

Part III - Administrative, Procedural, and Miscellaneous

Chapter 4 Implementation Notice

Notice 2011-53

I. BACKGROUND AND PURPOSE

On March 18, 2010, the Hiring Incentives to Restore Employment Act of 2010, Pub. L. 111-147 (H.R. 2847) (the Act) added chapter 4 (Chapter 4) to Subtitle A of the Internal Revenue Code (Code). Chapter 4 (comprising sections 1471 through 1474 of the Code) imposes information reporting requirements on foreign financial institutions (FFIs) with respect to U.S. accounts and imposes withholding, documentation, and reporting requirements with respect to certain payments made to certain foreign entities.

On August 29, 2010, the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) released Notice 2010-60, 2010-37 I.R.B. 329, providing preliminary guidance regarding the implementation of Chapter 4 and requesting comments on issues addressed in that notice and otherwise relevant to the implementation of Chapter 4. On April 8, 2011, Treasury and the IRS released Notice 2011-34, 2011-19 I.R.B. 765, which modified and supplemented the guidance in Notice 2010-60. Unless otherwise defined, terms used in this notice have the same meanings as set forth in sections 1471 through 1474, Notice 2010-60, and Notice 2011-34.

Treasury and the IRS have received numerous comments concerning the practical difficulties in implementing aspects of the Chapter 4 rules within the time frames provided in the Act and under Notice 2010-60 and Notice 2011-34. The

challenges identified relate to the time to develop compliance, reporting, and withholding systems necessary to comply with Chapter 4 and the implementing notices. In addition, a number of stakeholders have noted that complying with certain provisions may require coordination with a number of foreign governments. Treasury and the IRS have met with stakeholders and foreign governments to understand the specific administrative and legal challenges that must be addressed and the time necessary to do so. While the Act provides that the provisions of Chapter 4 are effective beginning in 2013, Treasury and the IRS have determined that because Chapter 4 creates the need for significant modifications to the information management systems of FFIs, withholding agents, and the IRS, it is reasonable for regulations to provide for a phased implementation of the various provisions of Chapter 4.

In light of these considerations, this notice describes the timeline for the implementation of Chapter 4 and discusses certain substantive and procedural matters that will be addressed in regulations issued by Treasury and the IRS. As described below, those regulations will provide that certain obligations of participating FFIs will commence in 2013. Further, those regulations will provide that the section 1471(a) withholding obligations of withholding agents with respect to amounts described in section 1473(1)(A)(i) (U.S. source FDAP payments) will begin on January 1, 2014. FFIs that would otherwise be subject to Chapter 4 withholding will be identified as participating FFIs and therefore should not be subject to such withholding if they have registered as participating FFIs and entered into FFI Agreements by June 30, 2013. The section 1471(b)(1)(D) withholding obligations of participating FFIs with respect to

pass-thru payments will be specified in future regulations, but will begin no earlier than January 1, 2015.

II. PHASED IMPLEMENTATION TIMELINE

A. Participating FFIs: Registration and Due Diligence

1. Registration of FFIs Beginning in 2013

The IRS will begin accepting FFI applications through its electronic submissions process no later than January 1, 2013. An FFI must enter into an FFI Agreement by June 30, 2013, to ensure that it will be identified as a participating FFI in sufficient time to allow U.S. withholding agents to refrain from withholding beginning on January 1, 2014. Because of the time needed for the IRS to process FFI applications and for U.S. withholding agents to verify whether a payee is a participating FFI, FFIs that enter into FFI Agreements after June 30, 2013, but before January 1, 2014, will be participating FFIs with respect to 2014, but might not be identified as such in time to prevent withholding beginning on January 1, 2014. The effective date of an FFI Agreement entered into any time before July 1, 2013, will be July 1, 2013. The effective date of an FFI Agreement entered into after June 30, 2013, will be the date the FFI enters into the FFI Agreement.

2. Participating FFI Due Diligence

a. New Accounts

A participating FFI will be required to put in place account opening procedures described in Notice 2010-60, as implemented in regulations, to identify U.S. accounts among accounts opened on or after the effective date of its FFI Agreement.

b. Pre-Existing Accounts

i. Certain Pre-Existing Private Banking Accounts (Equal to or Greater than \$500,000)

Within one year of the effective date of its FFI Agreement, a participating FFI will be required to have completed Step 3 of the pre-existing account due diligence procedures described in Section I.A.2 of Notice 2011-34 (the private banking procedures), for all accounts opened before the effective date of its FFI Agreement that are associated with a private banking relationship (including individual and entity accounts) and that have a balance or value of at least \$500,000 on the effective date of the FFI Agreement.

ii. Private Banking Accounts Less than \$500,000

A participating FFI will be required by the later of December 31, 2014, or the date that is one year after the effective date of its FFI Agreement, to complete the private banking procedures for all accounts opened before the effective date of its FFI Agreement that are associated with a private banking relationship and are not described in (i), above.

iii. Due Diligence for All Other Pre-Existing Accounts

For all pre-existing accounts not covered in sections (i) and (ii) above, a participating FFI must complete due diligence procedures as prescribed in Notice 2010-60, Notice 2011-34, and forthcoming regulations within two years of the effective date of its FFI Agreement.

iv. Private Banking Guidance

Regulations will provide further guidance on the scope of the private banking procedures and the associated search of account holder files. Regulations will also provide that, for purposes of applying the private banking procedures: (1) although private banking relationship managers must identify any client for which such relationship managers have actual knowledge that the client is a U.S. person and request a Form W-9 from such person, as set forth in Notice 2011-34, the review of account files may be completed by any person designated by the participating FFI; and (2) accounts subject to due diligence procedures and identified as either U.S. accounts or non-U.S. accounts will not be subject to additional due diligence procedures in subsequent years unless the account undergoes a change of circumstance.

B. Reporting

1. New Accounts, Documented U.S. Accounts, and Private Banking Accounts

An account for which a participating FFI has received a Form W-9 from the account holder (or, with respect to an account held by a U.S. owned foreign entity, from a substantial U.S. owner of such entity) by June 30, 2014, must be reported to the IRS as a U.S. account by September 30, 2014. These accounts generally will include: (1)

private banking accounts identified as U.S. accounts under the procedures set forth above and for which a Form W-9 has been collected by June 30, 2014; (2) new U.S. accounts opened after the effective date of the FFI's FFI Agreement and for which a Form W-9 has been collected; (3) documented U.S. accounts described in Section I.A.2 Step 1 of Notice 2011-34; and (4) existing U.S. accounts documented pursuant to Section 1.A.2 Steps 4 and 5 of Notice 2011-34 for which a Form W-9 is obtained by June 30, 2014. With respect to these identified U.S. accounts, a participating FFI that does not elect to report under section 1471(c)(2) must report in accordance with Notice 2011-34, except that for this first year of reporting, the participating FFI will only be required to report the following information:

- (i) the name, address, and U.S. TIN of each specified U.S. person who is an account holder and, in the case of any account holder that is a U.S. owned foreign entity, the name, address, and U.S. TIN of each substantial U.S. owner of such entity;
- (ii) the account balance as of December 31, 2013, or, if the account was closed after the effective date of the FFI's FFI Agreement, the balance of such account immediately before closure; and
- (iii) the account number.

The reporting described above is intended to provide participating FFIs greater flexibility to satisfy the reporting requirements of section 1471(c) and section IV.B of Notice 2011-34, and is not intended to change the information that generally must be reported as set forth in Notice 2011-34. Accordingly, reporting in 2014 will be made on

the same forms as will be used in subsequent years to report all required information, and participating FFIs may elect for 2014 to report any or all of the additional information described in section IV.B of Notice 2011-34 with respect to U.S. accounts. With respect to a participating FFI that elects reporting under section 1471(c)(2) for such accounts, the FFI may report only the items listed in (i) and (iii), above, for its report filed by September 30, 2014.

In accordance with its normal practice, the IRS will assess the accuracy of the reported information and communicate with the FFI to resolve discrepancies in the information, such as those regarding U.S. TINs. Unresolved discrepancies could result in an account being treated as held by a recalcitrant account holder.

For each account for which the participating FFI is not able to report the information above, because, for example, the account holder has not waived any applicable reporting restrictions, the FFI will report the account among its recalcitrant account holders with U.S. indicia in accordance with section IV.F of Notice 2010-60 and as prescribed in future guidance. The reporting with respect to recalcitrant account holders identified by June 30, 2014, will be required to be filed with the IRS by September 30, 2014.

2. Reporting with respect to Post-2013 Years

Reporting with respect to 2014 and subsequent years will be required as contemplated in Notice 2010-60 and Notice 2011-34 and as implemented in future regulations.

C. Withholding

1. Withholdable payments

Pursuant to the phased implementation procedures contemplated in this notice, regulations under Chapter 4 will implement withholding by withholding agents on withholdable payments in two phases. For payments made on or after January 1, 2014, withholding agents (whether domestic or foreign, including participating FFIs) will be obligated to withhold under section 1471(a) only on U.S. source FDAP payments. For payments made on or after January 1, 2015, withholding agents will be obligated to withhold under section 1471(a) on all withholdable payments (including both U.S. source FDAP payments and gross proceeds described in section 1473(1)(A)(ii)).

2. Passthru payments

Participating FFIs will be obligated to withhold on withholdable payments of U.S. source FDAP under section 1471(a) for payments made on or after January 1, 2014, but will not be required to withhold under section 1471(b)(1)(D) with respect to other passthru payments made before January 1, 2015. Accordingly, the obligations of participating FFIs with respect to computing and publishing their passthru payment percentage as set forth in Notice 2011-34 will not begin before the first calendar quarter of 2014.

III. TIMELINE FOR PUBLISHED GUIDANCE

Treasury and the IRS anticipate issuing proposed regulations incorporating the guidance provided in Notice 2010-60 as amended and supplemented by Notice 2011-34

and this Notice and providing further guidance on implementing Chapter 4 by December 31, 2011. After consideration of comments, Treasury and the IRS anticipate publishing final regulations in the summer of 2012. In conjunction with these regulations, Treasury and the IRS also anticipate issuing draft versions followed by final versions of the associated FFI Agreement and reporting forms for use by withholding agents and participating FFIs in the summer of 2012.

IV. MISCELLANEOUS

A. Qualified Intermediary and Other Withholding Agreements Expiring in 2012

All qualified intermediary agreements, withholding foreign partnership agreements, and withholding foreign trust agreements of entities qualifying as FFIs that expire on December 31, 2012, will be automatically extended until December 31, 2013. Any FFI that enters into an FFI Agreement on or before December 31, 2013, will be considered to have renewed its qualified intermediary agreement, withholding foreign partnership agreement, or withholding foreign trust agreement, as the case may be.

B. Clarification of the Scope of Grandfathered Obligations

Section 501(d)(2) of the Act provides that Chapter 4 shall not require any amount to be deducted or withheld from any payment under any obligation outstanding on March 18, 2012, or from the gross proceeds of any disposition of such an obligation. Section I of Notice 2010-60 defined the term “obligation” for this purpose to mean any legal agreement that produces or could produce withholdable payments, but not including any instrument treated as equity for U.S. tax purposes, or any legal agreement

that lacks a definitive expiration or term. Questions have been raised regarding whether legal agreements that give rise to passthru payments other than withholdable payments are excluded from the definition of “obligation” for this purpose. Treasury and the IRS intend to issue regulations clarifying that, for purposes of section 501(d)(2) of the Act, the term “obligation” means any legal agreement that produces or could produce passthru payments (including withholdable payments), but not including any instrument treated as equity for U.S. tax purposes, or any legal agreement that lacks a definitive expiration or term.

DRAFTING INFORMATION

The principal author of this notice is John Sweeney of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Mr. Sweeney at (202) 622-3840 (not a toll-free call).