

Foreign Financial Institutions Face New Disclosure Requirement Continued

The required information is: (1) the name, address and social security number or TIN of each account holder that is a specified U.S. person; (2) the name, address and social security number or TIN of each substantial U.S. owner of any account holder that is a U.S.- owned foreign entity; (3) the account number; (4) the account balance or value; and (5) the gross receipts and gross withdrawals or payments from the account. The information must be provided each year for each account.

A “withholdable payment” is any payment of interest (including original issue discount), dividends, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments and other fixed or determinable annual or periodical gains, profits and income from sources within the United States, plus the gross proceeds from the sale of any property that can produce interest or dividends from sources within the United States. Withholding under the new law applies to portfolio interest and to gross proceeds from the sale of property, whereas previously portfolio interest was not subject to withholding when paid to a nonresident individual or a foreign corporation from sources within the U.S. and gross proceeds were subject to withholding only on the sale of a U.S. real property interest. The fact that the beneficial owner is entitled to an exemption or reduced rate of withholding under an income tax treaty does not prevent the 30% withholding from applying. Rather, to receive the treaty benefit the beneficial owner will have to file for a refund or credit.

“Foreign financial institution” is broadly defined to include any foreign entity that: (1) accepts deposits in the ordinary course of a banking or similar business; (2) holds financial assets for others as a substantial part of its business; or (3) is engaged primarily in the business of investing, reinvesting or trading in securities, partnership interests, commodities, or any interest in such securities, partnership interests or commodities. The definition includes hedge funds and private equity funds, as well as institutions more typically considered financial institutions.

As an alternative to avoiding the 30% withholding by meeting the disclosure requirements, a foreign financial institution may elect to provide full Form 1099 reporting as if it were a U.S. person and as if each holder of an account that is a specified U.S. person or U.S.-owned foreign entity is a natural person and a citizen of the U.S. If the election is made, the foreign financial institution is not required to report the account balance or value, or the gross receipts and withdrawals from the account.

Under a companion statute, a withholding agent must withhold at 30% on any withholdable payment made to any foreign entity which is not a financial institution, unless: (1) the beneficial owner or payee provides the withholding agent with either a certification that the beneficial owner does not have any substantial U.S. owners, or the name, address and TIN of each substantial U.S. owner; (2) the withholding agent does not know, or has no reason to know that any information provided about substantial U.S. owners is incorrect; and (3) the withholding agent reports the name, address and TIN of any substantial U.S. owner to the IRS. The 30% withholding for withholdable payments to a non-financial foreign entity does not apply to any payment beneficially owned by certain enumerated persons, including a publicly traded corporation, an entity formed under the laws of a U.S. possession and wholly-owned by residents of the possession, a foreign governmental unit, an international organization and a foreign central bank of issue.

Tax Section

Montgomery McCracken has the experience and talent to assist clients in all areas of federal, state, local and international taxation. We counsel clients regarding tax-free corporate reorganizations and taxable mergers and acquisitions, partnerships and joint ventures, tax efficient structures for investment vehicles and international operations, investment vehicles, international operations and tax issues faced by nonprofit and tax-exempt organizations.

Please contact a member of our Tax Section if you have questions or if we may be of assistance.

Attorneys

Gary M. Edelson+
Clifford Scott Meyer+*
Virginia P. Sikes+

E-Mail

gedelson@mmwr.com
cmeyer@mmwr.com
vsikes@mmwr.com

Telephone

215-772-7264
215-772-7445
215-772-7275

+ Admitted to practice in Pennsylvania

* Admitted to practice in New Jersey



The Tax Bulletin is produced by Montgomery, McCracken, Walker & Rhoads, LLP. This publication should not be considered legal advice and should not be relied upon without consultation with appropriate professional advisers.

©2010 Montgomery, McCracken,
Walker & Rhoads, LLP

123 South Broad St.
Avenue of the Arts
Philadelphia, PA 19109
215-772-1500
215-772-7620 fax

1235 Westlakes Dr.
Suite 200
Berwyn, PA 19312
610-889-2210
610-889-2220 fax

Liberty View
457 Haddonfield Rd.,
Suite 600
Cherry Hill, NJ 08002
856-488-7700
856-488-7720 fax

Cornerstone
Commerce Center
1201 New Road
Linwood, NJ 08221
609-837-6278
609-601-8785 fax

1105 N. Market St.
15th Flr.
Wilmington, DE 19801
302-504-7800
302-504-7820 fax

Richard L. Scheff, Chairman

Louis A. Petroni, New Jersey
Responsible Partner