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IRS Issues Proposed Regulations Providing Guidance on Definition of Registered Form

The IRS issued proposed regulations (REG-125374-16 (<https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-19753.pdf>)) providing guidance on the definitions of “registration-required obligation” and “registered form,” including guidance on the issuance of pass-through certificates and participation interests in registered form. The regulations also withdraw a portion of proposed regulations issued in January 1993 on the definition of a registration-required obligation. Comments and public hearing requests are due by Dec. 18.

In March 2012, in response to comments, the IRS issued Notice 2012-20 (<https://www.irs.gov/pub/irs-drop/n-12-20.pdf>) to provide additional guidance on the definition of registered form. The proposed regulations, consistent with Notice 2012-20, amend the definition to take into account current market practices and changes made by the Hiring Incentives to Restore Employment Act, including the repeal of the foreign-targeting rules of Section 163(f)(2)(B) (section references are to the Internal Revenue Code of 1986, as amended (Code)). The regulations also amend the definition of a registration-required obligation by specifying the types of obligations that are treated as “of a type offered to the public,” withdrawing the 1993 proposed regulations and taking into account comments requesting clarification on the types of arrangements that qualify as pass-through certificates.

The proposed regulations, for purposes of defining a registration-required obligation, generally treat an obligation as of a type offered to the public if the obligation is traded on an established market as determined under Treasury Regulation Section 1.1273-2(f). The regulations amend the definition of a pass-through certificate in response to comments that an entity that issues those certificates may hold a pool of debt instruments that are either fixed or variable. The regulations also eliminate a requirement that the fund hold a pool of loans, replacing it with a requirement that the fund primarily hold debt instruments. The regulations treat an interest that evidences co-ownership of one or more obligations as a registration-required obligation if, standing alone, the interest satisfies the definition of a registration-required obligation. The regulations also propose to amend Treasury Regulation Section 1.871-14(d)(1) to include a cross-reference to the rules for pass-through certificates and participation interests in the proposed regulations so that similar rules apply for purposes of the portfolio-interest exception.

The proposed regulations amend the definition of registered form by providing that an obligation is considered to be in registered form if it is transferable through a book entry system maintained by the issuer of the obligation, an agent of the issuer or a clearing organization. The regulations also provide that an obligation represented by a physical certificate in bearer form will be considered to be in registered form if the physical certificate is effectively immobilized. In response to comments, the regulations modify the requirement in Notice 2012-20 that a successor clearing organization hold the physical certificate subject to the same terms as the predecessor organization did. The preamble to the proposed regulations states that the Treasury and the IRS concluded that it is sufficient for the successor clearing organization to have rules that effectively immobilize the physical certificate. The regulations permit holders of obligations the right to obtain physical certificates evidencing the obligation in bearer form, without causing the obligation to be treated as not in registered form in two circumstances.

Tax Court Rules Surviving Corporation's Return in F Reorg Commenced Running of Statute of Limitations

The Tax Court, in *New Capital Fire, Inc.*, TC Memo 2017-177 (<https://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=11402>), ruled that the IRS's deficiency and penalty assessment was barred by the statute of limitations because the exception to the statute of limitations under Section 6501(c)(3) (applicable where a taxpayer fails to file any return) did not apply. Almost nine years after the surviving corporation in a purported F reorganization filed its tax return, the IRS asserted that the other corporation in the merger failed to file a return for its final short year. Regulations under Section 381 and other guidance provide that when a corporation engages in an F reorganization, the part of the tax year before the reorganization and the part after constitute a single tax year, and the resulting corporation must file a single full-year return.

IRS Extends Penalty Relief Provided for Partnerships to REMICs Filing Late

In a notice revising a previously issued notice (Notice 2017-47; 2017-38 IRB 1 (<https://www.irs.gov/pub/irs-drop/n-17-47.pdf>)) (see our prior coverage here (<http://www.stradley.com/insights/publications/2017/09/tax-insights-september-13-2017>)) that provided penalty relief to certain partnerships that filed untimely returns or requests for extensions of time to file those returns, the IRS has now also applied this relief to real estate mortgage investment conduits (REMICs), which are treated as partnerships for purposes of Subtitle F of the Code (relating to procedure and administration). Partnerships and REMICs that filed certain untimely returns or untimely requests for extension of time to file those returns for the first tax year that began after Dec. 31, 2015, by the 15th day of the fourth month following the close of that tax year will receive relief from the penalty for failure to timely file.

IRS Rules Partnership Income From Transporting Crude Oil Is Qualifying Income

The IRS issued Private Letter Ruling 201736020 (<https://www.irs.gov/pub/irs-wd/201736020.pdf>) finding that gross income derived by a limited partnership from agreements with producers to transport crude oil to designated delivery points is qualifying income under Section 7704(d)(1)(E).

IRS Updates Guidelines Regarding Foreign Grantees as Qualifying Public Charities

In Revenue Procedure 2017-53, 2017-40 IRB (<https://www.irs.gov/pub/irs-drop/rp-17-53.pdf>), the IRS provides guidelines that qualified tax practitioners may use for preparing written advice on which a domestic private foundation ordinarily may rely in making a good-faith determination that the foreign grantee of the foundation's grant is a qualifying public charity.

IRS Issues Reminder Regarding FATCA Agreements

In Information Release 2017-153 (<https://www.irs.gov/newsroom/irs-urges-foreign-financial-institutions-participating-in-fatca-to-check-their-registrations>), the

IRS reminds foreign financial institutions (FFIs) to renew their foreign financial institution agreement if required (for example, a participating FFI not covered by an intergovernmental agreement (IGA), or a reporting financial institution under a Model 2 IGA). These FFIs have until Oct. 24 to complete their renewal. An FFI that fails to do so could be removed from the IRS's November FFI list and be subject to a 30 percent tax on certain U.S. source payments.

JCT Releases Report Summarizing Individual Income Taxation

In a Sept. 12 report (JCX-41-17 (<https://www.jct.gov/publications.html?func=fileinfo&id=5020>)), the Joint Committee on Taxation released a report summarizing the general structure of the individual income tax and discussing adjusted gross income, taxable income, tax liability, filing requirements and effective marginal tax rates.

Numerous Groups Submit Comments on Partnership Audit Rules

The following groups released comments on the proposed partnership audit regulations:

- The Managed Funds Association (<https://www.managedfunds.org/wp-content/uploads/2017/09/MFA-Comment-Letter-on-Partnership-Audit-Regulatory-Framework.pdf>) seeks a delay in its effective date and raises issues that the group says need to be addressed to accomplish the intended goals of the Bipartisan Budget Act of 2015 and to avoid adverse consequences that may deter investment in private investment funds.
- The American College of Trust and Estate Counsel (http://www.actec.org/assets/1/6/ACTEC_Comments_on_Partnership_Audit_Rules_8_4_2017.pdf) suggests that the IRS allow trusts to be eligible partners when determining a partnership's eligibility to opt out of the new rules, noting that adding trusts to the class of qualified partners would not increase the audit burdens.
- The Real Estate Roundtable (<http://www.stradley.com/~media/Files/Publications/2017/09/RealEstRoundtable-08-11-2017.pdf>) states that creating a set of rules for the push-out of tax adjustments through tiered partnerships that works for taxpayers and avoids a mandatory, entity-level tax is critical to the long-term success of the new audit regime.
- The American Fuel & Petrochemical Manufacturers (<http://www.stradley.com/~media/Files/Publications/2017/09/AFPM-IRS-Comments-on-Partnership-Audit-Regime-08-14-17.pdf>) raises concerns regarding elections out of the new audit rules, imputed underpayments and push-out elections, and it has addressed the impact of the Tax Technical Corrections Act of 2016 and requested delayed implementation of the new regime.
- The National Venture Capital Association (http://www.stradley.com/~media/Files/Publications/2017/09/NVCA_Comment-Letter-Regarding-Partnership-Audit-Rules-8-14-17.pdf) requests that the effective date of the rules be delayed by one year and that modifications be

made to the push-out procedures.

- The Master Limited Partnership Association (<https://www.mlpassociation.org/wp-content/uploads/2017/08/MLPA-BBA-Comment-Letter-FINAL-8.11.17.pdf>) advises the IRS not to “upset the careful balance struck by Congress” or to impose administrative burdens on partnerships seeking to push out adjusted items to their partners.
- The American Bar Association Section of Taxation’s comments (https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/091117comments_authcheckdam.pdf) include information on state and local tax implications of the rules.
- The Investment Company Institute (<https://www.ici.org/pdf/30839a.pdf>) urges the IRS to adopt provisions allowing the use of deficiency dividend procedures in some cases.
- The Pennsylvania Institute of Certified Public Accountants’ comments ([https://www.picpa.org/docs/site/keep_informeddoc/comment-letters/re-reg-136118-15-\(rin-1545-bn77\)-regarding-centralized-partnership-audit-regime.pdf?sfvrsn=7755a191_0](https://www.picpa.org/docs/site/keep_informeddoc/comment-letters/re-reg-136118-15-(rin-1545-bn77)-regarding-centralized-partnership-audit-regime.pdf?sfvrsn=7755a191_0)) focus on procedural questions rather than on the overall concept of the centralized regime.

IRS Releases Publication on REMICs Reporting Information

The IRS released an updated version of Publication 938 (rev. August 2017) (<https://www.irs.gov/pub/irs-pdf/p938.pdf>), “Real Estate Mortgage Investment Conduits (REMICs) Reporting Information (And Other

Collateralized Debt Obligations (CDOs)),” which provides directories relating to REMICs and collateralized debt obligations.

IRS Releases Additional International Practice Units

The IRS released the following international practice units (IPU):

- Withholding Refund Requests (https://www.irs.gov/pub/int_practice_units/wit_p_15_01_03.pdf): Reviews verifying refund requests of Section 1441 withholding on fixed or determinable annual or periodic income, and describes how to determine whether a nonresident alien’s request is allowable.
- Sourcing of Income (https://www.irs.gov/pub/int_practice_units/ftc_c_10_02_05.pdf): Discusses identifying an individual’s various types of income and the factors used to determine whether that income is U.S. or foreign sourced.
- Categorizing Income and Foreign Taxes (https://www.irs.gov/pub/int_practice_units/ftc_c_10_02_01.pdf): Reviews the appropriate identification of the types of foreign-sourced income and taxes to determine assignment into their proper categories or baskets.
- Creditable Foreign Taxes (https://www.irs.gov/pub/int_practice_units/ftc_c_10_01_03.pdf): Reviews the creditability of a claimed foreign tax credit, noting that a taxpayer may claim an FTC only for a creditable foreign tax that has been paid or accrued.



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