

February 4, 2013

On January 17, 2013, the Treasury Department and IRS released final regulations relating to the tax reporting and withholding requirements commonly referred to as the Foreign Account Tax Compliance Act ("FATCA").

FATCA generally requires foreign financial institutions ("FFIs") and non-financial foreign entities ("NFFEs") to comply with certain due diligence and reporting requirements with respect to their U.S. accountholders and substantial U.S. owners, respectively. If an FFI or NFFE fails to comply with these requirements and is otherwise not excepted, exempted or deemed compliant by the applicable regulations, a 30% withholding tax will be imposed on U.S.-source interest, dividends, rents, and salaries (generally referred to as U.S.-source FDAP income) as well as gross proceeds from the sale of debt and equity instruments that produce U.S.-source FDAP income.

For additional background information on FATCA, please see our previously issued Cooley Alert, "Government Issues Comprehensive FATCA Regulations."

Final regulations vs. prior guidance

The final FATCA regulations:

- reduce certain administrative burdens inherent in the proposed regulations;
- address conflicts with local law that might impede compliance with FACTA; and
- begin to address certain administrative procedures for compliance with FATCA.

While significant changes were made in the final regulations, the bulk of the reporting and withholding requirements set forth in prior guidance from the Treasury Department and the IRS remain in place.

Deadlines

Withholding

- Generally, U.S.-source FDAP income paid to non-participating FFIs, and NFFEs that fail to provide required certifications, will be subject to withholding beginning January 1, 2014.
- Gross proceeds from the sale or disposition of property that can produce U.S. source FDAP income (*e.g.*, stock and debt obligations of a U.S. corporation) are exempt from withholding if such payments are made prior to January 1, 2017.
- Certain obligations (but not any stock into which such obligations might be convertible) executed before January 1, 2014 are exempt from withholding.

Due diligence

- Participating FFIs and withholding agents have until December 31, 2015 to document their accountholders and payees that are not prima facie FFIs.

Reporting

- Initial information reports by participating FFIs for the 2013 and 2014 calendar years are due no later than March 31, 2015.

Intergovernmental agreements

Because many foreign jurisdictions have laws that do not permit compliance with FATCA's reporting and withholding requirements, the Treasury Department is negotiating agreements with foreign governments to address these impediments. Two alternative intergovernmental agreements ("IGAs") have been developed.

Model 1 IGA. In the first model IGA ("Model 1 IGA"), the partner jurisdiction agrees to enact legislation that will require local financial institutions to report FATCA information directly to the partner jurisdiction. The partner jurisdiction will then provide this information to the IRS. FFIs located in countries with a Model 1 IGA in place will be deemed to be compliant with FATCA (although they will still have to register as deemed compliant FFIs with the IRS as noted below under the heading "FFI Registration Process").

Model 2 IGA. In the second model IGA ("Model 2 IGA"), the partner jurisdiction agrees to enact legislation that will enable and direct local financial institutions to comply with FATCA's reporting and withholding requirements, except to the extent such requirements have been modified by the Model 2 IGA.

IGAs have been signed by Denmark, Ireland, Mexico, Norway, Spain, Switzerland and the United Kingdom and the Treasury Department has indicated that it is discussing implementing IGAs with at least 50 other countries.

The Treasury Department has indicated that, in order to enter into an IGA, the jurisdiction is required to have an income tax treaty, a tax information exchange agreement or, in the case of Model 2 IGAs, a local law that would permit the exchange of information with the United States.

FFIs: Who's "in" and who's "out"

The final regulations modify the definition of financial institutions to include investment entities. Investment entities include managed funds, investment advisors and asset managers that work for or on behalf of funds. Thus foreign investment advisors and asset managers will generally have to register as FFIs under the new regulations unless an applicable IGA modifies that requirement.

While the final regulations bring foreign investment advisors and asset managers under the scope of FATCA, the final regulations treat certain passive entities, which do not benefit from professional management, as passive NFFEs rather than FFIs. This distinction is important because the administrative requirements under FACTA are far less onerous for passive NFFEs than they are for FFIs.

Most foreign private equity funds remain squarely within the definition of investment entities or financial institutions and are therefore subject to the administrative burdens imposed on FFIs unless an applicable IGA modifies those requirements.

Modification of due diligence requirements

While FATCA requires withholding agents to determine the FATCA status of payees, the final regulations permit withholding agents, in certain circumstances, to rely on documentary evidence other than a new Form W-8 or W-9. Alternatively, the withholding agent may rely on certain presumption rules instead of obtaining new documentation from the payee.

FFI registration process

FFI registration will be completed through the FACTA Registration Portal (the "Portal"), a secure online web portal that will be accessible from anywhere in the world. The Portal is scheduled to be open for registration no later than July 15, 2013. Once a financial institution has registered through the Portal, the IRS will issue a Global Intermediary Identification Number (a "GIIN") to the FFI. The applicable FFIs will be able to use their GIINs to establish their status for reporting and withholding purposes.

The IRS intends to begin assigning GIINs no later than October 15, 2013 and will electronically post the first list of participating FFIs and registered deemed compliant FFIs on December 2, 2013. The IRS intends to update this list on a monthly basis. In order to ensure inclusion on the December 2, 2013 list, participating FFIs and registered deemed compliant FFIs must complete their registrations through the Portal no later than October 25, 2013.

While FFIs in a Model 1 IGA country may comply with the requirements under FATCA by reporting directly to that country instead of to the IRS, they will still be required to register and confirm their status through the Portal.

The final regulations present a significant, complex, and impending challenge for withholding agents, FFIs and NFFEs. If you have questions about FATCA please contact one of our tax attorneys or your regular Cooley contact.

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