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[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 31

[TD 9584]

RIN 1545-BJ01

Guidance on Reporting Interest Paid to Nonresident Aliens

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final regulations regarding the reporting requirements for interest that relates to deposits maintained at U.S. offices of certain financial institutions and is paid to certain nonresident alien individuals. These regulations will affect commercial banks, savings institutions, credit unions, securities brokerages, and insurance companies that pay interest on deposits.

DATES: Effective Date: These regulations are effective **[INSERT DATE OF**

**PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Applicability Date: These regulations apply to payments of interest made on or after January 1, 2013.

FOR FURTHER INFORMATION CONTACT: Kathryn Holman, (202) 622-3840 (not a toll free number).

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 for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-1725. 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). The collection of information is mandatory and the respondents are commercial banks, savings institutions, credit unions, securities brokerages, and insurance companies that maintain deposit accounts for nonresident alien individuals.

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

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Information collected under these regulations will be return information as defined in 26 U.S.C. 6103. Tax returns and return information are confidential as required by 26 U.S.C. 6103.

## **Background**

On January 7, 2011, the Treasury Department and the IRS published a notice of proposed rulemaking (REG 146097-09) (the 2011 proposed regulations) in the **Federal Register** (76 FR 1105, corrected by 76 FR 2852, 76 FR 20595, and 76 FR 22064) under section 6049 of the Internal Revenue Code (Code). The 2011 proposed regulations withdrew proposed regulations that had been issued on August 2, 2002 (67 FR 50386) (the 2002 proposed regulations). The 2002 proposed regulations would

have required reporting of interest payments to nonresident alien individuals that are residents of certain specified countries. The 2011 proposed regulations provide that payments of interest aggregating \$10 or more on a deposit maintained at a U.S. office of a financial institution and paid to any nonresident alien individual are subject to information reporting.

Written comments were received by the Treasury Department and the IRS in response to the 2011 proposed regulations. A public hearing on the 2011 proposed regulations was held on May 18, 2011, at which further comments were received. All comments were considered and are available for public inspection at <http://www.regulations.gov> or upon request. After consideration of the written comments and the comments provided at the public hearing, the 2011 proposed regulations are adopted as revised by this Treasury decision.

## **Explanation and Summary of Comments**

### Objectives of This Regulatory Action

The reporting required by these regulations is essential to the U.S. Government's efforts to combat offshore tax evasion for several reasons. First, it ensures that the IRS can, in appropriate circumstances, exchange information relating to tax enforcement with other jurisdictions. In order to ensure that U.S. taxpayers cannot evade U.S. tax by hiding income and assets offshore, the United States must be able to obtain information from other countries regarding income earned and assets held in those countries by U.S. taxpayers. Under present law, the measures available to assist the United States in obtaining this information include both treaty relationships and statutory provisions.

The effectiveness of these measures depends significantly, however, on the United States' ability to reciprocate.

The United States has constructed an expansive network of international agreements, including income tax or other conventions and bilateral agreements relating to the exchange of tax information (collectively referred to as information exchange agreements), which provide for the exchange of information related to tax enforcement under appropriate circumstances. These information exchange relationships are based on cooperation and reciprocity. A jurisdiction's willingness to share information with the IRS to combat offshore tax evasion by U.S. taxpayers depends, in large part, on the ability of the IRS to exchange information that will assist that jurisdiction in combating offshore tax evasion by its own residents. These regulations, by requiring reporting of deposit interest to the IRS, will ensure that the IRS is in a position to exchange such information reciprocally with a treaty partner when it is appropriate to do so.

Second, in 2010, Congress supplemented the established network of information exchange agreements by enacting, as part of the Hiring Incentives to Restore Employment Act of 2010 (Public Law 111 -147), provisions commonly known as the Foreign Account Tax Compliance Act (FATCA) that require overseas financial institutions to identify U.S. accounts and report information (including interest payments) about those accounts to the IRS. In many cases, however, the implementation of FATCA will require the cooperation of foreign governments in order to overcome legal impediments to reporting by their resident financial institutions. Like the United States, those foreign governments are keenly interested in addressing offshore tax evasion by

their own residents and need tax information from other jurisdictions, including the United States, to support their efforts. These regulations will facilitate intergovernmental cooperation on FATCA implementation by better enabling the IRS, in appropriate circumstances, to reciprocate by exchanging information with foreign governments for tax administration purposes.

Finally, the reporting of information required by these regulations will also directly enhance U.S. tax compliance by making it more difficult for U.S. taxpayers with U.S. deposits to falsely claim to be nonresidents in order to avoid U.S. taxation on their deposit interest income.

#### International Standard for Transparency and Information Exchange

Under the international standard for transparency and exchange of information, which is reflected in the Organisation for Economic Cooperation and Development (OECD) Model Agreement on Exchange of Information on Tax Matters, the OECD Model Tax Convention, and the United Nations Model Double Tax Convention between Developed and Developing Countries, exchange of tax information cannot be limited by domestic bank secrecy laws or the absence of a specific domestic tax interest in the information to be exchanged. Accordingly, under this global standard a country cannot refuse to share tax information based on domestic laws that do not require banks to share the information. In addition, under the global standard, a country cannot opt out of information exchange based on the fact that the country does not itself need the information to enforce its own tax rules. Thus, even countries that do not impose income taxes, and therefore do not have tax enforcement concerns, have entered into

information exchange agreements to provide information about the accounts of nonresidents.

#### Comments Regarding Confidentiality and Improper Use of Information

Some comments on the 2011 proposed regulations expressed concerns that the information required to be reported under those regulations might be misused. For example, comments expressed concern that deposit interest information may be shared with a country that does not have laws in place to protect the confidentiality of the information exchanged or that would use the information for purposes other than the enforcement of its tax laws. These comments further suggested that these concerns could affect nonresident alien investors' decisions about the location of their deposits.

The Treasury Department and the IRS believe that the concerns raised by the comments are addressed by existing legal limitations and administrative safeguards governing tax information exchange. As discussed herein, information reported pursuant to these regulations will be exchanged only with foreign governments with which the United States has an agreement providing for the exchange and when certain additional requirements are satisfied. Even when such an agreement exists, the IRS is not compelled to exchange information, including information collected pursuant to these regulations, if there is concern regarding the use of the information or other factors exist that would make exchange inappropriate.

First, information reported pursuant to these regulations is return information under section 6103. Section 6103 imposes strict confidentiality rules with respect to all return information. Moreover, section 6103(k)(4) allows the IRS to exchange return information with a foreign government only to the extent provided in, and subject to the

terms and conditions of an information exchange agreement. Thus, the IRS can share the information reported under these regulations only with foreign governments with which the United States has an information exchange agreement. Absent such an agreement, the IRS is statutorily barred from sharing return information with another country, and these regulations cannot and do not change that rule.

Second, consistent with established international standards, all of the information exchange agreements to which the United States is a party require that the information exchanged under the agreement be treated and protected as secret by the foreign government. In addition, information exchange agreements generally prohibit foreign governments from using any information exchanged under such an agreement for any purpose other than the purpose of administering, collecting, and enforcing the taxes covered by the agreement. Accordingly, under these agreements, neither country is permitted to release the information shared under the agreement or use it for any other law enforcement purposes.

Third, consistent with the international standard for information exchange and United States law, the United States will not enter into an information exchange agreement unless the Treasury Department and the IRS are satisfied that the foreign government has strict confidentiality protections. Specifically, prior to entering into an information exchange agreement with another jurisdiction, the Treasury Department and the IRS closely review the foreign jurisdiction's legal framework for maintaining the confidentiality of taxpayer information. In order to conclude an information exchange agreement with another country, the Treasury Department and the IRS must be satisfied that the foreign jurisdiction has the necessary legal safeguards in place to

protect exchanged information and that adequate penalties apply to any breach of that confidentiality.

Finally, even if an information exchange agreement is in effect, the IRS will not exchange information on deposit interest or otherwise with a country if the IRS determines that the country is not complying with its obligations under the agreement to protect the confidentiality of information and to use the information solely for collecting and enforcing taxes covered by the agreement. The IRS also will not exchange any return information with a country that does not impose tax on the income being reported because the information could not be used for the enforcement of tax laws within that country.

In addition, the IRS has options regarding the appropriate form of exchange. For example, the IRS might exchange information with another jurisdiction only upon specific request. In the case of specific exchange requests, the IRS evaluates the requesting country's current practices with respect to information confidentiality. The IRS also requires the requesting country to explain the intended permitted use of the information and justify the relevance of that information to the permitted use.

Alternatively, in appropriate circumstances, the IRS might exchange certain information on an automatic basis. The IRS currently exchanges deposit interest information on an automatic basis with only one jurisdiction (Canada). The IRS will not enter into a new automatic exchange relationship with a jurisdiction unless it has reviewed the country's policies and practices and has determined that such an exchange relationship is appropriate. Further, the IRS generally will not enter into an automatic exchange

relationship with respect to the information collected under these regulations unless the other jurisdiction is willing and able to reciprocate effectively.

The Treasury Department and the IRS believe that the legal and administrative safeguards described in the preceding paragraphs regarding the use of information collected under these regulations should adequately address the concerns identified by the comments and, therefore, these regulations should not significantly impact the investment and savings decisions of the vast majority of nonresidents who are aware of and understand these safeguards and existing law and practice. Nevertheless, to enhance awareness and further address concerns, these final regulations revise the 2011 proposed regulations to require reporting only in the case of interest paid to a nonresident alien individual resident in a country with which the United States has in effect an information exchange agreement pursuant to which the United States agrees to provide, as well as receive, information and under which the competent authority is the Secretary of the Treasury or his delegate.

For this purpose, the Treasury Department and the IRS will publish a Revenue Procedure contemporaneously with these final regulations specifically identifying the countries with which the United States has in force such an information exchange agreement. The Revenue Procedure will be updated as appropriate. With respect to any calendar year, payors will only be required to report interest on deposits maintained at an office within the United States and paid to a nonresident alien individual who is a resident of a country identified in the Revenue Procedure as of December 31 of the prior calendar year as being a country with which the United States has in effect such an information exchange agreement. To address any potential burden associated with

reporting on this basis, the final regulations provide that for any year for which the information return under §1.6049-4(b)(5) is required, a payor may elect to report interest payments to all nonresident alien individuals.

As previously discussed, the identification of a country as having an information exchange agreement with the United States does not necessarily mean that the information collected under these regulations will be reported to such foreign jurisdiction. As an additional measure to further increase awareness among concerned nonresidents regarding the IRS' use of information collected under these regulations, the Revenue Procedure also will include a second list identifying the countries with which the Treasury Department and the IRS have determined that it is appropriate to have an automatic exchange relationship with respect to the information collected under these regulations. This determination will be made only after further assessment of a country's confidentiality laws and practices and the extent to which the country is willing and able to reciprocate.

In addition, in response to comments, and given the information exchange practices described in the preceding paragraphs and the information that will be available in the Revenue Procedure, these final regulations eliminate the requirement in the 2011 proposed regulations for financial institutions to include in the information statement provided to nonresident alien individuals a statement informing the individual that the information may be furnished to the government of the country where the recipient resides. In addition, these final regulations clarify that a payor or middleman may rely on the permanent residence address provided on a valid Form W-8BEN, "Beneficial Owners Certificate of Foreign Status for U.S. Tax Withholding", for purposes

of determining the country of residence of a nonresident alien to whom reportable interest is paid unless the payor or middleman knows or has reason to know that such documentation of the country of residence is unreliable or incorrect. The final regulations also modify §31.3406(g)-1 of the proposed regulations to clarify that, consistent with the backup withholding rules generally, a payment of interest described in §1.6049-8(a) is not subject to withholding under section 3406 if the payor may treat the payee as a foreign person, without regard to whether the payor reported such interest (although a payor may be subject to penalties if it fails to report as required). As under the prior regulations requiring the reporting of interest paid to Canadian non-resident alien individuals, the final regulations define interest subject to reporting to mean interest paid on deposits as defined under section 871(i)(2)(A) (including deposits with persons carrying on a banking business, deposits with certain savings institutions, and certain amounts held by insurance companies under agreements to pay interest thereon).

#### Comments Regarding Authority and Congressional Intent

Some comments expressed the view that the Treasury Department and the IRS lack the authority to require the reporting required under the 2011 proposed regulations, or that the 2011 proposed regulations are contrary to Congressional intent. The relevant statutory provisions expressly contemplate that the Treasury Department and the IRS have authority to require reporting on deposit interest paid to nonresidents. Section 6049(a) provides generally for reporting with respect to interest payments. Section 6049(b)(2)(B) and (5) provides that, except to the extent otherwise provided in regulations, reportable interest does not include interest paid to nonresident alien

individuals on deposits described in section 871(i)(2)(A). Section 6049(b)(2)(B) and (5) thus provides express authority for the Treasury Department and the IRS to issue regulations requiring reporting of such interest.

### **Special Analyses**

It has been determined that these regulations are not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

When an agency promulgates a final rule, the Regulatory Flexibility Act, 5 U.S.C. chapter 6 (RFA), requires the agency to prepare a final regulatory flexibility analysis describing the impact of the final rule on small entities. 5 U.S.C. 604. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing a regulatory flexibility analysis, if the final rule is not expected to have a significant economic impact on a substantial number of small entities.

These regulations impose a collection of information, and thus, the Regulatory Flexibility Act (5 U.S.C. chapter 6) applies. It is hereby certified that the collection of information contained in these regulations will not have a significant economic impact on a substantial number of small entities.

The preamble to the 2011 proposed regulations sets forth an analysis of the number of small entities that may be required to report under these regulations. Although this rule may affect a substantial number of small entities, the IRS has

determined that the impact on entities affected by these final regulations will not be significant.

Some comments expressed concern that the regulations would impose a new administrative burden on U.S. financial institutions. In addition, some comments objected that collecting and reporting this information imposes burdens on certain types of financial institutions, including community banks and banks in certain states that have a larger percentage of customers who are nonresident alien individuals.

The Treasury Department and the IRS disagree. Under existing law, all U.S. financial institutions have responsibilities to withhold on and report with respect to depositors who are U.S. citizens, U.S. resident individuals, and Canadian resident individuals, and have developed the systems to perform such withholding and reporting.

All nonresident alien individual account holders who maintain accounts in the United States are already required to complete a Form W-8BEN, declaring their non-U.S. status and the country in which they reside. U.S. financial institutions can use their existing W-8 information to produce Form 1042-S disclosures for the relevant nonresident alien individual account holders. Nearly all U.S. banks and other financial institutions have automated systems to produce Form 1099-INT, "Interest Income", for U.S. accountholders and Form 1042-S, "Foreign Person's U.S. Source Income Subject to Withholding", for Canadian accountholders. As a result, the information collection requirements in these regulations build on reporting and information collection systems familiar to and currently used by U.S. financial institutions, including small business entities. The amount of time required to complete the Form 1042 and Form 1042-S is minimal, and the statement that is required to be collected is brief. Accordingly, it

should not be a significant burden to adapt those systems to report with respect to depositors who are resident in other countries with which the United States has an information exchange agreement. Therefore, a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses. The Chief Counsel for Advocacy of the Small Business Administration did not comment on the notice of proposed rulemaking.

### **Drafting Information**

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

### **List of Subjects**

#### **26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

#### **26 CFR Part 31**

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

### **Adoption of Amendments to the Regulations**

Accordingly, 26 CFR parts 1 and 31 are 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 certain 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 §§1.1461-1(b) (rules regarding the preparation of a Form 1042) and 1.6049-6(e)(4) (rules for furnishing a copy of the Form 1042-S to the recipient). To determine whether an information return is required for original issue discount, see §§1.6049-5(f) and 1.6049-8(a).

(ii) Effective/applicability date. Paragraph (b)(5)(i) of this section shall be applicable for payments made on or after January 1, 2013. (For interest paid to a Canadian nonresident alien individual on or before December 31, 2012, see paragraph (b)(5) of this section as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

\* \* \* \* \*

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

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

The revisions read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(12) \* \* \* This paragraph (b)(12) does not apply to interest paid on or after January 1, 2013, to a nonresident alien individual to the extent provided in §1.6049-8.

\* \* \* \* \*

(f) \* \* \* Original issue discount on an obligation (including an obligation with a maturity of not more than six months from the date of original issue) held by a nonresident alien individual or foreign corporation is interest described in paragraph (b)(1)(vi)(A) or (B) of this section and, therefore is not interest subject to reporting under section 6049 unless it is described in §1.6049-8(a) (relating to deposit interest paid on or after January 1, 2013, to certain nonresident alien individuals).

\* \* \* \* \*

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

1. The paragraph heading and text of paragraph (e)(4) is revised.
2. In paragraph (e)(5), the paragraph heading and first sentence are revised and a new sentence is added at the end of the paragraph.

The additions 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). In the case of amounts described in §1.6049-8(a) (relating to payments of deposit interest to certain nonresident alien individuals) paid on or after January 1, 2013, any person who makes 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 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.

(5) Effective/applicability date. Paragraph (e)(4) of this section applies to payee statements reporting payments of deposit interest to nonresident alien individuals paid on or after January 1, 2013. \* \* \* (For interest paid to a Canadian nonresident alien individual on or before December 31, 2012, see paragraph (e)(4) of this section as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

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

§1.6049-8 Interest and original issue discount paid to certain nonresident aliens.

(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) that relates to a deposit maintained at an office within the United States, and that is paid to a nonresident alien individual who is a resident of a country that is identified, in an applicable revenue

procedure (see §601.601(d)(2) of this chapter) as of December 31 prior to the calendar year in which the interest is paid, as a country with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of tax information within the meaning of section 6103(k)(4), under which the competent authority is the Secretary of the Treasury or his delegate and the United States agrees to provide, as well as receive, information. Notwithstanding the foregoing, for purposes of §§1.6049-4, 1.6049-6, and this section, for any year for which the information return under §1.6049-4(b)(5) is required, a payor may elect to treat interest as including all interest described in section 871(i)(2)(A) that relates to a deposit maintained at an office within the United States and that is paid to any nonresident alien individual. A payor shall make this election by reporting all such interest. For purposes of the regulations under section 6049 (§§ 1.6049-1 through 1.6049-8), a nonresident alien individual is a person described in section 7701(b)(1)(B). A payor or middleman may rely upon the permanent residence address provided on a valid Form W-8BEN, “Beneficial Owners Certificate of Foreign Status for U.S. Tax Withholding”, to determine the country in which a nonresident alien individual is resident unless such payor or middleman knows or has reason to know that such documentation of the country of residence is unreliable or incorrect. Amounts described in this paragraph (a) are not subject to backup withholding under section 3406 if the payor may treat the payee as a foreign beneficial owner or foreign payee under the rules of §1.6049-5(b)(12). See §31.3406(g)-1(d) of this chapter. However, if the payor or middleman does not have either a valid Form W-8BEN or valid Form W-9, “Request for Taxpayer Identification Number and Certification”, the payor or middleman must report the payment as made to a U.S. non-

exempt recipient if it must so treat the payee under the presumption rules of §1.6049-5(d)(2) and §1.1441-1(b)(3)(iii), and the payor must also backup withhold under section 3406. (For interest paid to a Canadian nonresident alien individual on or before December 31, 2012, see paragraph (a) of this section as in effect and contained in 26 CFR part 1 revised April 1, 2000).

\* \* \* \* \*

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

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

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

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

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

\* \* \* \* \*

(d) Reportable payments made to nonresident alien individuals. A payment of interest to a nonresident alien individual that is described in §1.6049-(8)(a) of this chapter is not subject to withholding under section 3406 if the payor may treat the payee as a foreign beneficial owner or foreign payee under the rules of §1.6049-5(b)(12). (For interest paid to a Canadian nonresident alien individual on or before December 31, 2012, see paragraph (d) of this section as in effect and contained in 26 CFR part 1 revised April 1, 2000.)

\* \* \* \* \*

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

Approved: April 12, 2012.

Emily S. McMahon,  
(Acting) Assistant Secretary of the Treasury (Tax Policy).

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