

Client Alert

Current Issues Relevant to Our Clients

July 22, 2013

FATCA Final Regulations Released

On July 12, 2013, the IRS released Notice 2013-43 postponing the start of FATCA withholding by six months, to June 30, 2014. Also, certain jurisdictions will be treated as having an effective IGA, even though that IGA may not actually have entered into force.

The Notice states that the IRS intends to amend the FATCA regulations to adopt these rules. However, taxpayers may rely on the dates and deadlines provided in the Notice.

Background: The FATCA requirements

The FATCA regime was enacted in the United States in 2010 as a way to encourage tax reporting and compliance regarding assets owned by US persons through foreign accounts. Under FATCA, a new 30 percent withholding is required on withholdable payments to non-US entities unless they comply with the information-gathering and reporting requirements of FATCA. The withholding “tax” is generally called FATCA withholding and is separate from regular withholding under Code § 1441.

In January 2013, final regulations were published with a detailed framework for FATCA due diligence and reporting requirements.

Background: Intergovernmental Agreements (IGAs)

The United States is in the process of negotiating and signing IGAs with many foreign governments, which generally provide an alternate framework to the final regulations. The IRS has published two model IGAs. The Model 1 IGA allows FFIs to satisfy their FATCA reporting requirements by reporting to their local tax authorities and provides for the automatic exchange of information between the local tax authorities and the IRS. Under the Model 2 IGA, FFIs report directly to the IRS, consistent with the requirements in the final regulations, and the two governments exchange information by request.

Jurisdictions with IGAs are known as partner jurisdictions. Under the Model IGAs, partner jurisdictions may permit their FFIs to apply the due diligence procedures described in the final regulations instead of the procedures in the IGA.

Planned Changes to the FATCA Regulations

- Revised FATCA Implementation Timeline
- Enforcement of Signed IGAs That Are Not Yet in Force

Revised FATCA Implementation Timeline

The IRS has generally delayed FATCA implementation by six months. Details on this postponement include the following:

1. Withholding

- Withholding agents do not have to withhold on withholdable payments until July 1, 2014.
- The date to start FATCA withholding on gross proceeds stays the same at December 31, 2016.

2. Grandfathering

- The Notice also pushes back the grandfather date so that FATCA does not apply to obligations outstanding as of July 1, 2014.

3. Preexisting Accounts

- A preexisting account is redefined as a financial account maintained as of June 30, 2014, rather than December 31, 2013. Therefore, new account opening procedures for withholding agents will not be required until July 1, 2014.
- This change is also expected to be made to the Model IGAs.

- Partner jurisdictions with IGAs in force will be allowed to permit the FFIs to use the new definition of preexisting accounts.

4. Due Diligence

- The FFI agreement of a participating FFI that registers with the IRS on or before June 30, 2014, will have an effective date of June 30, 2014. Thus, the deadline for performing due diligence on preexisting obligations will be postponed to June 30, 2014. A participating FFI is an FFI that has agreed to comply with the requirements of an FFI agreement and thus is compliant with FATCA.¹
- For withholding agents other than participating FFIs, the deadlines for due diligence are postponed six months.
- The determination of account balances for the purposes of establishing the level of review will be measured as of June 30, 2014, except for accounts with less than \$1,000,000. Specifically, an account with a balance of \$1,000,000 or below and with respect to which there has been no change in circumstances will not be subject to enhanced review unless the account balance or value exceeds \$1,000,000 as of the end of 2015 or any subsequent year.
- A similar six-month delay for IGA due diligence procedures is also expected.

5. Reporting Deadline

- The final regulations provided that reporting on US accounts by participating FFIs for 2013 and 2014 would be due by March 31, 2015. The Notice requires reporting by March 31, 2015, only with respect to the 2014 calendar year.
- This postponement also affects the Model 1 IGA.

6. Registration

- The web portal for FATCA registration, previously expected in July, is now projected to be accessible on August 19, 2013.
- Any information input in the web portal will not be regarded as a final submission until January 1, 2014.
- On or after January 1, 2014, FFIs must submit their information as final on the web portal.

¹ Treas. Reg. § 1.1471-1(b)(85).

- No Global Intermediary Identification Numbers (“GIINs”) will be issued until 2014.
- The IRS will electronically post the first FFI list by June 2, 2014. To be included in the list, FFIs need to finalize their registration by April 25, 2014.
- Withholding agents do not need to verify the GIINs of participating FFIs or registered deemed-compliant FFIs for payments made with respect to Model 1 IGAs prior to January 1, 2015.

7. Withholding Certificates

- Withholding certificates and documentary evidence that would otherwise expire on December 31, 2013, will expire instead on June 30, 2014, unless a change in circumstances occurs that would otherwise render the withholding certificate or documentary evidence incorrect or unreliable.

8. Automatic Extension of Expiring QI, WP and WT Agreements

- All qualified intermediary, withholding foreign partnership and withholding foreign trust agreements that would otherwise expire on December 31, 2013, will be automatically extended until June 30, 2014.

9. Extension of Foreign-Targeted Registered Obligation Rules

- Under Notice 2012-20, there is a limited transition rule that withholding agents paying interest on an obligation issued before the implementation of FATCA withholding may apply the foreign-targeted registered obligation rules of Treasury Regulation § 1.871-14(e), if the obligation satisfies the requirements of those rules.
- This transition rule is now extended so that it applies to obligations issued in registered form between March 18, 2012, and July 1, 2014.

Enforcement of Signed IGAs That Are Not Yet in Force

A jurisdiction will be treated as having an IGA in effect if the jurisdiction is listed on the Treasury website.² As of July 19, 2013, those countries are:

- Denmark
- Germany
- Ireland

²<http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>

- Japan
- Mexico
- Norway
- Spain
- Switzerland
- United Kingdom

This list is intended to include IGAs that have been signed but not yet brought into force. Financial institutions resident in those jurisdictions will be permitted to register on the FATCA registration web portal as registered deemed-compliant FFIs or participating FFIs. In addition, a financial institution may designate a branch in those jurisdictions as not a limited branch.

A jurisdiction may be removed from the list if it fails to perform the necessary steps to bring the IGA into force within a reasonable period of time. If that occurs, financial institutions that are resident in that jurisdiction will no longer be entitled to the status that would be provided under the IGA and must update their status on the FATCA web portal.

Key Terms:

FATCA

Foreign Account Tax Compliance Act, enacted as Code §§ 1471 through 1474, and included as part of the larger HIRE Act.

FFI

Foreign financial institution. A financial institution is any entity which (1) accepts deposits in the ordinary course of a banking or similar business, (2) as a substantial portion of its business, holds financial assets for the account of others, or (3) is engaged (or holds itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities. Thus, a financial institution would include a hedge fund, a private equity fund, or other collective investment vehicle, as well as a bank. An insurance company will not be a financial institution for these purposes if the insurance company only sells property, casualty insurance or reinsurance contracts.

Intergovernmental Agreement (IGA)

Agreement between the IRS and a taxing authority of another nation which allows automatic information exchanges of account holder information between governments. Generally, FFIs which are resident in a country with an effective IGA will report to their own government and not to the IRS.

Withholdable Payment

A withholdable payment includes (1) any FDAP payment if such payment is from sources within the United States and (2) any gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends from sources within the United States.

For More Information

To discuss any of the topics covered in this Client Alert, please contact any member of the Tax Department or visit us online at chapman.com.

This document has been prepared by Chapman and Cutler LLP attorneys for informational purposes only. It is general in nature and based on authorities that are subject to change. It is not intended as legal advice. Accordingly, readers should consult with, and seek the advice of, their own counsel with respect to any individual situation that involves the material contained in this document, the application of such material to their specific circumstances, or any questions relating to their own affairs that may be raised by such material.

© 2013 Chapman and Cutler LLP. All rights reserved.

Attorney Advertising Material.