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*1990-1 C.B. 31; T.D. 8300;
 1990 IRB LEXIS 2187, **

DEPARTMENT OF THE TREASURY

Treasury Decision 8300

1990-1 C.B. 31; **T.D. 8300**; 1990 IRB LEXIS 2187

January 1990

[* 1]

SUBJECT MATTER: Section 163.-Interest

APPLICABLE SECTIONS:

[26 CFR 1.163-5](#): Denial of interest deduction on certain obligations issued after December 31, 1982, unless issued in registered form. Internal Revenue Service 26 CFR Parts 1, 35a, 46, and 602

TEXT:

Registration Requirements with Respect to Certain Debt Obligations; Application of Repeal of 30 Percent Withholding by the Tax Reform Act of 1984

AGENCY:

Internal Revenue Service, Treasury.

ACTION:

Final and temporary regulations.

SUMMARY:

This document contains final Income Tax Regulations relating to the definition of the term "registration required obligations" with respect to obligations issued to certain foreign persons and relating to the imposition of sanctions on issuers of registration required obligations in bearer form.

This document also contains temporary regulations relating to the repeal of 30 percent withholding on certain types of interest by the Tax Reform Act of 1984. These regulations provide the public with guidance necessary to comply with the Tax Equity and Fiscal Responsibility Act of 1982 and the Tax Reform Act of 1984 and affect persons issuing debt obligations to foreign persons.

EFFECTIVE DATE:

These regulations are effective May 10, 1990. The text of the [*2] regulations states the dates of applicability of the rules contained therein to various transactions and taxpayers.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act ([44 U.S.C. § 3504 \(h\)](#)) under control number 1545-1132. The annual burden per respondent or record keeper is estimated to be 10 minutes.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on information as is available to the Internal Revenue Service. Individual respondents or recordkeepers may require greater or less time, depending on their particular circumstances.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Internal Revenue Service, Attention: IRS Reports Clearance Officer, T:FP, Washington, DC 20224, and to the Office of Management and Budget, Paperwork Reduction Project (1545-1132), Washington, DC 20503.

Background

On August 24, 1989, the FEDERAL REGISTER published [*3] proposed amendments ([54 FR 35200](#)) [INTL-0536-89, [1989-2 C.B. 833](#)] to the Income Tax Regulations (26 CFR Part 1 and 46) under [sections 163 \(f\)](#), [871](#), [881](#), [1441](#), [1442](#) and [4701 of the Internal Revenue Code of 1986](#). [Section 1.163-5 \(c\) of the regulations](#) incorporated by reference certain requirements based on the interpretation of the Securities Act of 1933 by the Securities and Exchange Commission (SEC). The SEC proposed to revise its interpretation of that Act. The proposed amendments were in response to that action. Written comments responding to this notice were received. No public hearing was requested and no public hearing was held. After consideration of all comments regarding the proposed amendments, those amendments are adopted by this Treasury Decision with revisions in response to those comments. The comments and revisions are discussed below.

Explanation of Provisions

The proposed regulations under [§ 1.163-5 \(c\) \(2\) \(i\)](#) provided rules relating to whether an obligation would be considered to be issued under arrangements reasonably designed to insure that the obligation will be sold (or resold in connection with its original issuance) only to a person who is not a United States [*4] person. Obligations that satisfied the "arrangements reasonably designed" test under [§ 1.163-5 \(c\) \(2\) \(i\) \(A\)](#) or [\(B\)](#) were required, after the effective date, to satisfy new [§ 1.163-5 \(c\) \(2\) \(i\) \(D\)](#).

Proposed [§ 1.163-5 \(c\) \(2\) \(i\) \(D\)](#) listed seven requirements. In brief they were:

- (1) Neither the issuer nor any distributor makes a directed selling effort with respect to the obligation;
- (2) Neither the issuer nor any distributor offers the obligation within the United States or its possessions or to a United States person;
- (3) The issuer does not, and each distributor covenants that it will not, sell the obligation within the United States or its possessions or to a U.S. person during the restricted period;
- (4) Neither the issuer nor any distributor delivers the obligation within the United States or its possessions during the restricted period;
- (5) All offering materials and documents used in connection with the original issuance of the obligation include a statement that the obligation may not be offered or sold within the United States or its possessions or to a United States person;
- (6) If the issuer or any distributor sells the obligation during the restricted period to a distributor, a dealer, **[*5]** or any other person who receives a selling concession, fee or other remuneration in respect to the security sold, the seller sends a confirmation to such person stating that such person is subject to the restrictions regarding offer, sale, and delivery of the obligation during the restricted period; and
- (7) No later than the 10th day after the last day of the restricted period, a certificate is provided to the issuer or a distributor of the obligation stating that the owner of the obligation on the last day of the restricted period is not a United States person.

The term "distributor" was defined to mean any affiliate of the issuer, the lead underwriter, any person participating in the original issuance of the obligation pursuant to a contractual arrangement, and any person acting on behalf of the issuer or any of the foregoing.

The term "restricted period" was defined as the forty day period beginning on the later of the closing of the offering or the first date on which the obligation is offered to persons other than a distributor.

[Section 1.163-5 \(c\) \(2\) \(i\) \(D\)](#) was proposed to be applicable to obligations originally issued after the date 30 days after final regulations are published **[*6]** in the FEDERAL REGISTER.

Commentors have suggested a number of difficulties with the proposed regulations under [§ 1.163-5 \(c\)-\(2\) \(i\) \(D\)](#). Principally, those difficulties arise from the possibility that an obligation may fail the requirements of [§ 1.163-5 \(c\) \(2\) \(i\) \(D\)](#) for reasons that may be beyond the control of the issuer, and from the possibility that all the obligations in an issue may fail such requirements if only a few obligations have failed an issue wide requirement. Other comments concerned the lack of an incentive for post-restricted period certifications when delivery of the obligation is not required, and the possibility that the date of applicability of the regulations may not allow sufficient time for amendment of the documentation associated with an issue.

In response to these comments, and in view of the SEC's requirements under Regulation S, these final regulations have deleted the requirements of the proposed regulations relating to directed selling efforts, offering materials and confirmations. The provisions regarding offers and sales have been amended to limit somewhat the issuer's liability for acts of distributors. The certification

procedure has been amended **[*7]** so that delivery of an obligation in definitive form triggers certification, and a more delayed effective date of the regulations has been provided.

These final regulations are separate and independent from the rules and interpretations that the SEC chooses to adopt in its administration of the securities laws. The SEC's interpretations will be considered by the Service where appropriate; however, the Service must ultimately base its interpretations on the tax policies underlying [section 163 \(f\) \(2\) \(B\)](#).

These final regulations contain three requirements: (1) restrictions on offers and sales, (2) restrictions on delivery, and (3) certification.

With respect to offers and sales, the issuer and distributor must not offer or sell the obligation during the restricted period to a person within the United States or its possessions or to a United States person. (The obligation may, however, be sold to a U.S. person in certain circumstances if the person is a financial institution or acquires and holds through a financial institution.) The distributor of the obligation will be deemed to satisfy this requirement if it covenants that it will not offer or sell the obligation during the restricted **[*8]** period to a person who is within the United States or its possessions or to a United States person, and it has in effect, in connection with the offer and sale of the obligation during the restricted period, procedures reasonably designed to insure that its employees or other agents who are directly engaged in selling the obligation are aware that the obligation can not be offered or sold during the restricted period to a person who is within the United States or its possessions or to a United States person.

With respect to delivery of obligations sold during the restricted period, neither the issuer nor any distributor may deliver the obligation in definitive form within the United States or its possessions.

Certification is required on the earlier of the date of the first payment of interest on the obligation or the date of delivery by the issuer of the obligation in definitive form. The certification may be signed or sent either by the owner of the obligation or by a financial institution or clearing organization through which the owner holds the obligation.

The final regulations alter the exception from certification contained in the proposed regulations for "targeted offshore offerings". **[*9]** The changes are in response to comments concerning offers and sales, under the exception, of obligations within or without the targeted foreign country. The IRS will continue to review the use of the exception and may make further changes, if warranted; such changes would be effective on a prospective basis.

The definition of distributor has been amended in these final regulations. A distributor is a person that offers or sells the obligation during the restricted period pursuant to a written contract with the issuer, any person that offers or sells the obligation during the restricted period pursuant to a written contract with a person previously described, and certain affiliates of the issuer or another distributor that offer and sell the obligation during the restricted period.

The **[*10]** preamble to the proposed regulations solicited comments on several issues, including whether registered obligations convertible into bearer form should be treated as registered rather than bearer obligations at the time of issuance. Because of general tax compliance concerns, it has been decided to continue current law, which treats such convertible obligations as being in bearer form at the time of issuance.

These final regulations will apply to obligations originally issued after September 7, 1990. The issuer of an obligation may choose to apply either the rules of [§ 1.163-5 \(c\) \(2\) \(i\) \(A\)](#) or [§ 1.163-5 \(c\) \(2\) \(i\) \(B\)](#), or the rules of these final regulations, to an obligation that is originally issued after May 10, 1990, and on or before September 7, 1990.

This document also publishes temporary regulations revising paragraphs (a), (c) and (e) of § 35a.9999-5 and adding new paragraph (e) to § 1.163-5T. These temporary regulations amend A-5 of paragraph (a) to provide an exception from the certification requirement for certain short term commercial paper. Under this provision a certificate will not be required under [§ 1.163-5 \(c\)-\(2\) \(i\) \(D\)](#) (3) by virtue of A-5 if the obligation is **[*11]** an original issue discount obligation with a

maturity of 183 days or less from the date of issuance.

A-18 of paragraph (c) of § 35a.9999-5 provides that an obligation that would otherwise be in registered form but for the fact that it is convertible into bearer form is considered to be in bearer form. Under A-1 of § 35a.9999-5 (a), this provision applies to obligations issued after July 18, 1984. The provision in A-18 is amended in order to better coordinate that provision with [§ 1.163-5 \(c\)-\(2\) \(vi\)](#).

A-21 of paragraph (e) of § 35a.9999-5 provides that interest paid to the holder of a pass-through certificate described in § 1.163-5T (d) may qualify as portfolio interest. It provides further that, for purposes of [sections 871 \(h\)](#) and [881 \(c\)](#), interest is considered to be paid on or with respect to the pass-through certificate and not with respect to any obligations held by the fund or trust to which the pass-through certificate relates. This rule was intended to apply with respect to payment from the trustee of the pass-through trust to the certificate holder, but not with respect to payments made to the trustee of the pass-through trust. Thus, the rule applies when the trustee of the [*12] pass-through trust is a United States person who collects and pays out interest to the certificate holder, but does not apply when the payment is made to a trustee that is a foreign person. A-21 is amended to clarify this point. A-21 is also amended to clarify its application to REMICs. Section 1.163-5T is also amended to add paragraph (e) concerning REMICs.

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553 (b) of the Administrative Procedure Act (5 U.S.C. Chapter 5) and the Regulatory Flexibility Act (5 U.S.C. Chapter 6) do not apply to these regulations, and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to [section 7805 \(f\) of the Internal Revenue Code](#), the notice of proposed rulemaking for the regulation was submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Adoption of amendments to the regulations

Accordingly, 26 CFR Parts 1, 35a, 46 and 602 are amended as follows:

PART 1-INCOME TAX REGULATIONS

Paragraph 1. The authority [*13] for part 1 continues to read in part:

Authority: [26 U.S.C. 7805](#). ;

Par. 2. [Section 1.163-5 \(c\)](#) is amended as follows:

1. Paragraph (c) (2) (i) introductory text is amended by revising the first, fourth and fifth sentences and by adding a new sentence between the fourth and fifth sentences as set forth below.

2. Paragraph (c) (2) (i) (A) is amended by adding the sentence set forth below after the last sentence thereof.
3. Paragraph (c) (2) (i) (B) introductory text is revised as set forth below.
4. Paragraph (c) (2) (i) (D) is added as set forth below.
5. Paragraph (c) (3) is amended by redesignating the existing text as paragraph (c) (3) (i) and adding a heading at the beginning of newly designated paragraph (c) (3) (i), and by adding a new paragraph (c) (3) (ii) as set forth below.

§ 1.163-5 Denial of interest deduction on certain 2 obligations issued after December 31, 1982, unless issued in registered form

(c) *Obligations issued to foreign persons after September 21, 1984*—

(2) *Rules for the application of this paragraph*—(i) *Arrangements reasonably designed to ensure sale to non-United States persons.* An obligation will be considered to satisfy paragraph (c) (1) (i) of this section **[*14]** if the conditions of paragraph (c) (2) (i) (A), (B), (C), or (D) of this section are met in connection with the original issuance of the obligation. ; Obligations that meet the conditions of paragraph (c) (2) (i) (A), (B), (C) or (D) of this section may be issued in a single public offering. The preceding sentence does not apply to certificates of deposit issued under the conditions of paragraph (c) (2) (i) (C) of this section by a United States person or by a controlled foreign corporation within the meaning of section 957 (a) that is engaged in the active conduct of a banking business within the meaning of section 954 (c) (3) (B) as in effect prior to the Tax Reform Act of 1986, and the regulations thereunder. A temporary global security need not satisfy the conditions of paragraph (c) (2) (i) (A), (B) or (C) of this section, but must satisfy the applicable requirements of paragraph (c) (2) (i) (D) of this section.

(A) Except as provided in paragraph (c) (3) of this section, this paragraph (c) (2) (i) (A) applies only to obligations issued on or before September 7, 1990.

(B) The obligation is registered under the Securities Act of 1933, is exempt from registration by reason **[*15]** of section 3 or section 4 of such Act, or does not qualify as a security under the Securities Act of 1933; all of the conditions set forth in paragraph (c) (2) (i) (B) (1), (2), (3), (4), and (5) of this section are met with respect to such obligation; and, except as provided in paragraph (c) (3) of this section, the obligation is issued on or before September 7, 1990.

(D) The obligation is issued after September 7, 1990, and all of the conditions set forth in this paragraph (c) (2) (i) (D) are met with respect to such obligation.

(1) *Offers and sales*—(i) *Issuer.* The issuer does not offer or sell the obligation during the restricted period to a person who is within the United States or its possessions or to a

United States person.

(ii) *Distributors.* (A) The distributor of the obligation does not offer or sell the obligation during the restricted period to a person who is within the United States or its possessions or to a United States person.

(B) The distributor of the obligation will be deemed to satisfy the requirements of paragraph (c) (2) (i)-(D) (1) (ii) (A) of this section if the distributor of the obligation covenants that it will not offer or sell the obligation during the [*16] restricted period to a person who is within the United States or its possessions or to a United States person; and the distributor of the obligation has in effect, in connection with the offer and sale of the obligation during the restricted period, procedures reasonably designed to ensure that its employees or agents who are directly engaged in selling the obligation are aware that the obligation cannot be offered or sold during the restricted period to a person who is within the United States or its possessions or is a United States person.

(iii) *Certain rules.* For purposes of paragraph (c) (2) (i) (D) (1) (i) and (ii) of this section:

(A) An offer or sale will be considered to be made to a person who is within the United States or its possessions if the offeror or seller of the obligation has an address within the United States or its possessions for the offeror or buyer of the obligation with respect to the offer or sale.

(B) An offer or sale of an obligation will not be treated as made to a person within the United States or its possessions or to a United States person if the person to whom the offer or sale is made is: An exempt distributor, as defined in paragraph (c) (2) (i) (D) [*17] (5) of this section; An international organization as defined in section 7701 (a) (18) and the regulations thereunder, or a foreign central bank as defined in section 895 and the regulations thereunder; or The foreign branch of a United States financial institution as described in paragraph (c) (2) (i) (D) (6) (i) of this section.

Paragraph (c) (2) (i) (D) (1) (iii) (B) regarding an exempt distributor will only apply to an offer to the United States office of an exempt distributor, and paragraph (c) (2) (i) (D) (1) (iii).

(B) regarding an international organization or foreign central bank will only apply to an offer to an international organization or foreign central bank, if such offer is made directly and specifically to the United States office, organization or bank.

(C) A sale of an obligation will not be treated as made to a person within the United States or its possessions or to a United States person if the person to whom the sale is made is a person described in paragraph (c) (2) (i) (D) (6) (ii) of this section.

(2) *Delivery.* In connection with the sale of the obligation during the restricted period, neither the issuer nor any distributor delivers the obligation in definitive [*18] form within the United States or its possessions.

(3) *Certification-(i) In general.* On the earlier of the date of the first actual payment of interest by the issuer on the obligation or the date of delivery by the issuer of the obligation in definitive form, a certificate is provided to the issuer of the obligation stating that on such date:

- (A) The obligation is owned by a person that is not a United States person;
- (B) The obligation is owned by a United States person described in paragraph (c) (2) (i) (D) ((6) of this section; or
- (C) The obligation is owned by a financial institution for purposes of resale during the restricted period, and such financial institution certifies in addition that it has not acquired the obligation for purposes of resale directly or indirectly to a United States person or to a person within the United States or its possessions. A certificate described in paragraph (c) (2) (i) (D) (3) (i) (A) or (B) of this section may not be given with respect to an obligation that is owned by a financial institution for purposes of resale during the restricted period. For purposes of paragraph (c) (2) (i)-(D) (2) and (3) of this section, a temporary global security (as defined **[*19]** in [§ 1.163-5 \(c\) \(1\) \(ii\) \(B\)](#)) is not considered to be an obligation in definitive form. If the issuer does not make the obligation available for delivery in definitive form within a reasonable period of time after the end of the restricted period, then the obligation shall be treated as not satisfying the requirements of this paragraph (c) (2) (i)-(D) (3). The certificate must be signed (or sent, as provided in paragraph (c) (2) (i) (D) (3) (ii) of this section) either by the owner of the obligation or by a financial institution or clearing organization through which the owner holds the obligation, directly or indirectly. For purposes of this paragraph (c) (2) (i) (D) (3), the term "financial institution" means a financial institution described in [§ 1.165-12 \(c\) \(i\) \(v\)](#). When a certificate is provided by a clearing organization, the certificate must be based on statements provided to it by its member organizations. The requirement of this paragraph (c) (1) (D) (3) shall be deemed not to be satisfied with respect to an obligation if the issuer knows or has reason to know that the certificate with respect to such obligation is false. The certificate must be retained by the issuer (and **[*20]** statements by member organizations must be retained by the clearing organization in the case of certificates based on such statements) for a period of four calendar years following the year in which the certificate is received.

(ii) Electronic certification. The certificate required by paragraph (c) (2) (i) (D) (3) (i) of this section (including a statement provided to a clearing organization by a member organization) may be provided electronically, but only if the person receiving such electronic certificate maintains adequate records, for the retention period described in paragraph (c) (2) (i) (D) (3) (i) of this section, establishing that such certificate was received in respect of the subject obligation, and only if there is a written agreement entered into prior to the time of certification (including the written membership rules of a clearing organization) to which the sender and recipient are subject, providing that the electronic certificate shall have the effect of a signed certificate described in paragraph (c) (2) (i) (D) (3) (i) of this section.

(iii) Exception for certain obligations. This paragraph (c) (2) (i) (D) (3) shall not apply, and no certificate shall be required, **[*21]** in the case of an obligation that is sold during the restricted period and that satisfies all of the following requirements:

- (A) The interest and principal with respect to the obligation are denominated only in the currency of a single foreign country.

- (B) The interest and principal with respect to the obligation are payable only within that foreign country (according to rules similar to those set forth in [§ 1.163-5\(c\) \(2\) \(v\)](#)).
- (C) The obligation is offered and sold in accordance with practices and documentation customary in that foreign country.
- (D) The distributor covenants to use reasonable efforts to sell the obligation within that foreign country.
- (E) The obligation is not listed, or the subject of an application for listing, on an exchange located outside that foreign country.
- (F) The Commissioner has designated that foreign country as a foreign country in which certification under paragraph (c) (2) (i) (D) (3) (i) of this section is not permissible.
- (G) The issuance of the obligation is subject to guidelines or restrictions imposed by governmental, banking or securities authorities in that foreign country.
- (H) More than 80 percent by value of the obligations included in the offering of which **[*22]** the obligation is a part are offered and sold to non-distributors by distributors maintaining an office located in that foreign country. Foreign currency denominated obligations that are convertible into U.S. dollar denominated obligations or that by their terms are linked to the U.S. dollar in a way which effectively converts the obligations to U. S. dollar denominated obligations do not satisfy the requirements of this paragraph (c) (2) (i) (D) (3) (iii). A foreign currency denominated obligation will not be treated as linked, by its terms, to the U.S. dollar solely because the obligation is the subject of a swap transaction.

(4) Distributor. For purposes of this paragraph (c) (2) (i) (D), the term "distributor" means:

- (i) a person that offers or sells the obligation during the restricted period pursuant to a written contract with the issuer;
- (ii) any person that offers or sells the obligation during the restricted period pursuant to a written contract with a person described in paragraph (c) (2) (i) (D) (4) (i); and
- (iii) any affiliate that acquires the obligation from another member of its affiliated group for the purpose of offering or selling the obligation during the restricted period, **[*23]** but only if the transferor member of the group is the issuer or

a person described in paragraph (c) (2) (i) (D) (4) (i) or (ii) of this section. The terms "affiliate" and "affiliated group" have the same meanings as in [section 1504 \(a\) of the Code](#), but without regard to the exceptions contained in [section 1504 \(b\)](#) and substituting "50 percent" for "80 percent" each time it appears. For purposes of this paragraph (c) (2) (i) (D) (4), a written contract does not include a confirmation or other notice of the transaction.

(5) *Exempt distributor.* For purposes of this paragraph (c) (2) (i) (D), the term "exempt distributor" means a distributor that covenants in its contract with the issuer or with a distributor described in paragraph (c) (2) (i) (D) (4) (i) that it is buying the obligation for the purpose of resale in connection with the original issuance of the obligation, and that if it retains the obligation for its own account, it will only do so in accordance with the requirements of paragraph (c) (2) (i) (D) (6) of this section. In the latter case, the covenant will constitute the certificate required under paragraph (c) (2) (i) (D) (6). The provisions of paragraph (c) (2) (i) (D) (7) **[*24]** governing the restricted period for unsold allotments or subscriptions shall apply to any obligation retained for investment by an exempt distributor.

(6) *Certain United States persons.* A person is described in this paragraph (c) (2) (i) (D) (6) if the requirements of this paragraph are satisfied and the person is:

- (i) the foreign branch of a United States financial institution purchasing for its own account or for resale, or
- (ii) a United States person who acquired the obligation through the foreign branch of a United States financial institution and who, for purposes of the certification required in paragraph (c) (2) (i) (D) (3) of this section, holds the obligation through such financial institution on the date of certification.

For purposes of paragraph (c) (2) (i)-(D) (6) (ii) of this section, a United States person will be considered to acquire and hold an obligation through the foreign branch of a United States financial institution if the United States person has an account with the United States office of a financial institution, and the transaction is executed by a foreign office of that financial institution, or by the foreign office of another financial institution acting on **[*25]** behalf of that financial institution. This paragraph (c) (2) (i) (D) (6) will apply, however, only if the United States financial institution (or the United States office of a foreign financial institution) holding the obligation provides a certificate to the issuer or distributor selling the obligation within a reasonable time stating that it agrees to comply with the requirements of section 165 (j) (3) (A), (B), or (C) and the regulations thereunder. For purposes of this paragraph (c) (2) (i) (D) (6), the term "financial institution" means a financial institution as defined in § 1.165-12 (c) (1) (v). As an alternative to the certification required above, a financial institution may provide a blanket certificate to the issuer or distributor selling the obligation stating that the financial institution will comply with the requirements of section 165 (j) (3) (A), (B) or (C) and the regulations thereunder. A blanket certificate must be received by the issuer or the distributor in the year of the issuance of the obligation or in either of the preceding two calendar years, and must be retained by the issuer or distributor for at least four years after the end of the last calendar year **[*26]** to which it relates.

(7) *Restricted period.* For purposes of this paragraph (c) (2) (i) (D), the restricted period with respect to an obligation begins on the earlier of the closing date (or the date on which the issuer receives the loan proceeds, if there is no closing with respect to the obligation), or the first date on which the obligation is offered to persons other than a

distributor. The restricted period with respect to an obligation ends on the expiration of the forty day period beginning on the closing date (or the date on which the issuer receives the loan proceeds, if there is no closing with respect to the obligation). Notwithstanding the preceding sentence, any offer or sale of the obligation by the issuer or a distributor shall be deemed to be during the restricted period if the issuer or distributor holds the obligation as part of an unsold allotment or subscription.

(8) *Clearing organization.* For purposes of this paragraph (c) (2) (i) (D), a "clearing organization" is an entity which is in the business of holding obligations for member organizations and transferring obligations among such members by credit or debit to the account of a member without the necessity of physical [*27] delivery of the obligation.

(3) *Effective date-*(i) *In general.*

(ii) *Special rules.* If an obligation is originally issued after September 7, 1990, pursuant to the exercise of a warrant or the conversion of a convertible obligation, which warrant or obligation (including conversion privilege) was issued on or before May 10, 1990, then the issuer may choose to apply either the rules of [§ 1.163-5 \(c\)-\(2\) \(i\) \(A\)](#) or [§ 1.163-5 \(c\)-\(2\) \(i\) \(B\)](#), or the rules of [§ 1.163-5 \(c\) \(2\) \(i\) \(D\)](#). The issuer of an obligation may choose to apply either the rules of [§ 1.163-5 \(c\)-\(2\) \(i\) \(A\)](#) or (B), or the rules of [§ 1.163-5 \(c\) \(2\) \(i\) \(D\)](#), to an obligation that is originally issued after May 10, 1990, and on or before September 7, 1990. However, any issuer choosing to apply the rules of [§ 1.163-5 \(c\)-\(2\) \(i\) \(A\)](#) must apply the definition of United States person used for such purposes on December 31, 1989, and must obtain any certificates that would have been required under applicable law on December 31, 1989.

Par. 3. Paragraph (e) of § 1.163-5T is added immediately after paragraph (d) of § 1.163-5T. Paragraph (e) reads as follows:

§ 1.163-5T Denial of interest deduction on certain obligations issued after December 31, 1982, unless issued in registered form (temporary).

[*28]

(e) *Regular interests in REMICS.* (1) A regular interest in a REMIC, as defined in sections 860D and 860G and the regulations thereunder, is considered to be a "registration-required obligation" under [section 163 \(f\) \(2\) \(A\)](#) and [§ 1.163-5 \(c\)](#) if the regular interest is described in [section 163 \(f\) \(2\) \(A\)](#) and [§ 1.163-5 \(c\)](#), without regard to whether any obligation held by the REMIC to which the regular interest relates is described in [section 163 \(f\) \(2\) \(A\)](#) and [§ 1.163-5 \(c\)](#). A regular interest in a REMIC is considered to be described in [section 163 \(f\) \(2\) \(B\)](#) and [§ 1.163-5 \(c\)](#), if the regular interest is described in [section 163 \(f\) \(2\) \(B\)](#) and [§ 1.163-5 \(c\)](#), without regard to whether any obligation held by the REMIC to which the regular interest relates is described in [section 163 \(f\) \(2\) \(B\)](#) and [§ 1.163-5 \(c\)](#).

(2) An obligation held by a REMIC is considered to be described in [section 163 \(f\) \(2\) \(A\)](#) or (B) if such obligation is described in [section 163 \(f\) \(2\) \(A\)](#) or (B), respectively, without regard to whether the regular interests in the REMIC are so considered.

(3) For purposes of [section 4701](#), a regular interest is considered to be issued solely by the recipient of the proceeds [***29**] from the issuance of the regular interest (hereinafter the "sponsor"). The sponsor is therefore liable for any excise tax under [section 4701](#) that may be imposed with reference to the principal amount of the regular interest.

(4) In order to implement the purpose of [section 163](#), [§ 1.163-5 \(c\)](#), and this section, the Commissioner may characterize a regular interest in a REMIC and any obligation held by such REMIC in accordance with the substance of the arrangement they represent and may impose the penalties provided under [sections 163 \(f\) \(1\)](#) and [4701](#) in the appropriate amounts and on the appropriate persons. This provision may be applied, for example, where a corporation issues an obligation that is purportedly in registered form and that will qualify as a "qualified mortgage" within the meaning of [section 860G \(a\) \(3\)](#) in the hands of a REMIC, contributes the obligation to a REMIC as its only asset, and arranges for the sale to investors of regular interests in the REMIC in bearer form that do not meet the requirements of [section 163 \(f\) \(2\) \(B\)](#). If this provision is applied, the obligation held by the REMIC will not be considered to be issued in registered form or to meet the requirements [***30**] of [section 163 \(f\)-\(2\) \(B\)](#). The corporation will not be allowed a deduction for the payment of interest on the obligation held by the REMIC, and the excise tax under [section 4701](#), calculated with reference to the principal amount of the obligation held by the REMIC, will be imposed on the corporation and may be collected from the corporation and its agents.

Par. 4. The authority for part 35a continues to read in part as follows:

Authority: [26 U.S.C. 7805](#). □; □ □

Par. 5. Section 35a.9999-5 is amended by adding a parenthetical in A-5 (ii) of paragraph (a) immediately before A-5 (iii); by adding a parenthetical in A-5 (iii) of paragraph (a) immediately before A-5 (iv); by removing the first sentence of A-13 of paragraph (b), and adding a new sentence in its place; by adding new subdivision (i) (G) to A-14 of paragraph (b); by removing the sentence immediately before the last sentence of A-18 of paragraph (c), and adding two new sentences in its place; in paragraph (e), by redesignating the text of existing A-21 as subdivision (i) and adding a sentence immediately following the second sentence in newly designated subdivision (i), and adding new subdivision (ii). The added sentences read as [***31**] follows:

§ 35a.9999-5 Questions and answers relating to repeal of 30 percent withholding by section 127 of the Tax Reform Act of 1984 and to the application of information reporting and backup withholding in light of such repeal.

□ □ □

(a) *Rules concerning obligations in bearer form.*

A-5. ?; (ii) (determined by reference to the spot rate on the date of issuance, in the case of an obligation not denominated in United States dollars); (iii) (However, an original issue discount obligation with a maturity of 183 days or less from the date of issuance is not required to satisfy the certification requirement of [§ 1.163-5 \(c\) \(2\) \(i\) \(D\) \(3\).](#))

(b) *Rules concerning obligations in registered form.*

A-13. An obligation is considered to be targeted to foreign markets for purposes of A-12 if it is sold (or resold in connection with its original issuance) only to foreign persons (or to foreign branches of United States financial institutions described in [section 871 \(h\) \(4\) \(B\)](#)) in accordance with procedures similar to those prescribed in [§ 1.163-5 \(c\) \(2\) \(i\) \(A\), \(B\) or \(D\)](#).

A-14. ;

(i)

(G) The certificate described in this subdivision may be provided electronically [***32**] under the terms and conditions of [§ 1.163-5 \(c\) \(2\) \(i\) \(D\) \(3\) \(ii\)](#).

(c) *Convertibility of obligations.*

A-18. ; An obligation issued after July 18, 1984, and on or before September 21, 1984, that would otherwise be in registered form but for the fact that it is convertible into bearer form, shall be considered to be in bearer form for purposes of A-1 if it satisfies the applicable requirements of the relevant temporary or proposed regulations under [section 163 \(f\) \(2\) \(B\)](#), as described in [§ 1.163-5 \(c\) \(2\) \(vi\)](#). An obligation issued after September 21, 1984, that would otherwise be in registered form but for the fact that it is convertible into bearer form shall be considered to be in bearer form. ;

?

(e) *Application of repeal of 30 percent withholding to pass-through certificates.*

A-21. (i) The rule of this A-21 applies only to payments made to the holder of the pass-through certificate from the trustee of the pass-through trust and does not apply to payments made to the trustee of the pass-through trust.

(ii) Interest paid to a holder of a regular or residual interest in a REMIC will qualify as portfolio interest under [section 871 \(h\) \(2\)](#) or [section 881 \(c\) \(2\)](#)

[*33] for purposes of the exemption from 30 percent withholding if the interest paid to the holder satisfies the conditions described in A-1 or A-8 of this section. For purposes of A-1 or A-8 of this section and [sections 871 \(h\)](#) and [881 \(c\)](#), interest paid to the holder of a regular interest in a REMIC is considered to be paid on or with respect to the regular interest in the REMIC and not on or with respect to any mortgage obligations held by the REMIC. The foregoing rule, however, applies only to payments made to the holder of the regular interest from the REMIC and does not apply to payments made to the REMIC. For purposes of A-1 or A-8 of this section and [sections 871 \(h\)](#) and [881 \(c\)](#), interest paid to the holder of a residual interest in a REMIC is considered to be paid on or with respect to the obligations held by the REMIC, and not on or with respect to the residual interest. For purposes of A-1 and A-8 of this section and [section 127](#) of the Tax Reform Act of 1984, a residual interest in a REMIC will be considered as issued after July 18, 1984, only to the extent that the obligations held by the REMIC are issued after July 13, 1984, but a regular interest in a REMIC will be considered **[*34]** as issued after July 18, 1984, if the regular interest was issued after July 18, 1984, without regard to the date on which the mortgage obligations held by the REMIC were issued.

Par. 6. The authority for Part 46 continues to read in part as follows:

Authority: [26 U.S.C. 7805](#). ;

Par. 7. Section 46.4701-1 is amended by revising paragraph (b) (5) to read as follows:

§ 46.4701-1 Tax on issuer of registration-required obligation not in registered form.

(b) *Definitions*-

(5) *Issuer*. Except as provided in § 1.163-5T (d) (relating to passthrough certificates) and § 1.163-5T (e) (relating to REMICs), the "issuer" is the person whose interest deduction would be disallowed solely by reason of [section 163 \(f\) \(1\)](#).

PART 602-OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 8. The authority for Part 602 continues to read in part as follows:

Authority: [26 U.S.C. 7805](#). ?;

Par. 9. [Section 602.101 \(c\)](#) is amended by revising the entry for [§ 1.163-5](#) in the table to read as follows: "[§ 1.163-5](#) ? 1545-1132."

Fred T. Goldberg, Jr.,

Commissioner of Internal Revenue.

Approved April 26, 1990.

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

(Filed by the Office of the Federal Register [***35**] on May 4, 1990, 5:00 p.m., and published in the issue of the Federal Register for May 10, 1990, [55 F.R. 19622](#))

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