

## FATCA Compliance for Investment Fund Managers, Part Three

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June 26, 2013

### Offshore Master with U.S. and Offshore Feeders

This is the third in a series of Foley Advisers about FATCA, the new U.S. tax regime designed to combat offshore tax evasion by U.S. taxpayers that will go into effect on January 1, 2014. Our prior installments described FATCA compliance for (1) U.S. stand-alone funds and U.S. feeder funds with only U.S. investors (Part One [click here](#)), and (2) U.S. master funds with offshore feeder funds that are treated as corporations for U.S. tax purposes (Part Two [click here](#)). This Part Three focuses on preliminary FATCA compliance for offshore master funds with onshore and offshore feeder funds – for example, a Cayman Islands master (treated as a partnership for U.S. tax purposes) with a Delaware limited partnership feeder and a Cayman Islands feeder (treated as a corporation for U.S. tax purposes). The following discussion assumes that the offshore master fund is required to be FATCA-compliant.<sup>1</sup>

### Offshore Funds: Master and Feeder

The specific FATCA compliance obligations of an offshore master fund or an offshore feeder fund will depend on the country in which such offshore fund is organized. The United States currently is in the process of concluding FATCA-related Intergovernmental Agreements (“IGAs”) with countries throughout the world, based on two model agreements: the Model 1 IGA and the Model 2 IGA.<sup>2</sup> An offshore fund organized in a Model 1 jurisdiction will refer to the applicable Model 1 IGA and local law to determine its FATCA compliance requirements. In contrast, an offshore fund organized in either a Model 2 jurisdiction or in a country that is not a party to an IGA generally will refer to the U.S. FATCA regulations to determine its FATCA compliance requirements.

Regardless of whether your offshore fund is located in a country that is a Model 1, Model 2 or non-IGA jurisdiction, you must take the following preliminary steps:

- **Registration:** You must register each offshore fund entity with the IRS using the online “FATCA Registration Portal,” which will be accessible through the IRS’s website no later than July 15, 2013.<sup>3</sup> Upon successful registration, each of the offshore funds will receive a Global Intermediary Identification Number (“GIIN”), a special taxpayer identification number for FATCA purposes, and its name and GIIN will be included in an online list of FATCA-compliant entities that will be first published in December 2013 and then will be updated on a monthly basis.<sup>4</sup>
- **FATCA Agreement:** As part of the registration process, an offshore fund that is organized in a Model 2 or non-IGA jurisdiction will be required to enter into an agreement with the IRS, pursuant to which the offshore fund will agree to undertake certain due diligence obligations with respect to its current and future owners, submit information returns to the IRS with respect to certain U.S. owners, and conduct withholding on payments or allocations of certain U.S.-source income to non-U.S. entity owners that fail to comply with FATCA.<sup>5</sup>
- **IRS Form W-9:** The offshore master fund must maintain a valid IRS Form W-9 for its U.S. feeder fund in its files.
- **IRS Form W-8:** Once the offshore funds have registered and obtained their GIINs, each offshore fund should immediately complete a new, “post-FATCA” IRS Form W-8.<sup>6</sup>
  - ▶ The offshore master fund should maintain a valid “post-FATCA” IRS Form W-8 for the offshore feeder fund in its files and verify, on an ongoing basis, that the offshore feeder fund and its GIIN continue to be included in the published IRS list of FATCA-compliant entities.
  - ▶ In addition, the offshore master fund should prepare its own valid “post-FATCA” IRS Form W-8 and furnish it to entities in

which it invests, if required.

If the offshore master fund invests in another entity that is a “withholding agent” for FATCA purposes (such as an unrelated U.S. investment fund, or an unrelated non-U.S. investment fund that is subject to FATCA, in a fund-of-funds structure), and such investment was or is made prior to January 1, 2014, you generally will have a grace period until June 30, 2014 to provide the offshore master fund’s “post-FATCA” IRS Form W-8 and GIIN to the withholding agent in order to avoid the FATCA withholding tax.<sup>7</sup> In contrast, if the offshore master fund makes an *initial* investment in an entity that is a withholding agent on or after January 1, 2014, you generally will have 90 days from the date on which the offshore master fund acquires the interest to provide this information to the withholding agent.<sup>8</sup>

Regardless of the applicable deadlines, you should begin the FATCA registration process (1) with respect to existing offshore funds, as soon as possible after registration opens in July 2013, and (2) with respect to offshore funds formed after the FATCA Registration Portal becomes accessible, as soon as possible thereafter.

## Onshore Feeder Fund

In order to ensure that the onshore feeder fund is FATCA-compliant, you should follow the procedures in Part One (click here) if the onshore feeder fund has only U.S. investors, or the procedures in Part Two (click here) if the onshore feeder fund has U.S. and non-U.S. investors. In either case, the onshore feeder fund should provide the offshore master fund with a valid IRS Form W-9, if it has not done so already.

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The foregoing discussion is limited to the preliminary FATCA compliance obligations of offshore master-feeder structures. Offshore entities that must be FATCA-compliant will have additional ongoing obligations to maintain their compliance with FATCA. You should review your fund and subscription documents to ensure that they contain appropriate provisions to enable the offshore master fund and its onshore and offshore feeder funds to fulfill their additional FATCA compliance obligations, including provisions requiring investors to provide any needed information under FATCA.

FATCA compliance is case-specific. If you would like more detailed information regarding FATCA, please contact Kip Cawley, Rick Schaul-Yoder, Nicola Lemay, or your Foley Hoag lawyer.

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1. Not all foreign entities must be FATCA-compliant. Many factors, including source and type of income, affiliations with other foreign entities and business relationships may affect the determination of whether a foreign entity must be FATCA-compliant. An analysis of these factors and a discussion of this determination are outside the scope of this Foley Adviser.[↔](#)
  2. Most countries in which offshore funds typically are organized, including the Cayman Islands and the British Virgin Islands, have executed or currently are negotiating Model 1 IGAs.[↔](#)
  3. We will publish another Foley Adviser regarding access to the Portal after the IRS makes the information available.[↔](#)
  4. Even if an offshore fund completes the registration process in July 2013, the IRS will not begin issuing GIINs until October 2013.[↔](#)
  5. An offshore fund organized in a Model 1 jurisdiction will not be required to enter into a FATCA agreement, but will have similar responsibilities under the applicable Model 1 IGA and local law, including the obligation to collect information about its owners and furnish information to its local taxing authority with respect to certain U.S. owners, which information then will be shared with the IRS.[↔](#)
  6. Existing versions of IRS Form W-8 are not sufficient; the IRS intends to issue new versions of Form W-8 specifically for FATCA purposes. We will publish another Foley Adviser with links to these “post-FATCA” Forms W-8 after the IRS makes the final versions of such forms available.[↔](#)
  7. The applicable grace period for offshore funds with pre-2014 investments in non-U.S. entities organized in IGA jurisdictions may vary depending upon the terms of the applicable IGA.[↔](#)
  8. These deadlines also apply to offshore feeder funds and are based on the date an offshore feeder fund acquires its interest in an offshore master fund.[↔](#)

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