



December 5, 2022

Mr. John Sweeney
Special Counsel, Office of Associate Chief Counsel (International)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Subin Seth
Senior Counsel, Office of Associate Chief Counsel (International)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Draft Instructions for Form 1042-S (2023)

Dear Gentlemen:

The Securities Industry and Financial Markets Association ("SIFMA")¹ is pleased to provide you with comments on the draft 2023 Instructions for Form 1042-S ("Draft Instructions"). We appreciate your continued engagement with SIFMA on guidance under section 1446(f), including the Form 1042-S instructions.

Reporting payments subject to withholding under sections 1446(a), 1446(f), and either 1441 or 1471

As previously commented by SIFMA² regarding the final section 1446(f) regulations, a single publicly traded partnership ("PTP") distribution may be subject to withholding under sections 1446(a), 1446(f), and either 1441 or 1471. For example, a PTP may designate on a qualified notice a \$1,000 distribution as follows: \$500 effectively connected income ("ECI") subject to section 1446(a) withholding; \$200 amount in excess of cumulative net income ("CNI") subject to section 1446(f) withholding; \$400 U.S. source FDAP income classified as dividends subject to section 1441 or 1471 withholding; and \$100 U.S. source FDAP income classified as portfolio interest subject to section 1441 or 1471 withholding. Such a distribution to a foreign non-corporate partner who is documented on a valid beneficial owner withholding certificate, is not treaty eligible, and is not subject to FATCA withholding would be subject to total

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² Please see our comment letter dated February 24, 2021.

withholding of \$325, comprised of: (1) \$185 (\$500 x 37%) withholding under section 1446(a); (2) \$20 (\$200 x 10%) withholding under section 1446(f); (3) \$120 (\$400 x 30%) withholding under section 1441 (dividends); and (4) \$0 (\$100 x 0%) withholding under section 1441 (interest).

It is not clear in the Draft Instructions how such payments should be reported on Form 1042-S. However, we believe, and would request confirmation in the final version of the Instructions, that the proper way is to report – on separate Forms 1042-S (four in this example) – the same \$1,000 distribution but subject to different withholding. So, using the example above, the reporting would appear on the following Forms 1042-S:

1. Distribution of ECI (1446(a)):

Box 1: Income code	Box 2: Gross Income	Box 3b: Tax rate	Box 7a: Tax withheld
27	500	37.00	185

2. Distribution in excess of CNI (1446(f)):

Box 1: Income code	Box 2: Gross Income	Box 3b: Tax rate	Box 7a: Tax withheld
57	200	10.00	20

3. Distribution of U.S. source dividend (1441)):

Box 1: Income code	Box 2: Gross Income	Box 3b: Tax rate	Box 7a: Tax withheld
06	400	30.00	120

4. Distribution of U.S. source portfolio interest (1441)):

Box 1: Income code	Box 2: Gross Income	Box 3b: Tax rate	Box 7a: Tax withheld
01	100	00.00	0

Providing such an example in the Form 1042-S instructions, when finalized, would clarify that a single distribution can be subject to reporting on separate Forms 1042-S and that the gross income reported (\$1,200 in the example) could be in excess of the amount of the distribution (\$1,000 in the example), considering that the amount subject to section 1446(f) withholding could also be subject to section 1446(a) withholding and/or either section 1441 or 1471 withholding.

Reporting payments to U.S. persons on Form 1042-S

The Draft Instructions include a helpful option for the reporting of PTP payments (distributions and amounts realized) to U.S. persons that are treated as foreign persons for purposes of withholding tax, for example where the U.S. person is receiving the distribution or amounts realized through a Nonqualified Intermediary (NQI) and the NQI agrees with the withholding agent to perform recipient-level reporting. The Draft Instructions state that Form 1042-S may be used to report the payment *and* withholding.

We applaud the IRS for adding this instruction, since reporting chapter 3 and section 1446 withholding on a Form 1099 creates significant operational issues (reconciliation, etc.) and potential challenges from the IRS when the U.S. person claims a credit. However, we suggest the IRS enhance this instruction as follows:

- Allow a withholding agent to report the payment on a Form 1099 and the related withholding on a Form 1042-S. The withholding agent could, therefore, report proceeds from the disposition of an interest in a PTP on a Form 1099-B and report any withholding under section 1446(f) on Form 1042-S.
- Provide that if a withholding agent reports the payment and withholding on Form 1042-S, no Form 1099 reporting is required.
- Allow the option to file Form 1042-S to apply in any situation where a U.S. person is subject to chapter 3 or section 1446 withholding. For example, where an NQI fails to disclose a U.S. beneficial owner and is subject to 30 percent withholding on U.S. source FDAP income, the NQI could report such income and withholding to the U.S. person on Form 1042-S.

Box 16 Reporting

The Draft Instructions provide that a withholding agent for a PTP distribution is required to provide the applicable information for the PTP in the payer's box when reporting the payment of a PTP distribution using income code 27, 57, or 58. However, it is not clear whether certain of boxes 16a through 16e are required to be completed in certain situations.

- Box 16b requires the Payer's TIN, but in many cases a withholding agent will not know the TIN of the PTP making the distribution. It would be helpful to clarify that if the withholding agent does not have the distributing PTP's TIN, then this box may be left blank.
- Box 16c requires the Payer's GIIN. Page 12 of the Draft Instructions states, however, that "If a payment is properly classified with a chapter 3 indicator in box 3, the withholding agent is not required to complete boxes 12e, 13h, 15e, and 16c, all of which request a GIIN". It would be helpful to confirm in the specific instructions to Box 16c that Box 16c may be left blank if a chapter 3 indicator is entered in Box 3.
- Box 16e requires the Ch. 4 status code. The IRS should clarify whether this box may be left blank if Box 16c is also left blank per the discussion in the prior bullet point.

Box 4a reporting

The 2022 Instructions for Form 1042-S provide that "A publicly traded partnership (PTP) (defined under Definitions, earlier) that has ECI must pay a withholding tax under section 1446(a) on distributions of that income made to its foreign partners and file Form 1042-S using income code 27 and chapter 4 exemption code 14." The 2023 Draft Instructions, however, do not provide the applicable code for Box 4a reporting of a PTP distribution or sale. The final Instructions should specify that chapter 4 exemption code 14 should be used to report PTP sales subject to withholding tax under Section 1446(f) and PTP distributions subject to withholding tax under Section 1446(a) and/or 1446(f), unless the IRS expects a different chapter 4 exemption code to be used.

Reporting multiple PTP sales subject to Section 1446(f)

The Draft Instructions state: "A broker should report the aggregate of the amounts realized from sales of PTP interests paid to each of these recipients using income code 57." The IRS should clarify that if a non-U.S. person sells interests in multiple PTPs in a year, the withholding agent could report each sale on a separate Form 1042-S if that is more administrable for the withholding agent.

* * * *

We greatly appreciate your consideration of these comments. Please don't hesitate to contact me if you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Justin Sok". The signature is fluid and cursive, with the first name "Justin" and last name "Sok" clearly distinguishable.

Justin Sok
Managing Director, Tax