

**MEMO# 14646**

April 18, 2002

# **INSTITUTE COMMENTS ON PROPOSED REGULATIONS PROVIDING EXPEDITED PROCESS TO OBTAIN INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS FOR FOREIGN PAYEES**

[14646] April 18, 2002 TO: PENSION MEMBERS No. 16-02 PENSION OPERATIONS ADVISORY COMMITTEE No. 24-02 TAX MEMBERS No. 21-02 RE: INSTITUTE COMMENTS ON PROPOSED REGULATIONS PROVIDING EXPEDITED PROCESS TO OBTAIN INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS FOR FOREIGN PAYEES The Institute has submitted the attached letter to the Internal Revenue Service ("IRS") commenting on temporary and proposed regulations under sections 1441 and 6109 of the Internal Revenue Code<sup>1</sup> which provide an expedited process for withholding agents to obtain individual taxpayer identification numbers ("ITINs") for foreign payees receiving "unexpected payments" that are eligible for reduced rates of US withholding tax under an income tax treaty. The regulations would not apply to dividends distributed by US mutual funds to foreign shareholders.<sup>2</sup> However, they could apply to death benefits paid to foreign individuals from US retirement plans that hold investments in US mutual funds due to the unexpected nature of the payment and potentially significant fluctuations in value of the underlying assets held by the plan while awaiting an ITIN for the beneficiary.<sup>3</sup> In this case, the foreign beneficiary may claim treaty benefits either by (1) providing the withholding agent with a Form W-8BEN ("Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding") that includes an ITIN in advance of the distribution<sup>4</sup> or (2) filing for a refund of any overwithheld tax on a Form 1040NR ("US Nonresident Alien Income Tax Return") that includes an ITIN. We acknowledge in our comments that the regulations generally lessen the administrative burden for foreign individuals receiving unexpected payments from US sources. <sup>1</sup> Treas. Reg. 1.1441-1T, 1.1441-6T and 301.6109-1T; see Institute Memorandum to Pension Members No. 3-02, Pension Operations Advisory Committee No. 5-02 and Tax Members No. 4-02, dated January 24, 2002. <sup>2</sup> Under current Treasury regulations, ITINs are not required to claim treaty rates on these distributions. See Treas. Reg. 1.1441-6(c)(2). <sup>3</sup> According to IRS Publication 915 ("Understanding your IRS ITIN"), it takes approximately six to eight weeks to obtain an ITIN in the mail after submitting IRS Form W-7 ("Application for IRS Individual Taxpayer Identification Number"). <sup>4</sup> It is unlikely that the distribution of a death benefit to a foreign individual would qualify for the special rule under the regulations permitting an application for an ITIN to be made on the first business day following the distribution. See Treas. Reg. 1.1441-6T(h)(2). <sup>2</sup> However, we recommend that the final regulations further simplify the ITIN rules for foreign individuals receiving death benefits from US retirement plans. First, we

recommend that these beneficiaries be permitted to claim treaty benefits without providing an ITIN to the withholding agent on Form W-8BEN. Second, we recommend that where a foreign individual receiving a death benefit from a US retirement plan does provide an ITIN on Form W-8BEN when claiming treaty benefits,<sup>5</sup> the Form W-8BEN be permitted to remain valid indefinitely, regardless of whether a reportable distribution is made to the foreign individual for each consecutive year.<sup>6</sup> For both recommendations, we propose that a US retirement plan be defined to include, at a minimum: (1) a trust described in section 401(a); (2) an annuity plan described in section 403(a); (3) an annuity, custodial account or retirement income account described in section 403(b); (4) an individual retirement arrangement under section 408 (e.g., individual retirement accounts, individual retirement annuities, simplified employee pensions (“SEPs”), savings incentive match for employees (“SIMPLEs”); or (5) an eligible deferred compensation plan described in section 457(b).

Deanna J. Flores Associate Counsel Attachment Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website (<http://members.ici.org>) and search for memo 14646, or call the ICI Library at (202) 326-8304 and request the attachment for memo 14646. Attachment (in .pdf format) 5 We understand that this situation typically may arise where a spousal, non-resident beneficiary previously acquired an ITIN to file a joint US tax return with a deceased spouse who acquired an interest in a US retirement plan while working in the United States. 6 Cf. Treas. Reg. 1.1441-1(e)(4)(ii)(B).