Modifications to Definition of United States Property under Section 956

Notice 2018-46

On May 11, 2012, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) published temporary and proposed regulations under section 956 in the **Federal Register** (TD 9589, 77 FR 27612, and REG-107548-11, 77 FR 27669, respectively) (the 2012 regulations). The 2012 regulations excepted from the definition of United States property (U.S. property) certain obligations arising from upfront payments on cleared notional principal contracts (NPCs) with respect to which full initial variation margin was posted. See §1.956-2T(b)(1)(xi) (as promulgated by TD 9589). On May 8, 2015, temporary and proposed regulations under sections 446 and 956 were published in the **Federal Register** (TD 9719, 80 FR 26437, and REG-102656-15, 80 FR 26500, respectively) (the 2015 regulations). The 2015 regulations under section 956 extended the exception to the definition of U.S. property contained in the 2012 regulations to certain obligations of United States persons arising from upfront payments made with respect to uncleared NPCs, if certain conditions were met. See §1.956-2T(b)(1)(xi) (the full margin or cash collateral exception) (as promulgated by TD 9719).

The Treasury Department and the IRS have received several comments on the 2015 regulations, including regarding uncertainty about the application of §1.956-2T(b)(1)(xi). For example, commenters requested clarification regarding the application of the exception when a combination of cash and other property is posted as margin, particularly in light of the rule in section 956(c)(2)(J) that provides an exception from U.S. property to the extent that readily marketable securities are posted as collateral (qualifying collateral). Commenters requested that the exception apply (1) to the extent that qualifying collateral has been posted as margin in respect of an upfront payment regardless of whether the remainder of the payment is collateralized (similar to the exception in section 956(c)(2)(J)), and (2) without regard to whether the underlying derivative financial instrument is an NPC. The temporary 2015 regulations will expire on May 7, 2018.

In light of the foregoing, the Treasury Department and the IRS intend to publish regulations that will provide an exception from the definition of U.S. property (similar to the exception in section 956(c)(2)(J)) for an obligation (without regard to whether such obligation arises in connection with a derivative financial instrument that is or is not an NPC) of a United States person to the extent the principal amount of the obligation does not exceed the fair market value of cash and readily marketable securities posted or received as margin or collateral for the obligation in the ordinary course of its business by a United States or foreign person that is a dealer in securities or commodities. Before the issuance of the regulations, taxpayers may rely either on the provisions of this notice (including with respect to obligations arising before May 4, 2018) or on the full margin or cash collateral exception provided in the 2015 regulations.

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