



Treasury publishes new final and temporary chapter 4 regulations

Closing the distance

On January 6, 2016, the Department of the Treasury and the IRS published in the Federal Register new final and temporary regulations under [chapter 4 of the Internal Revenue Code \("IRC"\) \(also known as the Foreign Account Tax Compliance Act \("FATCA"\) regulations\)](#). These regulations, effective on the date of publication, contain a substantial number of changes, some of which were described in previously-published Notices 2014-33, 2015-66, and 2016-08. These changes are described in detail in the preamble, with the final regulation changes addressed in Part I of the summary and the temporary regulation changes addressed in Part II. This publication notes the most impactful changes, but a more careful reading of the full text of the preamble and regulations is advised.

With respect to the final regulations, there are a number of definition changes under Treas. Reg. § 1.1471-1, some of which are highlighted below:

Documentation Rules

Reliance on Prior Form Versions

There were a number of changes in the updated regulations on documentation rules. Treas. Reg. § 1.1471-3 of the new regulations extends the validity period of prior versions of withholding certificates, allowing acceptance and reliance on prior versions of withholding certificates through the later of a) six full months after the revision date or b) the end of the calendar year during which the revised version is issued.

Requirements for US Branches of FFIs

The rules under this section for US branches of FFIs electing to be treated as a US person were amended, eliminating both the requirement for such US branches to be participating foreign financial institutions ("FFIs") or registered deemed-compliant FFIs and the need to furnish the Global Intermediary Identification Number ("GIIN") of the FFI of which it forms a part. This amendment was made because such a branch "is subject to withholding, due diligence, and information reporting requirements similar to any other US withholding agent." This rule also applies to a US branch that is *not* electing to be treated as a US person, except it must provide its taxpayer identification number and a certification that it is complying with the reporting, due diligence, and withholding rules under Treas. Reg. § 1.1471-

4(d)(2)(ii)(C) as if it were a participating FFI. Note that these rule changes only impact a US branch acting as an intermediary; a US branch receiving a payment as a beneficial owner, it must still provide the GIIN of the FFI of which it is a party.

Withholding Certificates Housed by Third Party Repositories

The temporary regulations clarify that a withholding agent can rely on a withholding certificate housed by a third party repository provided certain conditions are met. The general rule is that the documentation must be obtained directly from the payee or from its agent, a standard that is satisfied if the certificate is obtained from a third party repository that meets the regulatory requirements. As with any other withholding certificate, the same validation rules apply, and the withholding agent must review the form by the same standard to determine whether it is reliable. Additionally, the forms may be e-signed provided the electronic signature meets the standard provided in the temporary coordination regulations.

Hold Mail Addresses

The temporary regulations modify Treas. Reg. § 1.1471-1 in its treatment of hold mail addresses. As previously drafted, it appeared that an address with a hold mail instruction could not be used to establish a payee's permanent residency. Under these new temporary regulations, "an address that is subject to a hold mail instruction can be relied upon as a permanent residence address if the account holder provides documentary evidence establishing residence in the country where the account holder is claiming to be a resident."

Miscellaneous Documentation Rules

Other documentation rule changes include the following:

- *Exempt Payee Pools:* With respect to exempt payee pools, the regulations align the documentation rules with chapter 3, requiring documentation to be provided on all payees in the pool. Such payee documentation must include appropriate chapter 4 status codes for the payees for Form 1042-S reporting purposes, and the GIIN of the intermediary or flow-through entity must be provided on the withholding statement. Payment allocation information is now only needed for the pool rather than for each payee in the pool as those payees are not reportable. For payees listed within a pool that are treated as nonparticipating FFIs, documentation is no longer needed.
- *Government Documentation:* To document foreign status, the regulations previously required official documentation issued by an authorized government body. This requirement was softened to include any documentation that substantiates an entity's formation under the laws of a foreign country.
- *Indefinite Validity:* The claim of foreign status for individuals on a withholding certificate will be indefinitely valid if receipt of documentary evidence and withholding certificate occurs within 30 days of each other (regardless of which is received first). For entities, receipt of both within the validity period of either will result in indefinite validity; in other words, the claim of foreign status for an entity will be valid indefinitely if both the withholding evidence and documentary evidence are received by the withholding agent and neither has expired.
- *Chapter 4 Status Changes:* Withholding certificates will not need to be replaced for a change in circumstances that results in a change in chapter 4 status provided such change does not impact withholding. A FFI can provide oral or written confirmation, including an email, to document a change in chapter 4 status within 30 days of the change, and the withholding agent must retain a record of this confirmation.
- *Electronic Transmission of Forms:* Withholding agents can rely on faxed or electronically scanned Forms W-8 that were transmitted prior to March 6, 2014, the date of the rule change allowing electronic transmission.
- *Country Abbreviations:* Unambiguous country abbreviations on a withholding certificate no longer require curing documentation.
- *GIIN Requirement for Branches:* A GIIN must be obtained by a withholding agent making payments to a branch of a participating FFI or registered deemed-compliant FFI located outside of the FFI's country of residence or organization.

Removal of Jurisdictions from IGA List: As of January 1, 2017, the Treasury Department has initiated a review of the IGA List and will begin to remove jurisdictions that have failed to bring their IGAs into force. Such a change is considered a change in circumstances with respect to entities within those jurisdictions to the extent that the IGA status impacts their chapter 4 statuses. These temporary regulations state that a withholding agent has reason to know of a change in circumstances with respect to its FFI payees based on the changes to the IGA List and must cure the change within 90 days.

Sponsored Entity Registration and Documentation

Nonreporting IGA FFIs

The regulatory definition of Nonreporting Intergovernmental Agreement (“IGA”) FFI was revised to include a FFI that qualifies as a Nonreporting FI under Annex II of the Model 1 or Model 2 IGAs. Previously, entities such as sponsored entities within an IGA jurisdiction did not fall under the regulatory definition of Nonreporting IGA FFI, a misalignment with the IGA definitions and the Form W-8BEN-E instructions that is adjusted by these changes.

GIINs of Sponsored Entities

With sponsored entities obtaining GIINs as of January 1, 2017, withholding agents are now required to obtain and verify these GIINs by March 31, 2017. These GIINs can be obtained by oral or written communication, including email, rather than obtaining new withholding certificates for all sponsored entities. GIINs are not required to be obtained or verified for payees that provided a valid withholding certificate prior to January 1, 2017, that identifies the payee as a sponsored FFI and includes the GIIN of the sponsoring entity if the withholding agent determines, based on information provided on the withholding certificate, that the payee is resident, organized or located in a Model 1 IGA jurisdiction. In this circumstance, if the withholding certificate is obtained after January 1, 2017, the payee must identify itself as a Nonreporting IGA FFI.

Gross Amounts Paid or Credited

The definition of gross amounts paid or credited—the figure required to be reported under FATCA for any account that is a debt or equity interest in a FFI—was also provided by these temporary regulations. The proper figure to report is “the partner’s distributive share of the partnership’s income or loss for the calendar year, without regard to whether any such amount is distributed to the partner during the year, and any guaranteed payments for the use of capital.” This figure can be based on tax numbers, if available at the time of reporting, or can be sourced from other financial statements or using any other reasonable method used by the partnership to establish partners’ income shares. Note that this definition may be applied retroactively but is only mandatorily applicable to FATCA reports for calendar year 2017 onwards.

Other Definition Modifications

The final and temporary regulations contain a number of other definition updates and changes, as highlighted below:

- **Branch**
The definition of branch was updated to be a general definition to apply for all branches of a financial institution (“FI”), not just branches of participating FFI. This was the original intention of the definition under chapter 4, but the cross-reference was inconsistent and required amendment.
- **Preexisting Obligations**
The preexisting obligation definition was updated to align with Notice 2014-33 in providing transitional relief for documenting preexisting obligations issued, opened, or executed from July 1 to December 31, 2014. Note that use of this transitional relief prohibits application of the low-value threshold exemption.
- **US Person**
“US person” under the regulations has been amended to clarify that a dual resident—an individual considered a resident of both the US and also a jurisdiction with which the US has an income tax treaty—will not be considered a US person under chapter 4. Additionally, an alien individual electing to be treated as a US resident will not be considered a US person.
- **Foreign Insurance Company**
A foreign insurance company that has made an election under IRC section 953(d) to be treated as a US person will be treated as a US person for chapter 4 purposes provided it is not a specified insurance company. Previous temporary regulations included a requirement that such insurance companies not be licensed to do business in any state, and this requirement has been removed.
- **FFI**
The regulations modify the definition of FFI “to refer to an entity that is (or is not) resident in, or organized under the laws of, as applicable, a country that has in effect an IGA.” This change was made because certain jurisdictions determine a FFI’s jurisdiction using an organizational test rather than a residence test. Additionally, since the definition of a financial institution in the IGAs includes US financial institutions, for entities resident in a

Model 1 or Model 2 IGA country, the definition of FFI now means an entity that is treated as a FATCA Partner Financial Institution under the IGA.

- **Withholding Foreign Partnership as Sponsored Investment Entity**

A Withholding Foreign Partnership ("WP") is now permitted to be a sponsored investment entity to the extent allowed under the WP agreement.

- **Limited Life Debt Investment Entities ("LLDIEs")**

The definition of LLDIE was modified to allow for an LLDIE to hold non-debt assets in the case of a restructuring or bankruptcy without compromising its status.

- **Investment Advisors and Investment Managers**

The certified deemed-compliant category of investment advisors and investment managers is expanded to include investment entities that do not maintain financial accounts.

Additional Notable Changes

Withholding rules under Treas. Reg. § 1.1471-2 were modified to clarify treatment of a foreign branch of a US FI as a withholding agent. Previously, the temporary regulations treated such foreign branches as US withholding agents ("USWAs"), but clarification was needed to establish that the foreign branch is treated as a US payee, making it responsible as the primary withholding agent on any withholdable payments. Additionally, these regulations align a foreign branch's responsibilities as a USWA with its obligations as a reporting Model 1 FFI or Qualified Intermediary, where applicable. Additional changes were made with respect to grandfathered obligations in this section.

Treas. Reg. § 1.1471-4 contains updated regulations on withholding on foreign passthru payments, extending the transition period to the later of January 1, 2019, or the date of publication in the Federal Register to align the regulations with the timeline announced in Notice 2015-66. The section also updates the timeline for a responsible officer's certification of due diligence compliance in accordance with Notice 2016-08, allowing responsible officers until July 1, 2018 to submit certifications for both due diligence and general compliance. Other adjustments were made to this section to clarify account reporting requirements, including exempting a FFI that elects to report cash value insurance contracts or annuity contracts on Form 1099-R from reporting the account balance or value of those accounts for FATCA purposes. The regulations also outline Limited FFI status timelines in accordance with Notice 2015-66 and address other impacts of the Limited FFI status.

There are minor changes to Treas. Reg. § 1472-1 clarifying withholding and due diligence rules for nonfinancial foreign entities ("NFFEs"). The most notable change under this section is regarding a NFFE that has elected to be a direct reporting NFFE. Previously, a direct reporting NFFE could only revoke its election by obtaining consent from the Commissioner of the Internal Revenue Service. However, these regulations are amended to allow for revocation without consent by canceling the registration agreement on the FATCA registration website. A NFFE that has revoked such an election is required to notify counterparties from whom it receives payments of this change within 30 days.

The extension to January 1, 2019 for withholding on gross proceeds from the sale or other disposition of property, as announced in Notice 2015-66, was incorporated into Treas. Reg. §1.1473-1. This section also includes updates on the following:

- Withholding agents are now permitted to transmit Forms 1042-S to recipients electronically for both chapters 3 and 4 purposes.
- An Owner-documented FFI ("ODFFI") or a passive NFFE is not required to be reported by a withholding agent that makes a withholdable payment when the withholding agent receives a certification of reporting from the FFI receiving the withholdable payment allocable to the ODFFI or passive NFFE and the withholding agent has no reason to know that the certification is incorrect or unreliable. This certification can be included on the FFI's withholding statement.
- Form 8966 filing extensions are now available to withholding agents reporting on ODFFIs under the same rules and timelines applicable to other Form 8966 filers.

Additional updates and the text of the regulations are included in the Federal Register. As previously noted, a careful reading of the full text is recommended.

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