

February 21, 2014

IRS Issues New FATCA Regulations

On February 20, 2014, the Internal Revenue Service (IRS) issued additional final and temporary regulations ([T.D. 9657](#)) under the Foreign Account Tax Compliance Act of 2009 (FATCA) as well as new regulations ([T.D. 9658](#)) that modify the international withholding, backup withholding and information reporting rules that apply outside the scope of FATCA. FATCA generally requires US withholding agents to withhold tax on certain payments to (i) foreign financial institutions that do not report requested information about accounts held by US persons to the IRS, and (ii) certain nonfinancial foreign entities that do not disclose information about their substantial US owners. The regulations issued on February 20 supplement and amend FATCA regulations issued in January 2013, and incorporate IRS administrative guidance issued over the past year.

The February 20 FATCA regulations are intended to make fixes to the existing FATCA regulations to:

- better coordinate the FATCA regulations with the general international withholding, backup withholding and information reporting rules,
- facilitate withholding and reporting procedures used by banks and other paying agents,
- avoid duplicate withholding and information reporting,
- align the FATCA regulations with the new draft IRS Forms W-8 (released throughout 2013), and
- align the FATCA regulations with the intergovernmental agreements (IGAs) that the US Treasury Department has been entering into with foreign governments.

The February 20 FATCA regulations make some notable changes to the FATCA regulations that were issued in 2013. These changes are positive changes that reflect comments from taxpayers and industry groups.

Guidance for withholding agents. One of those changes is intended to provide greater certainty to withholding agents with respect to grandfathered obligations that may lose grandfathered status and become subject to FATCA withholding tax. Certain obligations, such as debt instruments and swaps, that are issued before July 1, 2014, and that are not significantly modified after that date, are not subject to FATCA. If they are significantly modified after June 30, 2014, however, those obligations would become subject to FATCA withholding tax. Withholding agents have raised concerns that they would not know whether an obligation loses grandfathered status and, therefore, would be unsure whether their withholding obligations are satisfied. The IRS revised the FATCA regulations to apply an actual knowledge threshold with respect to the modification of the obligation. In most cases, a withholding agent would not have actual knowledge of a material modification until it receives a disclosure indicating that there has been or will be a material modification to the obligation.

Definition changes for foreign insurance companies. The February 20 FATCA regulations also provide that foreign insurance companies that elect under Section 953(d) to be treated as US persons for US tax purposes may be treated as US persons for FATCA purposes if the foreign insurance company is not an insurance company that issues (or is obligated to make payments with respect to) cash value insurance or annuity contracts (i.e., a “specified insurance company”), or is a “specified insurance company” that is licensed to do business in any state in the United States. This is a change from the prior FATCA regulations, which treated a foreign insurance company that is not licensed to do business in any state in the United States as a foreign person whether or not it made an election under section 953(d) to be treated as a US person.

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