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The Latest FATCA Regulations – The Plot Thickens!

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Foreign Account Tax Compliance Act

What is FATCA

FATCA refers to a major revamp of the U.S. withholding tax system. It imposes a new 30% withholding tax on certain payments made to foreign financial institutions ("FFIs") and non-financial foreign entities ("NFFEs") that refuse to identify U.S. account holders and investors. It does not matter whether the U.S. person invests in U.S. securities or receives the U.S. source income directly. "Withholdable payments" that are subject to the 30% tax include both U.S. source income (e.g., interest or dividends paid by a U.S. corporation) and the gross proceeds from the sale of securities that theoretically could generate U.S. source income.

FATCA, U.S. Individuals & Foreign Trusts

FATCA affects more than financial institutions and multinational corporations. U.S. individuals (citizens and fiscal residents) who have foreign bank accounts, trusts and other entities outside the United States are all affected by FATCA.

FATCA, U.S. Individuals & Foreign Trusts (Cont'd)

Financial institutions and trust companies which serve as trustees of trusts in which at least one settlor or a current or future beneficiary is a United States person now more than ever, must understand all past, current and future United States federal and state tax payment and reporting obligations related in any way whatsoever to such trusts.

Final FATCA Regulations

On January 17, 2013, the U.S. Treasury Department released final FATCA Regulations issuing guidance for foreign institutions and entities on how to comply with FATCA's reporting requirements.

FATCA
Trusts and Trust Companies

- Trust companies will be FFIs.
- Regarding trusts, the final regulations eliminate the FFI definition "engage in investing, reinvesting, or trading of securities." Under the eliminated definition small, unsophisticated investment entities like family trusts were considered FFIs and expected to enter into agreements with the IRS.
- Under the final regulations, family trusts are considered "non-financial foreign entities" ("NFFEs") unless they are professionally managed.
- If a trust is professionally managed, it is still an FFI but the expectation is the manager will do the FATCA compliance for the trust.

FATCA – Managing Entities
Trusts and Trust Companies

Alert for managing entities! Entities managing trusts, small investment companies and similar entities should assess their FATCA obligations given a change in approach to reporting under the new regulations.

Final regulations may confer FFI status where proposed regulations did not.

FATCA
Trusts and Trust Companies

- The regulations set out rules for determining when a US person will be treated as having a beneficial interest in a trust, including based on attribution and constructive ownership rules, to determine whether a US grantor or beneficiary of a non-US trust is a substantial US owner of a foreign entity.

- Trusts with US grantors or beneficiaries must be classified as either "grantor" or "non-grantor" trusts, as this classification will impact the attribution of ownership to US Persons for the purposes of these rules.

- In the context of a discretionary trust, the regulations clarify that attribution is to be based on the pattern of distributions over the prior year (subject to a US$5,000 de minimis threshold).

FATCA
Intergovernmental Agreements

Agreements

Model 1 – Relies on government-to-government exchange of information. Model 1 agreements address concerns that foreign law prohibits FFI(s) from reporting account holder information to the IRS.

Model 2 – Alternative solution to the Model 1 restrictions. Model 2 provides another framework by which to comply with FATCA.

Key Differences

- **Model 2 requires FFI(s) to report certain information to the IRS directly. Model 1 permits FFIs to report US account information to the foreign government.**
- **Model 2 does not have a reciprocal version providing that the U.S. government would share information with the partner country.**

FATCA
Signed Intergovernmental Agreements

- **Model 1**
  - **Denmark (November 19, 2012)**
  - **Mexico (November 19, 2012)**
  - **United Kingdom (September 12, 2012)**
  - **Ireland (January 23, 2012)**

- **Model 2**
  - **Switzerland (February 14, 2013)**
- **Many other countries have initialed or are negotiating IGAs, but final agreements are still pending (e.g. Spain and Norway)**

FATCA
Intergovernmental Agreements

Various governments have announced their intention to enter into IGAs with the U.S. Some notable countries include:

- **Cayman Islands**
- **Guernsey**
- **Jersey**

Draft FFI Registration Form 8957 Released

- The IRS released a draft of form 8957, "Foreign Account Tax Compliance Act (FATCA) Registration", the form on which FFI's will register with the IRS.
- FFIs can begin to register with the IRS through an online website beginning in July 2013.

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