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tax lawflash

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Initial FATCA Registration/Withholding Dates Draw Near

Foreign financial institutions, such as offshore funds, should register with the IRS by May 5 and review new and revised IRS forms.

The July 1 start date for Foreign Account Tax Compliance Act (FATCA) withholding on certain payments of U.S. source income¹ is fast approaching, and no extensions of that start date are on the horizon.² In this regard, foreign financial institutions (FFIs), such as non-U.S. investment funds, should consider the below FATCA compliance steps and take immediate action to prepare for FATCA.

1. Register with the Internal Revenue Service and get a Global Intermediary Identification Number by May 5.

- The Internal Revenue Service (IRS) recently extended the deadline for registration of FFIs from April 25 to May 5. FFIs must register with the IRS by May 5 to be included in the first list of FFIs that are not subject to FATCA withholding (the First List), which the IRS will publish on June 2. Upon registration, an FFI will receive a Global Intermediary Identification Number (GIIN) that the FFI will provide to withholding agents to identify themselves as registered FFIs and to prevent FATCA withholding.³
- We believe that there will be considerable confusion regarding U.S. withholding on payments made on and
 after July 1. For example, withholding agents may withhold on payments to nonregistered FFIs, even with
 respect to FFIs that are subject to extended registration timelines (e.g., in the case of an FFI located in a
 "Model 1 IGA" jurisdiction).
- We believe that withholding agents making payments subject to FATCA withholding will want to see FFIs on the First List because withholding agents will be cross-checking GIINs provided on a Form W-8BEN-E with GIINs associated with FFIs included on the First List.
- As a result, FFIs—even in jurisdictions with Intergovernmental Agreements (IGAs)⁴ —should register on the IRS FATCA website by May 5 and obtain a GIIN in order to be included on the First List and to reduce the risk of inadvertent withholding on or after July 1.

^{1.} For an overview of FATCA, see our July 15, 2013 LawFlash, "Treasury Revises FATCA Implementation Timeline," available at http://www.morganlewis.com/pubs/Tax_LF_TreasuryRevisesFATCAImplementationTimeline_15july13.

For a discussion of FATCA prior to the promulgation of the final FATCA regulations, see our October 26, 2012 LawFlash, "Revisions to FATCA Implementation," available at http://www.morganlewis.com/pubs/Tax_LF_RevisionstoFATCAImplementation_26oct12; our March 5, 2012 LawFlash, "FATCA Proposed Regulations Unveiled by Treasury," available at http://www.morganlewis.com/pubs/Tax_LF_FATCAProposedRegsUnveiled_5mar12; and our August 26, 2011 LawFlash, "Recent IRS Notices Provide Supplemental FATCA Guidance and Phased-in Implementation," available at http://www.morganlewis.com/pubs/Tax_LF_FATCAGuidancePhased-inImplementation_26aug11.pdf.

^{2.} Various IRS officials have informally noted that the IRS will not extend the July 1 start of FATCA withholding on certain types of U.S. source income, such as dividends and interest.

^{3.} The IRS will be publishing FFI lists every month following the First List. The second FFI list will be published on July 1, 2014, and the deadline to be included on such second list is June 3. However, our view is that it is preferable for an FFI to be included on the First List so as to avoid any inadvertent withholding that might occur shortly after July 1, 2014.

^{4.} The IRS has provided in guidance that FFIs eligible for the benefit of IGAs do not need to register and obtain a GIIN prior to January 1, 2015. In practice, however, a withholding agent may be unwilling to rely on this guidance after July 1, 2014. Also, note that the IRS has recently expanded the list of jurisdictions deemed to have entered into IGAs with the United States to include jurisdictions that have not yet executed such agreements, with the list now including 48 countries. For more information, view IRS Announcement 2014-17 at http://www.irs.gov/pub/irs-drop/a-14-17.pdf.

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• The registration process requires an FFI to answer several questions, including designating what type of financial institution the FFI is (e.g., single, part of a group/sponsor, and whether the FFI is located in a "Model 1 IGA" or other jurisdiction) and identifying a "responsible officer" who will serve as point of contact.⁵

2. Review Forms W-8BEN-E and W-8IMY.

- Although the "pre-FATCA" Forms W-8 may, in some cases, be used by non-U.S. persons for payments made prior to January 1, 2017, we recommend reviewing the newly issued Form W-8BEN-E (or, if applicable, IRS Form W-8IMY or any other form in the W-8 family of forms) and calling your tax adviser to discuss how you would complete that form. The new Form W-8BEN-E allows an FFI to provide its GIIN to a withholding agent and to clearly indicate its status under FATCA (e.g., deemed compliant, participating, or exempt).
- Although instructions have yet to be issued for Form W-8BEN-E, we believe withholding agents will
 request new Forms W-8 as soon as July 1 (and possibly before then), and FFIs should be prepared to
 deliver such forms. If the updated forms are provided and a GIIN is applicable, FFIs may reduce the risk of
 inadvertent FATCA withholding.

3. Keep a tax adviser on speed dial.

Tax advisers can help FFIs navigate the confusion that will likely occur when FATCA goes into place. Because the IRS FATCA guidance to date is unclear and inconsistent in many respects (with new guidance appearing frequently, including through various Web-only FAQs and other releases), FFIs should consult with their advisers to obtain counsel on how to complete the registration process and to answer questions regarding the new Form W-8BEN-E and revised Form W-8IMY.

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^{5.} The FATCA responsible officer or "FRO" is generally responsible for overseeing an FFI's FATCA compliance program. FROs in certain IGA jurisdictions may have different obligations than those of FFIs that enter into an FFI agreement directly with the IRS. FFIs may appoint an internal officer to serve as FRO. We are also aware that third-party FATCA service providers include FRO duties as part of their service package.

Note also that, by registering, an FFI located in a non-IGA jurisdiction or "Model 2 IGA" jurisdiction will be formally entering into an FFI agreement with the IRS to perform FATCA-related withholding and reporting directly to the IRS. For a complete list of the jurisdictions that have either signed an IGA or have an IGA deemed to be in effect (by Model type) as of the date hereof, visit http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx.

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