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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

TD 9103

RIN 1545-BC97

Information Statements for Certain Substitute Payments

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 6045(d) that reflect the changes to information reporting for payments in lieu of dividends effected by the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA). These regulations provide that brokers must file information returns and furnish information statements reporting substitute payments in lieu of dividends to individuals who receive substitute payments in lieu of dividends on or after January 1, 2003.

DATES: Effective Date: These final regulations are effective December 29, 2003.

Applicability Date: These regulations apply to information returns required to be filed, and information statements required to be furnished, after December 31, 2003.

FOR FURTHER INFORMATION CONTACT: Michael Hara of the Office of Associate Chief Counsel (Procedure and Administration), (202) 622-4910 (not a

toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### **Background**

Section 302 of the Jobs and Growth Tax Relief Reconciliation Act of 2003 (the JGTRRA), Public Law No. 108-27 (117 Stat. 752), reduced the tax rate for “qualified dividends” paid to an individual shareholder to the same tax rate as capital gains for taxable years beginning after December 31, 2002, and beginning before January 1, 2009. The legislative history states, however, “Payments in lieu of dividends are not eligible for the lower rates.” See H.R. REP. NO. 108–94, 108th Cong., 1st Sess. 31 n.36 (2003).

##### **Explanation of Provisions**

Section 6045(a) of the Internal Revenue Code (Code) provides that every person doing business as a broker shall, when required by the Secretary, make a return showing the name and address of each customer, together with information as required by forms and regulations. Section 6045(d) provides that brokers who transfer a customer’s securities for use in a short sale or similar transaction, and receive payments in lieu of a dividend, tax-exempt interest, or other items set forth in regulations (substitute payments), must furnish the customer with a written statement identifying the payment as being in lieu of the dividend, tax-exempt interest, or other item. This section authorizes the Secretary to prescribe regulations that require brokers to file information returns that include the information contained in the written statement.

Section 1.6045-2 of the existing Income Tax Regulations provides rules for reporting substitute payments under section 6045(d). In general, §1.6045-2(a)(3)(i) of

the existing regulations excludes payments in lieu of dividends received by a broker on behalf of an individual from the broker reporting requirements of section 6045(d). Section 1.6045-2(a)(3)(ii) of the existing regulations requires reporting for certain dividend substitute payments received by a broker on behalf of an individual, such as payments in lieu of exempt interest dividends distributed by regulated investment companies.

These regulations contain amendments to the existing regulations to require reporting under section 6045(d) for payments in lieu of dividends made to individuals on or after January 1, 2003. For taxable years beginning on or after January 1, 2003, brokers must use Form 1099-MISC, "Miscellaneous Income", to report substitute payments to individuals, including payments in lieu of dividends.

The IRS issued interim guidance regarding provisions of the JGTRRA that affect information reporting for payments in lieu of dividends in Notice 2003-67 (2003-40 I.R.B. 752). The notice also provided guidance on the definition of loanable shares and the allocation and selection of transferred shares (that is, shares giving rise to payments in lieu of dividends to customers). The IRS intends to issue comprehensive regulations amending §1.6045-2 in the future. The IRS anticipates that these regulations will define payments in lieu of dividends, provide rules for determining loanable shares, and provide rules for allocating and selecting transferred shares to customers. Pending issuance of further amendments to §1.6045-2 of the existing regulations, brokers may rely on Notice 2003-67 to comply with the requirements of the JGTRRA and section 6045(d).

In addition, pending issuance of further amendments to §1.6045-2, the IRS will permit brokers to continue to use the rules of §1.6045-2 of the existing regulations for allocating transferred shares to customers. A broker may continue to allocate transferred shares to shares of stock that the broker has borrowed under a security agreement with the customer. In addition, if a broker uses the lottery method of allocation and selection of loanable shares specified in §1.6045-2(f)(2)(ii), the broker may make the selection of the transferred shares within the individual pool described in §1.6045-2(f)(2)(ii)(C) using the methods of selection of transferred shares used within the nonindividual pool as prescribed in §1.6045-2(f)(2)(ii)(B).

### **Special Analyses**

These final regulations are necessary to provide brokers and taxpayers with immediate guidance regarding provisions in the JGTRRA that affect information reporting for substitute payments in lieu of dividends. The regulations apply to information returns required to be filed, and information statements required to be furnished, after December 31, 2003. Based on these considerations, it is determined that these final regulations will provide brokers and taxpayers with the necessary guidance and authority to comply with the tax laws. Because of the need for immediate guidance, notice and public procedure are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(B) and delayed effective date is not required pursuant to 5 U.S.C. 553(d)(3).

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 (et seq.) do not apply. Further, it has been determined that this Treasury decision is not a significant regulatory action as defined in

Executive Order 12866. Therefore, a regulatory assessment is not required. Pursuant to section 7805(f) of the Code, these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

### **Drafting Information**

The principal author of these regulations is Michael Hara, Office of Associate Chief Counsel (Procedures and Administration), Administrative Provisions and Judicial Practice.

### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

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

Accordingly, 26 CFR part 1 is 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. Section 1.6045-2 is amended by:

1. Paragraph (a)(3)(i) is revised.
2. The heading for paragraph (a)(3)(ii) is revised.

The revisions read as follows:

§1.6045-2 Furnishing statement required with respect to certain substitute payments.

(a) \* \* \*

(3) \* \* \* (i) In general. Except as otherwise provided in paragraph (a)(3)(ii) of this section, for taxable years beginning before January 1, 2003, a broker that receives a

substitute payment in lieu of a dividend on behalf of a customer who is an individual (“individual customer”) need not furnish a statement to the customer.

(ii) Reporting for certain dividends. \* \* \*

\* \* \* \* \*

/s/ Mark E. Matthews

Deputy Commissioner for Services and Enforcement.

Approved: December 18, 2003

/s/ Pamela F. Olson

Assistant Secretary of the Treasury.