

Comments Submitted in Response to the IRS's Draft 13930-A

August 4, 2019

Background: At a meeting organized by The National Endowment for the Arts, senior staff of the Internal Revenue Service and representatives of the performing arts industry met to discuss IRS policy changes that could alleviate problems resulting from new policies in the execution of the Central Withhold Agreement program. In December of 2018, representatives of the performing arts industry submitted a proposal for a "Simplified CWA Program. On July 3, 2019, the IRS published a draft of a new form, the 13930-A, designed to make the "Simplified CWA" a reality. The Service has requested comment. Following are the comments prepared by the representatives of the performing arts industry.

Abstract: Stakeholders submitted to the IRS a document explaining the need for policy revision, outlining proposed policy changes to the CWA program, and also outlining measures the performing arts industry will take to help the Service promote compliance within the industry.

The Need for Policy Revision: The recent policy change, effective October 1, 2018, addresses staffing concerns at the IRS, but unintentionally created significant impediments to business and culture, especially for U.S. performing arts venues that serve to the audiences of developing artists, jazz, classical, and non-commercial performers. The proposed "Simplified CWA" goes a great distance toward ensuring that the Service will be able to support compliance with the law, continue to offer its popular CWA program, and do so without hobbling a critical sector of the performing arts industry with unduly burdensome withholding. However, some revisions and clarifications are requested in the comments that follow.

Comments:

(1) We seek a change to Section 9 of the "Simplified Central Withholding Agreement Declaration" and Section 5(12) of the "Instructions."

Request: We request that the Service change Section 9 of the "Simplified Central Withholding Agreement Declaration" and Section 5(12) of the form's "Instructions" to reflect the principle of "willfulness" embodied elsewhere in comparable passages of the tax code (*cf.* "Fraud and False Statements" at 26 U.S.C. § 7206(1) (where a person is only guilty of making a false and fraudulent declaration where he "willfully" does so). Revised passage in the Declaration should read: "If the Applicant and/or Designated Withholding Agent willfully represents a fact to the IRS that is materially erroneous or materially inaccurate, Applicant and/or Designated Withholding Agent will be ineligible to enter into a CWA agreement for the remainder of the year of discovery and two subsequent tax years." Revised passage in the Instructions should read: "If the Applicant and/or Designated Withholding Agent willfully represents a fact to the IRS that is materially erroneous or materially inaccurate, then the restrictions and obligations imposed on the Signatory Designation shall be null and void, and

the Applicant and Designated Withholding Agent will be ineligible to enter into a CWA agreement for the remainder of the year of discovery and two subsequent tax years.”

Policy Rationale: The proposed rules states that any material inaccuracy would result in any Applicant or Designated Withholding Agent being barred from the program. This rule is unduly burdensome. If a single minor good faith error is grounds for disqualification of an agent, no withholding agent would be willing to file a Simplified CWA, due to the risk to their business. Furthermore, the rule is out of step with similar passages in the Tax Code where culpability is linked to the principle of “willfulness” (c.f.: “Fraud and False Statements” at 26 U.S.C. § 7206).

(2) We seek clarification regarding when NRAAEs may apply for a Simplified CWA.

Request: The form’s Instructions should clarify that an NRAAE whose projected cumulative earnings during the calendar year will not exceed \$10,000 may file a Simplified CWA. As such, an NRAAE may file multiple Simplified CWA forms in one year, each covering any discrete tour, provided the cumulative earnings do not exceed \$10,000. Conversely, when an NRAAE seeks a CWA to cover a tour’s projected earnings in the U.S., and that tour’s earnings combined with that individual’s prior earnings during that year in the U.S. total a gross of more than \$10,000, the NRAAE must file a Regular CWA.

Policy Rationale: The Instructions are currently unclear.

(3) We seek clarification regarding good faith errors in the projection of earnings.

Request: The form’s instructions should clarify that if an NRAAE uses a Simplified CWA to cover the earnings of a planned tour in the U.S., and the NRAAE’s good faith projection that his or her earnings will be less than \$10,000 proves to be inaccurate, the NRAAE will not be penalized in any way.

Policy Rationale: Although there is a significant disincentive for NRAAEs to use the Simplified CWA when in a given year their gross earnings exceed \$10,000, it is conceivable that unexpected earnings could lead to a situation where an NRAAE grosses more than the predicted \$10,000 on a tour covered by a Simplified CWA. To penalize an NRAAE in this situation would create a significant disincentive to the use of the program.

(4) We seek clarification regarding how the Service will handle the requirement of filing of prior tax returns prior to filing a CWA.

Request: We request that the Service resume accepting new CWA Applications (both regular and simplified) with proof of the IRS’s receipt of any outstanding tax returns in the last four years.

Policy Rationale: Requiring outstanding tax returns to be posted prior to the processing of a CWA application can delay the processing of a CWA application for 8-15 weeks. This delay creates a significant barrier to compliance for artists who have previously failed to comply with U.S. tax law. While we understand that the Service is disinclined to make any accommodations to NRAAEs who have previously failed to file required returns, it is not good policy to create additional barriers to compliance for those NRAAE's who have previously failed to comply, especially given that there are situations where an NRAAE may have been unaware that a return was required:

- If an NRAAE paid full 30% withholding and did not file a tax return, having paid a much higher amount of tax than they would have paid had they filed a return, they might understandably feel that they have done more than is required. Many countries do not require that a tax return be filed in this situation, so ignorance of the law would be understandable.
- Some U.S. venues may not properly withhold. If an NRAAE principally performs at venues that do not properly withhold, it is very possible that they may have performed in the U.S. without any knowledge that they should file a return. Many countries do not require that a tax return be filed in this situation, so ignorance of the law would be understandable.

To encourage compliance—especially amongst NRAAE's historically unlikely to comply—we strongly recommend that the Service make the application process more efficient and predictable to the user, and resume accepting new CWA Applications (both regular and simplified) with proof of the IRS's receipt of any outstanding tax returns in the last four years.

(5) Regarding the requirement of having received an ITIN prior to filing a CWA:

Request: We request that the Service resume accepting new CWA Applications (both regular and simplified) with proof of the filing of a request for an ITIN.

Policy Rationale: Requiring prior tax returns to be posted with an ITIN number can delay the processing of a CWA application for 8-15 weeks. To reiterate as described above, this delay creates a significant barrier to compliance for artists who have previously failed to comply with U.S. tax law. While we understand that the Service is disinclined to make any accommodations to NRAAEs who have previously failed to file required returns, it is not good policy to create additional barriers to compliance for those NRAAE's who have previously failed to comply, especially given that there are situations where an NRAAE may have been unaware that a return was required:

- If an artist paid full withholding and opted to not file a tax return, having paid a much higher amount of tax than they would have paid had they filed a return, they might understandably feel that they have done more than is required.
- Some U.S. venues may not properly withhold. If an artist principally performs at venues that do not withhold, it is very possible that they may have performed in the U.S. without any knowledge that they should file a return.

To encourage compliance—especially amongst NRAAE's historically unlikely to comply—we strongly recommend that the Service make the application process more efficient and

predictable to the user, and resume accepting new CWA Applications (both regular and simplified) with proof of the filing of a request for an ITIN.

(6) We seek clarification regarding whether the Simplified CWA process will require a final accounting.

Request: The form's Instructions should clarify that an NRAAE must (or must not) submit a final accounting of the U.S. engagements following the last engagement covered by the Simplified CWA.

Policy Rationale: The Instructions are currently unclear.

Measures the Performing Arts Industry Will Undertake: The undersigned organizations broadly represent the U.S. performing arts industry, and commit to promoting compliance with the CWA Program through measures including but not limited to:

- Providing educational opportunities at professional events and conferences where their constituencies may learn about U.S. tax compliance and the CWA program,
- Providing online educational resources where their constituencies may learn about U.S. tax compliance and the CWA program, and partnering with the IRS to offer national learning events via webinars, and
- Working individually and collectively to develop and promote best practices within the industry that will encourage compliance with U.S. tax law and the CWA program.
- We welcome further opportunities to partner with the IRS towards policy solutions, technical assistance, and stakeholder awareness efforts that both encourage international cultural activities and support compliance with U.S. tax withholding requirements.

Thank you for the opportunity to provide public comment. This statement was authored by Cecile Glunt, Matthew Covey, Frank Page, and Heather Noonan, and is endorsed by the undersigned organizations.

**Arts Midwest
Chorus America
League of American Orchestras
Performing Arts Alliance
Tamizdat**