

FATCA Withholding Delayed for Non-Financial Foreign Entities

Although Notice 2011-53 released July 14, 2011, did not delay the effective date for FATCA withholding to non-financial foreign entities (NFFEs), a corrected version of Notice 2011-53 was released today that delays the withholding obligation of payors until January 1, 2014.

The new 30 percent withholding on payments to non-US entities scheduled to start in 2013 was delayed in regard to payments to foreign financial institutions (FFIs) until January 1, 2014, by the original version of Notice 2011-53. FFIs will be treated as participating FFIs (and not subject to the withholding) if they have registered as participating FFIs and entered into FFI agreements by June 30, 2013. The withholding obligations of participating FFIs in regard to passthru payments will begin no earlier than January 1, 2015.

NFFEs Can Join FFIs In Signing for Relief

Part of the HIRE Act passed early in 2010 introduced a new 30 percent withholding on payments to non-US entities. This is generally called FATCA withholding. FATCA withholding has two major parts: payments to FFIs and payments to NFFEs.

- Payments to FFIs will be subject to withholding unless the FFI enters into an agreement with the IRS to determine whether the entity has any direct or indirect US account holders. The agreement will also obligate FFIs to withhold on passthru payments made by the FFI.
- Payments to NFFEs will be subject to the new withholding unless the NFFE certifies that it has no direct or indirect US owners of more than 10 percent of the NFFE's equity (or provides information about those that it has).

Revised Notice 2011-53 Extends Dates for NFFEs

Revised Notice 2011-53 (released July 25, 2011) delayed the times that withholding will apply in regard to payments to NFFEs until January 1, 2014, in regard to FDAP payments in response to industry comments. In regard to any gross proceeds from the sale or other disposition of

any property of a type that can produce interest or dividends from sources within the United States, withholding has been delayed until January 1, 2015.

The Original Notice 2011-53 Extended Dates for FFIs

Notice 2011-53 (released July 14, 2011) delayed the times that withholding will apply in regard to payments to FFIs and in regard to passthru payments by FFIs in response to industry comments. As with NFFEs, FATCA withholding on payments to FFIs in 2014 will only apply to FDAP payments. In 2015, FATCA withholding will apply to (i) any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends from sources within the United States and (ii) passthru payments by the FFI..

- The IRS will begin accepting applications for entering into participating FFI agreements January 1, 2013.
- The time by which a participating FFI agreement must be entered into (so that payments to the FFI are not subject to FATCA withholding) has been delayed until June 30, 2013.

Key Terms

FATCA

Foreign Account Tax Compliance Act, enacted as Sections 1471 through 1474 of the Code as part of the HIRE Act.

FDAP

FDAP payments include any payments of interest (including original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodic gains, profits, and income if such payment is from sources within the United States.

FFI

Foreign financial institution. A financial institution is any entity which (1) accepts deposits in the ordinary course of a banking or similar business, (2) as a substantial portion of its business, holds financial assets for the account of others, or (3) is engaged (or holds itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities. Thus, a financial institution would include a hedge fund, a private equity fund, or other collective investment vehicle, as well as a bank. An insurance company will not be a financial institution for these purposes if the insurance company only sells property or casualty insurance or reinsurance contracts.

HIRE Act

Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111-147 (H.R.2847).

NFFE

Non-financial foreign entity. A non-financial foreign entity is any non-US entity that is not a financial institution. Certain NFFEs are excluded from the withholding obligations. Excluded non-financial foreign entities include (a) any corporation the stock of which is regularly traded on an established securities market, (b) any corporation which is a member of the same expanded affiliated group as a corporation the stock of which is regularly traded on an established securities market, (c) any entity which is organized under the laws of a US territory and which is wholly owned by one or more bona fide residents (as defined in Sec. 937(a)) of such US territory, (d) any foreign government, any political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one or more of the foregoing, (e) any international organization or any wholly owned agency or instrumentality thereof, (f) any foreign central bank of issue, and (g) any other class of persons identified by the Treasury for purposes of Sec. 1472(c).

Withholdable Payment

A withholdable payment under FATCA includes (1) any payment of interest (including original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodic gains, profits, and income if such payment is from sources within the United States and (2) any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends from sources within the United States.

For more information please contact Melanie Gnazzo (415-541-9020) or Paul Carman (312-845-3443). To the extent that any part of this summary is interpreted as being tax advice, (i) no taxpayer may rely upon this summary for the purposes of avoiding penalties, (ii) this summary may be interpreted for tax purposes as being prepared in connection with the promotion of the transactions described, and (iii) taxpayers should consult independent tax advisors.

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