

THE ASSOCIATION OF GLOBAL CUSTODIANS

THE BANK OF NEW YORK MELLON CORPORATION  
BROWN BROTHERS HARRIMAN  
CITIBANK, N.A.  
HSBC SECURITIES SERVICES  
JPMORGAN CHASE BANK, N.A.  
NORTHERN TRUST  
RBC DEXIA INVESTOR SERVICES  
STATE STREET BANK AND TRUST COMPANY

COUNSEL AND SECRETARIAT TO THE ASSOCIATION:  
BAKER & MCKENZIE LLP  
815 CONNECTICUT AVENUE, N.W.  
WASHINGTON, D.C. 20006  
TELEPHONE: 202/452-7000  
FACSIMILE: 202/452-7074  
WWW.THEAGC.COM

January 22, 2008

**Via Overnight Courier and Hand Delivery**

U.S. Department of the Treasury  
Internal Revenue Service  
Washington, D.C. 20044  
ATTN: Kathryn Holman

**Re: Comments on CC:PA:LPD:PR (REG-140206-06);  
Proposed Regulation Section 1.1441-3**

RECEIVED  
INTERNAL REVENUE SERVICE  
2008 JAN 22 PM 1:33

Ladies and Gentlemen:

This letter is submitted on behalf of the Association of Global Custodians ("Association") and its member banks in respect of Proposed Regulation §1.1441-3 ("Prop Reg").<sup>1</sup> Prop Reg concerns a withholding agent's obligation to withhold and report tax under Chapter 3 of the Internal Revenue Code ("Code") when there is a distribution in redemption of stock of a corporation that is actively traded on an established financial market. In the proposed regulations, the Department of the Treasury ("Treasury") also proposes an escrow procedure for withholding agents to observe while making the determination under Code § 302 as to whether the distribution

---

<sup>1</sup> The Association is an informal group of eight global custodian banks that provide securities safekeeping services and related asset-servicing functions to cross-border institutional investors, including pension funds, insurance companies, and investment companies, many of which are organized in the United States. Members of the Association are listed on the letterhead above.

As intermediary custodians, Association members operating in the United States necessarily act as withholding agents on U.S.-traded securities. It is estimated that Association members hold in custody investor assets valued in excess of \$US 55 Trillion. Prop Reg would have a substantial impact on custodian operations and activities.

THE ASSOCIATION OF GLOBAL CUSTODIANS

Department of the Treasury  
Internal Revenue Service  
Page 2  
January 22, 2008

in redemption of stock held by a foreign shareholder is to be treated as a dividend subject to withholding, or a distribution in exchange for stock. Prop Reg also would introduce new securityholder-certification verification requirements for withholding agents.

The Association appreciates the opportunity to comment on Prop Reg § 1.1441-3 and encourages Treasury and the Internal Revenue Service ("IRS") to adopt the Association's suggestions.

In summary, the Association strongly encourages the Treasury and IRS to amend the proposed regulations to generally allow a withholding agent to presume that a § 302 payment with respect to a stock which is publicly traded is a distribution in exchange for stock and, therefore, is generally not subject to withholding under § 1441. To the extent that Prop Reg is not amended to enable that presumption, the Association urges the Treasury and IRS, as discussed below, to revise the proposal so as to eliminate unworkable provisions and alleviate unduly burdensome provisions.

**Recommendation for exchange treatment presumption**

The Association strongly encourages the Treasury and IRS to modify the proposed regulations to generally allow the presumption of exchange treatment because the requirements imposed in Prop Reg will be unduly burdensome for both withholding agents and taxpayers and will significantly outweigh any benefit to tax system administration. The Association specifically recommends that guidance be issued that generally allows a withholding agent to presume that a § 302 payment with respect to a publicly traded stock is a distribution in exchange for stock and, therefore, is generally not subject to withholding under § 1441. That treatment was generally applied by withholding agents prior to the issuance of the proposed regulations and Private Letter Ruling ("PLR") 200552007, on which the proposed regulations are modeled, and is consistent with the treatment by U.S. payors for domestic information reporting purposes.

The following points support amendment of the proposed regulations:

- *There is minimal tax revenue associated with § 302 payments.*

If Prop Reg is amended and guidance is issued allowing the presumption that a § 302 payment with respect to a publicly traded stock is a distribution in

THE ASSOCIATION OF GLOBAL CUSTODIANS

Department of the Treasury  
Internal Revenue Service  
Page 3  
January 22, 2008

exchange for stock and, therefore, is generally not subject to withholding under § 1441, we believe the amount of tax left uncollected would be small. Moreover, if Prop Reg is not so amended, we believe that the costs to agents tasked with implementing the proposed procedures would far exceed the tax revenues generated under the proposal. See Section A of the Appendix for data and more detailed commentary supporting this position.

- *The regulations as proposed will be costly for withholding agents to comply with, without providing a material benefit to the IRS.*

Despite the relatively low number of distributions involving § 302, the proposed regulations would impose heavy compliance costs on withholding agents – both in terms of start-up costs and from an ongoing compliance perspective. See Section B of the Appendix for a description of these costs.

- *The proposed regulations are inconsistent with the approach taken by payors for domestic information reporting purposes.*

For domestic information reporting purposes, U.S. payors typically report all self-tender distributions on Form 1099-B. Several PLRs are in concert with that approach. [See PLRs 9115019, 9015012, 8920007, 8850004, 8617063.] Those rulings appropriately recognize the complexities of determining dividend or exchange treatment under Code §§ 302, 304, 318, among other sections, as well as the significant costs that payors would incur if required to administer shareholder level certifications of ownership interest.

**In lieu of adopting Prop Reg, guidance should be issued that allows a presumption of exchange treatment**

The Association recommends that, in lieu of adopting the proposed regulations, Treasury and the IRS should issue guidance to generally allow a withholding agent to presume that a § 302 payment with respect to a publicly traded stock is a distribution in exchange for stock and, therefore, is generally not subject to withholding under § 1441. We think it would be most efficient to allow that presumption to operate in respect of any interest in a publicly traded instrument. Alternatively, the guidance could allow for exchange treatment in respect of any less-than-5% ownership interest in a publicly traded instrument. This alternative could be implemented in one of the following two ways:

THE ASSOCIATION OF GLOBAL CUSTODIANS

Department of the Treasury  
Internal Revenue Service

Page 4  
January 22, 2008

- Withholding agents could obtain statements from beneficial owners certifying less than 5% ownership interest in respect of all publicly traded securities held by such beneficial owner. The certification would be obtained near the time of account opening (not at the time of each § 302 distribution); cover all securities other than those in which the beneficial owner identifies a 5% or greater interest (i.e., only securities positions not meeting the 5% test would be identified on the certification); and be updated only if circumstances change.
- A determination could be made by the withholding agent of a beneficial owner's de minimis interest using shareholding figures known to the withholding agent without requiring consideration of constructive ownership or shareholdings not known or serviced by the withholding agent. (It is impractical for any withholding agent to gather or estimate constructive ownership information in respect of shareholdings not serviced by the withholding agent.) This determination would be made by the withholding agent on an event-by-event basis.

**If the Treasury and IRS adopt Prop Reg, certain unduly burdensome or unworkable aspects of the proposal should be amended.**

We believe several aspects of the proposed regulations are unworkable or impractical, and many provisions would be unduly burdensome. Some examples are noted briefly below, and additional information regarding these points is provided in Section C of the Appendix.

- The requirement that certifications be provided by U.S. financial institutions "on or before the date it received the section 302 payment" is not feasible. Among other things, information confirming the total of issuers' post-distribution outstanding shares, which information is required on the certification request, is typically available only several days following payment date, and not on or before payment date.
- The 60-day deadline in which the deposit liability must be satisfied does not adequately take into account that foreign intermediaries will need time to solicit statements from potentially hundreds of payees around the world in response to a U.S. financial institution's notification.

THE ASSOCIATION OF GLOBAL CUSTODIANS

Department of the Treasury

Internal Revenue Service

Page 5

January 22, 2008

- The escrow process as defined in the proposed regulations creates an unnecessary burden on withholding agents. Withholding agents should be allowed to withhold tax at the time of a § 302 payment and be able to treat the amount as tax withheld as of the payment date, rather than at a later date as envisioned under the escrow procedure. Withheld amounts could be deposited with the IRS under normal rules. This withholding approach is more practical and less costly to withholding agents than putting new procedures in place and enhancing systems to accommodate the escrow process.
- The exclusion of Qualified Intermediaries that assume primary withholding, withholding foreign partnerships ("WP") and withholding foreign trusts ("WT") from withholding tax on § 302 payments is inconsistent with the current QI withholding regime. If adopted, this exclusion would impose unnecessary information technology development costs on U.S. financial institutions and would require the development of rules regarding withholding of tax on foreign accounts that assume primary withholding on distributions characterized as dividends only in certain cases.
- Requiring that a U.S. financial institution notify distributing corporations of the amount of § 302 payments would create yet another exception-based reporting process that places new costs on withholding agents that may not be justified by any benefit to a distributing corporation. Also, at present a regulated and defined process for reporting such information to C corporations does not exist.
- Requiring U.S. financial institutions to verify the computations on certifications provided by foreign payees would be costly for withholding agents to undertake, and would be outside the scope of other certifications currently collected from non-U.S. resident shareholders (such as the 5% ownership interest test in respect of REITs in order to evidence satisfaction of Code §§ 857(b)(3)(F) and 897(h)(1), and numerous other, similar certifications made under existing tax treaties).
- The IRS should issue a model written notice. A standard notice would promote uniformity in notification and would reduce the risk that interpretive differences result in needless compliance shortfalls.

THE ASSOCIATION OF GLOBAL CUSTODIANS

Department of the Treasury

Internal Revenue Service

Page 6

January 22, 2008

- The proposed regulations do not include a definition of "U.S. financial institution". Without such a definition, approaches to compliance with the regulations would be inconsistent.
- The requirement to obtain §302 certifications from U.S. non-exempt recipients that receive a distribution indirectly through foreign intermediaries or flow-through entities should be removed. U.S. payors do not obtain § 302 certifications from U.S. persons that receive a §302 distribution directly. There should not be a more onerous requirement for these indirect owners. It should be sufficient that these U.S. non-exempt recipients provide a Form W-9 to avoid withholding under section 1441. The foreign intermediary or flow-through entity would then allocate a portion of the distribution to a zero rate pool for a documented U.S. non-exempt recipient. Further, the regulations propose that payment made to U.S. non-exempt recipients through such foreign entities be reported either on Form 1099-DIV, as a dividend, or Form 1099-B, as an exchange, depending on the certification provided. This is contrary to the general rule on IRS reporting on corporate actions, which allows a U.S. financial institution to report the event as gross proceeds on a Form 1099-B. The existing reporting position should also apply to U.S. non-exempt recipients that receive distributions through foreign intermediaries or flow-through entities. The obligation, then, to report the distribution on a Form 1099-B would depend on whether the entity that makes the payment to the U.S. non-exempt recipient is a U.S. payor, as under the existing regulations and agreements respecting the reporting of gross proceeds.
- Reference to § 304(a)(2) in respect of stock of a parent corporation purchased by its controlled subsidiary should be removed. Such purchases should be rare and are likely not readily identifiable by U.S. financial institutions acting in the ordinary course of their trade or business.
- Clarification that the proposed regulations apply only in respect of self-tenders should be added. This is necessary because § 302 is involved in other capital changes, including corporate reorganizations under § 368 where "boot" is paid. The proposed regulations make clear that corporate reorganizations with boot are covered transactions. To withhold on payments made in kind as "boot" means the withholding agent may need to sell securities or identify cash otherwise available with which to pay the tax. Withholding would thus be impractical and burdensome. In addition, there is insufficient publicly available

THE ASSOCIATION OF GLOBAL CUSTODIANS

Department of the Treasury  
Internal Revenue Service  
Page 7  
January 22, 2008

information for withholding agents to identify and value "boot" in order to be able to consistently impose withholding on such payments.

- The term "before and after the distribution" in Prop Reg 1.1441-3(c)(5)(iii)(D)(5), used with reference to beneficial owners' certification of their ownership interests, should be defined. Clarification should be provided as to whether the term means ownership interest on the actual distribution date, and if so, whether market trades (purchases or sales) by the tendering shareholder that settle that day should be considered in determining ownership interest.
- The effective date of the proposed regulations should be clarified as it relates to when the withholding obligation arose or will arise. The proposed regulations do not make it clear (i) whether the withholding obligation on payments of stock redemptions is retroactive, while the escrow process is optional before January 1, 2009 or, alternatively (ii) whether the escrow process and withholding obligations on § 302 payments are both optional before January 1, 2009.
- A provision should be added to allow fax or electronic certifications in lieu of any requirement to collect documents that contain an "original" ink-on-paper signature.

\* \* \*

THE ASSOCIATION OF GLOBAL CUSTODIANS

Department of the Treasury

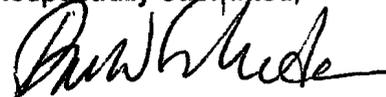
Internal Revenue Service

Page 8

January 22, 2008

The Association appreciates the opportunity to provide comments on Prop Reg. We encourage the Treasury and IRS to adopt Association members' suggestions, and we would be pleased to address any questions you may have. For further information, please contact the Association's Tax Committee Chair, Douglas Shepherd, at 617.382.1663, or the undersigned, at 312.861.2620.

Respectfully submitted,



Dan W. Schneider  
Baker & McKenzie LLP  
Counsel to the Association

Cc: Eric Solomon  
Department of the Treasury

Donald L. Korb  
Internal Revenue Service

Attachment - Appendix

**APPENDIX**

**Section A**

The following data support the Association's belief that the proposed regulations will not close the tax gap:

There were only approximately 70 self-tenders by U.S. distributing corporations for the period between October 2006 and October 2007. (That number, which is based on self-tenders processed at one sizeable bank member of the Association, should be statistically representative of the total population.)

Only about 21% of shareholders of the distributing corporations were foreign persons eligible to participate in the repurchase offers. (This number is based on a sample review of 40 tender offers and 12,500 shareholders.)

Approximately 85% of those foreign shareholders *did not tender* their stock. As a result, the majority of non-U.S. resident shareholders would not have a realization event. (This number excludes shareholders who submitted their shares for tender, but had their tenders rejected. Such shareholders would also not have a realization event.)

Of the non-U.S. resident shareholders who submitted their shares for tender, dividend treatment would have been the result for less than two percent. (Eighty events – instances of payment -- were included in the sample for this point; constructive ownership was disregarded.)

**Note:** The Association has not attempted to collect data reflecting non-self-tender § 302 payments. While the proposed regulations focus on self-tenders, the regulations appear to cover all payments for which § 302 is implicated, including reorganizations under Code § 368 where additional consideration (typically cash) also known as "boot" is paid. The Association estimates that there were approximately 43 such reorganizations involving U.S. corporations for the period between October 2006 and October 2007. (This number, which is based on corporate actions involving "boot" that were processed at a large bank member of the Association, should be statistically representative of the total population.)

## Appendix

### Section B

The following describes the types of compliance steps, and associated costs, that would be required of withholding agents by the proposed regulations:

Systems would need to be developed or enhanced to accommodate the new rules. Enhancements require drafting specifications, coding, and user and regression testing. That work is the same whether the new functionality is used for one self-tender or more. The enhancements required with respect to the proposed regulations are very substantial. Several aspects of the proposed rules introduce new concepts which will not be easily accommodated systematically. For example, the typical withholding agent tax system is currently not able to:

- Suspend in escrow tax amounts deducted from a foreign account. Those amounts at present are automatically identified for deposit at the next scheduled deposit date;
- Withhold tax on U.S. sourced "dividend" income paid to the account of a Qualified Intermediary ("QI") that assumes primary withholding responsibility;
- Identify and re-assign the date at which the liability for withholding tax on income events arises -- to the extent that the escrow procedure dictates that this would be 60 days after the date the payment is made to the non-U.S. resident payee.

The proposed regulations will also be costly to administer on an event-by-event basis -- more so we believe than any other payment type currently under the NRA tax regime. For example, withholding agents currently do not need to:

- Collect beneficial owner certification on an event by event basis
- Supply issuing C corporations with tax information
- Verify computations on beneficial owner certifications. (Other existing certifications -- such as the certification in respect of the ownership interest in a Real Estate Investment Trust ("REIT") in order to evidence satisfaction of eligibility to certain benefits under U.S. domestic law or tax treaties -- can be obtained on an annual basis and do not entail checking of calculations by the withholding agent.)

These and other process obligations under the proposed regulations are both manual and intricate in nature, and as a result will be problematic to administer for both withholding agents and beneficial owners.

## Appendix

### Section C

Recommendations for changes to the content of the proposed regulations if not withdrawn:

- Change the requirement that certifications be provided by U.S. financial institutions from “on or before the date it received the § 302 payment” to “no later than fourteen (14) days after it receives or identifies the § 302 payment.” Information confirming the total of issuers’ post distribution outstanding shares, which is information required on the certification request, is generally available several days following payment date, but not on or before payment date. This change would give U.S. financial institutions the opportunity to comply with the regulations, as well as sufficient time to prepare the certification requests to shareholders. The general withholding tax regulations require a withholding agent to do catch-up withholding when required. So any due date should be stated with reference to when a withholding agent receives a § 302 payment or identifies a covered transaction.
- Change the 60-day deadline in which the deposit liability must be satisfied to 90-days. This change would account for both the added 14 days (see the preceding paragraph) and the likely delay in obtaining certifications for foreign payees that are customers of foreign intermediaries.
- Either eliminate the escrow process defined in the proposed regulations or clarify that it is elective. U.S. financial institutions should be allowed to withhold tax at the time of a § 302 payment, and also treat the amount as tax withheld as of the payment date rather than later as envisioned in the escrow procedure. Withheld amounts could be deposited with the IRS under normal rules. This approach would be much more practical than putting procedures in place and enhancing systems to follow the escrow procedure. Also, refunds of withheld taxes to foreign beneficial owners where certifications are submitted could be made as currently prescribed under § 1.1461-2. In addition, a refund under § 1.1461-1 based on certifications provided after the end of the escrow period is already part of Prop Reg. A separate account is not needed to refund beneficial owners.

The proposed regulations are not clear about the elective character of the escrow process. For example, the section of the notice of proposed rulemaking captioned “SUMMARY” indicates “[s]pecifically, the proposed regulations provide an escrow procedure that a withholding agent *must* apply...” (emphasis added). Similarly, the section titled “Explanation of Provisions” indicates “[i]n general, the proposed

regulations *require* a U.S. financial institution...to set aside in an escrow..." (emphasis added). However, the section captioned "SUPPLEMENTARY INFORMATION" states "...[t]his information is required to allow a U.S. financial institution *that is applying* the escrow procedure..." (emphasis added). Also, Prop Reg 1.1441-3 at -(c)(5)(iii)(l) states that "...only the U.S. financial institution *may* establish an escrow account..." (emphasis added). These last two references suggest that the escrow procedures are elective for U.S. financial institutions.

- Remove the exclusion that does not allow QIs that assume primary withholding, WPs and WTs to withhold tax on § 302 payments. U.S. financial institutions are not equipped, without costly systems enhancements or manual exception-based processes, to withhold tax on foreign accounts that assume primary withholding on distributions characterized as dividends in certain cases but not in others.

Replace the foregoing exclusion with a requirement that:

-a U.S. financial institution should identify a § 302 payment made to a QI/WP/WT no later than 14 days after the U.S. financial institution receives or identifies the § 302 payment (such identification would be in lieu of reporting self tender payments on Form 1042-S to the QI either as capital gains or dividends), and

-the QI/WP/WT is responsible for the regulatory procedures and withholding tax with respect to such payments. Unlike with respect to Code §§ 1445 or 1446 payments, QIs have the authority under Rev Proc 2000-12 to withhold on § 1441 payments including § 302 payments.

- Remove the requirement that a U.S. financial institution notify distributing corporations of the amount of § 302 payments. At present, withholding agents are not required under U.S. tax rules to provide any information to C corporations. We recognize the possible use of the reportable information by a distributing corporation in calculating its earnings and profits. However, as a practical matter, this notification requirement would create yet another exception-based reporting process that adds costs to withholding agents and that may not be justified by any benefit to a distributing corporation. Indeed, the reported information would be a) inconsistent and incomplete since U.S. payors are not required to provide similar information about U.S. persons to distributing corporations, and b) inaccurate since the presumption, whether exchange or dividend treatment, for any account without a certification would not necessarily reflect the shareholders' "true" tax treatment under § 302. Also, a regulated and defined process for reporting such information to C corporations does not exist.

## THE ASSOCIATION OF GLOBAL CUSTODIANS

Page 13

- Allow a U.S. financial institution to rely on the representation on a certification that the distribution meets one of the three stated conditions without requiring that the U.S. financial institution verify the computations on the certification. Verification of computations would be costly to withholding agents and perhaps prone to error, and is not in the scope of other certifications currently made by non-U.S. resident shareholders.
- Issue a model statement that can be used by a withholding agent to ensure the satisfaction of the agent's obligation to furnish a written statement explaining the condition under which a § 302 payment will be treated as a dividend or a payment in exchange for stock, including an explanation of the constructive ownership rules under § 318. A model written notice would promote uniformity of notification and also would ensure that interpretive differences do not result in a needless lack of compliance.
- Include a definition of "U.S. financial institution". The term could well have the meaning given under Reg. §§ 1.1441-1(c)(5) and 1.165-12(c)(1)(iv).
- Remove the reference to § 304(a)(2) in respect of stock of a parent corporation purchased by its controlled subsidiary. Such purchases should be rare and are likely not readily identifiable by U.S. financial institutions in the ordinary course of their trade or business.
- Clarify that the proposed regulations apply in respect of self-tenders only. Section 302 is involved in other capital changes, including corporate reorganizations under Code § 368 where "boot" is paid. Those reorganizations, which often involve a web of provisions of Code sections (including 301, 302, 354, 356, 368), can be extremely complicated to decipher for both withholding agents and shareholders even with a well written opinion of counsel to the reorganization corporation(s) (such opinion is generally available in public SEC filings on the reorganization). With respect to § 302 payments other than those involving self-tenders, we recommend that withholding agents be allowed to presume capital gain treatment for the following reasons:
  - Certain § 302 payments are not readily identifiable;
  - Information, such as basis, may not be available to perform the calculations required to determine capital gain or dividend treatment under § 356;
  - The fair market value of in kind payments that are treated as "boot" may not be readily available; and

- Capital gain is likely the “true” tax treatment under § 302 in the majority of cases.

The requirement that the proposed regulations apply to reorganizations other than self-tenders would introduce a set of very complicated challenges for withholding agents, beginning with the identification of a § 302 event. Other than with respect to self-tenders, recognizing a payment that involves § 302 can be difficult. Section 302 can be buried in the text of an SEC filing and very hard to find, may not be mentioned (i.e. labeled “Section 302”) in such filings although the Code section applies, and can be involved in most types of corporate actions including those where it is typically not involved.

Section 302 is commonly in issue with respect to recapitalizations under § 368(a)(1)(E). Shareholders involved in such recapitalizations would generally recognize gain, but not loss, on the exchange in an amount equal to the lesser of a) the cash received or b) the excess of (1) the sum of the cash received plus the fair market value of the new shares received by the shareholder over (2) the shareholder’s aggregate adjusted tax basis in the shareholder’s existing shares. The “gain but not loss” is calculated separately for each identified block of the existing shares. Any such gain would be capital gain provided that one of the § 302 tests was satisfied. If none of the § 302 tests were satisfied, the shareholder’s gain would be treated as the distribution of a dividend only to the extent of the shareholder’s ratable share of the company’s available earnings and profits. Certain withholding agents, such as banks that provide custodial services but not fund accounting recordkeeping services, do not currently maintain basis information that would enable them to perform the above calculations. Shareholders would often need to rely on their own basis information to perform these complicated calculations. Certifications would look very different from those used with respect to self-tenders because basis and market value are not required data elements for self-tenders.

Many distributing corporations’ SEC filings for corporate actions involving “boot” say that capital gain will generally apply, whether this is because it is likely that shareholders will experience a meaningful reduction or the corporation will not have earnings and profits to support dividend treatment, or for some other reason. (While other SEC filings that we reviewed described the possibility of either capital gain or dividend treatment without leaning one way or the other, none said that dividend treatment will generally apply.) Relevant excerpts from a sample of SEC filings follow:

- “As discussed below, however, dividend treatment will generally not apply to a minority stockholder in a publicly held corporation who relative stock interest is minimal and who exercises no control with respect to corporate affairs. Gain recognized by such a stockholder will *generally be treated a capital gain.*”

Digene, Inc., Registration of Securities, Foreign Private Issuers, Business Combinations (Form F-4), at 66 (June 15, 2007) (emphasis added).

- "...such shareholders will generally recognize gain, but not loss, to the extent of the lesser of the amount of gain realized by the shareholder or the amount of cash received by the shareholders in the exchange. Gain recognized by such shareholders will *generally be treated as capital gain*." First Mutual Bancshares Inc, Registration of Securities, Business Combinations [amend] (Form S-4/A), at 52 (Sept. 5, 2007) (emphasis added).

- "This gain will *generally be capital gain* unless the holder's exchange of Pogo common stock for cash and Plains common stock "has the effect of the distribution of a dividend." Pogo Producing Co., Prospectus (Form 424B3), at 109 (Oct. 1, 2007) (emphasis added).

- "Gain recognized upon the exchange *generally will be capital gain*, unless the receipt of cash by a U.S. holder had the effect of a distribution of a dividend..." Warrior Energy Services, Prospectus (Form 424B3), at 83 (Nov. 3, 2006) (emphasis added).

Given the likely capital gain treatment, it seems reasonable that a withholding agent should be able to presume capital gain.

- Certain non-U.S. corporations can have U.S. source income – where they have at least 25% income effectively connected with a U.S. trade or business under Code § 861(a)(2)(B), for example. Self-tenders by such corporations should fall outside the scope of the regulations because they are likely neither common nor readily identifiable.

- Define the term "before and after the distribution" at 1.1441-3(c)(5)(iii)(D)(5) as used with respect to the certification from beneficial owners of their ownership interest. Consideration should be given to whether the term means ownership interest on the actual distribution date, and if so, whether market trades (purchases or sales) by the tendering shareholder that settle that day should be considered in determining ownership interest.

We recommend that the term "before" be treated as meaning the safekeeping (also known as the "long" or "custody") position at the close of business on the date prior to the date of the scheduled § 302 payment, and the term "after" mean the safekeeping position at the close of business on the date prior to the date of the § 302 payment minus the shares accepted for tender. The "after" date should be the date after the tender payment is made or at the close of business on the date the tender payment is

made. This definition would clarify how beneficial owners would determine ownership interest.

- The effective date of the proposed regulations as they relate to when a withholding obligation arose or will arise should be addressed specifically. The proposed regulations are not clear as to whether (i) the withholding obligation on payments of stock redemptions are retroactive, while the escrow process is optional before January 1, 2009 or (ii) the escrow process and withholding obligations are both optional before January 1, 2009. We recommend that the effective date of the regulations be clarified by differentiating the effective date for the withholding obligations on § 302 payments as described in the proposed regulations from the effective date of the escrow process set forth in the proposed rules.
- Allow fax or electronic certifications in lieu of any requirement to collect documents that contain an "original" ink-on-paper signature.