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US Treasury Extends Several FATCA Deadlines

William Byrnes (Texas A&M University Law) · Wednesday, September 23rd, 2015

On 18 September 2015 the US Treasury issued [Notice 2015-66](#) which announced that the it intends to amend the regulations under chapter 4 (sections 1471-1474) to extend the period of time that certain transitional rules will apply. Specifically, the amendments will extend:

- (1) the date upon which withholding on gross proceeds and foreign passthru payments will begin;
- (2) the use of limited branches and limited foreign financial institutions (limited FFIs); and
- (3) the deadline for a sponsoring entity to register its sponsored entities and redocument such entities with withholding agents.

In addition, in order to reduce compliance burdens on withholding agents that hold collateral as a secured party, this notice announces that Treasury and the IRS intend to amend the regulations under chapter 4 to modify the rules for grandfathered obligations with respect to collateral.

Finally, this notice also provides information on the exchange of information by Model 1 IGA jurisdictions with respect to 2014. Previous timelines may be read about on William Byrnes [SSRN FATCA Article](#)

1. EXTENSION OF DATES FOR WHEN WITHHOLDING BEGINS FOR PAYMENTS OF GROSS PROCEEDS AND PASSTHRU PAYMENTS

Many U.S. and foreign financial institutions, foreign governments, Treasury, the IRS, and other stakeholders have devoted resources to implementing FATCA withholding on withholdable payments, which (subject to certain exceptions) began on July 1, 2014, as well as for the first U.S. account reporting under FATCA, which was due for certain FFIs starting in March 2015. At the same time, 112 jurisdictions are now treated as if they have an IGA in effect, which allows for the information reporting goals of FATCA to be satisfied for FFIs covered by such IGAs. Of these 112 jurisdictions, 73 have actually signed the IGA, whereas the others have only agreed to sign it, with 165,680 total GIIN registrations.

In order to continue to facilitate an orderly phase-in of FATCA withholding, Treasury and the IRS intend to amend the chapter 4 regulations under section 1473 to extend the start date of gross proceeds withholding by providing that the definition of the term withholdable payment means any payment of U.S. source FDAP income, and for sales or other dispositions occurring after December 31, 2018, any gross proceeds from the sale or other disposition of any property of a type

that can produce interest or dividends that are U.S. source FDAP income.

Additionally, Treasury and the IRS intend to amend the regulations under section 1471 to extend the start date of withholding on foreign passthru payments to provide that a participating FFI is not required to withhold tax on a foreign passthru payment made to a recalcitrant account holder or a nonparticipating FFI before the later of January 1, 2019, or the date of publication in the Federal Register of final regulations defining the term foreign passthru payment.

2. EXTENSION OF LIMITED BRANCH AND LIMITED FFI STATUSES

Currently, 112 jurisdictions are treated as if they have an IGA in effect, and 131 do not. FFIs and other stakeholders continue to express strong support for IGAs as a way to facilitate effective and efficient FATCA implementation while avoiding conflicts with local law. A Canadian court last week denied hearing a case regarding the legitimacy of the Canada-US IGA.

While Treasury remains open to entering into IGA discussions based on the published models, there may be jurisdictions that have not been able or willing to agree to an IGA and that continue to impose legal restrictions that prevent FFIs resident or organized there, or branches located there, from complying with the terms of an FFI agreement. If an FFI that is not covered by an IGA has a branch located in, or an FFI affiliate subject to the laws of, a jurisdiction that prohibits compliance with the terms of an FFI agreement, that FFI will no longer be able to obtain or maintain status as a participating or deemed-compliant FFI once limited branch and limited FFI status expire.

To provide FFIs and other stakeholders additional time to determine whether to continue operating in jurisdictions where limited branches or limited FFIs exist, Treasury and the IRS intend to amend the regulations under section 1471 to provide that the availability of limited branch and limited FFI statuses will terminate on January 1, 2017. A limited FFI or limited branch that becomes able to comply with the terms of the FFI agreement or becomes a participating FFI or deemed-compliant FFI pursuant to an applicable IGA should amend its registration to reflect its modified status.

FFIs that continue to operate after December 31, 2016, in jurisdictions where they cannot comply with the terms of an FFI agreement due to local law will jeopardize the chapter 4 status of participating FFIs and registered deemed-compliant FFIs (other than FFIs covered by an IGA) in the group.

Branches that continue to operate after December 31, 2016, in jurisdictions where they cannot comply with the terms of an FFI agreement due to local law will jeopardize the participating FFI status of the FFI of which the branch is part (as well as jeopardize any branches of the FFI that have participating FFI status under the FFI agreement), subject to the terms of an applicable IGA.

After December 31, 2015, all limited FFI and limited branch registrations will be placed in “registration incomplete” status on their online FATCA account. Limited FFIs and limited branches that seek to continue such status during the 2016 calendar year will be required to edit and resubmit their registrations after December 31, 2015, on the FATCA registration website.

3. EXTENSION OF TIME TO REGISTER SPONSORED ENTITIES AND EXTENSION OF RELIANCE ON SPONSORING ENTITY GIINS

The IRS is developing a streamlined process for sponsoring entities to register their sponsored entities on the FATCA registration website. The IRS anticipates that this registration process will

be available in the coming months and intends to update the FATCA registration user guide to include this process. In order to provide sufficient time for sponsored entity registration, Treasury and the IRS intend to amend the regulations under sections 1471 and 1472 to provide that sponsoring entities must register their sponsored registered deemed-compliant FFIs and sponsored direct reporting NFFEs by January 1, 2017.

Beginning on such date, sponsoring entities must use the GIIN of the sponsored entity when reporting with respect to the sponsored entity on Form 8966 (FATCA Report) and must provide the GIIN to withholding agents making payments to the sponsored entity.

Sponsored investment entities and sponsored controlled foreign corporations covered by Annex II of a Model 1 IGA will maintain their deemed-compliant status as long as they are registered by the sponsoring entity on or before the later of December 31, 2016, and the date that is 90 days after a U.S. reportable account is first identified.

Sponsored investment entities and sponsored controlled foreign corporations covered by Annex II of a Model 2 IGA will maintain their deemed-compliant status as long as they are registered by the sponsoring entity on or before December 31, 2016.

In addition, Treasury and the IRS intend to amend the regulations under section 1471 to provide that withholding agents can continue to rely on withholding certificates from sponsored registered deemed-compliant FFIs and sponsored direct reporting NFFEs that have only the sponsoring entity's GIIN for payments made prior to January 1, 2017.

For a payment made on or after January 1, 2017, a withholding agent will be required to obtain the GIIN of a payee that is a sponsored registered deemed-compliant FFI or a sponsored direct reporting NFFE by obtaining either:

- (1) a withholding certificate from the payee that includes its GIIN, or
- (2) if the withholding agent already has on file a withholding certificate for the payee that includes the GIIN of the sponsoring entity, oral or written confirmation of the payee's GIIN (such as by e-mail).

If a withholding agent obtains oral or written confirmation of the payee's GIIN, it will be required to retain a record of such information, which will become part of the withholding certificate. Whether the withholding agent receives the GIIN through a new withholding certificate, or by oral or written confirmation, the withholding agent will have 90 days from the date it obtains the GIIN to verify its accuracy against the published IRS FFI list. Because withholding agents will be required to obtain the GIIN of each sponsored entity for payments made after December 31, 2016, sponsoring entities should consider registering to obtain GIINs well in advance of January 1, 2017, in order to give withholding agents sufficient time to complete this requirement (and thereby avoid being withheld upon).

4. TIMING OF EXCHANGE OF 2014 INFORMATION UNDER A MODEL 1 IGA

A. Model 1 IGAs for which the Obligation to Exchange Has Not Taken Effect

Many partner jurisdictions that have signed IGAs or reached an agreement in substance on the text of an IGA continue to work through their internal procedures to bring the IGA into force. Pursuant

to its authority under section 1471(b)(2)(B), and consistent with Announcement 2014-38, for Model 1 IGAs that have not yet entered into force on September 30, 2015, Treasury intends to continue to treat FFIs covered by the IGA as complying with, and not subject to withholding under, FATCA so long as the partner jurisdiction continues to demonstrate firm resolve to bring the IGA into force and any information that would have been reportable under the IGA on September 30, 2015, is exchanged by September 30, 2016, together with any information that is reportable under the IGA on September 30, 2016.

B. Model 1 IGAs for which the Obligation to Exchange Is in Effect For Model 1B

IGA jurisdictions that have an IGA in force pursuant to Article 10(1) or Article 12(1) (as applicable) of the IGA, and for Model 1A IGA jurisdictions for which the obligation to exchange information has taken effect pursuant to Articles 3(9) and 10(1) of the IGA, Article 3(5) of the IGA requires the partner jurisdiction to exchange information on U.S. reportable accounts with respect to 2014 by September 30, 2015.

Treasury and the IRS understand that partner jurisdictions are continuing to develop and implement the systems needed for automatic information exchange and may not have those systems in place by September 30, 2015. In addition, several partner jurisdictions are in the process of enacting legislation to implement their IGAs, without which they are not able to exchange information with the United States.

Consistent with treating 2014 and 2015 as a transition period, Treasury and the IRS will treat FFIs covered by an IGA as complying with, and not subject to withholding under, FATCA even if the relevant partner jurisdiction has not exchanged 2014 information by September 30, 2015, as long as the partner jurisdiction notifies the U.S. competent authority before September 30, 2015, of the delay and provides assurance that the jurisdiction is making good faith efforts to exchange the information as soon as possible. This notice does not affect the timing of when FFIs should report information to a partner jurisdiction, which remains governed by local law.

5. TREATMENT OF COLLATERAL UNDER THE GRANDFATHERED OBLIGATION RULE

A. Modifications to Pro Rata Rule for Pooled Collateral

Treasury and the IRS agree that, in order to ease administrative burdens when collateral secures both grandfathered obligations and obligations that are not grandfathered, the secured party should be permitted either to withhold on all collateral or to apply the pro rata approach with respect to such collateral. Therefore, Treasury and the IRS intend to amend to provide that the pro rata rule is not mandatory.

B. Substitute Payments Made with Respect to a Grandfathered Obligation

In balancing the benefits and burdens of the information reporting and withholding rules under FATCA, Treasury and the IRS agree that a substitute payment made with respect to a grandfathered obligation that has been posted as collateral should also be treated as a payment made under a grandfathered obligation, and therefore not subject to withholding under section 1471 or section 1472.

Therefore, Treasury and the IRS intend to amend the definition of grandfathered obligation to

include any obligation that gives rise to substitute payments and that is created as a result of the payee posting collateral that is otherwise treated as a grandfathered obligation.

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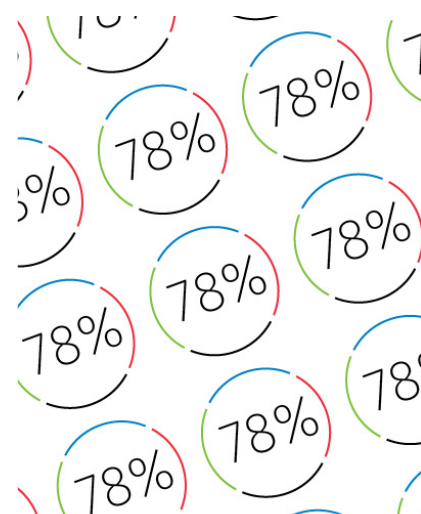
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