not be required to make the return of information required under §1.6050W-1(a)(1) if the PSE obtains from the payee a Form W-8 that satisfies the requirements of §1.1441-7(b)(5)(i)(A) or (B), and (ii), or documentary evidence that satisfies the requirements of §1.1441-7(b)(7) and -7(b)(8)(ii) and (iii).

Treasury and the IRS also intend to modify the regulations to allow a PSE to accept a substitute form in lieu of a Form W-8BEN in order for a participating payee to certify its non-U.S. status. Such substitute form will be acceptable provided that it contains the payee's name, country of incorporation (when applicable), type of entity, residence and mailing address (if different from residence address), the certification of the payee's non-U.S. status made under penalties of perjury and, in the case of a participating payee that is an entity, the capacity of the individual providing the certification of behalf of the payee. In lieu of the certification and penalties-of-perjury statement contained on the Form W-8BEN, a substitute form may contain the following statement: "Under penalties of perjury, I declare that the payee providing this certification is not a United States person (i.e., a citizen or resident of the United States as determined for U.S. federal tax purposes, a corporation or partnership created or organized in the United States or under the law of the United States or of any State, any estate that would be subject to U.S. federal income tax on income from sources

without the United States which is not effectively connected with the conduct of a trade or business within the United States, or any trust if a court within the United States is able to exercise primary supervision over the administration of the trust and one or more United States persons have the authority to control all substantial decisions of the trust), that the income to which this certification relates is not effectively connected with the conduct of a trade or business in the United States, and that the undersigned has examined the information on this form and to the best of my knowledge and belief it is true, correct, and complete. Furthermore, I authorize this form to be provided to any person that has control, receipt, or custody of the payment to which I am entitled or any person that can disburse or make the payments to which I am entitled.”

Treasury and the IRS have also received comments questioning whether, for purposes of determining whether the requirements of §1.1441-1(e)(1)(ii) are satisfied, a PSE may rely on documentary evidence that is more than three years old. Section 1.1441-1(e)(1)(ii)(A)(2) provides that, if a payment is made outside the United States to an offshore account, the withholding agent can rely on documentary evidence described in §1.1441-6(c)(3) or (4), or §1.6049-5(c)(1). Section 1.6049-5(c)(1) provides that a payor may rely on documentary evidence sufficient to establish the identity of the payee and the status of that person as a foreign person (including, but not limited to, documentary evidence described in §1.1441-6(c)(3) or (4)). Section 1.6049-5(c)(1) does not require that, at the time of collection, the documentary evidence be less than three years old. Under §1.1441-1(e)(4)(ii)(A) (cross-referenced by §1.6049-5(c)(2)), documentary evidence described in §1.6049-5(c)(1) remains valid until the earlier of the last day of the third calendar year following the year in which the documentary evidence

is provided to the withholding agent or the day that a change in circumstances occurs that makes any information on the documentary evidence incorrect.

Until the amendments to the final regulations described in this Notice are published, PSEs may rely on the guidance provided in this notice.

DRAFTING INFORMATION

The principal author of this notice is Danielle Nishida of the Office of Associate Chief Counsel (International). For further information regarding this notice, please contact John Sweeney at (202) 622-3840 (not a toll-free call).