

To: Deans and Department Heads  
From: Office of the General Counsel  
Date: August 9, 2006

Attached is a policy recently adopted by the Vice President of Finance/Treasurer in consultation with the Office of General Counsel. It is the Washington and Lee University policy with respect to income tax withholding on payments to non-employee foreign persons or their U.S. agents.

The policy is not a change in practice, but rather memorializes and informs of Washington and Lee's standard procedure, which is to comply with all Internal Revenue Service laws and regulations. Questions frequently arise regarding withholding on payments to non-employee foreign persons; the policy explains the withholding rules and possible exceptions, including the documentation required to meet such exceptions.

Examples include the following, among many other possibilities:

Your department invites a lecturer to campus to give a talk, and you agree to pay her a \$500 honorarium. She is an Argentine national currently present in the United States on a J-1 visa; for IRS purposes she is classified as a nonresident alien. The Business Office will withhold federal income tax of \$150 (30%) when it issues her honorarium.

Your department contracts with a U.S. management company to arrange for a musical performance by an orchestra composed of German nationals (all of whom are nonresident aliens). The contract stipulates that on the day of the performance, W&L will pay \$10,000 to the U.S. management company representing the foreign performers. Because the underlying service will be performed by non-employee nonresident aliens, the Business Office must withhold federal income tax of \$3,000 (30%) from the payment to the management company unless proper documentation is presented ahead of time.

Those department heads who enter into contracts for the non-employee services of foreign persons should provide a copy of this policy to the foreign person or their U.S. agent before finalizing the contract. This will serve the dual purpose of providing notice to the payee and providing ample time for the payee to assemble the documentation required to meet the exceptions.

Payments to employees – whether citizens, resident aliens, or foreign persons – are not covered by this policy. Any questions regarding withholding on employee wages, including payments to foreign scholars or students, should be directed to Steven McClure or Kim Austin in the Office of Human Resources. Similarly, questions regarding the status of a payee—i.e. whether the payee is an employee or a non-employee—should be directed to the Office of Human Resources.

**Washington and Lee University Policy on Nonresident Alien Income Tax Withholding:  
Payments to Non-Employee Foreign Persons or U.S. Agents of Foreign Persons**

Nonresident alien individuals are subject to taxation and withholding under different rules than those that apply to U.S. persons. While U.S. persons (citizens and “resident aliens”) are subject to U.S. tax at graduated rates on their worldwide income, foreign persons (“nonresident aliens”) are subject to U.S. tax on a more limited basis.

All payments to non-employee foreign persons will be processed by the Business Office. Wages paid to nonresident alien employees generally are withheld upon at graduated rates and therefore are not within the scope of this policy; questions about wage withholding should be directed to the Office of Human Resources.

**No department or office may enter into a contract that in any way conflicts with or overrides W&L’s withholding obligations. Failure to comply with this policy could result in the Internal Revenue Service (IRS) holding the University responsible for the payee’s full tax liability, plus interest and penalties.**

The following is an explanation of the withholding obligations that the Business Office will comply with in issuing payments to non-employee nonresident aliens or their U.S. agents.

Who is a nonresident alien?

For U.S. income tax purposes, any non-U.S. citizen is an “alien”. The tax laws differentiate between “resident aliens”, who are taxed in the same manner as citizens, and “nonresident aliens”, who are taxed on a more limited basis.

All U.S. permanent residents (“green card holders”) are considered resident aliens for tax purposes. Generally speaking, a nonimmigrant individual who spends a certain number of days a year in the United States will be a resident alien for tax purposes if they meet the “substantial presence test”; special exemptions apply to individuals with certain visa status (including those on F, J, M, or Q visas).

Any alien person who is not a resident alien is, by default, a nonresident alien. For a more detailed explanation of how to determine resident alien or nonresident alien status and of the “substantial presence test”, please see <http://www.irs.gov/pub/irs-pdf/p519.pdf>.

W&L’s role as withholding agent

Most U.S. payments to nonresident alien individuals are subject to a 30% tax, and the payor is required to withhold this amount from the payment at the time that the payment is made. This is the IRS mechanism for collecting income tax from foreign persons.

Federal law and regulations require W&L to withhold 30% income tax from payments it makes to non-employee foreign persons, unless the payee provides certain documentation to the

Business Office showing that he or she is entitled to a reduced rate of, or an exemption from, withholding. See “Exceptions: Acceptable forms of documentation”, below.

### Special rule: Withholding on payments to U.S. agents of foreign persons

Treasury Regulations also require the payor to withhold 30% in cases where a payment is made to a U.S. person who is known to be acting as an agent of a foreign person. For example, if W&L enters into a contract with a U.S. management company for personal services to be performed by a foreign person, the University is obligated to withhold 30% from the payment to the U.S. management company acting as an agent for the foreign performer. This is required despite the fact that the payment is being made to a U.S. corporation or other U.S. entity. This 30% withholding requirement can be waived only if the U.S. agent or foreign person provides certain documentation to the Business Office, as described in the next section.

### Exceptions: Acceptable forms of documentation

The following types of documentation may result in a reduced withholding rate or an exemption from withholding. Any forms of documentation should be submitted to the Business Office for verification and processing as soon as possible.

**Central Withholding Agreement** – If the foreign person has entered into a central withholding agreement (CWA) with the IRS, W&L will withhold at the lower rate specified in the CWA. For more information on Central Withholding Agreements, including instructions on how to apply for one, see <http://www.irs.gov/businesses/small/international/article/0,,id=106060,00.html>.

**Form W-8EXP** – If the payee is a foreign government, international organization, foreign tax-exempt organization, or foreign private foundation, W&L can rely on Form W-8EXP to exempt or reduce the rate of withholding on the payment. Certain additional documentation may be required, such as a letter from a U.S. attorney attesting that an organization would likely obtain tax-exempt status from the IRS if it applied for it. For more information about Form W-8EXP and required accompanying statements, see <http://www.irs.gov/pub/irs-pdf/iw8exp.pdf>.

**Form 8233 or Form W-8BEN** – There are bilateral income tax treaties in force between the United States and many countries. The Business Office can determine whether the nonresident alien payee is eligible for benefits under an applicable tax treaty, and whether that might result in withholding at a lesser rate than 30%. The payee should submit either Form 8233 or Form W-8BEN, as applicable. Athletes and entertainers implicate special issues under treaties, and as a result may not be eligible for reduced withholding. More information about claiming income tax treaty benefits, including links to both of these forms, is available at: <http://www.irs.gov/businesses/small/international/article/0,,id=96438,00.html>.

**Absent one of the above forms of documentation, all payments to a non-employee foreign person or to a U.S. agent of a foreign person will be withheld upon by W&L at the rate of 30%, in compliance with federal law and regulations.**

Questions regarding this policy should be directed to Michelle Drumbl or Leanne Shank in the Office of General Counsel. Questions regarding required tax forms or acceptable documentation should be directed to Joan Swisher or Deborah Caylor in the Business Office.

ADOPTED AND EFFECTIVE: July 2006

By: Vice President of Finance/Treasurer in consultation with Office of General Counsel

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