FRIED FRANK

To Our Clients and Friends

Memorandum

April 16, 2020

IRS Delays in Processing EIN Applications for Non-U.S. Entities

In response to the Coronavirus pandemic, the Internal Revenue Service ("IRS") is operating at reduced capacity and is directing its available resources to "mission-critical" functions, such as accepting tax returns, sending refunds and processing economic impact payments under the Coronavirus Aid, Relief, and Economic Stability Act ("CARES Act"), which makes it more difficult to obtain U.S. employer identification numbers ("EINs") for certain entities, and which can have a number of consequences for newly formed entities.

In particular, non-U.S. entities must apply for EINs by phone, fax or mail (and this also applies for U.S. entities whose signatories do not have a Social Security Number or Individual Taxpayer Identification Number - for example, a U.S. entity that is owned and managed by non-U.S. individuals who have not obtained Individual Taxpayer Identification Numbers because they do not have U.S. tax filing obligations). With IRS personnel working remotely and focused on other priorities, the EIN phone and fax lines are currently inoperative, and the IRS does not appear to be actively processing mail applications. The IRS has not indicated when these resources will be available again, but it is possible that non-U.S. entities will be unable to obtain EINs for an extended period.

Most U.S. entities are unaffected and may obtain EINs using the online EIN assistant available at: https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online

EINs are required to be reported on all U.S. tax returns and many U.S. tax information statements and certifications, such as entity classification elections (also known as "check-the-box" elections) on IRS Form 8832, and certifications to avoid (or claim a reduction in) U.S. withholding on IRS Form W-9 (for U.S. persons) or the applicable IRS Form W-8 (for non-U.S. persons); although in certain cases, a non-U.S. person is not required to report its EIN (or other U.S. taxpayer identification number, or "TIN") on an IRS Form W-8. These withholding certifications are routinely requested from payees in business and investment transactions in order for the payor to determine whether and/or to what extent it has a withholding obligation. EINs are also commonly requested for a number of non-tax purposes, such as satisfying "know your customer" ("KYC") procedures when opening a U.S. bank account. Additional details regarding these common reasons for EINs, and potential interim strategies to address the inability to timely obtain an EIN, are included below.

The inability to obtain non-U.S. entity EINs is impacting a wide variety of transactions, including the formation of investment fund and M&A acquisition vehicles, completing subscription documents, transferring funds between entities, and making check-the-box elections. Your regular Fried Frank contacts are available to discuss these issues with you.

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Common Reasons for EINs and Interim Mitigation Strategies

- ***Opening a U.S. Bank Account***. U.S. banks typically will request the EIN of an entity seeking to open a bank account as part of the banks' KYC procedures. Representatives of the banks are likely aware that many newly formed non-U.S. entities are unable to provide an EIN at this time. You should discuss with those representatives how the bank is handling the situation, including whether alternative documentation can be provided or whether the EIN can be provided after the account is open (and IRS functionality is restored).

- ***Filing a U.S. Entity Classification (or "Check-the-Box") Election***. Certain business entities may elect a U.S. federal income tax classification (e.g., partnership, corporation, disregarded entity) different than their default classification, or change their existing classification, by filing IRS Form 8832 (a "check-the-box election"). This form must be mailed to the IRS no sooner than 12 months prior to, nor later than 75 days following, the desired effective date of the election. Any entity filing a check-the-box election must have an EIN. Revenue Procedure 2009-41 grants relief for elections that are up to three years late *if* there is "reasonable cause" for the late filing *and* (generally) any U.S. tax returns required to have been filed in the interim were consistent with the requested classification.

  On April 9, 2020, the IRS issued Notice 2020-23, which automatically extends the deadline for making certain tax payments or filing certain tax returns or other tax forms, including IRS Form 8832. According to the Notice, if a taxpayer's deadline for filing IRS Form 8832 falls between April 1, 2020 and July 15, 2020, the new deadline will be July 15, 2020. As a practical matter, Notice 2020-23 provides an extension for check-the-box elections with a specified effective date falling between January 17, 2020 and April 30, 2020. However, because the IRS ceased processing non-U.S. entity EIN applications before April 1, 2020 some taxpayers whose check-the-box elections were due in late March may have been precluded from timely filing a complete IRS Form 8832, but would not benefit from the relief offered by the Notice. For these taxpayers, a "reasonable cause" explanation under Revenue Procedure 2009-41 may be an appropriate remedy.

- ***Completing IRS Form W-9***. IRS Form W-9 is used to certify a person's status as a U.S. person and U.S. taxpayer identification number (e.g., SSN or EIN), usually to prevent withholding in connection with a payment made to the person providing the form.

  As mentioned above, most U.S. entities are still able to obtain EINs online and should be able to properly complete IRS Form W-9 in a timely manner. However, if delays are encountered (e.g., because the online EIN application is rejected and the application must be submitted by mail or fax) and the W-9 is requested in connection with an interest or dividend payment, or certain payments with respect to readily tradeable instruments, withholding may not apply if the EIN is provided to the requester within 60 days. In such case, the IRS Form W-9 may be provided with "Applied For" written in the TIN space (which the IRS interprets to mean that a TIN has been applied for or the signatory intends to apply for one soon). The 60-day grace period is not available for payment types other than those mentioned above, and withholding may apply to any such payments made until the EIN is provided to the requester. This withholding is not an additional tax and may be refunded if the EIN is timely furnished to the IRS.

- ***Completing IRS Form W-8***. IRS Form W-8 is used to certify a person's status as a non-U.S. person and is most commonly provided to establish the provider's eligibility for a reduced withholding tax rate

on certain U.S.-source payments under an income tax treaty and/or to comply with the Foreign Account Tax Compliance Act ("FATCA"). Certain non-U.S. entities are obligated to obtain U.S. EINs and to state their EINs on IRS Form W-8. However, a non-U.S. entity generally is not required to state an EIN on an IRS Form W-8 that is provided to claim treaty benefits if the entity provides a qualifying non-U.S. taxpayer identification number instead, or if the treaty claim relates to a dividend or interest paid with respect to certain actively traded securities. In many cases, amounts overwithheld as a result of the failure to furnish a properly completed IRS Form W-8 may be refunded, but obtaining such refund generally requires filing a U.S. tax return that the non-U.S. person may not otherwise have been required to file.

- ***Filing a U.S. Tax Return (Including Employment and Excise Tax Returns)***. Any person (U.S. or non-U.S.) that files a U.S. tax return generally must obtain a TIN (which in the case of an entity, would be an EIN). Many non-U.S. entities are not required to file U.S. tax returns, but a non-U.S. entity with U.S. trade or business income or an office or place of business in the United States, and certain other non-U.S. entities with a U.S. nexus, must file U.S. tax returns. Any such entity that does not already have an EIN will need to obtain one in connection with filing such returns. If a non-U.S. corporation or non-U.S. partnership has applied for, but not yet received, an EIN by the due date of its U.S. tax return, it may enter "Applied For" and the application date in the space on such tax return for the entity's EIN. A non-U.S. entity unable to obtain an EIN by phone or fax before the due date of its U.S. tax return should consider submitting an EIN application by mail prior to filing such return in order to satisfy this exception (though this approach may affect the entity's eligibility to file the tax return electronically). In this regard, it should be noted that corporations and partnerships generally are eligible for a six-month extension of the time to file their U.S. tax returns. This extension is requested by filing IRS Form 7004 no later than the unextended due date of the tax return, and is granted automatically to qualifying taxpayers. As discussed above, however, Notice 2020-23 automatically extends the deadline for filing certain U.S. tax returns until July 15, 2020. Taxpayers do not need to file any forms with the IRS to qualify for the July 15, 2020 extension. However, a taxpayer that would have been eligible for an extension beyond July 15, 2020 by filing IRS Form 7004 may still obtain such extension by filing IRS Form 7004 no later than July 15, 2020. That extension will not extend the time to pay applicable federal income taxes beyond July 15, 2020, but will give the taxpayer until the original statutory or regulatory extension date to complete and file the applicable tax return.

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Thanks to P. Ryan Davis and Xenia Garofalo for their assistance on this client memorandum.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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