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Early IGA Countries Can Get Flexible New FATCA Account Reporting From Later Pacts

The Treasury Department has notified countries with early versions of agreements under the Foreign Account Tax Compliance Act that their banks can use the more favorable procedures for reporting new accounts available in later pacts.

Treasury said July 27 that it had sent letters to 40 countries informing them of the beneficial option. Practitioners welcomed the news July 29, saying it would not only offer conformity between intergovernmental agreements, but would ease the reporting requirements for banks in many nations.

''This is a favorable update to make sure that the earlier IGAs have the same beneficial treatment for new accounts as that in the later IGAs,'' Alan Granwell, of counsel at Sharp Partners P.A. in Washington, told Bloomberg BNA. ''This is in order to conform everything so that we don't have differing provisions.''

'More Favorable Terms' Available. Enacted in 2010 and taking formal effect July 1, 2014, FATCA requires foreign financial institutions to report U.S.-owned accounts to the Internal Revenue Service or face, in some cases, a 30 percent withholding tax on their U.S.-source income.

IGAs are accords that allow banks to report the information to their own governments, which then would share the data with the U.S. Later versions of the agreements offered alternate procedures for reporting new accounts that the earlier versions didn't have, particularly in cases of legal barriers.

In a letter the government published online, Treasury told the 40 recipients that the ''more favorable terms'' of the more recent agreements were available to them—a notification required under Article 7 of all the accords. Treasury said these terms would be available whether the agreement had entered into force or was still agreed to only in substance, and countries would have to decline the favorable terms in writing.

Countries such as Australia, Canada, France, Germany, Liechtenstein, Luxembourg, Switzerland and the U.K. were among those receiving the letter, Treasury said. Other recipients included the Cayman Islands, Gibraltar, Jersey, the Isle of Man and Mauritius.

Message of Equality. Jonathan Jackel, a partner with Burt, Staples & Maner LLP in Washington, said this part of the IGAs was an effort by the U.S. to move accords along in negotiations with dozens of countries.

There was concern in some countries that other jurisdictions might get better terms, and Jackel said July 29 that the U.S. was sending the message, ''We would never treat you like that. If we give somebody else a better deal, then we'll give you the same deal.''

He emphasized that this letter and others the U.S. has sent stressing that earlier FATCA partners can take advantage of more recent favorable treatment are critical, especially in situations where countries haven't yet been able to enact legislation that would allow full FATCA compliance.

''It's very important in those jurisdictions where either the agreement hasn't been signed or if it's been signed but not fully implemented,'' Jackel said. ''It gives you a path to compliance.''

New Procedures. In an attachment to the letter, using the British Virgin Islands as an example, Treasury outlined alternate procedures available for new accounts in cases where governments don't have the legal authority to require their banks to comply.

The attachment said banks must ask new account holders to self-certify their citizenship status—and confirm the ''reasonableness'' of the certification—within one year after the agreement enters into force.

The country itself must send information to the IRS on U.S. reportable accounts or accounts held at nonparticipating financial institutions by the later of:

- Sept. 30 following the date an account is identified as falling into either of these two categories, or
- 90 days after that account identification.

Closed Account Reporting A year after the IGA goes into force, banks will have to close accounts if they can't get the self-certifications or other documentation, and the taxing authority will have to report closed accounts to the IRS.

The attachment also provides procedures for new entity accounts opened on or after July 1, 2014, and before Jan. 1, 2015. The jurisdiction's government can allow its banks to treat these accounts as pre-existing entity accounts, the attachment said.

Susan Grbic, a tax partner at WeiserMazars LLP in New York, said July 29 that the account-closing issue is an ''interesting aspect'' of the Treasury procedures. Requiring banks to close accounts that can't be identified within a year is consistent with the IRS's answer to FATCA frequently asked question 10, Grbic said.

She noted that both the U.K. and Canada differ with the IRS view on this issue and would treat such accounts as recalcitrant and report them, but wouldn't close them. ''For jurisdictions unlike Canada and the U.K., each of which passed enabling legislation a long

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time ago, they will need to close accounts if they sign onto this 'more favorable' approach,'' Grbic told Bloomberg BNA.

Pros and Cons. John Harrington, a partner at Dentons in Washington, told Bloomberg BNA it's good that Treasury identified the specific IGAs that would be updated and the specific provisions that would be modified.

However, he said the government's action in offering better terms than those in already-signed IGAs carries both pros and cons.

''The benefit is that older IGAs get the more favorable new account opening procedures that were agreed to in more recent IGAs,'' he said July 29. ''The pitfall is that a reader cannot look at just the text of the signed IGA to know what the actual agreement is. One has to look for these changes and confirm that the IGA partner agreed to them.''

By Alison Bennett

To contact the reporter on this story: Alison Bennett in Washington at abennett@bna.com

To contact the editor responsible for this story: Cheryl Saenz at csaenz@bna.com

Texts of the Treasury letter and attachment are at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/Notification%20of%20More%20Favorable%20Terms%20%287-27-2015%29.pdf.

