FOLEY HOAG LLP

FATCA Compliance for Investment Fund Managers, Part One

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April 2, 2013

U.S. Funds with Only U.S. Investors

FATCA, the new U.S. tax regime designed to combat offshore tax evasion by U.S. taxpayers, will go into effect on January 1, 2014. As a fund manager, you will be required to ensure that the investment funds you manage comply with FATCA.

You should act now to put procedures into place that will ensure FATCA compliance. Funds that fail to implement timely compliance procedures may be required to impose, or may be subject to, a 30 percent withholding tax on a broad range of U.S.-source items of income, including the gross proceeds from sales of certain securities.

This is the first in a series of Foley Advisers regarding FATCA. Each will introduce certain procedures that a fund must put into place to comply with FATCA, depending on whether the fund is a U.S. or non-U.S. entity, and whether the investors in the fund are U.S. or non-U.S. persons. This installment focuses on U.S. funds that have only U.S. investors ("U.S.-Only Funds"), and, specifically, the FATCA procedures that such funds will need to implement with respect to their investors.

If a fund that you manage is a U.S.-Only Fund (such as a Delaware limited partnership whose investors are all "U.S. persons," as defined for tax purposes), such a fund has only one basic requirement under FATCA with respect to its investors: the fund must obtain a valid IRS Form W-9 from each investor to confirm that the investor is a "U.S. person" for U.S. federal income tax purposes. To be "valid," an IRS Form W-9 must (1) contain the investor's name and taxpayer identification number, and (2) be signed and dated under penalties of perjury by the investor or a person authorized to sign for the investor.

In most cases, you will have obtained valid IRS Forms W-9 as part of your regular subscription procedures. If you have investors who for any reason did not provide a valid IRS Form W-9, you should ensure that they do so now.

If you manage funds that are organized outside the United States, such as master or feeder funds organized as Cayman Islands entities, or if your investors include investors who are not "U.S. persons," you will need to implement more extensive investor-related compliance procedures. Moreover, all funds may need to implement other FATCA-compliance procedures relating to certain payments made to non-investors, and may also need to verify that their portfolio companies are FATCA-compliant. Additional Foley Advisers in this FATCA series will address these procedures.

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