

SUBJECT: Serving Non-Citizen Members

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INTRODUCTION

This release applies to all credit unions. It explains how credit unions can provide services for members who are not U.S. citizens.

EXECUTIVE SUMMARY

This release explores membership issues, lending, account options and Internal Revenue Service withholding and reporting requirements for non-citizen members.

Anyone within a credit union's field of membership is eligible to join. Citizenship is not required by law, nor is a "green card" or Social Security Number. A credit union may impose membership requirements in addition to those imposed by law, as long as there is a rational basis for such requirements.

IRS tax reporting requirements for non-citizens accounts are complicated. The release describes the distinctions between resident and non-resident aliens, and it includes material that helps identify when IRS forms W-9, W-8BEN and 1042-S are required. In addition, a flow chart (attached as Exhibit A) will guide credit union staff to ask the right questions to determine whether members are U.S. citizens, resident aliens or non-resident aliens, as well as which IRS forms to file. However, when specific guidance is needed, credit unions should consult their attorneys or tax advisers.

In lending, credit unions may not discriminate against any loan applicant on the basis of national origin, but they can take immigration status into account when deciding whether to grant credit. For that reason, a credit union can ask about an applicant's permanent residence and immigration status to determine creditworthiness. The credit union should be consistent if it inquires about these issues.

For information on employing aliens, see *ii Release No. 0108*. For additional information on certifying Taxpayer Identification Numbers and IRS information reporting and backup withholding, see *ii Releases Nos. 0009 and 0130*.

MEMBERSHIP

Citizenship is not a factor in deciding whether someone may join a credit union. According to the NCUA, "as long as a person is in the field of membership of an FCU, the person may be considered for election into FCU membership by the FCU board of directors or appointed membership officers. There are no citizenship requirements."

This does not mean that everyone in a credit union's field of membership must be allowed to join. According to the NCUA: "Neither the Federal Credit Union Act nor the NCUA Rules and Regulations prohibits a non-resident alien from joining an FCU (provided that he is within the field of membership). This does not mean, however, that an FCU may not take an individual's citizenship, or lack of citizenship, into account when considering a membership application. We believe that an FCU's board of directors may impose membership requirements in addition to those set forth in the FCU Act, as long as there is a rational basis for such requirements." So, for example, a credit union could adopt a policy that requires proof of citizenship or immigration status for membership. The policy would have to be applied consistently, in a non-discriminatory manner.

The Wisconsin Office of Credit Unions advises that credit unions may impose additional membership requirements for non-citizens as long as the requirements are reasonable.

IRS REPORTING REQUIREMENTS

26 U.S.C. §871; 26 CFR §1.1441

The following material is adapted from [America's Credit Unions'](#) e-Guide summary, "IRS Reporting Non-Resident Alien Reporting—Forms W-8BEN and 1042-S."

Flow chart

Please review the flow chart attached as Exhibit A to this release. Prepared by [America's Credit Unions](#), it helps identify when IRS forms W-9, W-8BEN and 1042-S are required. Using the chart will guide credit union staff to ask the right questions to determine whether members are U.S. citizens, resident aliens or non-resident aliens, as well as which IRS forms to file.

Background

Generally, individuals eligible for credit union membership are either U.S. citizens or aliens. Aliens are categorized as either resident aliens (generally subject to tax in the same manner as U.S. citizens) or non-resident aliens.

Resident alien

A resident alien is typically an individual who meets either the "green card" test or the substantial presence test.

- If the individual is a lawful permanent resident at any time during the calendar year, he or she meets the green card test. Being a lawful permanent resident means being given the privilege of residing permanently in the U.S. as an immigrant and generally being issued a "green card." Formally, that document is a Permanent Resident Card, Form I-551. It used to be called an Alien Registration Card, and it is also known as "green card," though it hasn't been green since the 1950s. It's a wallet-sized card showing that the person is a lawful permanent resident (immigrant) in the United States. A green card holder (permanent resident) is someone who has been granted authorization to live and work in the United States on a permanent basis. The person is granted a card as proof of that status. Someone may become a permanent resident several different ways. Most are sponsored by a family member or employer in the United States. Others may become permanent residents through refugee, asylum, or other humanitarian programs. For details, see [this U.S. Citizenship and Immigration Services webpage](#).

To clarify, non-citizens may also have visas or employment authorization documents, but these are not the same thing as a "green card."

- *Visa*. A citizen of a foreign country who seeks to enter the United States generally must first obtain a U.S. visa, which is placed in the traveler's passport, a travel document issued by the traveler's country of citizenship. There are two main categories of U.S. visas: *nonimmigrant visas*, for travel to the United States on a temporary basis; and *immigrant visas*, for travel to live permanently in the United States. Visit [this U.S. State Department webpage](#) for more information.
- *Employment authorization document (EAD)*. An EAD card, known popularly as a "work permit" (Form I-766) is a document issued by the U.S. Citizenship and Immigration Services that provides temporary employment authorization to non-citizens in the United States. Someone who is not a U.S. citizen or a lawful permanent resident may need to apply for a card to prove that they can work in the U.S. Visit [this U.S. Citizen and Immigration Services webpage](#) for details. According to the site, "You do not need to apply for an EAD if you are a lawful permanent resident. Your Green Card (Form I-551, Permanent Resident Card) is evidence of your employment authorization." So, someone can obtain an EAD on the way to becoming a "lawful permanent resident" with a "green card," but it's not the same thing.
- To meet the substantial presence test, the individual must be physically present in the United States on at least 31 days during the current year and 183 days during the three year period that includes the current year and the two years immediately before that. When determining the 183-day threshold, the individual must count all the days he or she was present in the current year, 1/3 of the days in the first year before the current year and 1/6 of the days present in the second year before the current year. If the individual does not meet either of these tests, he or she will generally be considered a non-resident alien.

Resident aliens are generally subject to tax in the same manner as U.S. citizens.

Non-resident alien

Basically, a non-resident alien (NRA) is an individual whose permanent residence is outside of the U.S. and who is not a U.S. citizen.

A NRA is usually subject to U.S. income tax of 30% on “U.S. source income” – which the IRS rules describe as “a payment of U.S. sourced fixed or determinable annual or periodic (FDAP) income to a foreign person not associated with such person’s U.S. trade or business.” Examples of U.S. source income include: 1) interest earned from a U.S. debtor/obligor – not to be confused with deposit interest; 2) royalties; 3) rents; and 4) personal services.

A reduced tax rate, or even an exemption, may apply if there is a tax treaty between the NRA’s country of residence and the United States. Even though a non-resident alien, who is married to a U.S. citizen or resident alien, may choose to be treated as a resident alien for certain purposes (for example, filing a joint income tax return), such individual is still treated as a non-resident alien for withholding tax purposes. (See Instructions for IRS Form 1042-S).

Certain types of interest are exempt from NRA withholding, including “bank deposit interest and similar types of deposit interest.” (§1.1441-1(b)(4).) Due to this exception in the IRS regulations, NRAs do not have to rely on an income tax treaty to be exempted from U.S. income tax on their deposit interest paid by credit unions.

Documenting Foreign Status

All withholding agents, including credit unions, are required to withhold 30% of amounts paid to members unless it can “reliably associate” the payment with valid documentation that establishes either:

- The payee is a U.S. person (Form W-9, Request for Taxpayer ID Number); or
- The payee is entitled to a reduced rate of withholding (Form W-8BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding).

IRS Presumption Rules

If you cannot reliably associate a payment with valid documentation, a withholding agent must apply certain IRS presumption rules or the agent may be liable for tax, interest, and penalties (§1.1441-1(b)(3)(iii).) If you comply with the presumption rules, you are not liable for tax, interest, and penalties even if the rate of withholding that should have been applied based on the payee’s actual status is different from that presumed.

Essentially the presumption rules state that a payment that the withholding agent cannot reliably associate with documentation is presumed to be made to a U.S. person. Additionally, a payee or beneficial owner may rebut the presumptions by providing reliable documentation to the withholding agent. (§1.1441-1 (b)(3)(viii).) Furthermore, a withholding agent that withholds according to the presumption rules shall not be liable for withholding even if it is later established that the beneficial owner of the payment is, in fact, a foreign person. Similarly, a withholding agent that withholds on a payment according to the presumptions shall not be liable for withholding even if it is later established that the payee or beneficial owner is, in fact, a U.S. person. (§1.1441-1 (b)(3)(ix)(A).)

A withholding agent that, instead of relying on the presumption rules, relies on his or her own actual knowledge to withhold a lesser amount, not withhold, or not report a payment, even if withholding or reporting would be required if the agent had relied on the presumption, shall be liable for tax, interest and penalties. (§1.1441-1 (b)(3)(ix)(A).) You should, however, rely on your actual knowledge if doing so results in withholding an amount greater than would apply under the presumption rules or in reporting an amount that would not be subject to reporting under the presumption rules.

Joint owners

If you make a payment to joint owners, you need to get documentation from each owner. If any one of the owners gives you a Form W-9, you may treat the total amount as paid to a U.S. person. (IRS Publication 515 (2012).)

If all the owners provide documentation that permits them to receive the same reduced rate of withholding (for example, under an income tax treaty), you should apply the reduced rate of withholding. You are required, however, to report the payment on one Form 1042-S to the person whose status you rely upon to determine the withholding rate. If, however, any one of the owners requests its own Form 1042-S, you must furnish Form 1042-S to the person who requests it. If more than one Form 1042-S is issued for a single payment, the total amount paid and tax withheld reported on all Forms 1042-S cannot exceed the total amounts paid to joint owners.

Mergers

Merged credit unions may find that they have acquired non-resident alien accounts and wonder whether they can rely on the existing documentation for these accounts or take steps to verify the members' foreign status.

According to the IRS's March 2014 temporary regulations, a withholding agent that acquires an account in a merger from a U.S. withholding agent may rely on the predecessor's or transferor's determination of the account holder's non-resident alien status for a transition period of the lesser of six months from the date of the merger or until the acquirer knows that the claim of foreign status is inaccurate or a change in circumstances occurs. At the end of the transition period, the acquirer will be permitted to rely upon the predecessor's determination as to the non-resident alien status only if the documentation that the acquirer has for the account holder, supports the status claimed. An acquirer that discovers at the end of the transition period that the non-resident alien status was incorrect and has not withheld as would have been required, will be required to withhold on future payments.

Form W-8BEN

Form W-8BEN is used for a number of reasons: (1) to establish foreign status, (2) to claim that a foreign person is the beneficial owner of the income for which the form is being furnished, (3) to claim a reduced rate of, or exemption from, withholding under an income tax treaty, (4) to claim that the foreign person is exempt from Form 1099 reporting and backup withholding for income that is not subject to non-resident alien withholding, such as deposit interest.

If you receive a Form W-8BEN from your member, and you have no reason to know that any of the information on the form is unreliable or incorrect, you are exempt from reporting on Form 1099. However, after January 1, 2013, you are required to file Form 1042-S if the NRA is from a country that has an information exchange agreement with the U.S. These countries are listed on *IRS Revenue Procedure 2012-24*. (Before January 1, 2013, credit unions were only required to file Form 1042-S for Canadian non-resident aliens.) For more information, see the next section of this ii Release.

Reason to know information is unreliable

The following are some of the reasons the IRS has listed for how you will know a Form W-8BEN is unreliable or incorrect:

- If statements on the certificate, or other relevant facts, would cause a reasonably prudent person in your position to question the information;
- The Form W-8BEN is incomplete with respect to any item on the form that is relevant to the claims made by the account holder;
- The Form W-8BEN contains any information that is inconsistent with the account holder's claim;
- The Form W-8BEN lacks information necessary to establish entitlement to a reduced rate of withholding, if a reduced rate is claimed;
- You have information not contained on the form that is inconsistent with the claims made on the form;
- The Form W-8BEN has a permanent residence address in the United States;
- The Form W-8BEN has a mailing address in the U.S.;
- You have a residence or mailing address as part of your account information that is an address in the U.S.
- The person providing the certificate notifies you of a new residence or mailing address in the United States; or
- If the Form W-8BEN is provided with respect to an offshore account, the account holder has standing instructions directing you to pay amounts from its account to an address or account maintained in the U.S.

Do not send Forms W-8BEN to the IRS. Keep the forms in your records for as long as they may be relevant to your tax liability. (§1.1461.)

What if the member doesn't have a U.S.TIN?

If the member is claiming benefits under a tax treaty, a U.S. taxpayer identification number is required on line 6 of Form W-8BEN. Unless the member is claiming treaty benefits for the following income:

- Dividends and interest from stock and debt obligations that are actively traded;

- Dividends from any redeemable security issued by an investment company;
- Dividends, interest, or royalties from units of beneficial interest in a unit investment trust that are publicly offered and registered with the SEC;
- Income related to loan of any of the above securities.

Also, a U.S. TIN is not required to claim treaty benefits if the payment is unexpected.

As of 2012, you are allowed to rely on a W-8BEN that contains a P.O. Box as a permanent residence address provided you do not know, or have reason to know, that the person providing the form is a U.S. person and that a street address is available. This allowance may change in the future.

Expiration

Generally, a withholding certificate (Form W-8BEN) will remain valid until the earlier of the last day of the third calendar year following the year in which the withholding certificate is signed or the day that a change in circumstances occurs that makes any information on the certificate incorrect. For example, a withholding certificate signed on September 30, 2016, remains valid through December 31, 2019 – unless circumstances change that make the information on the form incorrect.

W-8BEN via fax or e-mail

Treasury clarified in its March 2014 temporary regulations that withholding agents may rely on valid W-8BEN Forms received by fax or a form scanned and received electronically. However, you may not rely on a form received by such means if you know that the form was transmitted by a person not authorized to do so by the member required to execute the form.

A credit union should establish procedures to authenticate and verify a W-8BEN form sent via e-mail or fax and may reject any form that fails to satisfy the requirements of these procedures.

Customer Identification Program

As explained later in this release, when obtaining identifying information from your non-resident alien members, remember that the Customer Identification Program (CIP) rules require you to obtain one of the following for non-U.S. persons: an ITIN, a passport number and the country of issuance, an alien identification card number, or a number and country of issuance on any other foreign government issued evidencing nationality or residence and bearing a photograph or similar safeguard.

Form 1042-S: Foreign Person's U.S. Source Income Subject to Withholding

Every U.S. withholding agent must file a Form 1042-S for amounts subject to NRA withholding, unless an exception applies. Before January 1, 2013, credit union deposit interest paid to NRAs (except Canadian residents (§1.6049-4(b)(5)) was excepted from Form 1042-S reporting. (§1.1441-(b)(4)(iii).) A final rule issued by the IRS on April 19, 2012, expanded the “exception to the exception” beyond Canadian residents to all non-resident aliens from countries that have an exchange agreement with the U.S. The IRS may update that list of countries from time to time. For now (as of *January 1, 2019*), the countries with information exchange agreements are:

1) Antigua & Barbuda	19) Croatia	37) Guyana
2) Argentina	20) Curaçao	38) Honduras
3) Aruba	21) Cyprus	39) Hong Kong
4) Australia	22) Czech Republic	40) Hungary
5) Austria	23) Denmark	41) Iceland
6) Azerbaijan	24) Dominica	42) India
7) Bangladesh	25) Dominican Republic	43) Indonesia
8) Barbados	26) Egypt	44) Ireland
9) Belgium	27) Estonia	45) Isle of Man
10) Bermuda	28) Faroe Islands	46) Israel
11) Brazil	29) Finland	47) Italy
12) British Virgin Islands	30) France	48) Jamaica
13) Bulgaria	31) Germany	49) Japan
14) Canada	32) Gibraltar	50) Jersey
15) Cayman Islands	33) Greece	51) Kazakhstan
16) China	34) Greenland	52) Korea, Republic of
17) Colombia	35) Grenada	53) Latvia
18) Costa Rica	36) Guernsey	54) Liechtenstein

55) Lithuania	67) Norway	81) Spain
56) Luxembourg	68) Pakistan	82) Sri Lanka
57) Malta	69) Panama	83) Sweden
58) Marshall Islands	70) Peru	84) Switzerland
59) Mauritius	71) Philippines	85) Thailand
60) Mexico	72) Poland	86) Trinidad and Tobago
61) Moldova	73) Portugal	87) Tunisia
62) Monaco	74) Romania	88) Turkey
63) Morocco	75) Russian Federation	89) Ukraine
64) Netherlands	76) Saint Lucia	90) United Kingdom
65) Netherlands special municipalities: Bonaire, Sint Eustatius, and Saba	77) Sint Maarten	91) Venezuela
66) New Zealand	78) Slovak Republic	
	79) Slovenia	
	80) South Africa	

Amounts subject to reporting on Form 1042-S are amounts paid to non-resident aliens (including persons presumed to be non-resident aliens) that are subject to withholding, even if no amount is deducted and withheld from the payment because of a Code exception (such as the “bank deposit interest” exception) or treaty. (IRS Publication 515.) If you pay deposit interest of \$10 or more to non-resident aliens from countries that have an information exchange agreement with the U.S., you will need to report the income on Form 1042-S. This reporting requirement generally applies to interest that is (a) on a deposit maintained at a credit union’s office in the United States and (b) not “effectively connected with a trade or business” in the U.S. The factors to be considered in establishing whether the income is “effectively connected with a U.S. trade or business” include: (1) whether the income is from assets used in, or held for use in, the conduct of that trade or business; or (2) whether the activities of that trade or business were a material factor in the realization of the income. In most cases, you should rely on the withholding documentation you have collected through the W-8BEN to complete your Form 1042-S submissions. When completing the Form 1042-S for credit union deposit interest, use income code 29 (deposit interest) in box 1, and exemption code 02 (exempt under an Internal Revenue Code section) in box 6.

You must furnish a statement to each recipient for whom you are filing a Form 1042-S by the due date for filing the Form 1042-S with the IRS (March 15). The statement must be to the effect that the information on the form is being furnished to the U.S. Internal Revenue Service and you must include a copy of the Form 1042-S.

A penalty may be imposed for failure to provide Form 1042-S to the recipient when due, or for failing to provide complete and correct information.

[Forms 1042-S, must be filed with the IRS by March 15th. Financial institutions are required to file Forms 1042-S electronically – regardless of the number of forms.](#) Withholding agents should retain a copy of the information returns filed with the IRS, or have the ability to reconstruct the data, for at least 3 years after the reporting date.

CUSTOMER IDENTIFICATION

Every credit union must have a written Customer Identification Program (CIP). At a minimum, your credit union’s CIP policies and procedures will require you to collect identifying information about each new account holder (including co-owners of accounts and co-borrowers, even if they are not members). You must also verify the member/customer’s identity, keep records of the information you collect, check the names of new member/customers against a Treasury Department list of possible terrorists, and provide members/customers with a CIP notice.

Under CIP, all new members/customers must provide you with:

- their name,
- street address,
- date of birth, and
- an identification number.

For anyone who is not a U.S. citizen by birth or naturalization, the identification number may be one of the following:

- a U.S. taxpayer identification number (such as an ITIN);
- passport number and country of issuance;
- alien identification card number; or

- a number and country of issuance of any other government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard (e.g., biometric identifiers may be used in addition to or instead of photographs).

The CIP rules are separate from and do not replace IRS tax reporting rules, which are explained later in this release.

See *ii Release No. 0159, “BSA: Customer Identification Program and Customer Due Diligence,”* for more information about CIP.

LOANS TO ALIENS

The Consumer Financial Protection Bureau's Regulation B (which implements the Equal Credit Opportunity Act) prohibits discrimination in any credit transaction, whether for consumer or business purposes, on the basis of race, color, religion, national origin, sex, marital status, age or certain other traits. So, for example, a credit union may not refuse to grant credit because an applicant comes from a particular country. Also, the credit unions should not have blanket policies against lending to any immigrants.

However, the credit union may take an applicant's immigration status into account when deciding whether to grant credit on a case by case basis. This is allowed because the applicant's immigration status and ties to the community (such as employment and continued residence in the area) could have a bearing on ability to repay. The commentary to Regulation B states that “a creditor may not refuse to grant credit because an applicant comes from a particular country but may take the applicant's immigration status into account.” For example, if a member is in the U.S. on a two-year student visa and has applied for a four-year car loan, you can (and should) take this information into account when deciding on the term of the loan you may approve. You should base your lending decisions on factors that apply to all applicants. Immigration status is just one more factor you can consider, but it should not be the only one.

Reg. B generally prohibits inquiries about race, national origin, color, or religion in connection with a credit transaction, except in limited circumstances. However, a credit union may inquire about an applicant's permanent residence and immigration status to determine creditworthiness. For example, the credit union might ask about immigration status if the person does not have an SSN. The credit union should be consistent if it inquires about these issues.

WIRE TRANSFERS

A particularly important service for many immigrants is the ability to wire money to families in their home countries. Credit unions may not provide unlimited wire transfer services to non-members; however, a 2002 NCUA opinion letter allows federal credit unions to offer wire transfer services to non-member aliens in limited circumstances. For example, the NCUA would allow FCUs to offer wire transfers to non-member within the FCU's field of membership as a charitable activity or as a marketing activity – to promote membership and familiarize the users of the service with the benefits of membership. The Wisconsin Statutes include provisions that allow credit unions to serve non-members if they have approval from the Office of Credit Unions. The OCU advises that this would include the ability to provide wire transfer services.

INTERNATIONAL REMITTANCE TRANSFERS

Reg. E requires disclosures and other consumer protections if your credit union regularly provides “international remittance transfers” – cross-border electronic funds transfers over \$15 that are initiated by consumers and sent to foreign individuals or businesses. That includes international ACH, international wire transfers, and transfers via the World Council of Credit Unions IRnet system, but not most transfers via credit, debit or prepaid cards. Many credit unions are exempt from these requirements, depending on how many such transfers they provide each year. For more information, see The League's *ii Release No. 0120*.

EXHIBITS

Exhibit A – IRS form W-8BEN & 1042-S Reporting.

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League publications are designed to provide accurate information with regard to the subject matter covered, with the understanding that The League does not render legal services. If you have general questions regarding this release, please call The League at (608) 640-4050 if local or (800) 242-0833. For specific legal advice, please consult your credit union's attorney.

Legal Affairs Department

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EXHIBIT A – IRS FORM W-8BEN & 1042-S REPORTING

