Former Treasury Official's Assurances Haunt Withholding World

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A former top Treasury official's 2017 comments about holding off on some of the dividend equivalent rules have left some financial institutions wondering how to proceed.

Dana Trier, former Treasury deputy assistant secretary for tax policy, said in November 2017 that practitioners might want to hold off on updating their systems because the government was reconsidering whether the rules related to non-delta-one transactions should ever take effect.

His assurances were praised by practitioners, but Trier abruptly resigned a few months later.

"No one has publicly gone and said, 'I know that Dana Trier said this, but we're recanting his statement,'" Julio M. Jimenez of Marks Paneth LLP said June 6 at the International Tax Withholding and Information Reporting Conference in New York.

However, in September 2018 the IRS issued Notice 2018-72, 2018-40 IRB 522, which delayed the effective date for some rules on non-delta-one transactions in the final section 871(m) regulations (T.D. 9815) by two years, to January 1, 2021. Jimenez said it's possible that the IRS believes that Trier's words carry no weight and that the notice is the definitive say on the matter.

But Jimenez added that it would be helpful for the government to affirm that it's serious about the new 2021 deadline as financial institutions try to plan their next steps. He said implementing the non-delta-one rules will be "the lion's share of the work" on the section 871(m) rules and that budgeting for that work is beginning now. But he also noted that the IRS has been busy implementing guidance on the Tax Cuts and Jobs Act and may not feel compelled to publicly affirm the 2021 deadline.

Jay Klein of PwC said he believes that the notice took Trier's statement off the table.

'Completely Unreasonable' Timetable

Jimenez and Klein also discussed the section 1446(f) regulations (REG-105476-18) issued May 7, which explain how to apply the 10 percent withholding rules to foreign partners when the gain on a disposition results in effectively connected income.

The proposed rules call for an effective date of 60 days after the regs are finalized, which Klein said is "completely unreasonable." He said there are myriad practical challenges, including the potential for double taxation, that make the 60-day timetable unfeasible.

In Notice 2018-8, 2018-4 IRB 352, the IRS suspended implementation of section 1446(f) for some publicly traded partnerships. Practitioners had hoped the carveout for such partnerships would be permanent, Klein said, but the regs instead proposed creating a new regime to allow for gross proceeds withholding in the publicly traded context — which Klein said has never been done before.

Jimenez agreed that the 60-day timetable is “impossible,” adding that there will likely be serious industry pressure on the government to provide more time.