

Tax alert: Captives



IRS and Treasury Department intend to treat foreign insurance companies with IRC §953(d) elections as “U.S. persons” for FATCA purposes

Fall, 2013

In brief

On Tuesday, October 29, 2013, the IRS and Treasury Department released Notice 2013-69 which contains proposed guidance for foreign financial institutions which must enter into an FFI agreement as part of the FATCA registration process. Notice 2013-69 also contains a very significant change for foreign insurance companies who have made the IRC §953(d) election to be taxed as U.S. entities.

The Foreign Account Tax Compliance Act (“FATCA”) was introduced as part of the HIRE Act of 2010. It requires foreign financial institutions (“FFIs”) to sign an agreement to provide information to the IRS regarding U.S. account holders or face a 30% withholding obligation on any withholdable payment. In cases where foreign law would prevent an FFI from complying with the terms of an FFI agreement, the Treasury Department has worked with foreign governments to develop two separate Intergovernmental Agreements (“IGAs”). In our PwC Newsbrief dated August 20, 2013, ([visit the Tax publications section of pwc.com/bm](http://pwc.com/bm)) we provided a brief overview of the new FATCA online registration system that all financial institutions subject to FATCA would use in order to comply with the various FATCA information reporting rules. Notice 2013-69 provides alerts about proposed updates to the final FATCA Regulations as well as a draft agreement to be used by participating FFIs reporting directly to the IRS and also by FFIs subject to what is known as the “Model 2 IGA.”

In detail

According to the final FATCA Regulations, foreign insurance companies who have made an IRC §953(d) election (“§953(d) companies”) are specifically excluded from the definition of “U.S. person” unless such entity is licensed to do business in a particular U.S. state. Very few §953(d) companies have taken this additional step. This meant that §953(d) companies would have to analyze whether they are FFIs or nonfinancial foreign entities (“NFFEs”), each category having its own information reporting and potential withholding requirements under FATCA. However, in the section of Notice 2013-69 entitled “Related Updates to Regulations,” the IRS and Treasury Department announce they “intend” a modification to the definition of “U.S. person” in the FATCA Regulations.

The IRS and Treasury Department intend to include foreign insurance companies that are not specified insurance companies and that elect pursuant to IRC §953(d) to be subject to U.S. income tax in the definition of “U.S. person.” This would be a very favourable modification to the existing FATCA laws because it would mean that §953(d) companies would not be subject to the rules and requirements imposed by FATCA (unless they fall under the definition of a “specified insurance company”¹ which generally includes insurance companies who sell policies with a cash value of greater than \$50,000 or annuities).

¹ A “specified insurance company” is an insurance company that issues, or is obligated to make payments with respect to, a cash value insurance or annuity contract.”

PwC observation

Although it would be very favourable for §953(d) companies to be included in the FATCA definition of “U.S. persons,” such insurance companies must keep in mind that they may still be considered a withholding agent for U.S. tax purposes. FATCA has a set of obligations which U.S. withholding agents must meet if they make withholdable payments under FATCA (e.g., insurance or reinsurance premium payments).

Let's talk

For a deeper discussion of how FATCA might affect your business, please contact:

Bermuda



Richard E. Irvine
Managing Director
D: 1 441 299 7136
C: 1 441 293 4102
richard.e.irvine@bm.pwc.com



Paul W. Eldridge
Director
D: 1 441 299 7148
paul.w.eldridge@bm.pwc.com



Belaid Jheengoor
Director
D: 1 441 299 7190
C: 1 441 296 8164
belaid.jheengoor@bm.pwc.com

Cayman



Scott D. Slater
Senior Manager
D: 1 441 299 7178
scott.slater@bm.pwc.com



Zack Rothman
Senior Manager
D: 1 441 299 7147
zack.rothman@bm.pwc.com



Damian Pentney
Insurance Leader
D: 1 345 914 8622
C: 1 345 938 8622
damian.pentney@ky.pwc.com