FATCA Registration Now Available

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On August 19, 2013, the IRS began to accept applications for registration under FATCA, the new U.S. tax regime designed to combat offshore tax evasion by U.S. taxpayers, by requiring foreign financial institutions ("FFIs"), including foreign investment funds and foreign investment management companies, to report information about their U.S. owners and accountholders. After numerous delays, the opening of the FATCA registration process marks the official beginning of the FATCA era, and each affected FFI must take steps to complete its FATCA registration before July 1, 2014, the date on which non-compliant FFIs will become subject to a 30 percent withholding tax on certain U.S.-source income.

The FATCA Registration Process

In order to be FATCA-compliant, you (if you are a non-U.S. investment management company) and each offshore fund you manage (each, for purposes of this discussion, an FFI) first must register with the IRS. In each case, to register, an FFI must either (A) register electronically through the online "FATCA Registration Portal," which is accessible through the IRS website, or (B) complete and file IRS Form 8957 (Foreign Account Tax Compliance Act [FATCA] Registration) in paper format. The paper and electronic versions are intended to be the same in substance; the differences are in the presentation of Form 8957, as well as the filing method, ease of editing and speed of processing.

Upon successful registration, an FFI will receive a Global Intermediary Identification Number ("GIIN"), a special taxpayer identification number for FATCA purposes, and its name will be included in an online list of FATCA-compliant entities that will be published and updated periodically by the IRS.

A. Required Information

To complete registration, whether online or on paper, each FFI will be required to provide basic identifying information, such as its full legal name, mailing address, and country of residence for tax purposes. In addition, such entities must provide their general classification for FATCA purposes, designate a "responsible officer" (the FFI's point of contact for FATCA purposes who is responsible for monitoring and ensuring the FFI's compliance with FATCA), and provide identifying and contact information about the designated responsible officer. Finally, the FFI may be required to disclose information about affiliated entities, U.S. branch operations and any pre-existing withholding arrangements with the IRS, if applicable.

B. Electronic Registration Encouraged

The IRS strongly recommends, as do we, that FFIs should register electronically, as opposed to filing Form 8957 in paper format, because electronic applications will be processed on an expedited basis, can be freely edited and amended until submitted as "final," and can be managed through the FFI's secure online account maintained through the FATCA Registration Portal on the IRS's website. In contrast, paper filings will not be processed concurrently with electronic registrations, and cannot be edited once submitted without filing additional paperwork, which may cause significant delays.

C. Getting Started

To register for FATCA electronically, an FFI (or its sponsoring entity or a lead member of its expanded affiliated group, as discussed below) must access the FATCA Registration Portal and create an account. Information about the FFI and the FFI's branch operations, if any, may then be input into the registration system. All input information will be saved automatically in the system and associated with the FFI's account.

Even though the FATCA registration process is now available, the IRS will not begin to process registrations until January 1, 2014. As a result, any information entered into the online FATCA Registration Portal will not be processed as a "final" submission, but rather will be stored as an "open" registration file, and may be edited until the registration has been submitted as "final" on or after January 1, 2014. Accordingly, FFIs will have the opportunity to use this "grace period" to become familiar with the FATCA Registration Portal and input and modify information. This will be particularly useful for FFIs that are located in jurisdictions whose status as a "partner jurisdiction" with the United States (through an intergovernmental agreement) is currently pending and does not become finally determined until a later date. For example, the British Virgin Islands and the United States have not concluded an agreement relating to FATCA, although they have begun the negotiation process; accordingly, the FATCA classification of an FFI located in the British Virgin Islands (to be disclosed in the registration process) is different today than it will be once such an agreement is finalized. In addition, the "grace period" will allow FFIs to determine their affiliations and/or delegate their FATCA responsibilities to a related entity or third party, as discussed below. As stated above, any information entered into the online FATCA Registration Portal, including an FFI's FATCA classification, affiliation or delegation, may be edited until the information is submitted as "final" on or after January 1, 2014.

D. Expanded Affiliated Groups and Sponsoring Entities

In certain circumstances, an FFI's registration and compliance obligations under FATCA may be undertaken by a third party, which may or may not be a related person, depending on the circumstances. In the context of an expanded affiliated group ("EAG", as defined in the next paragraph), one or more members of the EAG may assume the FATCA registration and compliance obligations (e.g., due diligence and information reporting) of other designated members of the EAG. Similarly, outside the context of an EAG, a "sponsoring entity" may enter into a contract with one or more FFIs to perform the "sponsored" FFIs' obligations under FATCA. In either case, however, the non-lead EAG members and sponsored entities that delegate their FATCA responsibilities to third parties will remain liable for their own non-compliance and, therefore, will be held responsible for any errors made by a lead EAG member or sponsoring entity on their behalf. Nevertheless, the benefit of delegating FATCA compliance is that an FFI can outsource its FATCA compliance obligations instead of building an in-house capacity for such tasks. For example, fund entities that already rely on you, in your capacity as fund manager, to run daily functions may delegate FATCA responsibilities to you in order to conduct FATCA compliance in a manner that more closely matches the reality of the existing business model.

An EAG is a group of entities linked by chains of more than 50 percent direct ownership. In the case of a corporation, the 50 percent ownership threshold is determined by measuring the percentage ownership of the aggregate voting rights and value of the corporation's stock. In the case of a partnership, the 50 percent ownership threshold is determined by measuring the percentage ownership of the value of beneficial interests in such partnership. For example, in a master-feeder structure, if a Cayman Islands feeder fund (treated as a corporation for U.S. tax purposes) owns 100 percent of the value of the beneficial interests in a Delaware master fund (treated as a partnership for U.S. tax purposes), the two fund entities would be members of an EAG for FATCA purposes.

EAG membership is significant for two primary reasons. First, if an FFI is a member of an EAG, even if such FFI complies with FATCA in its own right, it will be deemed to be "FATCA-compliant" only if every other FFI in the EAG complies with FATCA. Second, an EAG may designate one or more members of the EAG (domestic or foreign) to be the "lead" members of the EAG for FATCA purposes, which causes such members to assume the FATCA compliance obligations for other designated members of the group. As a result, EAG-wide FATCA compliance may be centralized in one or more entities that may register other member FFIs on the online FATCA Registration Portal, maintain and modify the members' registration information, and undertake such members' FATCA compliance obligations. This centralization of responsibility can protect members of an EAG from being deemed non-compliant because of another member's failure to comply with FATCA.

Similarly, outside of the EAG context, certain FFIs may be "sponsored" by an entity that is engaged by the FFI to be responsible for the FFI's FATCA registration and compliance obligations. For example, you may enter into contractual arrangements with the offshore funds you manage to act as their "sponsoring entity." As discussed above, this arrangement allows you to add FATCA compliance to the list of tasks you already perform for the funds you manage.

In both cases, the designation of entities as "lead members" or "sponsoring entities" may be changed. However, GIIN coding is tied directly to these designations, and the process for re-designating "lead members" and "sponsoring entities" has yet to be tested.

FATCA is still a work in progress. The IRS has yet to issue additional guidance to clarify certain issues left unresolved by the final FATCA regulations issued in early 2012 or many of the FATCA-related updates to existing IRS forms, such as Forms W-8 and W-9. In addition, the U.S. Treasury is still in the process of negotiating and executing FATCA-related intergovernmental agreements with "partner jurisdictions" throughout the world, and many of the existing and prospective "partner jurisdictions" have not enacted new legislation or regulations to establish their own legal infrastructure to handle FATCA compliance. Accordingly, the full roadmap to FATCA compliance remains far from clear.

Nevertheless, the opening of the FATCA registration process marks an important milestone in the history of this new U.S. tax regime. Although many questions remain unanswered, it is clear that affected FFIs must begin to act in order to be FATCA-compliant by July 1, 2014, the date on which FATCA withholding begins.

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