

# Information Reporting and Other Guidance Regarding Distributions With Respect to Securities Issued by Foreign Corporations

## Notice 2004-71

### SECTION 1. OVERVIEW

The Jobs and Growth Tax Relief Reconciliation Act of 2003 (P.L. 108-27, 117 Stat. 752) (the “2003 Act”) was enacted on May 28, 2003. Subject to certain limitations, the 2003 Act generally provides that a dividend paid to an individual shareholder from either a domestic corporation or a “qualified foreign corporation” is subject to tax at the reduced rates applicable to certain capital gains. A qualified foreign corporation includes certain foreign corporations that are eligible for benefits of a comprehensive income tax treaty with the United States which the Secretary determines is satisfactory for purposes of this provision and which includes an exchange of information program. In addition, a foreign corporation not otherwise treated as a qualified foreign corporation is so treated with respect to any dividend it pays if the stock with respect to which it pays such dividend is readily tradable on an established securities market in the United States.

This notice provides guidance for persons required to make returns and provide statements under section 6042 of the Internal Revenue Code regarding distributions with respect to securities issued by a foreign corporation, and for individuals receiving such statements. This notice provides generally that the simplified procedures and other rules contained in Notice 2003-79 are extended to apply for 2004 information reporting of distributions with respect to securities issued by foreign corporations.

### SECTION 2. NOTICE 2003-79

In November of 2003, the Treasury Department and the IRS issued Notice 2003-79, 2003-50 I.R.B. 1206, which provided guidance for persons required to make returns and provide statements under section 6042 of the Internal Revenue Code

(e.g., Form 1099-DIV) regarding distributions with respect to securities issued by a foreign corporation, and for individuals receiving such statements. Notice 2003-79 identified a series of separate determinations that must be made in order to determine whether a distribution with respect to a security issued by a foreign corporation is eligible for the reduced rates of tax under the 2003 Act. Notice 2003-79 provided simplified procedures to be used for 2003 information reporting of a distribution with respect to such a security. Notice 2003-79 also provided guidance regarding the determination as to whether a security (or an American depositary receipt in respect of such security) issued by a foreign corporation other than ordinary or common stock (such as preferred stock) is considered readily tradable on an established securities market in the United States for purposes of the 2003 Act.

In addition, Notice 2003-79 described certification procedures the Treasury Department and the IRS intend to develop for use for information reporting in future years of distributions with respect to securities issued by foreign corporations. Notice 2003-79 requested comments on the proposed certification procedures outlined, and several comments were received.

### SECTION 3. GUIDANCE FOR 2004

#### .01 *Generally.*

After reviewing the comments received and working further to develop procedures as outlined in Notice 2003-79, the Treasury Department and the IRS have concluded that it is appropriate to issue more detailed guidance setting forth the specific procedures to be used for information reporting in proposed form in order to provide interested parties an opportunity to comment. In order to allow for the issuance of proposed procedures and the consideration of comments before such procedures are finalized, the Treasury Department and the IRS are extending to 2004 information reporting the simplified procedures that were provided in Notice 2003-79 for 2003 information reporting.

Section 3.02 of this notice provides guidance regarding whether a security

is readily tradable on an established securities market in the United States for purposes of section 1(h)(11). Section 3.03 summarizes guidance for 2004 information reporting of a distribution with respect to a security issued by a foreign corporation. Section 3.04 provides guidance for 2004 for recipients of Form 1099-DIV.

#### .02 *Readily Tradable.*

Notice 2003-79 provided guidance for 2003 regarding whether certain securities other than common or ordinary stock are considered readily tradable on an established securities market in the United States for purposes of section 1(h)(11). Upon further review, the Treasury Department and the IRS have concluded that the guidance provided in Notice 2003-79 regarding this determination should be extended to future years. Accordingly, for 2004 and future years, a security (or an American depositary receipt in respect of such security) issued by a foreign corporation that is other than ordinary or common stock (such as preferred stock) will be considered readily tradable on an established securities market in the United States for purposes of the 2003 Act if the security is listed on a national securities exchange that is registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. § 78f) or on the Nasdaq Stock Market as described in Notice 2003-71.

#### .03 *Persons Required to File Form 1099-DIV.*

The rules for 2003 information reporting of a distribution with respect to a security issued by a foreign corporation that are described in detail in sections 3.01 through 3.07 of Notice 2003-79 will also apply for 2004 information reporting. Those rules are outlined in the following summary. For 2004, a person required to make a return under section 6042 shall report a distribution with respect to such a security in Box 1b of Form 1099-DIV as a qualified dividend if:

1. either the security with respect to which the distribution is made is a common or an ordinary share, or a public SEC filing contains a statement that the security will be, should

be, or more likely than not will be treated as equity rather than debt for U.S. federal income tax purposes; and

2. either:

- a. the security is considered “readily tradable on an established securities market in the United States”;<sup>1</sup>
- b. the foreign corporation is organized in a possession of the United States; or
- c. the foreign corporation is organized in a country whose income tax treaty with the United States is comprehensive, is satisfactory to the Secretary for purposes of section 1(h)(11), and includes an exchange of information program,<sup>2</sup> and if the relevant treaty contains a limitation on benefits provision, the corporation’s common or ordinary stock is listed on an exchange covered by that limitation on benefits provision’s public trading test, unless the person required to file an information return knows or has reason to know that the corporation is not eligible for benefits under that treaty; and

3. the person required to file Form 1099-DIV does not know or have reason to know that the foreign corporation is or expects to be, in the taxable year of the corporation in which the dividend was paid, or was, in the preceding taxable year, a foreign personal holding company (as defined in section 552), a foreign investment company (as defined in section 1246(b)), or a passive foreign investment company (as defined in section 1297);<sup>3</sup> and

4. the person required to make a return under section 6042 determines that the owner of the distribution has satisfied the holding period requirement of section 1(h)(11) or it is impractical for such person to make such determination.

The IRS will exercise its authority under section 6724(a) of the Code to waive penalties under sections 6721 and 6722 with respect to reporting of calendar year 2004 payments if persons required to file Form 1099-DIV make a good faith effort to report payments consistent with the rules summarized above and described in detail in sections 3.01 through 3.06 of Notice 2003-79. A person required to make a return under section 6042 may report a distribution in Box 1b as a qualified dividend even if the distribution does not satisfy these simplified information reporting procedures for 2004, subject to the applicable penalty provisions, as described in detail in section 3.07 of Notice 2003-79.

#### *.04 Recipients of Form 1099-DIV for 2004.*

For taxable years beginning in 2004, a recipient of Form 1099-DIV may treat amounts reported in Box 1b as qualified dividends, unless and to the extent the recipient knows or has reason to know that such amounts are not qualified dividends, as described in detail in section 3.08 of Notice 2003-79.

#### SECTION 4. EXPECTED GUIDANCE FOR FUTURE YEARS

The Treasury Department and the IRS are developing detailed procedures for implementing the certification approach for information reporting outlined in section 5 of Notice 2003-79. The Treasury Department and the IRS intend shortly to issue guidance setting forth those detailed pro-

cedures in proposed form. This will provide interested parties an opportunity to provide specific comments before the procedures are issued in final form to be effective for information reporting for future years.

#### SECTION 5. EFFECTIVE DATE

This notice is effective for taxable years beginning on or after January 1, 2004.

#### SECTION 6. PAPERWORK REDUCTION ACT

The information collection referenced in this notice has been previously reviewed and approved by the Office of Management and Budget as part of the promulgation of Form 1099-DIV. See OMB Control Number 1545-0110. This notice merely provides additional guidance regarding the proper filing of such returns and furnishing of such statements.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

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. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

#### SECTION 7. CONTACT INFORMATION

The principal author of this notice is Michelle L. Drumbl of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Ms. Drumbl at (202) 622-3880 (not a toll-free call).

<sup>1</sup> Notice 2003-71, 2003-43 I.R.B. 922, and section 3.02 of this notice provide guidance regarding when a security is considered readily tradable on an established securities market in the United States for purposes of section 1(h)(11).

<sup>2</sup> Notice 2003-69, 2003-42 I.R.B. 851, contains a list of qualifying treaties for this purpose.

<sup>3</sup> Notice 2004-70, 2004-44 I.R.B. 724, provides guidance regarding the extent to which distributions, inclusions, and other amounts received by, or included in the income of, individual shareholders as ordinary income from foreign corporations subject to certain anti-deferral regimes may be treated as qualified dividend income for purposes of section 1(h)(11).