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IRS to Amend Certain FATCA Transitional Rules

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On September 18, 2015, the ***IRS*** issued Notice 2015-66 (the Notice), which provides that the ***Treasury Department*** and the IRS intend to amend regulations issued under ***Sections 1471-1474 of the Internal Revenue Code (commonly known as FATCA***). The Notice, among other things, indicates that the Treasury and the IRS will extend the date when withholding on gross proceeds and foreign pass-through payments will begin.

Withholdable Payments

FATCA was enacted with the aim of increasing the disclosure by foreign financial institutions (FFI), which includes offshore funds, and other foreign entities with respect to their direct and indirect U.S. investors. Generally, FATCA imposes a 30 percent withholding tax on "withholdable payments" made to an FFI unless the FFI has entered into an agreement to be treated as a participating FFI and meets certain other conditions. A withholdable payment includes, among other items, the gross proceeds from a sale or other disposition occurring after December 31, 2016 of any property of a type that can produce U.S. source interest or dividends.

In order for an FFI to be treated as a participating FFI, it must also agree to withhold on passthru payments to recalcitrant account holders and nonparticipating FFIs. A passthru payment is defined as any withholdable payment and any foreign passthru payment. The regulations reserve on the definition of a foreign passthru payment, but do provide that a participating FFI does not have to withhold on a foreign passthru payment before the later of January 1, 2017 or the date of publication of the final regulations defining a foreign passthru payment.

The Notice provides that the Treasury Department and the IRS intend to amend the FATCA regulations to extend the start date of withholding on gross proceeds from sales or other dispositions of any property of a type that can produce U.S. source interest or dividends to sales or other dispositions occurring after December 31, 2018. In addition, the Treasury Department and the IRS intend to amend the regulations so that withholding on foreign passthru payments will not begin before the later of January 1, 2019, or the date of the publication of the final regulations defining the term foreign passthru payments.

Limited Branches and Limited FFIs

Generally, in order for an FFI that is a member of an expanded affiliated group (EAG) to be treated as a participating FFI or a registered deemed-compliant FFI (an FFI that meets various conditions and procedural requirements), each member of the EAG that is an FFI must be a participating FFI, a deemed-compliant FFI or an exempt beneficial owner. An FFI can be treated as a participating FFI even if it maintains a branch or has an affiliate that cannot satisfy the requirements of a participating FFI if such branch meets the definition of a "limited branch" and the FFI meets certain other requirements or any non-compliant FFI affiliate meets the definition of a "limited FFI." The status of a "limited branch" and "limited FFI" were set to expire after December 31, 2015. In order to provide FFIs additional time to determine whether they want to continue to operate in jurisdictions where they may not be able to comply with FATCA, the limited branch and limited FFI status will terminate on January 1, 2017. Those FFIs operating in jurisdictions after December 31, 2016 that prohibit their compliance with FATCA risk their participating FFI status.

IGAs

In order to facilitate the implementation of FATCA in jurisdictions that had impediments to residents meeting the requirements of FATCA, the Treasury Department introduced Intergovernmental Agreements (IGA) in two forms, Model 1 and Model 2. Generally, an FFI that is a resident of a jurisdiction with an IGA will not be subject to withholding under FATCA if it complies with the requirements of the IGA. The Notice provides that for FFIs that are residents in jurisdictions that have agreed to enter into a Model 1 IGA, but where such IGAs have not been entered into force, such FFIs will be treated as complying with, and not subject to withholding under, FATCA, provided such jurisdiction continues to demonstrate its resolve in bringing the IGA into force and, if the obligation to exchange information is not yet effective, any information that would have been reportable under previous transition rules is exchanged by September 30, 2016.

If a jurisdiction has a Model 1 IGA that is in force, or the obligation to exchange information is effective, and the exchange of information with respect to US reportable accounts for 2014 will not take place by September 30, 2015, the FFIs covered by such IGA will be treated as complying with, and not subject to withholding under, FATCA if the jurisdiction notifies the U.S. before September 30, 2015 of the delay and provides assurance that the jurisdiction is making good faith efforts to exchange information as soon as possible.

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