



IRS releases corrections to final and temporary regulations TD 9808 and TD 9809

Closing the distance

On June 30, 2017, the IRS published corrections to final and temporary regulations [TD 9808](#) ("82 FR 2046") and [TD 9809](#) ("82 FR 2124"). The corrections to TD 9809 are more substantive and we begin with a discussion of the same.

A. Corrections to TD 9809

Originally released on January 6, 2017, TD 9809 contains amendments to the regulations under chapter 4 (sections 1471 through 1474) of the Internal Revenue Code ("IRC") commonly known as the Foreign Account Tax Compliance Act, or FATCA. Chapter 4 generally requires U.S. withholding agents to withhold tax on certain payments to foreign financial institutions ("FFIs") that do not agree to report certain information to the IRS regarding their U.S. accounts, and on certain payments to certain nonfinancial foreign entities ("NFFEs") that do not provide information on their substantial United States owners to withholding agents. The amended final and temporary regulations in TD 9809 concern principally information reporting by FFIs with respect to U.S. accounts and withholding on certain payments to FFIs and other foreign entities.

The newly issued corrections (found [here](#) and [here](#))(the "9809 Corrections") revise certain portions of TD 9809 adversely affected by prior inaccurate IRS amending instructions. These corrections involve the addition, deletion, or modification of regulatory language to clarify the relevant provisions to meet their intended purposes, or for consistency with other related provisions of the regulations. The corrections also include language inadvertently removed in a prior amendment to the final regulations.

As indicated above, the 9809 Corrections are published in two separate documents. The shorter of the two ([FR Doc. 2017-13631](#)) contains a single correction, which reads as follows:

*On page 2192, column 1, under the title heading PART 301--- PROCEDURE AND ADMINISTRATION, the first line , the language "Par. 23. Need Authority" is corrected to read "Par. 23. The authority citation for part 301 continues to read in part as follows: Authority: 26 U.S.C. 7805 * * *."*

The second document ([FR Doc. 2017-13632](#)) is much more substantive and contains a number of meaningful changes. These are:

- **Section 1.1471-1T** is amended by revising the third sentence of paragraph (b)(99) to read as follows:
An address that is provided subject to instructions to hold all mail to that address must be accompanied by certain documentary evidence described in §1.1441-1(c)(38)(ii).

For reference, the previous version of the third sentence of paragraph (b)(99) reads as follows:

An address that is provided subject to instructions to hold all mail to that address must be accompanied by certain documentary evidence described in §1.1441-1(c)(38)(ii) supporting the claim of foreign status.

The 9809 Corrections remove the language “supporting the claim of foreign status” from §1.1471-1T(b)(99). Prior to the release of TD 9809, an address subject to hold mail instructions was not considered a valid permanent residence address. Certain withholding agents had interpreted this provision to mean that a payee that provides an address subject to a hold mail instruction could not generally establish non-U.S. status (because, for example, a Form W-8BEN requires a permanent residence address). In response, TD 9809 revised the definition of permanent residence address to provide that an address that is subject to a hold mail instruction can be used to the extent accompanied by documentary evidence described in §1.1441-1(c)(38)(ii) supporting the claim of foreign status.

The 9809 Corrections modify this cure provision by requiring that the documentary evidence provided establish the account holder’s residency in the country in which they claim to be tax resident, as opposed to simply proving that the account holder possesses non-U.S. status. This new more stringent requirement significantly increases the burden involved in curing a hold mail address. For example, a non-U.S. passport may no longer be sufficient to cure a hold mail instruction. The precise documentary evidence that will be sufficient to cure a hold mail instruction is as yet unclear.

- **Section 1.1471-2** is amended by revising the third sentence of paragraph (a)(2)(i) to read as follows:

*Further, a withholding agent is not required to withhold on a payment that it can reliably associate with documentation indicating that the payee is a U.S. branch treated as a U.S. person (as defined in §1.1471-1(b)(135)) or is a U.S. branch **of an FFI** that is not treated as a U.S. person but that applies the rules described in §1.1471-4(d)(2)(iii)(C).*

For reference, the previous version of the third sentence of paragraph (a)(2)(i) reads as follows:

Further, a withholding agent is not required to withhold on a payment that it can reliably associate with documentation indicating that the payee is a U.S. branch treated as a U.S. person (as defined in §1.1471-1(b)(135)) or is a U.S. branch that is not treated as a U.S. person but that applies the rules described in §1.1471-4(d)(2)(iii)(C).

This 9809 Correction to 1.1471-2(a)(2)(i) clarifies that the rules found in §1.1471-4(d)(2)(iii)(C) are applicable to “U.S. branches of FFIs not treated as U.S. persons” as opposed to any U.S. branch.

- **Section 1.1471-3** is amended by revising paragraph (b)(3) to read as follows:

Determination of whether the payment is made to a QI, WP, or WT. A withholding agent may treat the person who receives a payment as a QI, WP, or WT if the withholding agent can reliably associate the payment with a valid Form W-8IMY, as described in paragraph (c)(3)(iii) of this section, that indicates that the person who receives the payment is a QI, WP, or WT, provides the person’s QI-EIN, WP-EIN, or WT-EIN, and the person’s GIIN, if applicable.

For reference, the previous version of paragraph (b)(3) reads as follows:

[Reserved]. For Further Guidance, see §1.1471-3T(b)(3)

This 9809 Correction converts §1.1471-3T(b)(3) from a temporary to a final regulation. For context, §1.1471-3 provides rules for the identification of payee and §1.1471-3(b) provides rules for the determination of payee status. A withholding agent must base its determination of the chapter 4 status of a payee on documentation that the withholding agent can reliably associate with such payment. Section 1.1471-3(b)(3) specifies that a withholding agent

may base its determination of the chapter 4 status of a QI, WP, or WT on a valid Form W-8IMY as described in §1.1471-3(c)(3)(iii).

- **Section 1.1471-4** is amended by revising paragraph (d)(3)(ii)(E) and adding a heading to paragraph (d)(7) to read as follows:

(E) Such other information as is otherwise required to be reported under this paragraph (d)(3) or in the form described in paragraph (d)(3)(v) of this section and its accompanying instructions.

(d)(7) Special reporting rules with respect to the 2014 and 2015 calendar years

For reference, the previous version of paragraph (d)(3)(ii)(E) reads as follows:

[Reserved]. For further guidance, see §1.1471-4T(d)(3)(ii)(E)

Section 1.1471-4(d)(3)(i) concerns the reporting of accounts under IRC section 1471(c)(1)(respecting "information required to be reported on United States Accounts"). Section 1.1471-4(d)(3)(ii) provides that in the case of an account described in §1.1471-4(d)(3)(i) that is held by one or more specified U.S. persons, a participating FFI must report to the IRS a specified series of data elements (e.g., name, address, and TIN of each account holder that is a specified U.S. person). Prior to the publication of the 9809 Corrections, the last of these data elements, "*Such other information as is otherwise required...*" was contained in temporary regulation §1.1471-4T(d)(3)(ii)(E). The 9809 Corrections convert §1.1471-4T(d)(3)(ii)(E) to a final regulation.

- **Section 1.1471-4T** is amended by revising the paragraph (d)(2)(ii)(G) introductory text to read as follows:

*(G) Combined reporting on Form 8966 following merger or bulk acquisition. If a participating FFI (successor) acquires accounts of another participating FFI (predecessor) in a merger or bulk acquisition of accounts, the successor may assume the predecessor's obligations to report the acquired accounts under paragraph (d) of this section with respect the calendar year in which the merger or acquisition occurs (acquisition year), provided that the requirements in paragraphs **(d)(2)(ii)(G)(1) through (4)** of this section are satisfied. If the requirements of paragraphs **(d)(2)(ii)(G)(1) through (4)** of this section are not satisfied, both the predecessor and the successor are required to report the acquired accounts for the portion of the acquisition year that it maintains the account.*

For reference, the previous version of the paragraph (d)(2)(ii)(G) introductory text reads as follows:

*(G) Combined reporting on Form 8966 following merger or bulk acquisition. If a participating FFI (successor) acquires accounts of another participating FFI (predecessor) in a merger or bulk acquisition of accounts, the successor may assume the predecessor's obligations to report the acquired accounts under paragraph (d) of this section with respect the calendar year in which the merger or acquisition occurs (acquisition year), provided that the requirements in paragraphs **(d)(2)(ii)(G)(1) through (6)** of this section are not satisfied. If the requirements of paragraphs **(d)(2)(ii)(G)(1) through (6)** of this section are not satisfied, both the predecessor and the successor are required to report the acquired accounts for the portion of the acquisition year that it maintains the account.*

This 9809 correction corrects a typo in the introductory language of §1.1471-4T(d)(2)(ii)(G). The old version of TD 9809 references paragraphs **(d)(2)(ii)(G)(1) through (6)** despite the fact that the section has only four paragraphs. The 9809 Corrections fix this by referencing paragraphs **(d)(2)(ii)(G)(1) through (4)**.

- **Section 1.1471-5** is amended by adding paragraph (f)(1)(i)(F)(3)(viii) and revising paragraph (f)(2)(iii)(C) to read as follows:

(viii) Has not had its status as a sponsoring entity revoked.

(C) Twenty or fewer individuals own all of the debt and equity interests in the FFI (disregarding debt interests owned by U.S. financial institutions, participating FFIs, registered deemed-compliant FFIs, and certified deemed-compliant FFIs and equity interests owned by an entity if that entity owns 100 percent of the equity interests in the FFI and is itself a sponsored FFI under this paragraph (f)(2)(iii)).

For reference, the previous version of paragraph (f)(1)(i)(F)(3)(viii) was not present in the text while paragraph (f)(2)(iii)(C) reads as follows:

(C) Twenty or fewer individuals own all of the debt and equity interests in the FFI (disregarding debt interests owned by U.S. financial institutions, participating FFIs, registered deemed-compliant FFIs, and certified deemed-compliant FFIs and equity interests owned by an entity if that entity owns 100 percent of the equity interests in the FFI and is itself a sponsored FFI under this paragraph (f)(2)(iii)).

Deloitte can identify no material distinction between the corrected version of §1.1471-5(f)(2)(iii)(C) and the preexisting version. Regarding new paragraph (f)(1)(i)(F)(3)(viii), §1.1471-5(f)(1)(i) contains various "registered deemed-compliant FFI categories." Among these, §1.1471-5(f)(1)(i)(F) is with respect to sponsored investment entities and controlled foreign corporations. Under same, an FFI is considered a sponsored investment entity or controlled foreign corporation if the FFI is described in §1.1471-5(f)(1)(i)(F)(1) or (2) and the sponsoring entity meets the requirements set out in §1.1471-5(f)(1)(i)(F)(3). The 9809 Corrections add to the list of requirements set out in §1.1471-5(f)(1)(i)(F)(3) a requirement that the FFI have not had its status as a sponsoring entity revoked.

• Lastly, **Section 1.1474-1** is amended by:

1. Revising the text of paragraphs (d)(4)(i)(C)(2) and (3).
2. Adding paragraph (d)(4)(ii)(C).
3. Revising the heading of paragraph (d)(4)(iii), and paragraphs (d)(4)(iii)(A) and (B).

The text of these revisions is too lengthy to include in this bulletin in entirety. However the substance of the changes is as follows:

- 1) The revisions to the text of paragraph (d)(4)(i)(C)(2) and (3) clarify that the rules found in §1.1471-4(d)(2)(iii)(C) are applicable to a U.S. branch of an FFI, as opposed to any U.S. branch.
- 2) New §1.1471-1(d)(4)(ii)(C) provides that if a U.S. withholding agent makes a payment to a disregarded entity and receives a valid withholding certificate or other documentary evidence from the person that is the single owner of such disregarded entity, the withholding agent must file a Form 1042-S treating the single owner as the recipient in accordance with the instructions to the Form 1042-S.
- 3) The heading of §1.1471-1(d)(4)(iii) is revised to: (iii) Reporting by participating FFIs and deemed-compliant FFIs (including QIs, WPs, and WTs) and U.S. branches of FFIs not treated as U.S. persons.
- 4) The heading of §1.1471-1(d)(4)(iii)(A) is revised to: (A) In general.
- 5) The heading of §1.1471-1(d)(4)(iii)(B) is revised to: (B) Special reporting requirements of participating FFIs, deemed-compliant FFIs, FFIs that make an election under section 1471(b)(3), and U.S. branches of FFIs not treated as U.S. persons.

B. Corrections to TD 9808

Also originally released on January 6, 2017, TD 9808 contains final and temporary regulations regarding persons making payments of U.S. source income to foreign persons and persons making payments to certain U.S. persons subject to reporting and backup withholding (i.e., the qualified intermediary regulations). On June 30, 2017, the IRS published [corrections](#) to TD 9808. The regulations affected by these corrections are §§1.1441-0, 1.1441-1, 1.1441-1T, 1.1441-3, 1.1441-4, 1.6045-1, and 1.6049-5, promulgated under sections 1441, 6045, 6049, and 7805 of the IRC. Similarly to the IRS's corrections to TD 9809, the corrections to TD 9808 revise certain portions of TD 9808 adversely affected by a prior series of inaccurate amendatory instructions. These changes principally involve the addition,

deletion, or modification of regulatory language to clarify the relevant provisions to meet their intended purposes. The specific changes, as listed by the IRS, are the following:

- to make a conforming change to the entry in the table of contents (§1.1441-0) for (§1.1441-1(e)(4)(ix));
- to correct typographical errors in §§1.1441-1(e)(4)(ix)(D), 1.1441-1T(c)(3)(ii), and 1.1441-3(d)(1);
- to clarify that the allowances for electronic signatures in §1.1441-1T(e)(4)(i)(B) and use of third party repository in §1.1441-1T(e)(4)(iv)(E) are limited to Forms W-8;
- to remove an obsolete cross-reference to §1.1441-4(h); and
- to return §1.6045-1(m)(2)(ii) and (n)(12)(ii) to the way those provisions read prior to “unnecessary revisions” in TD 9808.

For more information please [click here](#) or contact:

Denise Hintzke Managing Director, Global FATCA/CRS Tax Leader Deloitte Tax LLP +1 212 436 4792	Anne Mericle Senior Manager, Global FATCA/CRS PMO Deloitte Tax LLP +1 212 436 3908	Susan Schultz Managing Director, FATCA Global Delivery Center (GDC) Operations Leader +1 612 397 4604	Susan Segar Managing Director, Global Information Reporting Deloitte Tax LLP +1 703 885 6328
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Americas

Matthew Cahill Partner, Global Information Reporting Deloitte Tax LLP +1 212 436 3420	Steve Chapman Partner, Global Information Reporting Deloitte Tax LLP +1 212 436 2339	David Charlton Principal, Global Information Reporting Deloitte Tax LLP +1 617 437 2118
James Dockeray FATCA Leader, Caribbean/Bermuda Deloitte & Touche Ltd. +1 441 299 1399	Patty Florness Partner, Global Information Reporting Deloitte Tax LLP +1 212 436 7413	Andrea Garcia Castelao Senior Manager, Global Information Reporting-CRS Deloitte Tax LLP +1 212 436 3785
Anthony Martirano Managing Director, Global Information Reporting Deloitte Tax LLP +1 973 602 6986	Richard Marcovitz FATCA/CRS Leader, Canada Deloitte LLP +1 416 775 4760	Michael Shepard Principal, Deloitte Transactions and Business Analytics LLP +1 215 299 5260
Kristen Starling Managing Director, Global Information Reporting Deloitte Tax LLP +1 212 436 4281	Greg Thomas Principal, Global Information Reporting Deloitte Tax LLP +1 415 783 5211	

Asia-Pacific

Troy Andrews FATCA/CRS Partner, New Zealand Deloitte, New Zealand +64 93030729	Alison Noble FATCA/CRS Leader, Australia Deloitte Tax Services Pty Ltd +61 3 9671 6716	Radish Singh Forensic SEA for FATCA/CRS Deloitte & Touche Financial Advisory Services +65 6530 8077
Michael Velten FATCA/CRS Leader, Asia-Pacific Deloitte & Touche LLP +65 6531 5039		

Europe, Middle East & Africa

Brandi Caruso Tax Transparency Leader, Switzerland Deloitte AG +41 58 279 6397	Eric Centi FATCA/CRS Tax Partner, Luxembourg Deloitte LLP +352 45145 2162	Claire Dawson FATCA Tax Leader, Middle East Deloitte LLP +971 4 5064900
Owen Gibbs FATCA/CRS Tax Director, EMEA Deloitte LLP +44 20 7007 4819	Humphry Hatton FATCA Co-Leader, Middle East Deloitte LLP +971 4 5064730	Alex Law FATCA Leader, Middle East Deloitte LLP +971 4 506 4700
Chris Tragheim FATCA Tax Leader, EMEA Deloitte LLP + 44 20 7303 2848	Markus Weber Financial Services Industry Tax Leader, Switzerland Deloitte AG +41 58 279 7527	David C. Wright FATCA/CRS Tax Partner, EMEA Deloitte LLP +44 20 7303 4641

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