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## IRS Extends Deadlines for FATCA Compliance

2011-07-21

On July 14, 2011, the Internal Revenue Service issued Notice 2011-53 (the "Notice"), which sets forth a timeline for the implementation of certain provisions of Sections 1471 through 1474 of the Internal Revenue Code (commonly referred to as the "Foreign Account Tax Compliance Act" or "FATCA"). While FATCA technically is effective January 1, 2013, the Notice extends various deadlines for withholding, reporting and other obligations under FATCA as described below.

The [Notice](#) is the third piece of guidance issued by the IRS with respect to FATCA. Please see our prior Client Alerts on this topic, which [discuss the initial guidance issued last August](#), Notice 2010-60 and the [guidance issued last April](#), Notice 2011-34.

### **FATCA Compliance Deadlines Relevant to Private Investment Funds**

#### ***Enter Into FFI Agreement by June 30, 2013***

Under FATCA, a private investment fund formed under the laws of a non-U.S. jurisdiction generally will be treated as a "foreign financial institution" (an "FFI") and will be required to enter into an agreement with the IRS (an "FFI Agreement") to comply with certain diligence, reporting and

withholding obligations with respect to its account holders (*i.e.*, the investors in the fund). An FFI that enters into an FFI Agreement and otherwise complies with FATCA is a "participating FFI." An FFI that does not enter into an FFI Agreement is a "non-participating FFI" that will suffer a 30% withholding tax on any "withholdable payments" that it receives.

The Notice provides that an FFI must enter into an FFI Agreement by June 30, 2013, to avoid incurring the 30% FATCA withholding tax on withholdable payments beginning January 1, 2014 (as described below). The IRS expects that it will begin accepting FFI applications through its electronic submission process no later than January 1, 2013.

The Notice further provides that while an FFI that enters into an FFI Agreement after June 30, 2013, but before January 1, 2014, technically will be a participating FFI, due to the time needed for the IRS to process FFI applications and for U.S. withholding agents to verify that a payee is a participating FFI, the FFI may not be identified as a participating FFI in time to prevent FATCA withholding on withholdable payments beginning January 1, 2014.

The effective date of an FFI Agreement entered into before July 1, 2013, will be July 1, 2013. The effective date of an FFI Agreement entered into after June 30, 2013, will be the date the FFI enters into the FFI Agreement.

### ***30% FATCA Withholding Tax on "Withholdable Payments" to be Phased In Beginning January 1, 2014***

The Notice provides that beginning January 1, 2014, a withholding agent (which will include a private investment fund formed under Delaware law) must begin withholding the 30% FATCA tax from withholdable payments

that constitute interest, dividends and certain other types of income from sources within the United States (such income collectively, "U.S. source FDAP income") made to non-participating FFIs. Beginning January 1, 2015, a withholding agent also must begin withholding the 30% FATCA tax from withholdable payments that constitute gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States (e.g., the sale of stock of a Delaware corporation) made to non-participating FFIs.

***30% FATCA Withholding Tax on "Passthru Payments" to be Phased In Beginning January 1, 2014***

FATCA requires a participating FFI to withhold a 30% tax from any "passthru payment" the FFI makes to a non-participating FFI or a "recalcitrant account holder" (as defined under FATCA). A "passthru payment" means a withholdable payment or other payment to the extent attributable to a withholdable payment.

The Notice provides that beginning January 1, 2014, a participating FFI is required to withhold the 30% FATCA tax on withholdable payments to non-participating FFIs that constitute U.S. source FDAP income. The Notice further provides that a participating FFI will not be required to withhold on other payments that constitute "passthru payments" before January 1, 2015. In addition, a participating FFI will not be required to calculate and publish its "passthru payment percentage" before the first calendar quarter of 2014 (as described in prior IRS Notice 2011-34, a "passthru payment percentage" is a percentage a participating FFI will be required to calculate that determines the extent to which any payments it makes are passthru payments subject to FATCA withholding).

## ***Account Due Diligence – Identifying United States Accounts***

FATCA requires a participating FFI to undertake certain diligence procedures to determine whether any of its accounts are "United States accounts" (as defined under FATCA).

For new accounts, the Notice provides that a participating FFI will be required to put in place account opening procedures to identify U.S. accounts opened on or after the effective date of its FFI Agreement (July 1, 2013 for most FFIs).

For most pre-existing accounts, the Notice provides that a participating FFI must complete due diligence procedures to identify U.S. accounts within two years after the effective date of its FFI Agreement. Due diligence procedures must be completed sooner for pre-existing "private banking accounts": within one year for such accounts with a value of \$500,000 or more on the effective date, and by December 31, 2014 for such accounts with a value of less than \$500,000 on the effective date.

The account diligence procedures that a participating FFI must employ to identify U.S. accounts were preliminarily described in the prior IRS Notices addressing FATCA and will be finalized in forthcoming IRS regulations.

## ***First FFI Reporting Deadline Under FATCA – September 30, 2014***

FATCA requires a participating FFI to report to the IRS on an annual basis certain information regarding its U.S. accounts. The Notice provides that the first deadline for reporting information under FATCA is September 30, 2014.

As a general matter, by this first reporting deadline, a participating FFI will be required to report to the IRS as a U.S. account, any account for which the FFI has received (employing due diligence procedures prescribed by IRS guidance) an IRS Form W-9 (or, if the account is held by a "United States owned foreign entity," the FFI has received an IRS Form W-9 from a "substantial United States owner" of such entity, as such terms are defined under FATCA). With respect to any such U.S. accounts, the participating FFI will be required to report the following information:

1. The name, address and U.S. TIN of each (i) "specified United States person" (as defined under FATCA) that is an account holder or (ii) if the account holder is a United States owned foreign entity, the name, address and U.S. TIN of each substantial United States owner of such entity.
2. The account balance as of December 31, 2013, or, if the account was closed after the effective date of the FFI's FFI Agreement, the balance of such account immediately before closure.
3. The account number.

A participating FFI also will be required to report to the IRS by the September 30, 2014 deadline certain information regarding accounts held by recalcitrant account holders.

In subsequent years, a participating FFI will be required to report additional information to the IRS to satisfy the requirements of FATCA.

### ***Timeline for Future FATCA Guidance***

The IRS expects to publish proposed regulations implementing FATCA by

December 31, 2011, and to publish final regulations in the summer of 2012. The IRS also anticipates issuing draft versions, followed by final versions, of the FFI Agreement and reporting forms for use by withholding agents and participating FFIs in the summer of 2012.

## **IRS CIRCULAR 230 DISCLOSURE:**

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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