FATCA: With Deadlines Looming, the Time to Act is Now

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February 26, 2014

On July 1, 2014, FATCA[i] will go into effect. As a consequence, foreign entities that receive payments or allocations of certain U.S.-source income generally will be subject to a new 30 percent U.S. withholding tax on such income unless such foreign entities comply with FATCA or otherwise are exempt from FATCA. Despite numerous prior extensions, the U.S. Internal Revenue Service (IRS) has stated that the July 1st effective date will not be extended further. Accordingly, time is running out for foreign entities to determine whether FATCA is applicable and, if so, to take steps to become FATCA-compliant by the time FATCA becomes effective.

At a minimum, <u>every</u> foreign entity should undertake a self-analysis <u>now</u> and, if FATCA compliance will be required for such entity by July 1, 2014, such entity must take steps to prepare for FATCA registration and complete its registration with the IRS by **April 25, 2014**.[ii]

The following list sets forth the basic questions each foreign entity must answer before April 25, 2014:

1. What is the entity's proper general classification for FATCA purposes?[iii]

- Foreign Financial Institution (FFI) or Non-Financial Foreign Entity?

2. If an FFI, is FATCA registration required?

3. If an FFI for which FATCA registration is required:

- Is the FFI a member of an "expanded affiliated group"?[iv]
    - If so, will the FFI act as the "lead" member of such group?
- Who will act as the FFI's "responsible officer"?[v]
    - The FFI must take whatever action is necessary to appoint and authorize such person to act as the FFI's "responsible officer."

FATCA is governed by extensive U.S. Treasury Regulations, as well as a growing web of intergovernmental agreements. Although FATCA has yet to be tested and the universe of FATCA guidance is still being developed, FATCA is very real and could have significant consequences on international business and investment structures. There is still time to prepare for FATCA and to become FATCA-compliant before FATCA goes into effect, but time is of the essence.

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i. FATCA is a new U.S. tax regime designed to combat offshore tax evasion by U.S. taxpayers. In essence, FATCA is an information-gathering tool. Under the threat of a 30 percent U.S. withholding tax for non-compliance, FATCA "encourages" foreign entities to disclose general information about their direct and indirect owners and, in the case of U.S. owners, such U.S. owners' identities and specific information about their respective foreign investments and income.↩

ii. FATCA will be phased-in between July 1, 2014 and January 1, 2017. During that period, varying registration and compliance deadlines will apply to different types of foreign entities. Notwithstanding the possibility that the registration deadline for a particular foreign entity may be later than April 25, 2014, each foreign entity should undertake its preliminary FATCA classification analysis before April 25, 2014 in order to know whether registration will be required and, if so, whether it must be completed by April 25, 2014, or some later date. In any case, entities that have undertaken a self-analysis and determined that FATCA registration will be required at a later date still may consider completing their respective registrations by April 25, 2014.↩

iii. Every foreign entity in the world will fall into one of these two categories, based on either the U.S. FATCA Regulations or an applicable intergovernmental agreement between the United States and another country. FFIs generally include investment fund entities, investment management entities, custodians, brokers and banks. Non-Financial Foreign Entities generally include all foreign entities other than FFIs.↩

iv. An "expanded affiliated group" 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 non-corporate entities, the 50 percent ownership threshold is determined by measuring the percentage ownership of the value of beneficial interests in such entity.↩

v. A "responsible officer" is a natural person appointed as an officer of the entity who is authorized to register the entity with the IRS, administer the entity's FATCA compliance program and correspond with taxing authorities regarding the entity's FATCA compliance.↩

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