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## **FATCA 30% Withholding on Payments to Non-US Retirement Plans – Six-Month Delay on Withholding and Other Recent Developments**

The Foreign Account Tax Compliance Act (FATCA), as interpreted by the US Treasury, originally would have imposed a 30% withholding on most interest and dividends (“fixed, determinable, annual, periodic” (FDAP) payments) paid by US payors to non-US retirement plan funds beginning January 1, 2014 – unless such non-US plans are exempt under US Treasury regulation as described here:

[http://www.groom.com/media/publication/1225\\_Non\\_US\\_Pension\\_Fund\\_Exemptions\\_Under\\_Final\\_FATCA\\_Regulations.pdf](http://www.groom.com/media/publication/1225_Non_US_Pension_Fund_Exemptions_Under_Final_FATCA_Regulations.pdf), or are specifically listed in an “Intergovernmental Agreement” (IGA) entered into between the US and the other country. There have been a number of recent developments worth noting for non-US retirement plans, though we are not yet at the point of knowing precisely what non-US retirement plans will have to do to avoid the tax.

Perhaps most importantly, in IRS Notice 2013-43, the IRS announced that the January 1, 2014 beginning date for US payors (“withholding agents”) to institute the 30% withholding has been pushed back to payments made after June 30, 2014. This is good news. Hopefully, this will be something that those who design the all-important computer systems that perform such withholding can accommodate. This does not affect other rules for future FATCA withholding on certain other types of payments beginning in 2015 and 2017.

Some further observations are also in order. First, the IRS Notice indicates that, because the US Treasury is still negotiating IGAs with a number of jurisdictions (at least 75 by press reports), and the uncertainty that creates as to whether an IGA will be in effect with a particular jurisdiction, Treasury intends to soon provide a list of jurisdictions that will be treated as having an IGA in effect even though that IGA may not have entered into force as of July 1, 2014. However, because IGAs typically list with great specificity which types of retirement plans may be considered exempt beneficial owners and thus exempt from withholding, without the actual IGA to refer to, it is unclear how a particular retirement plan in a country whose IGA is still in negotiation will avail itself of an IGA exemption. Perhaps the list will only benefit non-US financial institutions that intended to register with the US government as being covered by an IGA (which registration website is not expected to be accessible until August 19, 2013). The US Treasury currently keeps a list of all finalized IGAs with various countries here: <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>. Of particular interest to non-US retirement plans would be Groom’s summary of the provisions of the country IGA exemptions for specific non-US retirement plans and related plans or accounts, periodically updated here: [http://www.groom.com/FATCA\\_IGA\\_Exemptions](http://www.groom.com/FATCA_IGA_Exemptions). At the time this is written, Spain and Germany have most recently been added to the list of countries with such IGAs.

Recently, the IRS also reissued a draft Form W-8BEN-E, the form to be filed with the US withholding agent under which a non-US retirement plan may claim an exemption from FATCA withholding under the Treasury regulations of general applicability (rather than a specific listing in an IGA). Generally, the new draft, dated July, 2013, has been revised to conform to the final regulations issued in January, 2013. It breaks those exemptions down to the six major exemptions for pension funds, which can be described as the “Treaty” exemption, the “Broad Participation” retirement fund exemption, the “Narrow Participation” retirement plan exemption, the “Investment Vehicles Exclusively for Retirement Funds” exemption (these first four are most likely to apply to a private sector pension fund investment vehicle), the “Similar to a 401(a) Plan” exemption, and the “Pension Funds of Governmental and Intergovernmental Employers” exemption. However, inasmuch as the instructions to the form have not been issued, it is not clear how much or what kind of evidence the non-US plan will be required to provide to support the declarations (made under penalties of perjury) on the form.

Plan sponsors of non-US exempt plans continue to be advised to look to the regulations and any IGA their country may be negotiating with the US Treasury for an exemption from the onerous FATCA withholding tax, and also to be watching for future guidance on what they may have to do to claim an exemption.